principle and decided authority. If a tribunal is obliged to observe the rules of evidence or specified statutory procedures, and there is no dispute as to what actually took place, a question whether the rules were duly observed is again purely one of law. But suppose that the question is whether a building is a dwelling-house, or 'of special architectural or historic interest', or is 'unfit for human habitation', or whether an industrial injury arose 'out of or in the course of employment', or whether consent to a particular act was 'unreasonably withheld', or whether there was a 'material change in the use' of land for which planning permission was required. The tribunal or other deciding body finds the basic or primary facts (for example, who did which and with what and to whom?); it may draw inferences from the facts; it has to go on to decide whether the facts as found *fall within the ambit of the statutory description.* A court, on review or appeal, can choose whether to characterize the conclusion as one of fact or as one of law; either form of characterization is possible, for here we are in a 'grey zone'. Generally speaking, the following are categorized as questions of fact: questions decided by specialized expert tribunals in which the courts repose confidence; questions on which reasonable persons might arrive at divergent conclusions; questions which the courts consider to have been correctly decided; questions on which the courts would find it very difficult to form an independent judgment without hearing all the evidence. But where the crux of the issue is a question of the interpretation of the language adopted in a statute or statutory instrument the courts reserve the final say in the matter to themselves. So the Court of Appeal held that it was entitled to overrule ...mmission on the meaning of the term 'costs' in the Price

...f fact may still be held to embody reviewable errors of *law* ...nade without any supporting evidence at all, or if the ...rawn from them are perverse (in that the facts as found ...kably the other way) or are based on the application of a ...st or if the reasons given for the findings or conclusions ...le or inadequate in law; in these cases the tribunal will ... misdirected itself in law. Nevertheless, the courts will be ...e with erroneous findings, inferences or conclusions of ...ce, in one case the question was whether land had been ...ut planning permission; the central issue was whether ...se to which it had been put was 'material'. The only ...nstallation of an automatic egg-vending machine in the

...*mmission* [1976] I.C.R. 170.

forecourt of a petrol-filling station. The court held[29] that whether a change of use was 'material' was a question of 'fact and degree',[30] not a question of law; the local planning authority's decision that there had been a material change of use was surprising, but it was not so perverse as to justify the court's interference. If the question had been categorized as one of law, the court could have substituted its own opinion. Now, if the court had adopted a slightly different approach – if it had applied the following test: there is an error of law if the inference or conclusion drawn from the facts found could not *reasonably* have been arrived at[31] – it might possibly have set the decision aside. Sometimes the courts do apply this broader test to conclusions of fact.

Natural justice

The rules of natural justice are minimum standards of fair decision-making, imposed by the common law on persons or bodies who are under a duty to 'act judicially'. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges now prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice. Often the terms are interchangeable. But it is perhaps now the case that while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are

[29] *Bendles Motors Ltd* v. *Bristol Corporation* [1963] 1 W.L.R. 247 (enforcement notice) an appeal on a question of law.

[30] See the valuable articles by Wilson in (1963) 26 *Mod. L. Rev.* 609; (1969) 32 *Mod L. Rev.* 361.

[31] See *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320 at 1326 *per* Lord Denning, M.R.; adopted in *British Dredging (Services) Ltd* v. *Secretary of State for Wales* [1975] 1 W.L.R. 687.

generally formulated as the rule against bias (*nemo judex in causa sua*) and the right to a fair hearing (*audi alteram partem*). They will be examined first and then a brief explanation of the duty to act fairly, inasmuch as it has a separate existence from natural justice, will be considered.

Rule against bias (Nemo judex in causa sua)[32]

The rule has two main aspects. First, an adjudicator must not have any direct financial or proprietary interest in the outcome of the proceedings. Secondly, he must not be reasonably suspected, or show a real likelihood, of bias.

In its first aspect, the rule is very strict. No matter how small the adjudicator's pecuniary interest may be, no matter how unlikely it is to affect his judgment, he is disqualified from acting and the decision in which he has participated will be set aside,[33] unless (i) the parties are made fully aware of his interest in the proceedings and clearly waive their right to object to his participation, or (ii) he is empowered to sit (or the validity of the proceedings is preserved if he does sit) by a special statutory dispensation or (iii) in very exceptional circumstances, all the available adjudicators are affected by a disqualifying interest, in which case they may have to sit as a matter of *necessity*. Perhaps we should classify under the same heading the rule that nobody should act as both judge and prosecutor, plantiff or advocate in a controversy. But here we begin to move towards the second aspect of the rule.

