NOTES OF CASES

THE PROPER TEST OF A REAL LIKELIHOOD OF BIAS

R. v. *Abingdon Justices, ex p. Cousins*

If one wishes to disqualify a justice on the ground of bias, it is quite unnecessary for the applicant to show actual bias. He need only show a *real likelihood of bias* — a mere possibility of bias is, however, not enough. But even if we accept the proposition that the applicant has only to show a real likelihood of bias, we are still left with a difficult question. Must the court itself consider that there is a real likelihood of bias or is it sufficient for the applicant to show that a reasonable person in his position would consider that there was a real likelihood of bias or prejudice? In other words, is the proper test of a real likelihood of bias, satisfaction by the court or satisfaction by a reasonable person in the position of the applicant? It is the purpose of this note to suggest that we have moved some way towards the answer in the recent decision of the Divisional Court in *R.* v. *Abingdon Justices, ex p. Cousins.*[1] The facts of that case are as follows:—

Cousins, a 16 year old boy, was convicted by the Abingdon Justices (Chairman: A. W. Westall, Esq.) on a charge of assault occasioning actual bodily harm.[2] An application to the Divisional Court was made on his behalf for an order of *certiorari* to bring up and quash his conviction by the Abingdon Justices, it being alleged that the Chairman of the justices was biased, or, alternatively, that there was a real likelihood of bias. The application was based on three grounds.

1. It was said that Mr. Westall knew of a previous conviction for violence — of grievous bodily harm. Mr. Westall put in an affidavit in which he said he knew nothing of that conviction. The Lord Chief Justice accepted what Mr. Westall said and rejected this contention of the applicant.

2. It was said that Mr. Westall had sat on another occasion on which the applicant had been convicted. Mr. Westall said that he had checked the matter, and that it was quite untrue. This statement of Mr. Westall was also accepted by the Lord Chief Justice and this ground for the application was also rejected.

3. It was said that Mr. Westall was the boy's headmaster and that as headmaster he had written a very damaging report concerning this boy. It appeared that, in an earlier case concerning the boy, a report was put in by the boy's school and that report had been signed by Mr. Westall. The report was very damaging and stated, among other things, that the boy was "Very aggressive. Very noisy. Unreliable. Anti-social, ill-tempered. Difficult to control. Continuously troublesome. A leader of a gang. Could not conform to discipline. Was given to wilful damage. His temper was almost uncontrollable. Eight through this lad's school life his conduct and behaviour caused much difficulty. There was a temporary betterment in the middle of 1960, but in his early and late years here he was the cause of much trouble. He was malicious, wanton, and wilful; his dress was always that of a 'Teddy boy', he would not conform to rules; he carried put wanton damage. Recorded punishments include, punching girls, misbehaviour, wilful damage, disorderly conduct". Mr. Westall had said that he was the headmaster of a school with more than 700 pupils and that even though he had

1. *"The Times"*, October 14, 1964; Sol. Journal, October 23, 1964, p. 840.

2. The sentence was six months detention. Lord Parker C.J. thought the sentence was invalid, but could be cured by the Divisional Court.

> recognised the boy (Cousins) as an ex-pupil, he had quite forgotten the existence of this report. He then went on to say that the report had in fact been prepared by various members of the staff even though it bore his signature. Further, he had considered whether it might be said that he might be biased and that he had decided that it was all right and had gone ahead with the case. The Lord Chief Justice on this ground stated that though he was *absolutely satisfied* that Mr. Westall was in no way biased or prejudiced against the applicant[3] yet it was sufficient if the applicant could show that a reasonable person, in his position, would consider that there was a real likelihood of bias or prejudice. The applicant, knowing of the signature of the chairman, as headmaster, to the report, must inevitably have considered that there was such real likelihood. Accordingly the Lord Chief Justice quashed the conviction of the boy and let the order of *certiorari* issue.

