Determining Bias: A survey of the law in the United Kingdom

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP was requested by a project partner in India to prepare a report on issues of bias/ predetermination/ closing of mind in UK administrative/constitutional law. The project partner is trying to craft a new argument on administrative law grounds to challenge the rejection of clemency petitions.

2. For Indian citizens had been convicted of rape and murder and sentenced to death by a trial court in 2013. The appellate courts confirmed their sentences in 2017, and the review petition was dismissed in 2019. One of the convicts filed his clemency petition on 14th January 2020 and it was rejected by the President of India on 17th January 2020. Between 14th January and 17th January 2020, the Delhi Government's Council of Ministers recommended rejection of the clemency petition to the Lieutenant Governor of Delhi, followed by a rejection of the clemency petition by the Lieutenant Governor, and the Council of Ministers of the Government of India recommending rejection to the President of India.

3. Political leaders including ministers in both the Delhi Government and the Government of India have repeatedly called for the execution of the four convicts since their arrest. Given this context, the project partner is attempting to argue that any 'aid and advice' given to the President by the Council of Ministers is tainted, since some individual ministers have expressed their own opinion on the case, and are therefore, pre-disposed to decide in a certain way.

4. The project partner seeks assistance on the following questions - Whether the 'aid and advice' of the Council of Ministers to the President, on the question of deciding the mercy plea of a person sentenced to death, is bad in law by virtue of the ministers making repeated public statements calling for the execution of the four convicts? Would such a situation involve 'bias' rendering the 'aid and advice' illegal? Would the public statements by the ministers show that they had pre-determined the clemency petition and thereby effectively not applied their mind to the relevant materials?

5. For this research, the following research questions were identified. The research questions were based on the request of the project partner and were formulated as follows:

    a) What is the general position under UK administrative law on actual and apparent bias?

b) Can public statements made by a person in a decision-making position result in 'apparent bias'?
c) On what grounds can mercy petitions be judicially reviewed, and does bias constitute a ground? If so, how have the courts applied the bias ground in this context?

(b) Research Questions:

Question 1: What is the position of law in the UK on actual and apparent bias?

6. The initial test in the UK to assess 'apparent bias' was whether there was a 'real danger of bias' such that an individual might unfairly regard, with favour, or disfavour, the case of a party to the issue under consideration by him/her. This test was later modified, to bring it in line with the jurisprudence of the European Court of Human Rights. The current test is whether a 'fair minded and informed observer' would conclude that there was a real possibility that the decision maker was biased. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally. The observer is neither complacent nor unduly sensitive or suspicious when he/she/they examines the facts. He/she/they is able to distinguish between what is relevant and what is irrelevant, and is able when exercising judgment to decide what weight should be given to the facts that are relevant. He/she/they always reserves judgment on every point until he/she/they has seen and fully understood both sides of the argument.

7. Courts in the UK have also held that pre-determination is a form of bias. Pre-determination can be alleged when a decision-making body has closed its mind to the consideration and weighing of relevant factors because of a decision already reached, or because of determination to reach a particular decision. Whether the decision-making body pre-determined the outcome of the case is also judged from the perspective of a 'fair-minded and informed observer'.

Question 2: Can public statements made by a person in a decision-making position result in 'apparent bias'?

8. If a judge is hostile towards one of the parties or an administrative decision-maker is hostile to someone who would be subject to or would benefit from his or her decision, that may be sufficient to give rise to an appearance of bias, depending on the particular factual circumstances. Evidence of such hostility might arise by way of comments or public statements

made by the decision-maker prior to or during a hearing, or in the course of the decision-making process. Such hostile comments or statements have also been held to impair the fairness of a trial. If previous statements or decisions indicate or reflect a policy that it is proper for the agency to pursue, they will presumably not disclose a bias, or give reason to think that the process is unfair. But where prior statements or conclusions or judgments adverse to the claimant(s) were targeted personally and individually at the claimant(s), it may be unfair for the decision maker to make the subsequent decision.

Question 3: On what grounds can mercy petitions be judicially reviewed, and does bias constitute a ground? If so, how have the courts applied the bias ground in this context?

9. Although mercy is a prerogative power in the United Kingdom, the exercise of this power is susceptible to judicial review. Over the years, various grounds for reviewing the grant of mercy have been identified. These include: (a) failure to consider relevant material; (b) failure to act in accordance with any relevant guidelines; (c) error of law as to the elements of the offence for which the pardon was sought; (d) refusal of pardon solely on the ground of sex, race or religion; (e) exercise of the prerogative of mercy in a wholly arbitrary way by leaving out of account a relevant consideration; (f) irrationality in the exercise of the prerogative of mercy; (g) error of law on the part of the decision-makers, i.e., where the decision-maker errs in law when considering whether he/she/they has a power to grant a pardon; (h) material was produced before the decision-making body by persons palpably biased against the convicted man; (i) material produced before the decision making body is demonstrably false or is genuinely mistaken but capable of correction; (j) new information is available which by error of counsel or honest forgetfulness by the convicted man was not brought out before; (k) the decision is taken in an arbitrary or perverse way or is otherwise arrived at in an improper, unreasonable way; (l) the decision-maker is unconsciously biased; (m) gross breach of rules of fairness or principles of natural justice in the course of the processes leading to the exercise of the prerogative of mercy. Although 'palpable bias', 'unconscious bias' and 'breach of principles of natural justice' have been recognized as grounds of judicial review of the prerogative of mercy, no case yet has seen an applicant raise the rule against bias to challenge a mercy decision.

