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# THE DUTY TO ACT FAIRLY

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## RECENT DEVELOPMENTS

### The concept of fairness

1. The common law imposes a duty to act fairly when '*any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals*'.[1] The requirements of fairness will depend upon '*the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates*'.[2]

2. The rule against bias and the right to be heard are the '*two fundamental rights accorded .. by the rules of natural justice or fairness*'.[3] However, the duty to act fairly has been gradually extended over the years, to include significant further rights, such as legitimate expectation, and the duty to give reasons.

### Article 6 ECHR

3. The common law duty of fairness has been reinforced by the procedural guarantees in Art. 6 ECHR. In **R v Parole Board ex parte Smith & West** [2005] UKHL 1 Lord Hope observed (paragraph 74):

> '*The protection which the Human Rights Act 1998 provides in the case of a person's Convention rights is designed to provide a minimum standard of human rights protection. But it does not restrict any other right or freedom which the law confers: section 11(1)(a). This is where the common law steps in. The requirement of procedural fairness is part of the common law. .... Common law procedural fairness as such is not a Convention requirement. But the Convention can and does inform the common law, and the common law informs the Convention.*'

4. Art 6(1) provides:

> *'In the determination of his civil rights and obligations …everyone is entitled to a fair and public hearing, within a reasonable time by an independent and impartial tribunal established by law.'*

5. Art. 6(1) has wide application in public law determinations, for example:

   - administrative decisions affecting property rights or interests;
   - right to carry out business or enter a profession;
   - professional disciplinary proceedings;

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[1] **Lloyd v McMahon** [1987] AC 625, per Lord Bridge at 702H
[2] See FN 1 above
[3] **O'Reilly v Mackman** [1983] 2 AC 237, 279F-G per Lord Diplock

- rights to social security benefits;

- determinations of the rights of prisoners and mental patients.

6. Arts. 6(2) & (3) provide minimum rights for those facing a criminal charge. Disciplinary proceedings may be classified as '*criminal*' if the allegation is grave and the potential severity and nature of the punishment. [4] In **Ezeh & Connors v UK** (2002) 35 EHRR 691; (2003) 39 EHRR 1, the ECtHR held that disciplinary proceedings against prisoners serving determinate sentences who were facing serious charges and were at risk of imposition of additional days by way of punishment, were criminal in character. There had been a violation of Art. 6(3) because of the refusal to allow them legal representation. In **Whitfield & Ors v UK App. No. 46387/99**[5], the ECtHR applied **Ezeh** and held there had been a breach of Art. 6(3) when four prisoners were refused legal representation in prison adjudication proceedings. In **R(Greenfield) v Secretary of State for the Home Department** [2005] UKHL 14, the Secretary of State conceded that, in the light of **Ezeh**, the Court of Appeal judgment in his favour had to be reversed.

7. As a result of **Ezeh**, the Prison Rules were amended to require prison governors to refer charges for hearing by independent adjudicators if a case was so serious that additional days were likely to be awarded as punishment, because the UK Government accepted that governors were not independent and impartial within the meaning of Art. 6. However, in **Tangney v Governor of HMP Elmley and Secretary of State for the Home Department** [2005] EWCA Civ 1009, the Court of Appeal rejected the claim by a life sentence prisoner to have his disciplinary charge heard by an independent adjudicator instead of the prison governor, on the ground that, as a lifer, additional days could not be imposed, and there were no consequences serious enough to engage Art. 6. The Court held that there was no common law right to a hearing before the independent adjudicator, providing an interesting example of the importance of Art. 6 in establishing the requirements of independence and impartiality in decision-making.

8. There is controversy over the extent to which professional disciplinary proceedings give rise to a dispute over civil rights and obligations or the determination of a criminal charge if the outcome of the proceedings is not decisive for the individual's right to practise his profession e.g. a fine is imposed, rather than suspension or erasure.

- In **Le Compte, Van Leuven & De Meyere v Belgium (1981) 4 EHRR 1**, the ECtHR concluded that disciplinary proceedings do not normally lead to a dispute over civil rights and obligations, but may do is if the decision is 'directly decisive' of the right to practise medicine. It said: '*Unlike certain other disciplinary sanctions that might have been imposed on the applicants (warning, censure and reprimand ..., the suspension*

[4] **Engel v The Netherlands** (1979-80) 1 EHRR 647
[5] Judgment given 12 April 2005

*constituted a direct and material interference with the right to continue to exercise the medical profession.*'[6]

- In **A v United Kingdom** App No 10331/83 where a barrister was reprimanded by a Disciplinary Tribunal, the Commission held that his civil rights were not determined and Art. 6 was not engaged.

- In **X v Finland** App. No. 44998/98 an advocate received a warning from his professional disciplinary committee. The ECtHR[7] said that Art. 6 applied because expulsion from the bar was 'not impossible' at the outset of the proceedings. The applicability of Art. 6 did not depend upon the '*concrete outcome of the proceedings*'.

- In **R (Nicolaides) v General Medical Council** [2001] EWHC Admin 625 a reprimand of a consultant by the Professional Conduct Committee was held not to engage Art. 6.