If an adjudicator is likely to be biased he is also disqualified from acting. Likelihood of bias may arise from a number of causes: membership of an organization or authority that is a party to the proceedings; partisanship expressed in extra-judicial pronouncements; the fact of appearing as a witness for a party to the proceedings; personal animosity or friendship towards a party; family relationship with a party; professional or commercial relationships with a party; and so on. The categories of situations potentially giving rise to a likelihood of bias are not closed.

The test of likelihood of bias must be applied realistically. If a controversy has aroused strong local passions, one cannot reasonably demand that every member of a local bench of magistrates deciding the issue must have maintained a total and lofty detachment from the

[32] de Smith, op. cit., ch. 5. See also Paul Jackson, *Natural Justice* (2nd edn, 1979).

[33] In *Dimes* v. *Grand Junction Canal Proprietors* (1852) 3 H.L.C. 759 a decree made by the Lord Chancellor was set aside because he was a shareholder in the company which was a party to the proceedings.

controversy from the time when it first arose. When a Minister (like the Minister in the *Stevenage* case) is placed by a statute in a position where he must inevitably incline toward confirming his own provisional decision notwithstanding the force of objections subsequently expressed, he cannot be subjected to the rigorous standards of impartiality rightly imposed on a superior judge or indeed on a member of an independent statutory tribunal.[34]

How should the test of disqualification for likelihood of bias be formulated? The strict test of disqualification for personal interest is based on the principle that public confidence in the administration of justice must not be impaired by even the smallest suspicion of judicial impropriety; the rule looks to the *appearance* of the matter to an outsider. Occasionally the courts have adopted a similarly exacting approach to the 'likelihood of bias' test. A magistrates' clerk retired with the bench while they were considering their verdict in a case of dangerous driving; the defendant was convicted; he applied, successfully, for certiorari to quash the conviction, on the ground that the clerk belonged to a firm of solicitors acting in civil proceedings on behalf of the other party to the accident out of which the criminal proceedings arose. It was 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[35] Yet in that case there was no evidence at all that the clerk had influenced or attempted to influence the decision. A more common formulation of the test is: Would a member of the public, looking at the situation as a whole, *reasonably suspect* that a member of the adjudicating body would be biased? Another common formulation is: Is there in fact a *real likelihood* of bias?[36] There is no need, on either formulation, to prove *actual* bias; indeed, the courts may refuse to entertain submissions designed to establish the actual bias of a member of an independent tribunal, on the ground that such an inquiry would be unseemly. In practice the tests of 'reasonable suspicion' and 'real likelihood' of bias will generally lead to the same result. Seldom indeed will one find a situation in which reasonable persons adequately apprised of the facts will reasonably suspect bias but a court reviewing the facts will hold that there was no real likelihood of bias. Neither formulation is concerned wholly with appearances or wholly with objective reality. In ninety-nine cases out of a hundred it is enough for

[34] *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

[35] *R.* v. *Sussex JJ., ex p. McCarthy* [1924] 1 K.B. 256 at 259, *per* Lord Hewart C.J.

[36] *R.* v. *Camborne JJ., ex p. Pearce* [1955] 1 Q.B. 41 and 51. It has been doubted, however, whether there is any distinction between those two tests: see *R.* v. *St Edmondsbury B.C., ex p. Investors in Industry Ltd* [1985] 1 W.L.R. 1168.

the court to ask itself whether a reasonable person viewing the facts would think that there was a substantial possibility of bias. So the decision of a rent assessment committee was quashed because the chairman, a solicitor, was acting for his father and other tenants in a separate dispute with the landlords. Reasonable people would have seen his conduct as unwise and unjudicial.[37]

Clearly the nature of these criteria offers scope for the exercise of judicial discretion. In *Hannam* v. *Bradford Corporation*[38] it was held that it was contrary to natural justice for school governors to sit as members of a local education authority's sub-committee which had to decide whether to confirm a decision of the governors to dismiss a teacher. This was so even though the relevant governors had been absent from the meeting of governors which took the decision to dismiss. But in *Ward* v. *Bradford Corporation*[39] the court refused to interfere with the decision of the governors of a teachers' training college to expel a girl student who had had a man in her room for several weeks, despite the fact that the same body instituted the disciplinary proceedings against the girl. The court's disapproval of the applicant's conduct was unveiled. Nevertheless it seems better to regard *Hannam* as the rule and *Ward* as the exception. The Divisional Court in 1978 quashed a decision of the Leicestershire Fire Authority reducing an officer to the ranks after evidence that the Chief Fire Officer, who had brought the disciplinary charge, had spent five minutes or so with the committee after they had retired. Justice, said the court, must be seen to be done and it was inevitable that the applicant would infer that the Chief Fire Officer had influenced the committee. There was no reason to treat the case as one of those exceptional instances requiring some degree of flexibility in the rule against the likelihood or suspicion of bias.[40]