QUESTION 1: WHAT IS THE POSITION OF LAW IN THE UK ON ACTUAL AND APPARENT BIAS?

I. Position of law on 'apparent bias'

1. In *Re Medicaments No 2*, the Court of Appeal held:

> ***Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve***. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him.[1]
>
> The decided cases draw a distinction between `actual bias' and `apparent bias'. The phrase `actual bias' has not been used with great precision and has been applied to the situation
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> (1) where a Judge has been influenced by partiality or prejudice in reaching his decision and
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> (2) where it has been demonstrated that a Judge is actually prejudiced in favour of or against a party.
>
> '***Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been, or may be, biased***.[2]
>
> Findings of actual bias on the part of a Judge are rare. The more usual issue is whether, having regard to all the material circumstances, a case of apparent bias is made out.[3] (emphasis added)

2. The initial test in the UK for determining apparent bias was laid down in *R v Gough*, where the House of Lords held:

> having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a ***real danger of bias*** on the part of the relevant member of the tribunal in question, in the sense that ***he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him***.[4] (emphasis added)

[1] *Re Medicaments No 2* [2001] 1 WLR 700 [37].

[2] ibid [38].

[3] ibid [39].

[4] *R v Gough* [1993] UKHL 1 [14].

3. It was clarified that this 'real danger of bias' was not to be ascertained from the point of view of a reasonable individual, but from that of the Court:

> ***I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man***, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[5] (emphasis added)

4. The test was also framed as 'real danger' of bias, rather than 'real likelihood' of bias, to ensure that the Court is thinking in terms of possibility rather than probability of bias.[6]
5. While the test in the UK remained 'real danger of bias', the test under Article 6 of the European Convention of Human Rights 1950 ('ECHR'), which guarantees 'a fair and public hearing within a reasonable time by an independent and ***impartial*** tribunal', was different.[7] Under the ECHR, the Court focused on whether there exist any 'objectively justifiable' doubts as to impartiality. For instance, in *Pullar v United Kingdom*, the Court held:

> It is well established in the case-law of the Court that there are two aspects to the requirement of impartiality in Article 6 para. 1. First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, ***the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect***.[8] (emphasis added)

6. Thus, unlike in *R v Gough*, the impartiality of the tribunal was to be assessed from the point of view of 'an objective observer'.[9] Similarly, in *Gregory v United Kingdom*, the Court held:

> the Court must examine whether in the circumstances there were ***sufficient guarantees to exclude any objectively justified or legitimate doubts*** **as to the impartiality** of the jury.[10] (emphasis added)

7. The crucial features of the test for bias under the ECHR jurisprudence are:

> (1) If a Judge is shown to have been influenced by actual bias, his decision must be set aside.

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[5] ibid.

[6] ibid.

[7] European Convention of Human Rights, 1950, art. 6(1).

[8] *Pullar v United Kingdom* (1996) 22 EHRR [30].

[9] ibid [33].

[10] *Gregory v United Kingdom* (1997) 25 EHRR 577 [14].

(2) Where actual bias has not been established the personal impartiality of the Judge is to be presumed.

(3) The Court then has to decide whether, ***on an objective appraisal***, the material facts give rise to a legitimate fear that the Judge might not have been impartial. If they do the decision of the Judge must be set aside.

(4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the Court.

(5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.[11] (emphasis added)

8. In *Locabail (UK) Ltd v Bayfield Properties Ltd* the UK Court of Appeal observed that the test in *R v Gough* had not commanded universal approval outside the UK, with Scotland and some Commonwealth countries preferring an alternative test which is `more clearly in harmony with the jurisprudence of the European Court of Human Rights'.[12]

9. Following this line of reasoning, the Court of Appeal, in *Re Medicaments No 2*, modified the test in *R v Gough* to bring it in consonance with the ECHR jurisprudence. The Court held:

When the Strasbourg jurisprudence is taken into account, ***we believe that a modest adjustment of the test in Gough is called for***, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. ***The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased***.[13]

The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The Court does not have to rule whether the explanation should be accepted or rejected. Rather ***it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced***.[14] (emphasis added)

[11] *Re Medicaments No 2* [2001] 1 WLR 700 [83].

[12] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 [17].

[13] *Re Medicaments No 2* [2001] 1 WLR 700 [85].

[14] ibid [86].