- In **Tehrani v United Kingdom Council for Nursing Midwifery and Health Visiting** [2001] IRLR 208 Lord Mackay said:[8]

> '***What remains in dispute, however, is whether the disciplinary proceedings initiated against the petitioner could lead to a 'determination of her civil rights and obligations' within the meaning of Article 6(1). I use the word 'could' advisedly. In my opinion, for the purpose of the present proceedings it is not necessary for the petitioner to establish that, whatever their outcome, the disciplinary proceedings will result in a determination of her civil rights and obligations. In my opinion, if the petitioner can establish that the disciplinary proceedings could result in a finding that would constitute a determination of her civil rights and obligations, the decision to initiate those proceedings is open to challenge as being incompatible with the petitioner's Convention rights.***'

- In **R (Wayne Thompson) v The Law Society** [2004] 1 WLR 2522, the Court of Appeal undertook a comprehensive review of the authorities and held a decision by the OSS Adjudicator to reprimand a solicitor did not amount to a determination of civil rights under Art. 6 because the right to continue to practise his profession was not at stake.

- In **Threlfall v General Optical Council** [2004] EWHC 2683, Stanley Burnton J. said '*it seems to me obvious that the applicability of Article 6 must be determined on the basis of the jurisdiction and powers of the tribunal rather than its ultimate decision ... the question whether a person subject to disciplinary proceedings is entitled to a 'fair and public hearing*

[6] Paragraph 49
[7] The Court was hearing an admissibility application which had been transferred to the court
[8] paragraph 33

*.. by an independent and impartial tribunal' must be determined before the hearing and before the result is known'.*

9. Art. 6 only confers procedural rights, not substantive ones. *'The Strasbourg case law is emphatic that article 6(1) of the Convention applies only to civil rights which can be said on arguable grounds to be recognised under domestic law, it does not guarantee any particular content for civil rights in any member state: see, for example,* ***Z v United Kingdom*** *(2001) EHRR 97, 134-135, 137, paras 87,88'*.[9] In **Z**, the ECtHR held there was no breach of the right of access to a court under Art. 6 where claims in negligence by children in care against local authorities were struck out, although there had been a breach of their Art. 3 rights (inhuman and degrading treatment), and they had been denied an effective remedy, in breach of Art, 13.

10. The same principle applies in criminal cases. For example, in **Barnfather v London Borough of Islington** [2003] EWHC 418, the AC held that s.444(1) Education Act 1996 which imposed liability on parents for a child's failure to attend school, regardless of fault or knowledge, did not breach the fair trial or presumption of innocence requirements of Art. 6.

11. Administrative decisions that determine civil rights and obligations may be made by bodies that do not provide all the guarantees of Art. 6 provided there is a right of review or appeal which ensures that the procedure, when taken as a whole, does comply with Art. 6 (**Bryan v United Kingdom** (1995) 21 E.H.R.R. 342, applied by the Commission to GMC proceedings in **Stefan v UK** App. No. 29419/95 & **Wickramsinghe v UK** App. No 31503/96). In **Ghosh v GMC** [2001] 1 WLR 1915, Lord Millett said[10] the statutory right of appeal was sufficient to remedy any deficiency in the Convention requirements of independence and impartiality, since it was an '*appeal by way of rehearing in which the Board is fully entitled to substitute its own decision for that of the committee. The fact that the appeal is on paper and that witnesses are not recalled makes it incumbent upon the appellant to demonstrate that some error has occurred in the proceedings before the committee or in its decision, but that is true of most appellate processes*'.

12. Presumably because of concern about a potential challenge under Art. 6, CPR PD 52 paragraph 22.3 expressly provides that appeals to the High Court[11] from a list of professional regulatory bodies shall be by way of rehearing, not review. However, in practice, the courts are conducting an exercise which is closer to a review than a rehearing.

    - '*It is nonetheless clear that a re-hearing in this context is in general a review of the decision of the lower court ... [i]n other words, the appeal court does not normally hear evidence afresh, but considers the appeal on the basis of the record of the evidence given in the court below. Because it does not itself hear the witnesses give evidence, the Court must take into account that the Disciplinary Committee was in a far*

[9] **Matthews v. Ministry of Defence** [2003] 1 A.C. 1163, per Lord Bingham at 1168, [3].
[10] at 1923 [32][33]
[11] The appellate jurisdiction has been transferred from the Privy Council to the High Court

*better position to assess the reliability of the evidence of live witnesses where it was in issue.. The Disciplinary Committee possesses professional expertise that a High Court judge lacks ...is better qualified to assess evidence relating to professional practice*': **Threlfall v General Optical Council** [2004] EWHC 2683, per Stanley Burnton J. at [20 - 21].

