CHAPTER-III
RULE AGAINST BIAS AND ITS TYPES

1. INTRODUCTION

Rule against bias (Nemo iudex in Causa sua or Nemo debet esse judex in propriा Causa i.e. No man shall be a judge in his own case)

According to the 'Lectric Law Library’s Lexicon, “Any mental condition that would prevent a judge or juror from being fair and impartial is called bias. A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object. It may be ground for disqualification of the judge or juror in question.” It is also defined as, “A predisposition or a preconceived opinion that prevents a person from impartially evaluating facts that have been presented for determination; a prejudice.” But we have to keep in mind the observations of Justice Frank of United States in re. Linahan1: -

“If, however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with the predispositions and the process of education, formal and informal, create attitudes which precede reasoning in particular instances and which therefore, by definition are prejudices.”

1. (1943) 138 F 2nd 650 at p 652
We may say that there are three types of bias. The first of the three disabling types of bias is bias on the subject matter. But it is only rarely that proceedings will be vitiated due to this type of bias. For example, a Magistrate who subscribed to the Royal Society for the Prevention of Cruelty to Animals was held not to be disqualified from trying a charge brought by that body of cruelty to a horse. ‘A mere general interest in the general object to be pursued would not disqualify,’ said Field J. There must be some direct connection with the litigation. If there is such prejudice on the subject-matter that the court has reached fixed and unalterable conclusions not founded on reason or understanding, so that there is not a fair hearing, that is bias of which the courts will take account. For example a justice announced his intention of convicting anyone coming before him on a charge of supplying liquor after the permitted hours. Naturally, there can be little hope of a fair trial at the hands of such a judge! Secondly, a pecuniary interest, however, slight will disqualify, even though it is not proved that the decision is in any way affected. The third type of bias is personal bias. A judge may be a relative, friend or business associate of a party, or he may be personally hostile as a result of events happening either before or during the course of a trial. The courts have not been consistent in laying down when bias
of this type will invalidate a hearing. The House of Lords in *Frome United Brewering v. Bath Justices*\(^2\), approved an earlier test of whether “there is a real likelihood of bias.” The House of Lords has since approved a dictum of Lord Hewart that “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

Lord Denning has observed in *The Discipline of Law* that, “If a disqualified person takes part in a decision, it is a **Nullity and void**\(^3\).” The point came up in *Metropolitan Properties Co (FGC) Ltd v Lannon*\(^4\). Lord Denning noted:

“A man may be disqualified from sitting in a judicial capacity on one of the two grounds. First, a “direct pecuniary interest” in the subject matter. Second, “bias” in favour of one side or the other”.

One Mr. Lannon was the Chairman of a Rent Assessment Committee in England. One day a company, Freshwater Company made an application to his committee. He sat on the Committee. But it was discovered that his father had a case pending against that company. There was no evidence of a pecuniary interest. No evidence of an actual bias was also found.

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2. (1926) ac 586
3. (1979 edn., page 86)
4. [1969] 1 QB 577
But it was said that there was, albeit unconscious, a real likelihood of bias. Lord Denning quoted what Lord Hewart CJ had said in *R v Sussex Justices ex parte McCarthy*\(^5\): “It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did in fact, favour one side unfairly. Suffice it that reasonable people might think that he did.

\(^5\) [1924] 1 KB 256
The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking:

“The judge was biased”.

Applying these principles, I ask myself: Ought Mr John Lannon to have sat? I think not…In this case he was not a tenant, but the son of a tenant. But that makes no difference. Metropolitan Properties Co (FGC) Ltd v Lannon\(^6\).