10. Thus, there was a shift in the nature of the test to ascertain 'apparent bias'. This shift was confirmed in *Porter v Magill*, by the House of Lords. The test for 'apparent bias' was laid down as:

> ***what the fair-minded and informed*** **observer** ***would have thought***, and whether his conclusion would have been that ***there was real possibility of bias***.[15] (emphasis added)

11. This was also followed in *Lawal v Northern Spirit Ltd*[16], wherein the opposing party asserted bias in the tribunal based on the fact that the Counsel appearing at the tribunal had previously sat as a judge with a tribunal member. It was held that:

> It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach.[17]

12. In *Flaherty v National Greyhoud Racing Club,* it was clarified that the test for apparent bias involves the court conducting a two-stage process. Care must be taken when applying decisions that relate to one type of decision-maker to another type of decision-maker, as the particular context is often important:

> The test for apparent bias involves a two stage process. ***First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased***…An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided: see *Locabail (UK) Limited v Bayfield Properties Limited* [2000] 2 QB 451, 480 para 25. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing.[18] (emphasis added)

13. In *Gillies v Secretary of State for Work Pensions*, it was alleged that there was a reasonable apprehension that the medical member of a disability appeal tribunal was biased. Elaborating upon who a fair-minded and informed observer is the House of Lords held that a fair-minded

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[15] *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 [105].

[16] Later, it was also upheld in *R (Al-Hasan) v Home Secretary* [2005] UKHL 13 [30].

[17] *Lawal v Northern Spirit Ltd* (2003) UKHL 35 [14].

[18] *Flaherty v National Greyhound Racing Club* [2005] EWCA Civ 1117 [27].

observer is not an insider, he/she/they can distinguish what is relevant and is irrelevant, and can determine what weight should be given to relevant facts. The informed observer has access to all the facts that are capable of being known to the public generally:

> ***The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the* public generally**, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that ***the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts*** that he can look at. It is to be assumed too that ***he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant***.[19]
>
> 'The 'fair minded and informed observer' is ***probably not an insider*** (ie another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. ***But she is informed. She knows the relevant facts. And she is fair minded.***[20] (emphasis added)

14. The test in *Porter v Magill* was further explained in *Helow v Secretary of State for the Home Department*. This was a case in which the appellant, a Palestinian, challenged the involvement of Lady Cosgrove as a judge in her case, as Lady Cosgrove's involvement as a Jew in pro-Jewish lobby organisations meant that there was an appearance of bias. Lord Hope elaborated upon the test by stating that a fair-minded observer always reserves judgement on every point until he/she/they has seen and fully understood both sides of the argument.

> The observer who is fair-minded is the sort of person who always ***reserves judgment on every point until she has seen and fully understood both sides of the argument***. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson*, (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.[21]

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[19] *Gillies v Secretary of State for Work& Pensions* [2006] 1 WLR 781 [17].

[20] ibid [39].

[21] *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [2].

> Then there is the attribute that the observer is "informed". ***It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant.*** She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.[22] (emphasis added)

15. With respect to the test of apparent bias, the Sir Terence Etherton held in *Resolution Chemicals Ltd v H. Lundbeck A/C,* held that that there has to be a 'real possibility of bias':

> 'The test is "a real possibility" of bias, whether subconscious or otherwise. Lundbeck's skeleton argument describes that test as "a necessarily low threshold". While the test is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of "any possibility" but of a "real" possibility of bias.'[23]

In*, R (on the Application of United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* case, the Court reiterated that:

> 'When applying the test of real possibility "it will very often be appropriate to enquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled" (*Locabail* at para 18). However, no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind [24](*Locabail (UK) Ltd* at para 19, and *Helow* at para 39, per Lord Mance).'[25]

16. A helpful summary of the relevant principles pertaining to the assessment of bias has been provided in *R (PD) v West Midlands and North West Mental Health Review Tribunal*:

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[22] ibid [3].

[23] *Resolution Chemicals Ltd v H. Lundbeck A/C* [2013] EWCA Civ 1515 [36]. This has been reiterated in *R (on the Application of United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* [2019] EWHC 409 (Admin) [36].

[24] The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para. 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. Quoted in *Helow v Secretary of State for the Home Department* [2008] UKHL 62 [39].

[25] *R (on the Application of United Cabbies Group (London) Ltd) v Westminster Magistrates' Court* [2019] EWHC 409 (Admin) [36].

(a) in order to determine whether there was bias in a case where actual bias is not alleged "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" (per Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at 494 [103]). It follows that this exercise entails consideration of all the relevant facts as "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased" (ibid [104]).

(b) "Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* [2000] 200 CLR 488, 509 at paragraph 53 by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"" (per Lord Steyn in *Lawal v Northern Spirit Limited* [2003] ICR 856, 862 [14]).

(c) in ascertaining whether there is a case of unconscious bias, the courts must look at the matter by examining other similar analogous situations. "One does not come to the issue with a clean slate; on the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem" (Lord Steyn in *Lawal v Northern Spirit Limited* (supra), 862 [15])

(d) the approach of the court is that "one starts by identifying the circumstances which are said to give rise to bias … [a court] must concentrate on a systematic challenge and apply a principled approach to the facts on which it is called to rule" (per Lord Steyn in *Lawal v Northern Spirit Limited* (supra) 864-5 [20])

(e) the need for a Tribunal to be impartial and independent means that "it must also be impartial for an objective viewpoint, that is it must offer *sufficient guarantees* to exclude any legitimate doubt in this respect" (*Findlay v United Kingdom* (1997) 24 EHRR 221 at 224-245 and quoted with approval by Lord Bingham of Cornhill in *R v Spear* [2003] 1 AC 734 [8]).[26]

It is to be noted that the Court of Appeal in this case cautioned against excessive citation of authority when considering the essentially factual question whether a fair-minded and informed observer would think that, considering the relevant circumstances, there was a real possibility that the decision maker was biased, because there was a danger that such citation may cloud rather than clarify matters.[27]

17. It should be noted that most of the cases on apparent bias concern complaints about judges. But it is evident that the doctrine in *Porter v Magill* extends to apparent bias on the part of other decision makers. The decision maker in *Porter v Magill* itself was not a judge, but an auditor engaged in an investigation; the claimant argued that the way in which the auditor announced

[26] R *(PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311 [6].