Subject to the qualifications already indicated, the principles apply to the conduct of all statutory tribunals, to bodies other than tribunals deciding matters analogous to the judicial (for example, local authorities deciding whether to grant a permit after objections have been lodged, or to revoke a licence[41]) and to Ministers deciding disputes between parties. If the deciding body is a large one (for example, a local

[37] See *Metropolitan Properties Co. (F.G.C.) Ltd* v. *Lannon* [1969] 1 Q.B. 577.
[38] [1970] 1 W.L.R. 937.
[39] (1971) 70 L.G.R. 27.
[40] *R.* v. *Leicestershire Fire Authority, ex p. Thompson* (1978) 77 L.G.R. 375. Constrast *R.* v. *Board of Visitors of Frankland Prison, ex p. Lewis* [1986] 1 W.L.R. 130 (Board member not disqualified from adjudicating despite knowledge of prisoner's previous criminal record: such knowledge is common in such members).
[41] *R.* v. *Barnsley M.B.C., ex p. Hook* [1976] 1 W.L.R. 1052, C.A.

council), the pecuniary interest of a single member will disqualify[42] although it may be that likelihood of his being biased will not be material unless he took an active part in influencing the decision. This is still a doubtful point.

The right to a fair hearing (audi alteram partem)[43]

The right to a fair hearing requires at least that nobody be penalized by a decision affecting his rights or legitimate expectations unless he has been given (a) notice of the case he has to meet and (b) a fair opportunity to answer the case against him and put his own case. The enforcement of this right has a long and chequered history. In 1723 a Dr Bentley obtained an order of mandamus to secure his reinstatement to degrees of which he had been deprived by the University of Cambridge without notice or hearing.[44] When a local authority exercised a statutory power to demolish a house without giving the owner notice or an opportunity to make representations on his own behalf he was awarded damages for trespass, for the authority had failed to observe a rule 'of universal application and founded on the plainest principles of justice'. The court claimed that it 'invoked the justice of the common law to supply the omission of the legislature' which had failed to give the property-owner any right to be heard. So in *Cooper* v. *Wandsworth Board of Works* the foundations of the rules of natural justice were laid.[45]

Natural justice binds Ministers and officials in departmental adjudication. They must 'act in good faith and fairly listen to both sides, for that is a duty lying upon anyone who decides anything'.[46] Did the rules of natural justice then bind all decision-makers? The authoritative statement is to be found in the judgment of Atkin L. J. in *R.* v. *Electricity Commissioners*.[47] Certiorari, the remedy used to correct a breach of the rules of natural justice, lay to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. From 1920 to 1960 this much quoted passage was used to limit the application of natural

[42] *R.* v. *Hendon R.D.C., ex p. Chorley* [1933] 2 K.B. 696 (unanimous decision by council on application to change use of land quashed because one councillor was an estate agent acting for an interested party).
[43] de Smith, op. cit., ch. 4.
[44] *R.* v. *Chancellor of the University of Cambridge* (1723) 1 Str. 557.
[45] (1863) 14 C.B. (N.S.) 180.
[46] *Board of Education* v. *Rice* [1911] A.C. 179.
[47] [1924] 1 K.B. 171 at p. 205.

justice to the extent that the rules of natural justice almost faded into obscurity. A series of decisions held that only if the decision-making body was similar in nature to a court of law or obliged to follow a judicial procedure was there any duty to 'act judicially'. To take one example, the Commissioner of Metropolitan Police had a discretionary power to cancel taxi-drivers' licences. The Divisional Court held that he was not obliged to observe the rules of natural justice because his powers were of an administrative and disciplinary nature.[48] In no sense did the deprivation of a licence by the Commissioner resemble proceedings in court – that is, judicial proceedings. Effectively, only if the decision-making body was required to determine a dispute between parties independent of itself did any question of granting a fair hearing arise.