The issue of bias was considered by **Supreme Court in S Parthasarthi vs State of AP\(^7\)**. Parthasarthi was working as an Office Superintendent in the office of Public relations Department of Government of Andhra Pradesh. In this case the inquiry against the Charged Officer was conducted by a person named Manvi. He had written a letter to Hospital for Mental Diseases, Hyderabad about the charged officer’s mental condition. In his reply Dr Natarajan replied as follows:

“Unfortunately, I cannot, on medical grounds, advice his retrenchment or removal and therefore, I would suggest you to deal with him departmentally…I am sorry I will not be able to help you further as he cannot be termed insane in the spirit of which is understood.”

\(^6\) [1969] 1 QB 577

\(^7\) AIR 1973 SC 2701
Supreme Court noted:

“The letter written by the Medical Officer would indicate that Manvi wanted to get rid of the services of the appellant on the ground of his mental imbalance and it was for that purpose that he tried to get a certificate to the effect that the appellant was mentally unsound. We are of the opinion that the cumulative effect of the circumstances stated above was sufficient to create in the mind of a reasonable man the impression that there was a real likelihood of bias in the enquiry officer. There must be a real likelihood of bias and that means there must be a substantial possibility of bias. The court will have judge of the matter as a reasonable man would judge of any matter in the conduct of his own business.”

In A. K. Kraipak & Ors V. Union Of India & Ors\(^8\), a Special Selection Board was constituted for selecting officers to the Indian Forest Service in the senior and junior scales from officers serving in the forest department of the State of Jammu and Kashmir. One of the members of the Board was the Acting Chief Conservator of Forests of the State. He was also one of the candidates seeking to be selected to the Indian Forest Service. His name was at the top of the list of selected officers, while the names of three conservators, who were the Acting Chief Conservator's

\(^8\) AIR 1970 SC 150
rivals (including the officer who was superseded), were omitted. He did not sit in the Selection Board at the time his name was considered, but participated in the deliberations when the names of his rivals were considered. He also participated in the Board's deliberations while preparing the list of selected candidates in order of preference. At the time of selection, the other members of the Board did not know that the appeal of the superseded conservator was pending before the State Government and hence there was no occasion for them to distrust the opinion of the Acting Chief Conservator. As per the procedure, the list and the records were sent to the Ministry of Home Affairs and the Ministry of Home Affairs forwarded the list with its observations to the Union Public Service Commission, as required by the Regulations, and the U P S.C examined the records of the officers afresh and made its recommendations. The nominee of the Chairman of the Union Public Service Commission, one M. A. Venkataraman was the Chairman of the board. The other members of the board were the Inspector General of Forests of the Government of India, one of the Joint Secretaries in the Government of India, the Chief Secretary to the State Government of Jammu and Kashmir and Naqishbund, the Acting Chief Conservator of Forests of Jammu and Kashmir.

For several years before that selection the adverse entries made in the character rolls of the officers had not been communicated to
them and their explanation called for. In doing so quite clearly the authorities concerned had contravened the instructions issued by the Chief Secretary of the State. Sometime after the afore-mentioned selections were made, at the instance of the Government of India, the adverse remarks made in the course of years against those officers who had not been selected were communicated to them and their explanations called for. Those explanations were considered by the State Government and on the basis of the same some of the adverse remarks made against some of the officers were removed. Thereafter the selection board reviewed the cases of officers not selected earlier as a result of which a few more officers were selected. Even after the review Basu, Baig and Kaul, Naqishbund’s rivals, were not selected. It is true that the list prepared by the selection board was not the last word in the matter of the selection -in -question. But it is obvious that the recommendations made by the selection board should have weighed with the Commission. Undoubtedly the adjudging of the merits of the candidates by the selection board was an extremely important step in the process.

Supreme Court observed that ordinarily the Chief Conservator of Forests in a State should be considered as the most -appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All India
Service is entitled to great weight. But then under the circumstances it was improper to have included Naquishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of this participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from
further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates. In Ranjit Thakur vs Union of India\(^9\), the applicant Ranjit Thakur, a Signal Man, had been imprisoned for 28 days by the Commanding officer for representing against ill treatment at the hands of the Commanding officer (the same man). When in prison he is said to have refused to take food despite order by the Orderly Officer of the same regiment. He was dismissed and sentenced to one year of rigorous imprisonment. The same Commanding Officer was a member of the Court Martial tribunal.