- '*it seems to me that practice direction 22.3 should be reconsidered because it is, in my view, clearly inappropriate for appeals such as this ... it is very difficult to conceive of any circumstances in which it would be appropriate for this court to hear evidence and, whatever is meant by a re-hearing, it does not involve a reconsideration of evidence such as, for example, takes place in the Crown Court on an appeal against a decision of the magistrates' court. This is a case where the normal rules of the Court of Appeal will apply..*': **Nandi v General Medical Council** [2004] EWHC 2317 (Admin), per Collins J. at [29]

- '*As must be obvious, when it comes to questions of professional competence the committee's views are to be accorded the very greatest of weight. When it comes to decisions which do not so much depend upon professional expertise, this court may be in a better position to be able to form a judgment for itself. But this court must never act unless it is plain that in the circumstances the decision of the committee was one which was, as I would put it, clearly wrong*': **Moody v General Osteopathic Council** [2004] EWHC 967 (Admin), per Collins J. at [12 – 14]

**Legal representation**

13. Under Art. 6, the right to free legal assistance is confined to 'criminal cases'. There have been important developments for legal representation for prisoners facing 'criminal' charges in disciplinary proceedings, summarised at paragraph 6 above.

14. In civil cases, there may be an entitlement to free legal assistance if it is 'indispensable for effective access to court ... by reason of the complexity of the procedure or of the case': **Airey v Ireland** (1979) 2 EHRR 304, [26]. This principle was applied in **Steel & Morris v UK** App. No. 68416/01 (the **McLibel** case), when the ECtHR held that the denial of legal aid to defend the libel claim had deprived the defendants of the opportunity to present their case effectively, and contributed to an unacceptable inequality of arms with McDonald's.

**Oral Hearing**

15. In **R v Parole Board ex parte Smith & West** [2005] UKHL 1 the HL held that the Parole Board was in breach of the common law duty of fairness by not holding an oral hearing when deciding whether to recall determinate sentence prisoners released on licence, on grounds of alleged licence breaches. The principles set out by the HL will have significant implications for other cases. They may be summarised as follows:

- The requirements of fairness change over time, are flexible and are closely conditioned by the legal and administrative context. The Parole Board now routinely holds oral hearings where licence revocations are challenged by life sentence prisoners. Oral hearings for detainee have been recognised as a fundamental procedural guarantee by the ECtHR and in Canada and New Zealand (per Lord Bingham at [27 – 32]).

- Although s.32 Criminal Justice Act 1991 expressly provided for oral hearings in some classes of case, those classes did not include cases such as the present in which oral hearings were permitted but not required. However, the HL rejected the submission by the Board that this represented a legislative choice, saying 'the maxim expressio unius exclusio alterius can seldom, if ever, be enough to exclude the common law rules of natural justice' (per Lord Bingham at [29]).

- The HL rejected the CA's view that an oral hearing was not necessary because there was no dispute on the primary facts; the Board had only to assess the risks. Lord Bingham said at [27]:

> *'The common law duty of procedural fairness does not, in my opinion, require the Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation and mitigation, or may lose some of their significance in the light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it ... by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.'*

- The HL did not resolve the disputed question whether Art. 6(1) was engaged, referring to **Aldrian v Austria** (1990) 65 DR 337, 342 where the Commission referred to '*its constant case-law according to which proceedings concerning the execution of a sentence imposed by a competent court, including proceedings on the grant of conditional release, are not covered by Article 6 para 1 of the Convention. They concern neither the determination of 'a criminal charge' nor of 'civil rights and obligations*' ' (per Lord Bingham at [43]).

- The HL held that Art. 6(2) was not engaged, since this was not the determination of a criminal charge.

- The appellant's rights under Art. 5(4) (to take proceedings to decide the lawfulness of the detention) were violated because the review by the Parole Board did not meet the requirements of procedural fairness at common law (per Lord Bingham at [37]; per Lord Hope at [72 – 75])

**Disclosure and the opportunity to make representations**

16. The obligation to act fairly requires a decision maker to give any persons affected the opportunity to comment on any material on which the decision will be based. The extent of the obligation will depend on the circumstances of the case.

17. In **R (Varma) v HRH Duke of Kent** [2004] EWHC 1705 (Admin), [2004] ELR 616, the University Visitor appointed a judge to act on his behalf in the conduct of an appeal by a student. The judge sent the Visitor his report, advising that the appeal should be dismissed. The Visitor made his decision, sending the student a copy of the report. The student claimed that he should have been given an opportunity to see and comment on the report before a final decision was made. Collins J. held that since the Visitor's decision was final, fairness required that the parties were given an opportunity to see and comment on the report before the final decision was made, in respect of any new issues of law or clear errors of fact. However, in the exercise of his discretion he dismissed the claim, since he could not have made any representations which could have affected the result. The appeal was bound to fail.

18. In **R (X) v Chief Constable of West Midlands Police & Anor** [2004] EWCA Civ 1068, [2005] 1 All ER 610, the claimant was a social worker who applied for an enhanced criminal record certificate from the Criminal Records Bureau under the Police Act 1997. The certificate contained information given by the police about two criminal charges which had not been proceeded with. The claimant had had an opportunity to give his account when he was originally interviewed by the police in connection with the charges. S. 117 gave him the right to apply to the Secretary of State for a new certificate if the information was inaccurate. It imposed '*too heavy an obligation on the Chief Constable to require him to give an opportunity for a person to make representations prior to the Chief Constable performing his statutory duty of disclosure.*' In any event, representations would only have assisted him if he could have persuaded the Chief Constable that there was no truth in the allegations, by objective confirmation, which was not available.