The House of Lords in *Ridge* v. *Baldwin*[49] breathed new life into natural justice. They held that the Chief Constable of Brighton, who held an office from which by statutory regulations he could only be removed on grounds of neglect of duty or inability, could not validly be dismissed in the absence of notification of the charge and an opportunity to be heard in his defence. The duty to act judicially could be inferred from the nature of the decision to be taken and was not dependent on the nature of the decision-making body.

Since *Ridge* v. *Baldwin* the general trend has been to extend the application of the rules of natural justice to any decision-maker who determines questions affecting the rights or legitimate expectations of individuals. The content of the rules has been adapted and rendered sufficiently flexible to meet the needs of the wide spectrum of decision-making now subject to natural justice. Public policy is openly considered in determining whether the rules should apply to a body and what constitutes a fair hearing in a particular instance.[50] And as the remedies available to those who allege a breach of natural justice are discretionary, the courts may refuse a remedy despite a breach of natural justice, because in the circumstances it is felt that there is no merit in the applicant's case or it is clear that even if natural justice had been scrupulously observed the applicant would still have met the same fate.[51]

A few examples will illustrate the general trend of extending the scope of natural justice. The right to a hearing was said by the Privy Council to apply to the dissolution of a local council for incompetence

[48] *R.* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150.
[49] [1964] A.C. 40.
[50] *R.* v. *Hull Prison Board of Visitors, ex p. St Germain* [1978] Q.B. 678, C.A.
[51] *Glynn* v. *University of Keele* [1971] 1 W.L.R. 487.

by the Minister of Local Government in Ceylon.[52] Three matters were important in determining whether a right to be heard must be granted: the nature of the benefit of which the applicant was deprived by the decision, the circumstances in which the decision-making body could intervene, and the severity and effect of the sanction which could be imposed. So a Scottish schoolteacher dismissible at pleasure had to be afforded an opportunity to be heard before dismissal.[53] A local constituency party was entitled to a hearing before final suspension or disaffiliation from the party organization.[54] Before it was held that exclusive jurisdiction over university students as members of the university vested in the Visitor,[55] students were said to be entitled to a hearing before being sent down either on academic or disciplinary grounds.[56] In *R.* v. *Hull Prison Board of Visitors*[57] the Court of Appeal found that prisoners appearing before the Board of Visitors to answer serious disciplinary charges which could result in severe punishment had the right to a proper hearing. Despite their deprivation of general liberty the prisoners retained rights which the Board of Visitors had power to affect materially either by punishment within the prison through solitary confinement or loss of privileges, or by effectively extending their period of incarceration through loss of remission.[58] The Board's power to intervene was in cases of gravity where judicial conduct would be expected of a decision-making body and the sanctions at their disposal were severe. Nor did their Lordships see that the extension of natural justice to the deliberations of Boards of Visitors would disrupt the efficiency of the prison service, although they admitted that demanding the same standards from the governor in his day-to-day disciplinary role might do so.[59] In *Hone* v. *Maze Prison Board of Visitors*[60] the House of Lords held, however, that this does not imply an absolute right to legal representation before the Board, and that such representation would never be required on a charge heard by the governor of a prison. The rigid application of pre-

[52] *Durayappah* v. *Fernando* [1967] 2. A.C. 337.
[53] *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578, H.L.
[54] *John* v. *Rees* [1970] Ch. 345.
[55] See *Thomas v. University of Bradford* [1987] 1 All E.R. 834.
[56] *R.* v. *Aston University Senate, ex p. Roffey* [1969] 2. Q.B. 538.
[57] [1978] Q.B. 678.
[58] See also *Raymond* v. *Honey* [1983] A.C. 1.
[59] That qualification was subsequently accepted in *R.* v. *Deputy Governor of Camphill Prison, ex p. King* [1985] Q.B. 735, but that case was later overruled by the House of Lords in *Leech* v. *Parkhurst Prison Deputy Governor* [1988] 1 All E.R. 485, the House refusing to give special immunity to a prison governor's 'management function'. See further [1988] *Public Law* 183.
[60] [1988] 1 All E.R. 321.

determined policy without allowing representations for a change in the policy may be a breach of the rules of natural justice.[61]

Natural justice is not confined to decisions depriving citizens of existing rights. Dicta suggest that when a citizen has a legitimate expectation that his application for a discretionary benefit such as a licence or permit will not be refused without a chance for him to put his case then he is entitled to some sort of hearing.[62] Where he already enjoys the benefit, the expectation that he should not be deprived of it arbitrarily and unheard by the decision-maker makes his case morally and legally stronger.[63] But this is an area where judges tend to speak in terms of the duty to act fairly, a more fluid and less formalized duty than the duty to observe the rules of natural justice.