This case then is an authority for the proposition that the proper test of a real likelihood of bias is satisfaction by a reasonable person in the position of the applicant that there was a real likelihood of bias or prejudice. But the authorities are not all one way and it might be useful to examine a few cases before we attempt to draw any conclusions.

"Real likelihood of bias" had its origin in the case of *R.* v. *Rand*[4] where Blackburn J. said:

> Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere. . .[5]

This test of bias was adopted by A. L. Smith M.R. in 1901 in *R.* v. *Sunderland Justices*[6] where he said:

> in cases where the decision of justices is impeached on the ground of a bias … the decision must really turn on the question of fact, whether there was or was not under the circumstances *a real likelihood* that there would be a bias on the part of the justices alleged to have been so biassed.

And more recently in *R.* v. *Barnsley Licensing Justices*[7] (1960) both Salmon J. in the Divisional Court and Devlin L.J. in the Court of Appeal accepted as axiomatic that in cases of bias it is not necessary to prove actual bias but that it is sufficient to show a real likelihood of bias.

It is when we ask the next question however that the divergence in view among the judges manifests itself. Must the Court itself consider that there is a real likelihood of bias or is it sufficient for the applicant to show that a reasonable person in his position would consider that there was a real likelihood of bias?[8] Let us

3. This seems to suggest that even if the Court is satisfied that there is no actual bias yet an applicant can succeed if he can show that a reasonable person in his position would consider that there is a real likelihood of bias.

4. (1866) L.R. 1 Q.B. 230.

5. *Ibid.,* at p. 233.

6. [1901] 2 K.B. 357.

7. [I960] 2 Q.B. 167 at p. 187 *Per* Devlin L.J.: "The term 'real likelihood' . . . is used to show that it is not necessary that actual bias should be proved". See also [1959] 2 Q.B. 276 *per* Salmon J. (dissenting) in the Divisional Court "In order for [the applicants] to succeed it is not necessary for them to go as far as proving actual bias. … In order successfully to impugn the decision of the justices, a real likelihood of bias must be established". See also Rose C.J. in *Re Application by ONG ENG GUAN for an Order of Prohibition in re appointment of S.H.D. ELI AS* [1959] 25 M.L.J. 92 at p. 94. "On the question of bias . . . what emerges from the review of the authorities … is that the proper test should be "is there a real likelihood bias?"

8. De Smith, *Judicial Review of Administrative Action,* (London 1959), at p. 150 treats this question as a choice between the "real likelihood" test and the "reasonable suspicion" test. It is submitted however that the question posed above does not involve a "reasonable suspicion" test. If an applicant can show a reasonable person in his position would consider that there was a real likelihood of bias, the applicant has shown a "real likelihood of bias" and this is no more "reasonable suspicion" than consideration by the court itself that there is a "real likelihood of bias" is "reasonable suspicion" by the court.

examine a few cases. In *R.* v. *Essex Justices, ex p. Perkins* [9] a solicitor's clerk who was completely in charge of a branch office advised a lady about a deed of separation. The solicitor acted as clerk to the justices when a summons for maintenance by the lady against her husband came up before the justices. The solicitor did not remember the lady though her name had been mentioned in the weekly report which the solicitor's clerk sent from the branch office. It was held that the husband had a right to take objection to the presence of the solicitor as clerk to the justices and the order of the justices in favour of the lady was quashed. As Avory J. put it [10]

> Though the clerk to the justices and the justices did not know that his firm had acted for the applicant's wife, the necessary, or at least the reasonable, impression on the mind of the applicant would be that justice was not being done . . .

and Swift J. said [11]

> It is essential that justice should be administered so as to satisfy reasonable persons that the tribunal is impartial and unbiassed.

Both these judges did not mention satisfaction by the court of a real likelihood of bias. Avory J. spoke of the "reasonable impression on the mind of the applicant" and Swift J. of the satisfaction of "reasonable persons."