[27] ibid [8].

his preliminary findings raised an appearance of bias when he issued his final decision (the claimant lost on the facts). The doctrine of apparent bias is best understood as applying to executive officials and agencies, but in a contextual fashion, so that what counts as bias depends on the type of decision and the role of the decision maker. A bona fide policy will not raise an appearance of bias, since the fair-minded and informed observer will not conclude that such a policy shows a real possibility of bias. This is discussed in further detail in the next section below.

II. Position of law on pre-determination as a form of bias

18. The 'fair-minded and informed observer' test set out in *Porter v Magill* has also been used to determine whether there is a possibility of bias arising from 'pre-determination'. In *R v Amber Valley DC, ex p Jackson*, the decision of the planning council was challenged because the decision was motivated by an existing policy in place. It was argued that the planning council was therefore 'pre-disposed' towards an outcome which would further the existing policy. The Court held:

> The rules of fairness or natural justice cannot be regarded as being rigid. They must alter in accordance with context. Thus in the case of highways, the department can be both the promoting authority and the determining authority. When this happens, of course any reasonable man would regard the department as being pre-disposed towards the outcome of the inquiry. The department is under an obligation to be fair and carefully to consider the evidence given before the inquiry but the fact that it has a policy in the matter does not entitle a court to intervene.[28]

19. In *R v Environment Secretary, ex p Kirkstall Valley Campaign Ltd*, the Court held that 'the law recognises that members will take up office with publicly stated views on a variety of policy issues', and that those views do not count as bias unless the councillor refuses to consider objections.[29]

20. In *Bovis Homes Ltd v New Forest District Council*, in discussing 'pre-determination', the Court held:

> In my judgment a Council acts unlawfully where its decision-making body has ***predetermined the outcome of the consideration*** which it is obliged to give to a matter, whether by the delegation of its decision to another body, or by the adoption of an inflexible policy, or as in effect is alleged here, ***by the closing of its mind to the consideration and weighing of the relevant factors because of a decision already reached or because of a determination to reach a particular decision***. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed.

[28] *R v Amber Valley DC, ex p Jackson*, [1985] I WLR 298, 307-8.

[29] *R v Environment Secretary, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304.

It is to be distinguished from a legitimate predisposition towards a particular point of view. I derive those principles from the Kirkstall Valley Campaign Ltd.[30]

There is obviously an overlap between this requirement and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. ***The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order.*** In those circumstances, the reasons given would not be the true reasons but a sham.[31] (emphasis added)

21. In *Georgiou v Enfield London Borough Council*, it was clarified that 'pre-determination' can be a form of bias. The Court held:

I accept Mr Dinkin's submission that bias, in the sense of a pecuniary or personal interest in the outcome of a decision, is conceptually distinct from predetermination or a closed mind.[32]

It seems to me, however, that a different approach is required in the light of Porter v Magill. The relevant question in that case was whether what had been said and done by the district auditor in relation to the publication of his provisional conclusions suggested that he had a closed mind and would not act impartially in reaching his final decision…Thus it was a case of alleged predetermination rather than one in which the district auditor was alleged to have a disqualifying interest. Yet it was considered within the context of apparent bias, and the decision was based on the application of the test as to apparent bias which I have already set out. There is nothing particularly surprising about this…***predetermination can legitimately be regarded as a form of bias. Cases in which judicial remarks or interventions in the course of the evidence or submissions have been alleged to evidence a closed mind on the part of the court or tribunal have also been considered in terms of bias***: see e.g. London Borough of Southwark v Jiminez [2003] EWCA Civ 502 at para 25 of the judgment, where the test in Porter v Magill was accepted as common ground and was then applied.[33]

I therefore take the view that in considering the question of apparent bias in accordance with the test in Porter v Magill, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members ***were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues***.[34] (emphasis added)

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[30] *Bovis Homes Ltd v New Forest District Council* [2002] EWHC 483 (Admin) [111].

[31] ibid [112].

[32] *Georgiou v Enfield London Borough Council* [2004] EWHC 779 (Admin) [29].

[33] ibid [30].

[34] ibid [31].

22. Accepting this, in *R (Lewis) v Redcar and Cleveland*, it was held:

> ***Actual or apparent bias or predetermination*** on the part of a decision maker renders his decision unlawful.[35]
>
> ***If a fair minded and informed observer who is neither complacent nor unduly sensitive or suspicious, having considered the facts, would conclude that there was a real possibility of bias or predetermination, then apparent bias or predetermination is established***. For the sake of brevity, I shall use the phrase "the notional observer" to denote an observer who is fair minded, informed, not complacent and not unduly sensitive or suspicious.[36]
>
> In the context of decisions reached by a council committee, the notional observer is a person cognisant of the practicalities of local government. He does not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he trusts councillors, whatever their pre-existing views, to approach decision making with an open mind. ***If, however, there are additional and unusual circumstances which suggest that councillors may have closed their minds before embarking upon a decision, then he will conclude that there is a real possibility of bias or predetermination***.[37] (emphasis added)

23. Thus, decision makers are entitled to be predisposed to particular views, such as where the planning council makes a decision in accordance with an existing policy. However, predetermination occurs where someone closes their mind to any other possibility beyond that predisposition, with the effect that they are unable to apply their judgement fully and properly to an issue requiring a decision. Such pre-determination is a form of bias.