While finding against the trade union members of G.C.H.Q. who had been deprived by the Government of their right to belong to their unions on the grounds of national security, some at least of their Lordships held that, but for national security, the trade unionists would have had a legitimate expectation of consultation before the ban was imposed.[64] The G.C.H.Q. case illustrates two important trends in judicial attitudes towards the expectation of a fair hearing. First, it may open the door to a wider practice of requiring consultations with groups rather than with individuals. Secondly, once again the courts have shown a great unwillingness to go behind the Government's view of what national security requires.[65]

Today it can be assumed that the rules of natural justice will apply in the following cases.

1 Where the decision-making body is a court or tribunal. Such a body may nevertheless be empowered or required to act *ex parte* (hearing one side only) in special circumstances – for example, to order that a person suffering from a prescribed infectious disease be detained in hospital.
2 Where the decision-making body has as its functions the holding

[61] *R.* v. *Secretary of State for the Environment, ex p. Brent L.B.C.* [1983] 3 All E.R. 321.
[62] *McInnes* v. *Onslow-Fane* [1978] 1 W.L.R. 1520; *O'Reilly* v. *Mackman* [1983] A.C. 237.
[63] *Schmidt* v. *Home Secretary* [1969] 2 Ch. 149 at p. 170; *R.* v. *Gaming Board, ex p. Benaim and Khaida* [1970] 2. Q.B. 417, at p. 430; *Att.-Gen. of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 A.C. 829.
[64] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374, applied on the legitimate expectation point in *R.* v. *Secretary of State for Transport, ex p. GLC* [1986] Q.B. 556.
[65] But in *R.* v. *Secretary of State for the Home Department, ex p. Ruddock* [1987] 2 All E.R. 518, Taylor J. held that the courts would not decline to intervene merely because a Minister asserted that national security would be prejudiced if there were a hearing, and that the doctrine of legitimate expectation imposed a duty to act fairly.

and hearing of inquiries, or the determination of disputes between parties.
3 In any case where a decision-making body is required to determine questions of law or fact in individual cases and its decisions will have a direct impact on the interests of the individuals concerned.
4 When a decision-making body vested with discretionary powers in the exercise of those powers will take a decision seriously impinging on individual rights and expectations. But it may well be that today such bodies will be characterized as under a duty to act fairly rather than observe the rules of natural justice.

So wide is the class of cases when it will be presumed that the rules of natural justice apply that it is the exceptions which repay more careful attention and analysis.

1 Where a body conducts an investigation but has no power to decide,[66] providing that the investigation is truly only a preliminary fact-finding exercise and there are no circumstances to suggest that it would be unfair to prevent the aggrieved individual putting his case at this stage. But a duty to act fairly will attach to such bodies.[67] The stringency and content of this duty will depend to what degree the preliminary investigation is of a kind where some degree of disclosure of the case against him and opportunity to put his case would reasonably be expected by the person under investigation. So if the investigation exposes a person to legal hazard and is a necessary prelude to other proceedings which may seriously affect the person's rights or interests then the investigator must at least inform the person of adverse imputations against him and give him an opportunity to reply.[68] The requirements of 'fairness' will depend on the circumstances of each case. Where the function of the investigating authority is akin to that of the police gathering evidence in order to determine whether further proceedings are necessary, even a suspicion of bias may not affect the validity of the action taken.[69] The duty to act fairly in such circumstances is a duty not to misuse the discretionary powers vested in the investigating body, not a duty to attempt to achieve a fair procedure.
2 Where an exhaustive statutory procedural code has been

[66] *Herring* v. *Templeman* [1973] 3 All E.R. 569.
[67] *Norwest Holst Ltd* v. *Department of Trade* [1978] Ch. 201, C.A.; *Lewis* v. *Heffer* [1978] 1 W.L.R. 1601, C.A.
[68] *Re Pergamon Press* [1971] Ch. 388; *Maxwell* v. *Department of Trade and Industry* [1974] Q.B. 523.
[69] *R.* v. *Secretary of State for Trade, ex p. Perestrello* [1980] 1 All E.R. 28.

prescribed.[70] Since the establishment of the Council on Tribunals, such codes have proliferated. But the courts may hold that an ostensibly exhaustive code imports further duties to act fairly in accordance with natural justice.