The Army Act, Section 130, requires that at the opening of the trial, names of presiding officers would be read, and the accused would be asked as to whether he objects to being tried by any of members. The remaining members of the tribunal would decide on the objection. The tribunal did not seek the objection of the accused.

Supreme Court held, “The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court- Martial. But the sentence has to suit the offence and offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive

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9. AIR 1987 S C 2386
evidence of bias.” Court also cited the oft quoted words of Frankfurter, J. in Vitarelli v Seaton¹⁰:

“…if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed….

“This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.”

“The history of liberty” said the same learned Judge “has largely been the history of observance of procedural safeguards¹¹.”

If the Inquiry is by a biased man, the defect cannot be cured.

In Tilak Chand Mangatram Obhan v Kamala Prasad Shukla¹² decided by Supreme Court on 5th October, 1994 the respondent’s counsel argued that where the order is passed by the school authorities and it is found to be biased on account of the presence of a biased member on the Committee, it is open to the higher authorities to evaluate the order independently of the decision taken by that Committee and come to its own independent findings on the basis of the record whether or not all or any of the charges are proved against the delinquent. Supreme Court observed:

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¹⁰.       359 US 535
¹¹.      (1942) 318 US 332
¹².    (1994 SOL Case No. 264)
If the defect is one which goes to the root of the matter and which is incurable it cannot be remedied by the higher authority taking a decision independent of the authority that rendered the initial decision. In Leary v. National Union of Vehicle Builders, 1970(2) All ER 713, it was conceded that the disciplinary authority had not followed the requirements of natural justice. The question which was posed for consideration was: Can a deficiency of natural justice before a trial tribunal be cured by a sufficiency of natural justice before an Appellate Tribunal? Megarry, J., after stating that the sheet should be made as clean as possible; I think it should be the same sheet and not a different one, proceeded to add at p. 720 as under:

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, although not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a
mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

Supreme Court further observed,

“Where the lapse is of the enquiry being conducted by an officer deeply biased against the delinquent or one of them being so biased that the entire enquiry proceedings are rendered void, the appellate authority cannot repair the damage done to the enquiry. Where one of the members of the Enquiry Committee has a strong hatred or bias against the delinquent of which the other members know not or the said member is in a position to influence the decision-making, the entire record of the enquiry will be slanted and any independent decision taken by the appellate authority on such tainted record cannot undo the damage done. Besides where a delinquent is asked to appear before a committee of which one member is deeply hostile towards him, the delinquent would be greatly handicapped in conducting his defence as he would be inhibited by the atmosphere prevailing in the enquiry room. Justice must not only be done but must also appear to be done. Would it so appear to the delinquent if one of the members of the Enquiry Committee has a strong bias against him? And we repeat the bias must be strong and hostile and not a
mere allegation of bias of a superior having rebuked him in the past or the like.”

Court was merely reiterating its decision in Rattan Lal Sharma v. Managing Committee\textsuperscript{13}, Dr. Hari Ram (Co-educational) Higher Secondary School\textsuperscript{14}. It had observed:

"The learned Single Judge, in our view has rightly held that the bias of Shri Maru Ram, one of the members of the enquiry committee, had percolated throughout the enquiry proceedings thereby vitiating the principles of natural justice and the findings made by the enquiry committee was a product of a bias and prejudiced mind. The illegality committed in conducting the departmental proceedings has left an indelible stamp of infirmity on decision of the Managing Committee since affirmed by the Deputy Commissioner and the Commissioner."