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[35] R *(Lewis) v Redcar and Cleveland* [2008] EWCA Civ 746 [74].

[36] ibid [75].

[37] ibid [76].

QUESTION 2: CAN PUBLIC STATEMENTS MADE BY A PERSON IN A DECISION-MAKING POSITION RESULT IN 'APPARENT BIAS'?

I. Statements as an indicator of bias

24. In *Locabail (UK) Ltd v Bayfield Properties* [2000] Q.B. 451, the Court held that personal acquaintance with, or antagonism against, any individual involved in a case, would give rise to a real danger of bias. The Court said:

> …. a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; ***or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind*** (see Vakauta v Kelly (1989) 167 CLR 568); ***or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear*** **on the issues before him**. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.[38] (emphasis added)

25. The following case law examples demonstrate that evidence of such hostility might arise by way of comments made by the decision-maker prior to, or during, a hearing or in the course of the decision-making process.

26. In *R v Inner West London Coroner, ex p Dallaglio,*[39] a coroner used expressions such as "mentally unwell" or "unhinged" to describe relatives of the deceased. The coroner had sought the views of the deceased's family as to whether the inquests should be resumed. The coroner then refused to resume the inquests or to remove himself on the ground of apparent bias. The Court held that the use of the expressions 'unhinged' and 'mentally unwell' indicated a real possibility that he had unconsciously allowed himself to be influenced against the applicants and other members of the

[38] *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451 [25].

[39] *R v Inner West London Coroner, ex p Dallaglio* [1994] 4 All ER 138.

action group by a feeling of hostility towards them and that he had undervalued their case that the inquests should be resumed.

27. Regarding the test in *R v Gough,*[40] the Court observed that:

> (6) A decision-maker may have unfairly regarded with disfavour one party's case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously bias.[41]
>
> …
>
> (8) In the circumstances of the present case the court must therefore ask itself: is there a real danger that the coroner unfairly (though unconsciously) regarded with disfavour the case of those seeking a resumption of the inquest? Or: is there a real danger that the coroner was unconsciously prejudiced against this group? Or, as Neill LJ put it in the Divisional Court:
>
> '… is there a real danger that in deciding … not to resume the inquests D Knapman was influenced, consciously or unconsciously, to a material degrees by his views … about the Marchioness action group? [42]

28. When applying the test to the facts, the Court held:

> For a judicial officer to say publicly of someone that they are unreliable because they are "'unhinged" shows, I have no doubt, an appearance of bias: ***such a description is not merely injudicious and insensitive but bound to be interpreted as a gratuitous insult***... As to the crucial second limb, I find myself in the last analysis unable to discount the real possibility that the coroner unconsciously allowed himself to be influenced against the applicants and the other members of the action group by a feeling of hostility towards them. ***There remains to my mind not a probability but a not insubstantial possibility that he thought them troublemakers and in the result unfairly undervalued their case for a resumption***.[43] (emphasis added)

29. In *R v Lashley (Angela)*,[44] convictions were quashed as being unsafe where the trial judge's attitude and conduct towards counsel for the defendant had damaged the defendant's confidence in the administration of justice in her case and would similarly have damaged the perception of any reasonable observer present at the trial. This conduct included, among other things, several heated exchanges between counsel and the judge, including numerous personal

[40] *R v Gough* [1993] AC 646.

[41] *R v Inner West London Coroner, ex p Dallaglio* [1994] 4 All ER 138, 151-152.

[42] ibid.

[43] Ibid 153.

[44] *R v Lashley (Angela)* [2005] EWCA Crim 2016.

attacks on the counsel's skill and professional integrity that were 'wholly disproportionate' and 'unjustified'. [45]

30. The Court observed that:

> In short, [Lashley] had heard the exchanges to which we have already referred, and we have no reason to doubt that she was troubled by them, and we would add, that it was not unreasonable for her to be troubled by them.
>
> 39. Of itself, the fact that a defendant may invite his counsel to complain about the judge's behaviour is far from conclusive about any aspect of the trial. If it were so, any defendant who felt that the trial was going badly, would instruct his counsel to make a submission recording his (the defendant's) dissatisfaction with the fairness of the trial judge, with a view to bringing a perfectly satisfactory trial to an end. Here, however, ***it is significant that the defendant's concern was triggered by a specific concern arising from the exchanges*** which we have already recorded, a concern that we share. Although it is by no means conclusive, in this particular case the anxiety expressed on the defendant's behalf about what was happening is a feature that we have borne firmly in mind.[46] (emphasis added)