3 Where a decision affects so many people that it is really a legislative act;[71] or where the range of public policy considerations that the deciding body can legitimately take into account is very wide.[72] This proposition has to be expressed guardedly, for the idea of procedural fairness is not necessarily thus restricted, and in such cases judges will often state that there is a duty to act fairly even though the rules of natural justice are not applicable.

4 Where an employer decides to dismiss an employee. Unless contractual or statutory procedural duties are cast on the employer, the courts may confine the employee to damages for breach of contract if the dismissal is wrongful.[73] But there are now large exceptions to the general rule,[74] particularly since the concept of 'unfair dismissal' was introduced by the Industrial Relations Act 1971 and preserved by subsequent employment legislation.

5 Where a decision entails the allocation of scarce resources – for example, university places, council houses, industrial grants, certain discretionary licences – for which there are numerous competitors. But withdrawal or non-renewal of any such advantage *may*, in justice, have to be preceded by notice and an opportunity to make representations.[75]

In addition, as we have seen, factors such as urgency or an overriding need for confidentiality or national security may negative the existence of a *prima facie* duty to observe the rule or aspects of the rule. Nor need the rule be observed in the exercise of those prerogative powers which are not justiciable.

[70] *Wiseman* v. *Borneman* [1971] A.C. 297; *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534; *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660.

[71] See, for example, *Essex C.C.* v. *Ministry of Housing and Local Government* (1967) 66 L.G.R. 23 (designation of third London airport); *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373 (making statutory rules for solicitors' charges).

[72] *Schmidt* v. *Home Secretary* [1969] 2 Ch. 149 (non-renewal of entry permits for alien scientology students).

[73] See, for example, *Vidyodaya University Council* v. *Silva* [1965] 1 W.L.R. 77; *Pillai* v. *Singapore City Council* [1968] 1 W.L.R. 1728. The decision in *Ridge* v. *Baldwin* [1964] A.C. 40 is not inconsistent with the principle; a chief constable is nobody's servant and enjoys a special legal *status*.

[74] See *Malloch*'s case (note 53); *Hill* v. *Parsons (C.A.) & Co.* [1972] Ch. 305 (injunction to restrain wrongful dismissal).

[75] See notes 62 and 63. See also *R.* v. *East Berkshire Health Authority, ex p. Walsh* [1985] Q.B. 152; C.A., and *R.* v. *BBC, ex p. Lavelle* [1983] 1 W.L.R. 23.

6 Where the conduct of the person claiming to be affected by the denial of a hearing was such that he could have 'no legitimate expectation of a hearing'. Mini-cab drivers who had persistently flouted the law and regulations concerning touting for custom at London Airport were found to have only themselves to blame when they were denied any opportunity to make representations to the authority when it acted to exclude all persons from the airport who were not bona fide passengers.[76]

What is a fair hearing?

When a person has a right to a hearing he must know what evidence has been given and what statements made against him and he must be given a fair opportunity to correct or contradict them.[77] There is no fixed rule that the right to be heard means a right to be heard orally; in some situations a case can fairly be concluded in writing.[78] But there is a rebuttable presumption in favour of the duty to afford an oral hearing if one is requested. All relevant information, including information gathered by the decision-maker on his own initiative or as a result of his own expertise or consideration of the case,[79] must be disclosed to persons likely to be affected by its concealment, except when full disclosure may injure the individual affected or the public interest.[80] The Gaming Board was not required to disclose its sources of information suggesting that applicants for gaming licences had underworld connections.[81] And in *R.* v. *Secretary of State for Home Affairs, ex p. Hosenball*,[82] when a young American journalist sought to have a deportation order quashed on the grounds that his presence in the United Kingdom was not prejudicial to national security, Cumming Bruce L. J. said, '. . . the field of judicial scrutiny by reference to the enforcement of the rules of common fairness is an extremely restricted

[76] *Cinnamond* v. *British Airports Authority* 190] 1 W.L.R. 582; and see *Lovelock* v. *Secretary of State for Transport* [1979].

[77] *Kanda* v. *Government of Malaya* [1962] A.C. 322 at pp. 337–8.

[78] *Local Government Board* v. *Arlidge* [1915] A.C. 120; *Brighton Corporation* v. *Parry* (1972) 70 L.G.R. 576.