Supreme Court has observed in Arjun Chaubey v Union of India\textsuperscript{15}:

“The main thrust of the charge against the appellant related to his conduct qua respondent 3, i.e., his disciplinary authority. Therefore, it was not open to the latter to sit in judgment over the explanation offered by the appellant and decide that the explanation was untrue. No person can be a judge in his own cause and no witness can certify that his

\textsuperscript{13} 1993(3) SCT 525(SC)
\textsuperscript{14} 1993(4) SCC 10
\textsuperscript{15} AIR 1984 SC 1356
own testimony is true. Anyone who has a personal stake in an inquiry must keep himself aloof from the conduct of the inquiry”.

However, the plea of bias has to be raised when there is still time. Sh G S Sarna was a candidate for the post of Professor of Anthropology in the Lucknow University. In the selection panel were two persons Dr S C Dubey and Dr S R K Chopra. They recommended another person Dr K S Mathur Reader and HOD Anthropology in the Lucknow University for the post. Sh Sarna alleged bias against the above two members of the selection committee. It was alleged that Dr Dubey had close relations with the respondent Dr Mathur and used to stay with him whenever he visited Lucknow. It was also alleged that Dr Chopra had contested an election (for the office of President, Anthropology section of the Indian Science Congress), had when the two worked together, opposed Dr Sarna’s application for leave of absence to avail of a scholarship at Harvard University, and he had to resign from the post because of this. This is what Supreme Court observed in G S Sarna vs Lucknow University16:

“We do not, however, consider it necessary in the present case to go into the question the of reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before

16. AIR 1976 SC 2428
appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it.

Having done so, it is not now open to him to turn round and question the constitution of the Committee. This view gains strength from a decision of this Court in Manak Lal’s case\textsuperscript{17} wherein more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting:-

“It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.”

Thus in sum:

(i) Any inquiry conducted by a biased Inquiring Authority is \textit{ab initio} void.

(ii) If there is an actual bias, it will be sufficient to quash the inquiry

\textsuperscript{17} (AIR 1957 SC 425) (supra)
(iii) Courts will look at whether there is reasonable ground for believing that he was likely to have been biased

(iv) Some actions may themselves indicate malafide, like a disproportionate penalty. They will be by themselves constitute a proof of bias

(v) Even if one member of the committee is biased, decision of the Committee will be rendered illegal

(vi) Anybody who has a personal stake, should keep himself aloof from the inquiry

(vii) If a person is aware of bias and does not raise that issue, he creates an estoppel against himself, and will not be allowed to raise it once the said body has taken a decision.

Rules against Bias is one of the cardinal principle of natural justice. A Latin maxim 'Nemo debet esse judex in propria Causa' which means that no man shall be a judge in his own case. The term 'judge' here is not confined to the judge of court, but includes all adjudicatory authorities. Further the term judge also includes administrative adjudicatory authority. The adjudicator is required to be unbiased and natural which indicates that the deciding authority must be impartial and without bias as in case of Rattan Lal Sharma v. Managing Committee. The adjudicator may only be in a position to apply his mind objectively in deciding the dispute before him when he is required

to be impartial and natural. Bias may be taken to mean operative prejudice, whether conscious or unconscious in relation to a party to a dispute or subject-matter of the dispute. It may be taken as predisposition to decide for or against one party without proper regard to the true merits of the dispute of the case under consideration as in case of Secretary to Govt. Transport Deptt. v. Munuswamy¹⁹.

Adjudicator is disentitled to decide the dispute when he is interested or appears to be interested therein. Therefore, he is disentitled not only when he is actually interested but also when it appears that he is interested. The rule is that nothing is to be done which creates even a suspicion that there has been an improper interference with the court of justice. It is also a well-established rule that justice should not only be done but manifestly and undoubtedly be seen to be done as in case of R.Sussex justices, p. McCarthy²⁰. The rule is of a wide application and means that a judicial or quasi-judicial authority should not only himself not be a party as in case of Frome United Breweries v. Bath Justices²¹, but must also not be interested as a party in the subject-matter of the dispute which he has to decide as in case of Ranger v. G.W. Ry²². In

20. (1924) 1 K.B. 256
21. (1926) A.C. 586 (591, 593) H.L.
22. (1854) 5 H.L.C. 72(89)
short, ‘Judges like Ceaser’s wife, should be above suspicion’ as in case of **Leeson v. General Council**\(^{23}\).