31. The Court held that:

> We expect judges to be robust, and we are not troubled when counsel are over−sensitive to criticism. We also recognise that from time to time judges will become impatient, sometimes unjustifiably so, without undermining the safety of the conviction. The stark problem in the present case was that the judge's attitude and conduct towards counsel for the defendant was unfair. In truth, ***this trial became over−infused with what appears to have been a repeated and unnecessary demonstrations of inappropriate personal animosity towards counsel which involved public criticism not only of her ability, but also of her integrity.*** These interfered to a marked degree with the normal due process required at every trial. This had the inevitable effect of damaging the defendant's confidence in the administration of justice in her case. Our reading of the transcripts shows that the perception of any reasonable observer present at the trial would have been similarly damaged.[47] (emphasis added)

32. In *El Farargy v El Farargy*, the Court held that a judge who made several jokes and comments about a Saudi sheikh who was a party to the proceedings ought to have recused himself on the ground of apparent bias, since the fair-minded and informed observer would conclude that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words conveyed. These included the judge's reference to the appellant sheikh departing 'on his flying carpet', to 'every grain of sand [being] sifted', to the case being 'bit gelatinous...like

[45] ibid [29].

[46] ibid [38]-[39].

[47] ibid [48].

Turkish Delight', and to a 'relatively fast-free time of the year', which together gave rise to an appearance of bias.[48]

33. In addition, the appellant argued that the judge's comment that he had "formed a view about [the] case", which was "near conviction" that the Sheikh and another party were party to an improper combination or campaign, threw doubt on the judge's ability to try the issues with an objective, open judicial mind (the predetermination issue).
34. The Court rejected the predetermination argument,[49] but accepted that the jokes and comments made by Singer J were not just 'colourful language', but were mocking and disparaging of the appellant for either his status as a sheikh, his Saudi nationality, his ethnic origins, his Muslim faith, or some or all of those elements. The jokes would be perceived to be racially offensive, even though that was not the intention. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that there was a real possibility that Singer J would carry into his judgment the scorn and contempt the words conveyed.[50]

35. The Court held:

> … These, I regret to say, were not just bad jokes: they were thoroughly bad jokes. Moreover, and importantly, ***they will inevitably be perceived to be racially offensive jokes***. For my part I am totally convinced that they were not meant to be racist and I unreservedly acquit the judge of any suggestion that they were so intended. Unfortunately, every one of the four remarks can be seen to be not simply "colourful language" as the judge sought to excuse them but, to adopt Mr Randall's submission, to be ***mocking and disparaging*** of the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith.
>
> 31. I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. ***They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt***

[48] *El Farargy v El Farargy* [2007] EWCA Civ 1149 [17].

[49] ibid [25]-[27] per Ward LJ. Note that adverse comments about a party made by a decision-maker prior to a decision might demonstrate antipathy towards that party and therefore give rise to the appearance of bias (as is the case here), or they may suggest that the decision-maker did not approach the decision with the required open mind and therefore give rise to the appearance of predetermination.

[50] ibid [30-[31].

> ***the words convey.*** Singer J. may talk too much; yet he is a good judge. Unfortunately for him and for all of us, on this occasion he crossed the line between the tolerable and the impermissible. For that reason, allowing the appeal is inevitable. (emphasis added)

II. Statements as an indicator of unfairness of trial

36. Hostile comments made by a judge also affect whether the trial is considered fair. A number of cases have dealt with unfair judicial intervention in the course of trial. The starting point for these cases is the decision of the Court of Appeal in *R v Hulusi* (1973) 58 Cr. App. R 378, 382, which adopted Lord Parker CJ's statement of principle in *R v Hamilton* (unreported, 9 June 1969):

> Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate. . . . Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be. ***Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury . . . . The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.***[51] (emphasis added)

37. Lord Brown JSC in *Michel v The Queen* also made it clear that the judges need to act fairly and impartially throughout the court process:

> The need for the judge to steer clear of advocacy is more acute still in criminal cases. It is imperative that a party to litigation, above all ***a convicted defendant…leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it.***[52] (emphasis added)

Lord Brown JSC, giving the judgment of the Court, made it clear that the issue whether a trial has been fair was not to be judged merely by the correctness of the result:

> There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however

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[51] Lord Parker CJ's statement in *R v Hamilton* (unreported, 9 June 1969) quoted in *Michel v The Queen (The Court of Appeal of Jersey)* [2009] UKPC 41 [17].

[52] ibid [32].

obviously guilty an accused person may appear to be, the appeal court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor...[53]

Lord Bingham was, of course, right to recognise that by no means all departures from good practice render a trial unfair.... ***Ultimately the question is one of degree***…'[54]

'[N]ot merely is the accused in such a case deprived of "the opportunity of having his evidence considered by the jury in the way that he was entitled". ***He is denied too the basic right underlying the adversarial system of trial, whether by jury or jurats: that of having an impartial judge to see fair play in the conduct of the case against him***. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials." (emphasis added)'[55]

38. In the recent Court of Appeal decision (2019) in *Serafin v Malkiewicz & Ors,* the Court dealt with unfair judicial treatment. Forming the fifth ground of appeal in this case, the claimant alleged that the trial process was either unfair and/or conducted with the appearance of unfairness and that consequently the judge's findings were not safe or reliable:

'Ground 5: Unfair judicial treatment: During the trial, ***the Judge showed hostility and rudeness to the Claimant, an unrepresented party. He made frequent gratuitous interjections during the trial, hostile to the Claimant, putting the Claimant under enormous pressure and making it extremely difficult for him to conduct the litigation. He also prejudged matters against the Claimant (for example making it clear early in the trial that he regarded him as a "liar" who had behaved "deplorably" and threatened that he would say so in his judgment). He made repeated demands that the Claimant prove matters to him by reference to documents which were not before the Court***. In consequent of the above, the trial process was either unfair and/or conducted with the appearance of unfairness, and the Judge's findings are not safe or reliable.[56] (emphasis added)

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[53] ibid [27].