[79] *Sabey* v. *Secretary of State for the Environment* [1978] 1 All E.R. 586 (refusal of permission to extract gravel based on conclusions reached by the inspector at the inquiry which he had never put to the applicants for their consideration).

[80] *R.* v. *Kent Police Authority, ex p. Godden* [1971] 2 Q.B. 662 (distressing medical report disclosed to the applicant's medical adviser only and withheld from him); *Re WLW* [1972] 1 Ch. 456 (psychiatric reports held back in a case where an infant would suffer if published).

[81] *R.* v. *Gaming Board, ex p. Banaim and Khaida* [1970] 2 Q.B. 417.

[82] [1977] 1 W.L.R. 766.

field in the sphere of operations necessary to protect the security of the state'. So Mr Hosenball was deported, despite the fact that when he was afforded an opportunity of appearing before a panel advising the Home Secretary on his decision to deport, he was given totally inadequate information on which to answer the general charge against him.

Generally when an oral hearing is granted parties must be allowed to call witnesses and make submissions. They must have a fair chance to put their case and an adjournment of the hearing should be granted if necessary to prevent a party being taken by surprise,[83] but where there are a large number of parties (as in a public inquiry) the prejudice to one party must be weighed against the inconvenience to everyone else.[84] Cross-examination of witnesses should generally not be prevented[85] and hearsay evidence should not be allowed if it results in a person being effectively disabled from answering the points made against him in the hearsay testimony.[86] There are no hard and fast rules either on cross-examination or hearsay. The crucial factors are the nature of the decision and process challenged and whether at the end of the day the persons affected did have a proper opportunity to put their case. A refusal by the inspector at a public inquiry to allow cross-examination of departmental witnesses giving evidence on national road policies did not result in a breach of natural justice.[87] But prisoners appearing on disciplinary charges before a Board of Visitors should be allowed to cross-examine any witness the reliability of whose evidence is material to the case against them.[88]

It has been said that a party who is entitled to be heard is *prima facie* entitled to be legally represented.[89] The number of circumstances in which this implied right can be excluded[90] makes it more accurate to say now that there is probably a right to be legally represented when a fair hearing is not possible without legal representation. The more that the person affected has at stake and the more severe the potential sanction then the more likely it is that legal representation may become a right enforced by the rules of natural justice.[91] And so where

[83] *R.* v. *Thames Magistrates, ex p. Polemis* [1974] 1 W.L.R. 1371.
[84] *Ostreicher* v. *Secretary of State for the Environment* [1978] 1 W.L.R. 810.
[85] *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223.
[86] *R.* v. *Hull Prison Board of Visitors, ex p. St Germain (No. 2)* [1979] 1 W.L.R 1401.
[87] *Bushell* v. *Secretary of State for the Environment* [1980] 2 All E.R. 608.
[88] *R.* v. *Hull Prison Board of Visitors (No. 2)* [1979] 1. W.L.R. 1401.
[89] *R.* v. *Assessment Committee of St Mary Abbots, Kensington* [1891] 1 Q.B. 378.
[90] See *Enderby Town F.C. Ltd* v. *Football Association Ltd* [1971] Ch. 591; *Fraser* v. *Mudge* [1975] 1 W.L.R. 1132; *Hone* v. *Maze Prison Board of Visitors* (1988) 1 All E.R. 321 (prisoners on disciplinary charges).
[91] *Pett* v. *Greyhound Racing Association Ltd* [1969] 1 Q.B. 125; *(No. 2)* [1970] 1 Q.B. 46.

prisoners faced charges of mutiny before the prison Board of Visitors, the Board was held to have acted wrongly in refusing them legal representation. The requirements of a fair hearing demand that the tribunal exercise its discretion over the issue of representation. No reasonable Board could refuse legal representation to men facing charges of such gravity and complexity.[92]