The maxim ‘nemo judex in re sua or nemo judex in Causa sua’ translated literally prohibits a man being a judge in his own case (no man shall be a judge in his own case). By extension, however, it is often cited when referring to the allied, but distinct rule that a judge must be impartial or without bias. That the two rules are distinct was recognized by **Hobbes** in Chapter 15 of ‘Leviathan’. The eleventh law of nature was, he said………

"if a man be trusted to judge between man and man'. It is a precept of the law of Nature, 'that he deal equally between them.’ For without that, the controversies of men cannot be determined but by war. He, therefore, that is partial in judgment, doth what in him lies, to deter men from the use of judges and arbitrators and consequently, against the fundamental law of Nature, is the cause of war."

The fifteenth and sixteenth laws, he described as follows:-

"and because, though men be never so willing to observe these laws, there may nevertheless arise questions concerning a man's action, first whether it was done or not done, secondly if done, whether against the law or not against the law……., therefore, unless parties to the

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\(^{23}\) (1889) 43 Ch. D. 366 (385)
question covenant mutually to stand to the sentence of another, they are as far from peace as ever. This other to whose sentence they submit is called an 'arbitrator' and, therefore, is the law of Nature that they are at controversy, submit their right to the judgment of an arbitrator'.

"And seeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause and if were never so fit, yet equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also and so the controversy, that is the cause of war, remains against the law of Nature."

In the **Earl of Derby's Case** for example, the **Earl of Derby** claimed to be entitled to decide himself in his own court in Chester, a dispute between himself and **Sir John Egerton**. **Coke** reports that it was decided,

"that the Chamberlain of Chester, being sole Judge of Equity, cannot decree anything wherein himself is party, for he cannot be judge in propria causa, but in such case where he is party, the suit shall be heard in the Chancery coram domino Rege."

24. (1614) 12 Co. Rep. 114
Apart from the development of natural justice, such decisions were also important in the field of constitutional law and they provided the justification for denying the king the right to sit in his own courts to administer justice. Although the courts were and are royal courts, if justice is to be dispensed impartially it must be done by independent judges to whom the power of determining disputes has been delegated.

Unlike the Earl of Durby, Holt C.J. ostentatiously refrained from taking part in deciding in his own court the question whether the right to appoint to the office of chief clerk belonged to the Crown or to the Chief Justice, when the case was argued the 'great judge’ sat 'near the Defendant’s counsel upon a chair uncovered’ in case of Bridgman v. Holt. An 18th century example of the prohibition of a man being a judge in his own cause is provided by R.v. Bishop of Chester. The Bishop was both warden and also visitor of a college. It was held that the Bishop could not, in the latter capacity, exercise the normal visitorial jurisdiction and hear appeals from his own decisions taken as warden.

If the judge is not impartial and subject to bias in favour of or against either party to the dispute or he is a position that partially bias can be assumed, he is not entitled to decide the dispute.

25. (1693) Shower P.C. 111.
26. (1791) 2 Str. 797
"A judge is disqualified from deciding any case in which he may be or may fairly be suspected to be biased because a seat of 'justice' is the seat of God. This is the most fundamental principle of natural justice that a judge is biased or suspected to be biased, he is not qualified to decide the case.'

This rule applies mainly when the authority exercises judicial or quasi-judicial functions. Every person who is required to act judicially or quasi-judicially must observe this natural justice and this rule has been developed to strengthen the confidence of the people in the administrative of justice. This rule essentially applies to those performing judicial or quasi-judicial functions and normally does not apply to those performing legislative or administrative functions.