19. In **R (Refugee Legal Centre) v Secretary of State for the Home Department** [2004] EWCA Civ 1481 the Refugee Legal Centre challenged a fast track scheme for asylum seekers, in which they were expected to instruct their legal representative and attend a formal interview the day after arrival, and a decision was given the following day. The Court accepted that there was a risk of unfairness, particularly in the absence of a written procedure for providing a more flexible timetable in appropriate cases. However, the system was not inherently unfair and therefore unlawful, and there were no cases before the court where the outcome had been rendered unfair by the procedure.

20. In **R (Roberts) v The Parole Board** [2005] UKHL 45, the HL held (Lords Bingham and Steyn dissenting) that the Parole Board was entitled to withhold sensitive evidence from a source who would be at risk were his identity to be disclosed to the prisoner, and use a special advocate procedure to present arguments on behalf of the claimant.

**Reasons**

21. Two recent cases indicate that the court will not grant relief for inadequate reasons if it would make no difference to the outcome:

- **I v Secretary of State for the Home Department** [2005] EWCA Civ 886. The claimant alleged that the adjudicator rejected the claim under Article 3 because he had rejected it under the Refugee Convention. The court accepted that the adjudicator had not set out the Art 3 issue adequately, but even if he did not consider the issue properly, on the facts of the case, the claimant had no realistic prospect of success under Art. 3.

- **Brennan v LRT Pension Fund Trustee Co**. Mann J. 9.11.05. The appellant claimed he had not been informed that if his health improved, his ill health pension would be terminated. Where a case raised disputed issues of fact the Pensions Ombudsman should have made express findings of fact, with reasons, and not merely repeated the evidence. The quality of reasons would have led the court to allow the appeal and remit it to the ombudsman were it not for the ombudsman's conclusion that, even if B had received the correct advice from L's officer, there was nothing he could do to improve his position.

- In **R (Hirst) v Secretary of State for the Home Department and the Parole Board** [2005] EWHC 1480, the court held that where a life prisoner was recalled to prison after a period on parole, reasons had to be given promptly, to comply with Art 5(2) (everyone who is arrested shall be informed of the reasons promptly). In this case they were not given until 8 days after detention, which was held to be unreasonable.

22. In **R (Richards) v Pembrokeshire CC** [2004] EWCA Civ 1000, the council made directions regulating parking in the harbour area of Tenby, giving as the reason the need to improve pedestrian safety and control of traffic and parking. These reasons were ultra vires. On a judicial review application, the court refused to allow the council to supplement the reasons, to say that the directions were made for harbour operational considerations. Although there was no statutory obligation to give reasons, the principles in **R v Westminster City Council ex parte Ermakov** [1996] 2 All ER 302 applied:

- The primary source for identifying the reasons for the decision must be found in the direction itself, the decision adopting it, and the report before the committee;

- Where there is any ambiguity in the reasons, that ambiguity can be resolved by reference to evidence, provided that evidence is credible and authoritative;

- It was inherently unlikely that evidence of the relevant debate or discussion would normally be admissible;

- Reasons which could have been, but were not, in the decision maker's mind were immaterial.

**Bias and the need for an independent and impartial tribunal**

23. The Test for Apparent Bias

- **R v. Bow Street Magistrate, ex parte Pinochet (No. 2)** [2000] 1 AC 119 [132F-G] (per Lord Browne-Wilkinson):

  *"The fundamental principle is that a man may not be a judge in his own cause. The principle, as developed by the courts, has two very similar but not identical implications. First, it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause…The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial…"*

- Focus on the "second application" **Porter v. Magill** [2002] 2 AC 357 at 494 [103] (per Lord Hope of Craighead):

  *"the question is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased".*

  ***Meerabux v. Attorney-General of Belize** [2005] UKPC 12, [2005] 2 WLR 1307 [22] (per Lord Hope):*

  ***"**…public perception of the possibility of unconscious bias is the key. If the House of Lords had felt able to apply this test in the Pinochet case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule"*

- The Strasbourg "*gloss*": would the fair-minded observer have "*legitimate grounds for fearing*" that the decision-maker would be influenced by his prior participation in the decision-making process, "*however slight*" the justification for that doubt? **Procola v. Luxembourg** (1995) 22 EHRR 193, applied in **R v. SSHD, ex parte Al-Hasan and Carroll** [2005] UKHL 13 [37], per Lord Brown of Eaton-under-Heywood.

24. Bias or General Want of Fairness

- Bias or providing a fair opportunity to comment? **Watson v. General Medical Council** [2005] EWHC 1896 (Admin) (Stanley Burnton J) [60]:

> *"those who advise a tribunal on issues of fact, whether as its experts or assessors, should do so openly, in the presence of the parties, and in circumstances in which the parties have an opportunity to make submissions on that advice before the tribunal makes its decision. This is, in general, what fairness requires. If the advice is controversial, there may be circumstances in which the tribunal may have to consider whether to permit the parties to put before the tribunal their own experts' responses to that advice"*

- Bias or taking account of an irrelevant consideration? **A & S Enterprises Ltd v. Kema Holdings Ltd**, HHJ Seymour QC, QBD 27.7.04 (Adjudicator apparently taking adverse view of non-attendance of witness in circumstances where he had not indicated to the parties that he was expecting to hear from him. Held that there was a real possibility, looking at his conclusions on this matter, that a fair-minded and informed observer would conclude that the Adjudicator was "biased").