Another case is *Cottle* v. *Cottle*.[12] In a summons alleging desertion there was an application by the husband that the case be remitted for hearing before some other justices on the ground that the Chairman of the Justices was — or at any rate might appear to be — biassed in the hearing of the case. In an affidavit which was not denied by the wife, the husband declared ". . . my wife told me she would 'get me' as she would summon me before the magistrates again and she would set the case down for hearing on a Monday when Mr. Percy Browning would be in the Chair and he would 'put me through it' as he was a friend of her mother . . ," Granting the application by the husband Sir Boyd Merriman said: [13]

> It will be observed that both Avory and Swift JJ., [in *R.* v. *Essex JJ*] took the test that the impression might reasonably be caused on the mind of the applicant that he was not having a fair trial ... it seems to me impossible to resist the conclusion that this particular husband might reasonably have formed the impression that Mr. Browning could not give this case an unbiassed hearing. . . .

And Mr. Justice Bucknill declared [14]

> The test which we have to apply is whether or not a reasonable man, in all the circumstances, might suppose that there was an improper interference with the course of justice if Mr. Browning sat as Chairman ... I find it impossible to say that no reasonable man could suppose, in the circumstances, that there was an improper interference with the course of justice. I attach, as everybody must attach, the greatest importance to the fact that every litigant in a British court of justice should be satisfied that he is having an absolutely impartial trial . . .

Sir Boyd Merriman spoke of "this particular husband who might reasonably have formed the impression" etc. and Mr. Justice Bucknill said "every litigant . . . should be satisfied." It seems therefore that at least in these two cases the proper test of a real likelihood of bias has been held to be satisfaction by a reasonable person in the position of the applicant of a real likelihood of bias. It may be of interest to note that *R.* v. *Essex Justices, ex p. Perkins* [15] was approved by a strong Court

9. [1927] 2 K.B. 475.
10. *Ibid.*, at p. 489.
11. *Ibid.*, at p. 490.
12. [1939] 2 All E.R. 535.
13. *Ibid.*, at p. 541.
14. *Ibid.*
15. [1927] 2 K.B. 475.

of Appeal in *R.* v. *Salford Assessment Committee, ex p. Ogden.*[16]

There are however a few cases where it has been suggested that the proper test of a real likelihood of bias is satisfaction by the court of a real likelihood of bias. The most important one is *R.* v. *Barnsley Licensing Justices*[17] in 1960. This was the case where an application for a spirits off-licence at a drug department was granted to a co-operative society by seven licensing justices, six of whom were members of the co-operative society.[18] In affirming the decision of the Divisional Court[19] not to grant an order of *certiorari* to quash the decision of the justices, Devlin L.J. and Lord Evershed M.R. made some observations on the proper test of a real likelihood of bias even though their decision was primarily on the provisions of the Licensing Act, 1953.[20] The observations are nevertheless important coming as they do from two members of the Court of Appeal.[21] Thus, Lord Evershed M.R. in discussing the proper test of a real likelihood of bias said "The test, I conceive, is objective. Was there in fact in his case real likelihood of bias?"[22] This observation by Lord Evershed, it is submitted, does not necessarily mean that the *Court* must be satisfied that there is a real likelihood of bias. Satisfaction by reasonable persons in the position of the applicant is also an objective test but it is a less stringent one. Devlin L.J., however, made it quite clear that in his view the proper test of a real likelihood of bias is the more stringent test of satisfaction by the Court that there was a real likelihood 01 bias. He said:

> We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias — not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad .... 'real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting.[23]

In Singapore, in 1959, in *Re Application by Ong Eng Guan*,[24] Alan Rose C.J. also said that the proper test of a real likelihood of bias is satisfaction by the Court. Mr. Ong Eng Guan believed that Mr. Elias (the Commissioner appointed under the Inquiry Commissions Ordinance), would be biassed as he had shown a personal antipathy to the Peoples Action Party, he had been closely identified with the activities of the former City Council which were criticised and in some cases nullified by the present Council, and for one other reason. Mr. Ong Eng Guan, therefore, applied for an order of prohibition to restrain Mr. Elias from acting on the ground that he was biassed. Rose C.J. held that a writ of prohibition does not lie in the case of a Commission of Inquiry but he then went on to discuss *obiter* the question of bias and in relation to the proper test of a real likelihood of bias said