However, some times it is applied even in administrative acts and an authority declared disentitled to perform even in administrative acts or functions on ground of bias. In case of A.K. Kraipak v. Union of India\(^27\), the Supreme Court has held that a person who sits on a committee for selection of candidates for certain job must not be a candidate himself for the job. In administrative acts reasonable standard of fairness is required to be maintained. It is to be noted that

legislative acts are regarded not pertaining to individuals but they are regarded general and, therefore, this rule does not apply to the legislative functions.

2. **Type of Bias alongwith recent decided cases in Apex Courts of India**

The common law distinguishes two types of bias, that rising from financial interest and arising from such causes as a relationship to a party or witness. The latter type of bias has often been described as a challenge to favour as opposed to the first type which is described as giving rise to an interest as in case of **R.v Rand**\(^{28}\). In the present circumstances interest and favour played an important role in affecting the impugned decisions in many cases as interest and favour amounts to bias which can take various forms. Usually it is classified into following categories such as Personal Bias, Pecuniary Bias, Subject-matter Bias and Departmental or Official Bias.

Following are some important cases in which rule against bias alongwith scope of articles are involved:-

**Scope of Article 6(1) ECHR: Secretary of State for the Foreign Office and Commonwealth Affairs v Maftah**\(^{29}\)

The claimants sought to challenge, by means of judicial review, the Secretary of State’s decision, to place them on a list of persons suspected of association with Al Qaida, Osama Bin Laden or the Taliban, the effect

\(^{28}\) (1866) L.R. 1 Q.B. 230.

\(^{29}\) [2011] EWCA Civ 350
of which was to cause their assets to be frozen. Keith J had ruled that the judicial review proceedings potentially involved the determination of civil rights and obligations under Article 6(1) ECHR. The Secretary of State successfully appealed on that point. Sedley LJ (with whom Smith LJ and Lord Judge CJ agreed) said (at [24]):

What seems to me to emerge from the present Strasbourg jurisprudence is that, while civil rights within the autonomous meaning of article 6 can be brought into play either by direct challenge or by administrative action, it is the nature and purpose of the administrative action which determines whether its impact on private law rights is such that a legal challenge to it involves a determination of civil rights.

Sedley LJ based his position in part on Pellegrin v France (2001) 31 EHRR 26 in which the ECtHR (at [66]) said that whether Article 6(1) applied to the dismissal of a civil servant would depend on:

whether the applicant’s post emails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities.

Sedley LJ did not, however, acknowledge that the principle laid down in Pellegrin had been developed – resulting in substantially broader application of Article 6 – in Eskelinen v Finland30

30. (2007) 45 EHRR 43
(on which see section 16.3.9). Sedley LJ concluded (at [26]):

The nature and purpose of freezing orders can themselves be legitimately described both as a step in the international struggle to contain terrorism and as a targeted assault by the State on an individual’s privacy, reputation and property. The heart of Keith J’s decision was that the orders were in form the first but in substance the second of these things; but I am not convinced that the Strasbourg jurisprudence looks to this distinction. It seems to look, rather, to the nature of the power itself. So seen, the making or procuring of a freezing order is, I think, a discharge of public functions, albeit with a dramatic impact on the civil rights of individuals. It is challengeable in public law, but the challenge is to the procuring and continuance of the order, not to its effects.

Scope of Article 6(1) and the curative principle: Crosbie v Secretary of State for Defence\(^{31}\) (Admin)

An army chaplain whose short service commission had not been extended by an Army Board argued that the Board should have complied with Article 6(1) ECHR. The question, then, was whether civil rights and obligations were being determined, so as to engage that provision. The court held that Article 6 (1) was not engaged Unlike the Court of Appeal in Maftah (see above), the Administrative Court considered *Eskelinen v Finland\(^{32}\)* as well as *Pellegrin v France\(^{33}\)*. The Court concluded that the Eskelinen test (on which see 16.3.9) was not satisfied.