25. Stepping into the Shoes of the Fair-Minded and Informed Observer

- *Presumption, in the absence of actual bias, of the personal impartiality of the judge:* ***Re Medicaments and Related Classes Goods (No. 2)*** *[2001] 1 WLR 700 at 726 [83] (per Lord Phillips of Worth Matravers MR); see also adjudicators:* ***AMEC Capital Projects Ltd. v. Whitefriars City Estates Ltd****. [2004] EWCA Civ 1418, (2005) 1 AER 723 [20] (per Dyson LJ).*

- *The two stage process:*

  - *Identify all the circumstances which have a bearing on the suggestion that the tribunal was biased, and*

  - *Ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased:* ***Re Medicaments*** *(above).*

- *Objective test, therefore no significant weight to be attached to the decision-maker's statement about his views at the time:* ***Georgiou v. London Borough of Enfield*** *[2004] EWHC 779 (Admin) [36] (per Richards J).*

- *"Relevant circumstances" are not limited to those available to the observer at the original hearing, but include all those apparent, upon investigation, to the court or tribunal considering the allegation of bias: ibid. They include:*

  - *The nature, functions and composition of the body against whom bias is alleged:* ***Flaherty v. National Greyhound Racing Club Ltd*** *[2005] EWCA Civ 1117,* The Times *October 5, 2005 [29-31] (per Scott Baker LJ) cf.* ***Watson*** *(above).*

- *The nature of the issue to be decided:* ***Locabail (UK) Limited v. Bayfield Properties Limited*** *[2000] 2 QB 451 at 480 [25];* ***Flaherty*** *(above) [42].*

- *Other safeguards inherent in the process:* ***R v. Abdroikov and others*** *[2005] EWCA Crim 1986,* The Times, *August 18, 2005 [30 and 31] (per Woolf LCJ) cf.* ***Lawal (Appellant) v. Northern Spirit Ltd.*** *[2003] UKHL 35, (2003) ICR 856.*

- *"The practical realities of decision making" in the field concerned:* ***Feld v. London Borough of Barnet*** *[2004] EWCA Civ 1307 [45] (per Ward LJ); see also* ***Al-Hasan*** *(above) [10-11] (per Lord Rodger of Earlsferry).*

- *In* ***Jones v. DAS Legal Expenses Insurance Co. Ltd****. [2003] EWCA Civ 1071 the Court of Appeal gave practical guidance as to the steps to be adopted by a court which is concerned that an issue may arise, while emphasising that these were not a checklist to be used as a "mantra" for complaint by "any disgruntled litigant" [35].*

- *Effect of allegations of bias/threats of legal action on ability of tribunal to re-hear matter?* ***Amec*** *(above) [44-46] (per Dyson LJ);* ***Jones t/a Shamrock Coaches v. Department of Transport Welsh Office*** *[2005] EWCA Civ 58,* The Times, *January 24, 2005 [34] (per Smith LJ);* ***Sinclair Roche & Temperley v. Heard*** *[2004] IRLR 763 (EAT) [46] (factors include proportionality; comparative cost of a fresh hearing; passage of time; whether there is a question of bias or the risk of pre-judgment of partiality; the extent to which the original decision was flawed; the risk of one party having a "second bite" at the cherry):* "in the absence of clear indicators to the contrary, it should be assumed that the tribunal is capable of a professional approach to dealing with the matter on remission"*;* ***Aaron v. Law Society*** *[2003] EWHC 2271 (Admin) [37-42] (per Auld LJ)*

**Delay**

26. **Delay and the Fair Hearing Guarantee**. As set out above, Article 6(1) guarantees a hearing *"within a reasonable time"* in the determination of civil rights or obligations, or of any criminal charge. The main differences between delay as a common law ground of review, and delay as an Article 6(1) ground are:

- No requirement under Article 6(1) that applicant demonstrates that delay has caused prejudice: **Darmalingum v. The State** [2000] 1 WLR 2303 at 2308A-B (per Lord Steyn) (in the context of the fair trial guarantee in the Constitution of Mauritius); see also **Dyer v. Watson** [2004] 1 AC 379 [92-94] (per Lord Hope of Craighead); **Mills v. HM Advocate** [2004] 1 AC 441 [13, 46, 1, 2, 57]. In **Attorney General's Reference (No. 2 of 2001)** [2003] UKHL 68, [2004] 2 AC 72, having referred to the Strasbourg case law, Lord Bingham of Cornhill (with whom the other Lords agreed on this issue) explained the rationale of the guarantee of a trial within a reasonable time as follows [16]:

> *"In its application to civil proceedings, the rationale of the reasonable time requirement is not in doubt. The state should not subject claimants to prolonged delay in pursuing their claims, whatever the outcome, nor defendants to prolonged uncertainty and anxiety in learning whether their opponents' claims will be established or not…*
>
> *…In its application to the determination of criminal charges…the rationale…is readily intelligible. A defendant who is not guilty should have the opportunity of clearing his name without excessive delay. A guilty defendant, facing conviction and punishment, should not have to undergo the additional punishment of protracted delay, with all the implications it may have for his health and family life…there are provisions of domestic law which seek to ensure the expeditious dispatch of criminal proceedings, but again article 6(1) reinforces these provisions…"*

An absence of serious prejudice is likely, however to affect the form of relief granted: **ibid**. [17 and 24]. In criminal proceedings, for example, a stay of proceedings is unlikely to be granted unless *"(a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant"*: **ibid**.

- Article 6(1) guarantee only operates from the point at which proceedings to which it applies have been instituted: ibid. [26-28]. In criminal cases, this period will begin *"at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him"*, which will normally encompass interview under caution, but not arrest: **ibid**. [27]. In disciplinary proceedings it is likely to operate from the point at which formal allegations are made: see, for example, **Aaron** (above) [28]. In addition, "*the passage of any considerable period of time before charge may call for greater than normal expedition thereafter*": **Dyer v. Watson** (above) [55] per Lord Bingham. Time runs until the final determination of the charge or dispute including (in the latter case) any claim for damages or costs.

27. The threshold of unreasonableness is *"a high one, not easily crossed"*: **Dyer** (above) [52] (per Lord Bingham). What is unreasonable will depend on the circumstances of the individual case: **ibid**. In **Dyer** [52-55], Lord Bingham identified three areas of any case as calling for particular inquiry, namely:

- the complexity of the case
- the conduct of the defendant, who *"cannot legitimately complain of any delay of which he is the author"*
- the manner in which the case has been dealt with by the administrative and judicial authorities:

> *"It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking incumbent on*

*contracting states so to organize their legal systems as to ensure that the reasonable time requirement is honoured."*

That said, "*nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system*", and in exceptional circumstances a delay which appears excessive may, in fact, be justified.

28. **Article 5(4): prisoners and mental health**. Article 5(4) provides that:

> "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful*".

29. The Courts have approached the application of this provision, in outline, as follows:

- The existence of a policy or practice of automatically referring applications to the judicial authorities within certain time-scales, irrespective of their individual facts or complexity, is likely to breach Article 5(4), absent proof that this is the "*only practical way of ensuring that individual cases are determined as speedily as their individual circumstances would permit*": **R (C) v. Mental Health Review Tribunal London South and South West Region** [2001] EWCA Civ 1110, [2002] 1 WLR 176 [45] (per Lord Phillips MR); **Noorkoiv v. SSHD** [2002] EWCA Civ 770, [2002] 1 WLR 3284 [37] (per Buxton LJ).

- No direct assistance is to be gained from cases decided in relation to the prompt hearing obligation in Article 6(1), since:

  > "*The fact that the state is dealing with people who are at least presumptively detained unlawfully…imposes a more intense obligation than that entailed by the need for a prompt trial of people who are not in custody*": **Noorkoiv** (above) [25] (per Buxton LJ).

  The extent to which "*the practical realities of litigious life even in a reasonably well organised system*" can justify an apparently excessive delay in this context is therefore unclear: see, for example, **R (KB) v. Mental Health Review Tribunal** [2002] EWHC 639 (Admin) [38-39] (Stanley Burnton J). It is clear, however, that general inadequacies in the system, or systemic underfunding, provide no justification for excessive delay, although they may be taken into account in determining the appropriate form of relief, and, in particular, in justifying a refusal of mandatory relief: **Murray v. Parole Board** [2003] EWCA Civ 1561, *The Times*, November 12, 2003 [24]; **KB** (above) [83, 86, 91].

- What is "*speedy*" will depend on the nature of the case and other relevant circumstances, including the complexity of the case. The issue is whether there has been "*a failure to proceed with reasonable dispatch having regard to all the material circumstances*": **R (C)** (above) [43] (per Lord Phillips MR); **Hirst** (above) [2005] EWHC 1480 (Admin) [37] (Crane J) (delay of 23 days in submitting dossier to

recalled prisoner breach of Article 5(4)). There is no presumption that a delay of more than one year between Parole Board reviews infringes Article 5(4), although it may do so on the facts of the individual case: **Day v. SSHD** [2004] EWHC 1742 (Admin) (Gibbs J).

30. **Delay in decision-making:**

- Where there is an express statutory time limit and a failure to comply with it: **Cllr Martin Dawkins v. Bolsover District Council** [2004] EWHC 2998 (Admin) (Hughes J) ("*significant compliance*" since otherwise proceedings which could "*perfectly well continue without any significant prejudice to the member complained of, or to the public good, would founder*" [51].