> It is to be noted that the deciding factor is not whether there is a reasonable suspicion[25] of bias on the part of even a considerable number of responsible persons, but whether the court itself — that is in the present case myself — considers that, irrespective of views that may genuinely and reasonably be held in other quarters, there is a real likelihood of bias.[26]

16. [1937] 2 K.B. 1.

17. [1960] 2 Q.B. 167.

18. The seventh member was a woman whose husband was a member of the co-operative society. Further, the Chairman of the Justices had unsuccessfully attempted in the past to become a member of the board of directors of the co-operative society.

19. [1959] 2 Q.B. 276.

20. 1 & 2 Eliz. 2, c. 46.

21. The Court of Appeal consisted of Lord Evershed M.R. and Ormerod and Devlin L.JJ.

22. [1960] 2 Q.B. 167 at p. 181.

23. *Ibid*., at p. 187.

24. [1959] 25 M.L.J. 92.

25. See *Healey* v. *Kauhina and Another* [1958] N.Z.L.R. 945. ". . . the weight of authority now is that the test to be applied is that of real likelihood of bias, and that reasonable suspicion of bias is insufficient. . . ." *Per* Hutchison J. at p. 951. Rose C.J. therefore rightly suggests that "reasonable suspicion" is not the correct test but he cites no authority to suggest that a real likelihood of bias should be shown to the satisfaction of the court.

26. [1959] 25 M.L.J. 92 at p. 94.

In the later case of *Re Chua Ho Ann*,[27] which was a case of deprivation of citizenship, Buttrose J. accepted without reservation the view of Rose C.J. The grounds relied on in support of the allegation of bias against the Minister were political animosity against the applicant by the Peoples' Action Party, a statement by Mr. Lee Kuan Yew that when he came into power he would get the applicant into trouble and that some two months after the present Peoples' Action Party Government came into power, the applicant was in fact arrested and detained under the Criminal Law (Temporary Provisions) Ordinance, 1955. In reply to all these allegations Buttrose J. merely said:

> ... I have come to the conclusion that there is no real likelihood of bias on the part of the Minister for Home Affairs in connection with the matters to which I have referred.[28]

Buttrose J. did not enquire whether a reasonable person in the position of the applicant would say that there was a real likelihood of bias. He therefore accepted the more stringent test of the satisfaction by the court of a real likelihood of bias as laid down by Rose C.J. in *Re Ong Eng Guan's Application*.[29] There is no real authority in support of the more stringent test apart from the very strong view expressed by Devlin L.J. in *R.* v. *Bamsley Licensing Justices*[30] and the *obiter dictum* of Rose C.J. in *Re Ong Eng Guan's Application.* On the other hand, the less stringent test has been expressly approved in *R.* v. *Essex Justices*[31] and in *Cottle* v. *Cottle*,[32] and *R.* v. *Essex Justices* was approved by the Court of Appeal in *R.* v. *Salford Assessment Committee ex parte Ogden*.[33] The decision in *R.* v. *Abingdon Justices, ex p. Cousins*[34] which clearly accepts the less stringent test of a real likelihood of bias is therefore a decision which merits serious attention. It is only a decision of the Divisional Court and has not yet attracted the attention or interest of the Incorporated Council of Law Reporting for England and Wales. A situation which it is hoped will soon be remedied.