\(^{31}\) [2011] EWHC 879
\(^{32}\) (2007) 45 EHRR 43
\(^{33}\) (2001) 31 EHRR 26
The judge went on to consider whether Article 6(1) would have been satisfied if, contrary to his view, it had applied. In concluding that it would have been satisfied, he applied *Ali v Birmingham City Council*\(^{34}\), holding that where decisions on factual points were merely staging posts *en route* to the exercise of judgment calling for expertise and discretion, the curative principle (triggered by virtue of the possibility of judicial review) would apply more readily.

**Adequacy of judicial review for purposes of the curative principle: R (MA) v National Probation Service*\(^{35}\).**

The Secretary of State for justice had imposed licence conditions upon the claimant, a released prisoner, to which the claimant objected. *Inter alia*, the claimant contended that Article 6 ECHR was breached by the absence of a dedicated mechanism whereby licence conditions could be challenged. This raised the question whether the possibility of judicial review of the Justice Secretary’s decision regarding licence conditions was sufficient to render the decision-making scheme consistent with Article 6. Concluding that it was, Keith J distinguished *Tsfayo v UK*\(^{36}\) (see section 10.5.3), holding that whereas that case had involved what the ECtHR called the determination of a ‘simple question of fact’,

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35. [2011] EWHC 1332 (Admin)  
36. (2009) 48 EHRR 18
the present case involved the exercise of discretion calling for the use of judgment and expertise. As such, the curative principle was more potent. Keith J’s analysis is consistent with that adopted by the Supreme Court in *Ali v Birmingham City Council*[^37^], although that case was not referred to in Keith J’s judgment.

**Article 6 (1) and related sets of proceedings: *R (G) v X School Governors*[^38^]**

The Court of Appeal’s decision in this case ([2010] EWCA Civ 1 [2010] 2 All ER 555) is referred to in section 10.5.2. That decision was subsequently reversed by the Supreme Court. As Lord Dyson explained (at [35]):

> The Principle question raised on this appeal is what kind of connection is required between proceedings A (in which an individual’s civil rights or obligations are not being explicitly determined) and proceedings B (in which his civil rights or obligations are being explicitly determined) for article 6 to apply in proceedings A as well as proceedings B.

**Lord Dyson endorsed Laws LJ’s formulation in the Court of Appeal[^39^], according to which a claimant:**

> May (not necessarily will) by force of article 6 enjoy appropriate procedural rights in relation to any of the others [set of proceedings] if the outcome of that other

[^39^]: ([2010] EWCA Civ 1 [2010] 2 All ER 555 at [37])
will have a substantial influence or effect on the determination of
the civil right or obligation. [Lord Dyson’s emphasis]

However, Lord Dyson – in common with Lords Hope, Walker and
Brown; Lord Kerr dissented in this point – disagreed with the Court
of Appeal’s application of that test to the facts of the instant case. He
said (at [79]):

It is clear … that the ISA [the Independent Safeguarding
Authority – the body responsible for conducting proceedings [B] is
required to make its own findings of fact and bring its own
independent judgment to bear as to their seriousness and
significance before deciding whether it is appropriate to place the
person on the barred list. Why did the Court of Appeal conclude
that, despite these procedures and …without any evidence to show
that they had not been and would not be applied properly, the
employer’s findings and decision would still exert a profound
influence on the decision-making process?