[54] ibid [28].

[55] ibid [31].

[56] *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852 [29].

The Court of Appeal in this case found that Mr Justice Jay had shown hostility and rudeness to the claimant, and allowed the appeal on the ground of unfair judicial treatment:

> In our view, the Judge not only seriously transgressed the core principle that a judge remains neutral during the evidence, but ***he also acted in a manner which was, at times, manifestly unfair and hostile to the Claimant***. As emphasised in *Michel*, not all departures from good practice render a trial unfair - ultimately the question is one of degree. Nevertheless, we have carefully considered and reflected upon this matter and are driven to the conclusion that ***the nature, tenor and frequency of the Judge's interventions were such as to render this libel trial unfair.***[57] (emphasis added)

III. Statements by officials other than judges

39. The cases considered above under the headings of 'Statements as an indicator of bias' and 'Statements as an indicator of unfairness of trial' concern statements by judges. It is evident from the planning cases discussed above (paragraphs 17-21) that such statements or previous decisions can potentially indicate bias, or indicate an unfair process, when the decision maker is not a judge, but an executive agency. The considerations leading to unfairness and therefore unlawfulness will be different in the different context of executive decisions. If previous statements or decisions indicate or reflect a policy that it is proper for the agency to pursue, they will presumably not disclose a bias, or give reason to think that the process is unfair (see paragraphs 17, 18 above). But where prior statements or conclusions or judgments adverse to the claimant(s) were targeted personally and individually at the claimant(s), it may be unfair for the decision maker to make the subsequent decision. In *Kingsley v United Kingdom*, App No 35605/97, 28th May 2002, the Grand Chamber of the European Court of Human Rights held that the right to an impartial tribunal in Art 6 of the ECHR was infringed where a Gaming Board decided to revoke a license to manage gaming clubs, after 'the Gaming Board had already publicly expressed the view,' in another hearing, 'that the applicant was not a fit and proper person.'[58]

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[57] ibid [119].

[58] *Kingsley v United Kingdom* [2002] ECHR 468

QUESTION 3: WHAT ARE THE GROUNDS FOR JUDICIAL REVIEW OF MERCY PETITIONS, AND DOES BIAS CONSTITUTE A GROUND? IF SO, HOW HAVE CASES DETERMINED SUCH BIAS?

I. Judicial review of mercy petitions

40. Mercy is a prerogative power in the UK.[59] Until the mid-1970s, courts in the UK were not normally prepared to examine the fairness of the procedure followed before a prerogative power was exercised,[60] and they would not allow bad faith to be attributed to the Crown.[61] However, in the *CCSU Case*,[62] the House of Lords was of the opinion that it was no longer constitutionally appropriate to deny the court supervisory jurisdiction over a governmental decision merely because the legal authority for that decision rested on prerogative powers of the Crown.
41. In light of the above decision, the prerogative of mercy was soon held to be susceptible to judicial review in *R v Secretary of State for the Home Department, ex parte Bentley*.[63] The Queen's Bench Division held:

> The CCSU case [1985] A.C. 374 made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal Prerogative is reviewable, in our judgment…. ***We conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process….It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not.***[64] (emphasis added)

As Watkins LJ noted, "the prerogative of mercy [can no longer be regarded as] no more than an arbitrary monarchical right of grace and favour. It is now a constitutional safeguard against mistakes."[65]

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[59] The Rt Hon the Lord Woolf et al, *DeSmith's Judicial Review* 129 (7th edn, Sweet & Maxwell 2013); *R (on the application of Shields) v Secretary of State for Justice* [2009] 3 All ER 265, 270 [19].

[60] *De Freitas v Benny* [1976] AC 239, 247-248.

[61] *Duncan v Theodore* (1917) 23 CLR 510, 544; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 257-258.

[62] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[63] *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349.

[64] ibid 363.

[65] ibid 365.