In recent years the courts have seen a great deal of litigation in which allegations of bias have been made. Sometimes, of course, these allegations have been on "quite unsubstantial grounds" and in some cases upon the "flimsiest pretexts of bias". This situation has led Slade J. to comment that an erroneous impression may be created "that it is more important that justice should appear to be done than that it should in fact be done".[35] It has also been suggested[36] that the allegation that members of an independent tribunal are likely to have been biassed is a serious allegation and that the public interest will not be served by relaxing the conditions under which it may be successfully made. It is submitted however that inspite of the fears expressed above the adoption of the less stringent test for a real likelihood of bias is very desirable. It should surely be sufficient to show that reasonable persons in the position of the applicant feel that there would be a real likelihood of bias. Of course as *R.* v. *Camborne Justices, ex p. Pearce*[37] indicates this "real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries." Such a test then is in some way objective while at the same time ensuring that the applicant will succeed if he can show that a reasonable person in his position would be satisfied that there was a real likelihood of bias. Satisfaction by a court of a real likelihood of bias is

27. [1963] 29 M.L.J. 193.

28. *Ibid*., at p. 195. Both the Malaysian cases were decided on the basis that prohibition will not lie to a purely administrative body. The views expressed in the cases on the question of bias were therefore *obiter dicta.*

29. [1959] 25 M.L.J. 92 at p. 94.

30. [1960] 2 Q.B. 167 at p. 187.

31. [1927] 2 K.B. 475.

32. [1939] 2 All E.R. 535.

33. [1937] 2 K.B. 1.

34. *"The Times",* Oct. 14, 1964; Sol. Jo., Oct. 23, 1964, p. 840.

35. *R.* v. *Camborne Justices, ex p. Pearce* [1955] 1 Q.B. 41 at p. 52.

36. See De Smith, *op. cit*., at pp. 150-51.

37. [1955] 1 Q.B. 41 at p. 51.

too strict a test and if reasonable persons are satisfied that there is a real likelihood of bias there is surely no reason why a tribunal should continue to sit and adjudicate under such circumstances. The proper test of a real likelihood of bias is then satisfaction by a reasonable person in the position of the applicant of a real likelihood of bias.

CONCLUSIONS

1. It is not necessary to show actual bias, a real likelihood of bias is sufficient. Further, even if the court is absolutely satisfied that there was no actual bias, an applicant can succeed if he can show a real likelihood of bias.[38]

2. The proper test of a real likelihood of bias is satisfaction by a reasonable person in the position of the applicant of a real likelihood of bias and not satisfaction by the court of a real likelihood of bias.

3. Satisfaction by a reasonable person in the position of the applicant of a real likelihood of bias is an objective test and is no more "reasonable suspicion" than satisfaction by the court of a real likelihood of bias is "reasonable suspicion" by the court.

4. If satisfaction by a reasonable person in the position of the applicant of a real likelihood of bias is the proper test and is applied, then questions of "reasonable suspicion" will become irrelevant. The integrity of the principle reasserted by Lord Hewart in *R.* v. *Sussex Justices, ex p. McCarthy*[39] will be maintained though the principle that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the the course of justice"[40] will be varied to "whether or not a reasonable man in all the circumstances might suppose that there was an improper interference with the course of justice . . ."[41]

5. A reasonable person in the position of the applicant will be endowed with the knowledge of not only "the materials in fact ascertained by the party complaining, but [also] such further facts as he might readily have ascertained and easily verified in the course of his enquiries".[42]

6. The proper test of bias is therefore a real likelihood of bias. The proper test of a real likelihood of bias is satisfaction by a reasonable person in the position of the applicant that there was a real likelihood of bias. This real likelihood is to be deduced not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his enquiries.

F. A. TRINDADE.

38. *R.* v. *Abingdon Justices, ex p. Cousins, "The Times",* Oct. 14, 1964; Sol. Jo., Oct. 23, 1964, p. 840.

39. [1924] 1 K.B. 256.

40. *Ibid*., at p. 259.

41. *Cottle,* v. *Cottle* [1939] 2 All E.R. 535 at p. 541.

42. *R.* v. *Camborne Justices, ex p. Pearce* [1955] 1 Q.B. 41 at p. 51.