In the circumstances, Lord Dyson did not think this question
could be satisfactorily answered, and so held that the implications of
proceedings A for proceedings B were not such as to render proceedings
A subject to Article 6. This indicates that the greater the extent to which
proceedings B are designed to enable decision-maker B to form its own
view of the facts and exercise independent judgment, the less likely it is
that Article 6 will apply to proceedings A on the basis presently under
consideration.
Article 6(1) and related sets of proceedings: Mattu v The University Hospitals of Coventry and Warwickshire NHS Trust

This is one of the first cases to apply the Supreme Court’s decision in *R(G) v X School Governors*. A doctor contended that dismissal proceedings by his employer, an NHS Trust, should have complied with Article 6. Timothy Straker QC, sitting as a Deputy High Court Judge, disagreed. Two questions arose. First, did the dismissal proceedings themselves determine a ‘civil right’? This, said the judge (at [92]), required the court to determine precisely what civil right was in play:

The level of abstraction of such a right needs to be specified. I consider that clearly it can be categorized as a right to practice a profession …. I do not consider it can be categorized as a right to remain in current employment. I say this because the article itself is not framed in that way and it would be remarkably difficult to conceive of a circumstance when such a right would be practicable. What happens, it may be asked, if a public hospital or state school is located in an area with a declining population? The purpose for the institution may be lost but if the right is defined in terms of current employment, then a process under article 6 in respect of employees has to be embarked upon before an administrative decision to close the institution can be taken.

40. [2011] EWHC 2068 (QB)
Second, even if the dismissal proceedings were not themselves determinative of a civil right, would they have such an impact on other proceedings – proceedings that would be determinative of a civil right – so as to fall within the purview of Article 6 under the approach adopted in G test. The relevant civil right – the right to pursue one’s profession – could be determined by the General Medical Council. Was the relationship between dismissal proceedings and GMC proceedings such as to satisfy the G test: No:

I consider that there can be said to be at least a civil right to practice the profession in which one is qualified. If one adopts that approach I consider it clear that Dr Mattu’s civil right has not been determined by the process within the Trust. First, the process has no effect on the General Medical Council, which adopts and follows, in a way which clearly complies with article 6, a procedure given by the legislative regime under which it operates. Consequently, it most certainly does not a major part in the civil right’s determination. Thus, G’s case does not support Dr Mattu.

The following comments of the judge are relevant to how the line should be drawn between circumstances in which the G test is satisfied and those in which they are not:

I do not consider that [counsel’s] reliance on Kulkarni v. Milton Keynes Hospital NHS Trust can be taken as overcoming the matters I have set out. In that case Smith LJ with whom Sir Mark Potter P and Wilson LJ agreed said that, had it been necessary,

42. [2010] [ICR] 101
she would in respect of a trainee doctor have said that in the disciplinary process of the Milton Keynes Hospital NHS Trust he was entitled to rely on article 6. However, she also said that in ordinary disciplinary proceedings, where all that could be said to be at stake was the loss of a specific job, article 6 would not be engaged. However, if the effect could deprive the employee of his right to practice then the article would be engaged but there was a difficulty in knowing where to draw the line. She drew attention to the fact that for trainee doctors, such as Dr. Kulkarni, it was literally true that the NHS was a monopoly employer. He could not complete his training in the private sector.

I do not consider that Dr Mattu's position can be equated to that of the trainee doctor who is provisionally registered with the GMC and appointed to a post in the only organisation able to provide such a post namely the NHS. The post to which he is appointed is an essential part of the process in becoming fully registered. Dr Mattu, on the other hand, is fully registered.'

**Bias, predisposition and predetermination: Localism Bill, cl 14**

In section *10.4*, we discuss the way in which the rule against (apparent) bias operates in relation to 'political' decision-makers. We noted, in particular, the fact that such decision-makers are likely to have expressed views on matters connected with issues upon which they are called to make decisions. As explained in 10.4, the courts have generally approached this issue by distinguishing between (lawful) 'predisposition' and (unlawful) 'predetermination'. At the time of writing this update, the
Localism Bill is before Parliament. Clause 14 provides *(inter alia)* *that:*

(1) Subsection (2) applies if-

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, and or appeared to have had a closed mind (to any extent) when making the decision.

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because-

(a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and

(b) the matter was relevant to the decision.

These provisions would apply only to members of 'relevant authorities'. This category would consist mainly of local authorities. It would not include (for example) central or devolved government Ministers.