- Delay as a free-standing ground of review:

  - Where delay results in very serious personal consequences for the claimant: **R (Salih and Rahmani) v. SSHD** [2003] EWHC 2273, *The Times*, October 13, 2003 (Stanley Burnton J) (delays of between 12 and 14 working days in provision of support for asylum seekers who were, by definition, destitute, unreasonable; general declaration as to the delays refused) cf. **Anufrijeva v. London Borough of Southwark** [2003] EWCA Civ 1406, [2004] QB 1124 [46-47] (per Woolf LCJ) (where complaint that culpable delay in administration of benefits, contrary to Article 8, no breach absent serious consequences for the claimant).

  - As a relevant factor in assessing proportionality: **Shala v. SSHD** [2003] EWCA Civ 233 ("*the appellant did have a legitimate claim to enter at the time when, on any reasonable basis, his claim should have been determined…the fact that the delay by the Home Office has deprived him of that advantage should be seen as an exceptional circumstance which takes the appellant's case out of the normal run of cases…*") [15] (per Laws LJ) cf. **Strbac v. SSHD** [2005] EWCA Civ 848 (where administrative delay in the determination of an application "*proves to be substantial and to have brought consequences in its wake beyond the mere passage of time*" it may be a factor which the decision-maker is obliged to consider [25] (per Laws LJ)) cf. **SSHD v. Akaeke** [2005] EWCA Civ 947, *The Times*, September 23, 2005 (unreasonable delay, without substantial prejudice, may be sufficient to render removal disproportionate).

**<u>The Doctrine of Legitimate Expectation</u>**

31. **What is a legitimate expectation?**

- **Attorney-General of Hong Kong v Ng Yuen Shiu** [1983] 2 AC 629, per Lord Fraser at 638:

> *"when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and*

*should implement its promise, so long as implementation does not interfere with its statutory duty."*

- **Fairness** in enforcing reliance on representations vs. allowing flexibility in decision making

32. **Procedural v Substantive Legitimate Expectations**

- Process v outcome

- Questions of fairness and abuse of power

33. **Key considerations in establishing legitimacy of substantive expectation**

- Clear and unqualified representation?

- Procedural or substantive expectation?

- Policy or individual representation? Typically no *legitimate* expectation that a public body will not change its policy.

- Knowledge of the affected party?

34. **Substantive expectation: no useful parallel with estoppel**

- Despite similar roots, "*it is unhelpful to introduce private law concepts of estoppel into planning law* [or, by extension, public law]": Lord Hoffmann in **R (Reprotech (Pebsham) Ltd) v East Sussex C** [2003] 1 WLR 348, [33]. *"…It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand on its own two feet" [35].*

- Unlike estoppel, remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote", and courts have to take into account "hierarchy of individual rights": Lord Hoffmann, ibid. Attempted reconciliations (as per Lord Denning MR in **Western Fish Products v Penwith District Council** [1981] 2 All ER 204) are not helpful.

- Cf. Elliott, **"Unlawful Representations, Legitimate Expectations and Estoppel in Public Law"** [2003] JR 71; Pievsky, **"Legitimate Expectation as a Relevancy"** [2003] JR 144.

35. ***Coughlan* onwards – recent developments in substantive legitimate expectation**

- **R. v North and East Devon Health Authority Ex p. Coughlan** [2001] Q.B. 213 (CA)

- Confirmation in the Court of Appeal of the doctrine of substantive legitimate expectation.

- Per Woolf LJ at [89]: *"We have no hesitation in concluding that the decision to move Miss Coughlan against her will and in breach of the Health Authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in Mardon House. There was no overriding public interest which justified it. In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself. Here, however, as we have already indicated, the Health Authority failed to weigh the conflicting interests correctly. Furthermore, we do not know (for reasons we will explain later) the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was on offer accommodation which could be said to be reasonably equivalent to Mardon House and the Health Authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the Health Authority."*

- **R (Bibi) v Newham LBC** [2002] 1 WLR 237 (CA)

- Following **Coughlan**, development of three part test for substantive legitimate expectation, per Schiemann LJ.

  at [19]: *"In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."*

  at [39]: *"on any view, if an authority, without even considering the fact that in breach of a promise which has given rise to a legitimate expectation that it will be honoured, makes a decision to adopt a course of action at variance with that promise then the authority is abusing its powers."*

  at [51]: *"The law requires that any legitimate expectation can be properly taken into account in the decision making process. It has not been in the present case and therefore the Authority has acted unlawfully."*

- **R (on the application of Bakhtear Rashid) v Secretary of State for the Home Department** [2005] EWCA Civ 744 (CA, 16 June 2005)

- Extant policy against removal of Kurdish Iraqis to Iraq.

- Refusal of asylum to BR, contrary to policy.

- **Coughlin** approach followed. Court effectively granted indefinite leave to remain, because serious errors in administration had resulted in conspicuous unfairness to BR. The unfairness was such as to amount to an abuse of power requiring the intervention of the court.

- Pill LJ, at [25]: *"In my judgment, there plainly is a legitimate expectation in a claimant for asylum that the Secretary of State will apply his policy on asylum to the claim. Whether the claimant knows of the policy is not in the present context relevant. It would be grossly unfair if the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of a policy, especially one unknown to relevant Home Office officials. "*

- Thus clear that substantive legitimate expectation may be protected even where no detrimental reliance, or even knowledge of "expectation".