II. Grounds of Judicial Review of Mercy Petitions

42. In *R v Secretary of State for the Home Department, ex parte Bentley*,[66] the Home Secretary had failed to consider the grant of a posthumous pardon on the ground that it was the Home Office's policy to grant a free pardon only if the Home Secretary was satisfied that the person concerned was both morally and technically innocent of the crime. However, he had not considered the possibility of granting a posthumous conditional pardon. The Court exercised the power of judicial review on the ground that this failure was a clear error of law.[67]

43. In arriving at the conclusion that the grant of mercy is reviewable, the Court agreed with counsel's reliance on the following passage in *Lewis, Judicial Remedies in Public Law (1992), p. 21:*

> In principle, a failure to consider exercising the power to grant a pardon should be reviewable, at least ***if an individual can demonstrate that there is some reason why the Home Secretary should consider the case***. It is also difficult to see why a decision to refuse a pardon should not also be reviewable in appropriate circumstances, for example, ***where the allegation is that there has been a failure to consider relevant material, or a failure to act in accordance with any relevant guidelines, or if there is an error of law as to the elements of the offence for which the pardon was sought.***[68] (emphasis added)

The Court also gave an example of a ground for reviewing the grant of pardon:

> If, for example, it was clear that the Home Secretary had ***refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so***. (emphasis added)

44. Subsequently, in *R (on the application of B) v Secretary of State for the Home Department*,[69] a divisional court held that if the Secretary of State exercises the prerogative of mercy '***in a wholly arbitrary way***' by '***[leaving] out of account a relevant consideration***', the courts would be prepared to intervene. The court considered whether the Home Secretary, in deciding on remission, had failed to take into account the assistance offered by the applicant to the authorities – he had not.

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[66] ibid.

[67] ibid 365.

[68] ibid 362.

[69] *R (on the application of B) v Secretary of State for the Home Department* [2002] EWHC 587 (Admin).

45. In *R (on the application of Shields) v Secretary of State for Justice*,[70] the point of law was whether Article 13 of the Convention on the Transfer of Sentenced Persons 1983 prevented the Secretary of State from granting pardon. He believed that it did and refused to pardon Mr. Shields. The Queen's Bench Division (Administrative Court) held that it could intervene on the ground that the Secretary of State '***was wrong***' in concluding that he was constrained by the Convention from granting a pardon.[71] This indicates that any error of law on the part of the decision-maker is a ground for judicial review of mercy.

46. In *Terence McGeough v Secretary of State for Northern Ireland*,[72] in considering whether the Secretary of State was wrong in not setting off the periods of incarceration the applicant served in Germany and the United States against the sentence he was to serve in Northern Ireland, the Court of Appeal of Northern Ireland observed:

> First of all, ***it appears to be well established that irrationality in relation to the exercise of the [Royal Prerogative of Mercy] would give grounds for judicial review***…Whatever may have been believed to be the limitations to the exercise of the RPM and its reviewability at the time of the CCSU case, it is, in our opinion, now clear from the subsequent discussion of this matter in Bentley's case that it is open to the courts to interfere ***if it is clear that the decision maker had refused to pardon someone on irrational grounds…A further situation in which a refusal to exercise the RPM may be reviewable is where there may have been an error of law on the part of the decision-maker, as where the decision-maker errs in law when considering whether he or she has a power to grant a pardon***. That is clear from the decision in R (on the application of Shields) v Secretary of State for Justice [2008] EWHC 3102 (Admin), [2008] All ER (D) 182 (Dec).[73] (emphasis added)

III. Bias as a ground of judicial review

47. In *Neville Lewis v Attorney General of Jamaica*,[74] the Privy Council held that the prerogative of mercy had been exercised unlawfully because of procedural defects: the claimant ought to have been given access to the material which was considered by the decision maker on the petition for mercy, ought to have had the right to make representations in respect of that material. In

[70] *R (on the application of Shields) v Secretary of State for Justice* [2009] 3 All ER 265, 270 [19].

[71] ibid 269-270.

[72] *Terence McGeough v Secretary of State for Northern Ireland* [2012] NICA 28.

[73] ibid [9]-[11].

[74] *Neville Lewis v Attorney General of Jamaica* [2001] 2 AC 50.

explaining why mercy should be judicially reviewable, the Court laid down various grounds of judicial review:

> This is the last chance and in so far as it is possible to ensure that proper procedural standards are maintained that should be done. ***Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. Similarly if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way—on the throw of a dice or on the basis of a convicted man's hairstyle—or is otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate***…In the Reckley (No 2) case [1996] AC 527 much importance was attached to the composition of the Advisory Committee on the Prerogative of Mercy. The experience, status, independence of the members is no doubt an important feature of the process. It provides a valuable protection and prevents the autocratic rejection of a petition by one person. Their Lordships do not however accept that this is a conclusive reason why judicial review should be excluded. ***They may unconsciously be biased, there may still be inadvertently a gross breach of fairness in the way the proceedings are conducted***.[75] (emphasis added)

The proposition that a refusal of mercy may be unlawful because of unconscious bias is *obiter dictum*, but it cannot be doubted that it is a sound a point of law because the Privy Council held that the process in *Lewis* had been unlawful for failure to provide material to the claimant to enable him to make representations. It follows that, if the decision maker lawfully required to consider such representations (and all other aspects of the case) was biased against the claimant, the process would be unfair and therefore, evidently, unlawful.

48. In its conclusion in *Lewis* that a breach of the rules of fairness and principles of natural justice is a ground for judicial review of mercy,[76] the Court relied on a number of common law precedents, including the decision of the Court of Appeal of Guyana in *Yassin v Attorney General of Guyana* (unreported) 30 August 1996, in which Fitzpatrick JA said:

> In this case, justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. It does not involve telling the head of state whether or not to commute. And ***where the principles of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty to intervene,***

[75] ibid 76.

[76] ibid 76-77.

as the manner in which it is exercised may pollute the decision itself.[77] (emphasis added)

[77] ibid 77.