- **Export of the doctrine: Ng Siu Tung v. Director of Immigration** [2002] 1 HKLRD 561 (Hong Kong Final Court of Appeal)

  *The doctrine of substantive legitimate expectation forms part of the law of Hong Kong … A failure to honour a legitimate expectation of a substantive outcome or benefit might, in the absence of any overriding reason of law or policy excluding its operation, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court.*

  **But rejected elsewhere: Australia (R v Minister for Immigration and Multicultural Affairs ex p Lam** [2003] HCA 6 (12 Feb 2003), by majority of the High Court (obiter).

*36.* ***Ultra Vires*** **promises capable of founding substantive legitimate expectation?**

- **The conventional position**:

  > *"No legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it."*

  **R v Inland Revenue Commissioners ex p. MFK Underwriting Agencies Ltd** [1990] 1 WLR 1545, Judge J at 1573H. Such an expectation could not be "legitimate".

- Followed in **R. v Secretary of State for Education ex p. Begbie** [2000] 1 WLR 1115.

- But the courts have always accepted that it may be an abuse of power for a public body to perform a (discretionary?) duty or exercise a power where there is a legitimate expectation to the contrary: see **R. v Inland Revenue**

**Commissioners ex p. Preston** [1985] AC 835, per Lord Templeman at 864: the court could direct the IRC

> *"to abstain from performing their duties or from exercising their statutory powers if the court is satisfied that the "unreasonableness" of which the applicant complains renders the insistence by the commissioners on performing their duties of exercising their powers an abuse of power…"*

- Principle called into question at the margins in **South Buckinghamshire DC v Flanagan** [2002] 1 WLR 2601 (CA):

  - Keene LJ found that legitimate expectation can stem from the actual *or ostensible* authority of a decision-maker, at [18].

    > *"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation."*

  - Questioning concept of ostensible authority in this context: Sales and Steyn, **"Legitimate Expectations in Public Law"** [2004] PL 564 at 577.

- Re-assertion of the orthodox position: **R (Bloggs 61) v Secretary of State for the Home Department** [2003] 1 WLR 2724 (CA)

  - Public bodies are unable to bind one another if to purport to do so would result in an *ultra vires* representation.

  - Ouseley J at [60]: *"The starting point is that no public body can be bound in the exercise of its statutory powers by a promise which it did not make or which was not made with its authority, even if the promise is one which it could lawfully have made. The exercise of statutory powers or of a statutory discretion can only be undertaken by the body to which statute has committed that task. No other body is so empowered. If a body is bound by promises which it has neither made nor authorised another lawfully to make, it would be unlawfully devolving the exercise of its powers, or fettering its discretion or taking account of irrelevant factors. It could not be an abuse of power for such a body to decline to be bound by such a representation."*

- Outflanking via Strasbourg: **Stretch v United Kingdom** (2004) 28 EHRR 12

  - Expectation that option to renew a lease granted by LA would be honoured was a legitimate expectation which was capable of protection as a property or possession under Article 1 of Protocol 1 of the Convention.

  - This was the case notwithstanding that the LA had (unbeknown to it at the time) no power to grant the option.

- Failure to protect this legitimate expectation was a disproportionate interference with S's property rights under the Convention.

- At [35]: *"The court considers, in the circumstances of the case, that the applicant must be regarded as having at least a legitimate expectation of exercising the option to renew and that this may be regarded, for the purposes of Art. 1 of Protocol 1, as attached to the property rights granted to him by Dorchester under the lease."*

- Limited "domestication" of Stretch: **Rowland v Environmental Agency** [2005] Ch.1; [2004] 3 WLR 249 (CA)

  - Despite **Stretch**, an ultra vires representation that navigation rights on the Thames outside R's home were private did not give rise to an enforceable domestic substantive legitimate expectation

  - Not a disproportionate interference with Article 1 Protocol 1 Convention rights.

    > "*The courts should be slow to fix a public authority permanently with the consequences of a mistake … particularly when it would deprive the public of their rights" (*per Peter Gibson LJ at [96]).
    >
    > Mance LJ at [152]: *"in light of the European Court decisions in Pine Valley and Stretch, … it can no longer be a automatic answer under English law to a case of legitimate expectation, that the Agency had no power to extinguish the [public rights of navigation] over Hedson Water or treat it as private. However, the present case differs significantly from those two cases."*

- But is **Stretch** what it seems? Was it wrongly understood in **Rowland**? See the interpretation of **Stretch** by the Grand Chamber of the ECHR in **Kopecky v. Slovakia**, Appln no. 44912/98, 28 September 2004, esp at para 47, where the court states that **Stretch** was a case where the legal act was "retrospectively invalidated" to the applicant's detriment. This may be a misunderstanding of the English law of invalidity, but it is a much more limited basis for explaining the "substantive" legitimate expectation there found.

- In any event, possible distinctions between **Stretch** and **Rowland:**

  - Detrimental reliance?

  - Only compensation sought?

  - What if there is no Convention right in play?

  - Cf. Blundell, **"*Ultra Vires* Legitimate Expectations"**, [2005] JR 147