In some situations there is an oral hearing conducted by a small committee or tribunal but the decision is made by a larger body. The general rule is that he who decides must also hear.[93] This requires that those who listen to the evidence and make recommendations must deliver to the deciding body an adequate report on which that body can discharge its obligation to hear as well as decide. The stringency with which this requirement is enforced will depend on the nature of the decision-making process under review. The more closely it resembles proceedings in the ordinary courts then the more strictly the rule will apply.[94] Departmental adjudication, where it is obvious that the Minister cannot hear and decide every case remitted to him, has always been outside the scope of the rule.[95] With the decision the fair hearing is complete. The common law has not as yet enforced any general rule that fairness demands that those affected be told the reasons for the decision, nor did it oblige Ministers to disclose the reports of inspectors at public inquiries.[96] In the case of the decisions of most special statutory tribunals, and of Ministers reaching decisions after the holding of inquiries, statute has filled the gap.[97] The courts enforce the giving of reasons when required by statute but the full rigour of the statutory rule is not always brought to bear on public authorities. For example, in one case concerning an application that the plaintiff's houses be rehabilitated rather than demolished a statement of reasons read: 'for the reason that the premises should be demolished and the site used for the erection of new housing accommodation'. The Court of Appeal held this to be sufficient although the Court also said that their finding did not mean that such a formula would always fulfil the duty to give reasons.[98]

In making sense of the inconsistencies in the application of the rules of natural justice it should never be forgotten that natural justice is not

[92] *R.* v. *Secretary of State for the Home Department, ex p. Tarrant* [1985] Q.B. 251; but see *Hone* v. *Maze Prison Board of Visitors* (above, p. 563, note 60).
[93] *Jeffs* v. *New Zealand Dairy Production & Marketing Board* [1967] 1 A.C. 551.
[94] *R.* v. *Race Relations Board, ex p. Selvarajan* [1975] 1 W.L.R. 1986. And see *Chief Constable of the North Wales Police* v. *Evans* [1982] 1 W.L.R. 1155, H.L.
[95] *Local Government Board* v. *Arlidge* [1915] A.C. 120.
[96] ibid.
[97] Tribunals and Inquiries Act 1971, s. 12.
[98] *Elliot* v. *Southwark L.B.C.* [1976] 1 W.L.R. 499.

and is not intended to be a precise and uniform code of procedure. What the courts seek to enforce is substantial justice. The whole of the decision-making process under review is examined. In *Calvin* v. *Carr*[99] the appellant had been accused of being a party with his jockey to stopping his horse running a fair race. It was assumed that he had been denied a fair hearing by the course stewards but his appeal to the Australian Jockey Club was conducted with scrupulous fairness. The Privy Council held that the unfairness of the first hearing did not necessarily vitiate the entire decision-making process.

Duty to act fairly

The duty to act fairly is not rationally distinguishable from the duty to observe the rules of natural justice. Judges on occasion use the terms interchangeably. Examples have been noted in which it has been suggested that although there is no right to a hearing, in the sense discussed in the previous section, the decision-maker is still bound to act fairly. This duty to act fairly prohibits the decision-maker from acting capriciously and here it merges with principles preventing misuse of discretionary powers. But it is in the area of decisions which either (1) affect large groups rather than individuals, or (2) appear to be part and parcel of everyday administration, or (3) are made by bodies so very different in form and functions from those usually subject to natural justice, that the courts appear happier to use the flexible notions of fairness rather than stretch the rules of natural justice even further.

In *R.* v. *Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association*[100] the town clerk of Liverpool assured bodies representing taxi drivers that no increase in the number of taxi licences would be made without consulting them. A sub-committee of the council recommended graduated increases after hearing representations from lawyers representing the taxi drivers. An undertaking was given in the council that there would be no increases made until forthcoming legislation was passed. The council was then advised that this restriction acted as an improper fetter on their discretion and the numbers of taxi-licences increased. The Court of Appeal held that although the council was indubitably exercising an administrative function in determining the number of taxi-licences to be allocated in the city the court should not hesitate in a suitable case to intervene to ensure fairness. A similar

[99] [1979] 2 W.L.R. 755.
[100] [1972] 2 Q.B. 299.

attitude has been taken to the functions of an immigration officer determining whether an immigrant in front of him is truly under sixteen and entitled to enter the United Kingdom as a dependant;[101] and to a magistrate condemning potatoes as unfit for human consumption.[102] In *H.T.V.* v. *Price Commission*[103] the Commission had regularly treated payments made by commercial television companies to the Exchequer as part of their total costs even though the scale of the payments was calculated as a percentage of advertising profits. In 1975 the Commission changed its mind and in determining an application for a price increase calculated H.T.V.'s profits as including those payments, refusing to treat them as costs. The Court of Appeal held that the Commission was obliged to act consistently and fairly and, having regularly interpreted costs in one manner, must allow representations from the affected company before reversing their policy.

These examples, and those cited earlier where 'the duty to act fairly' was preferred to the rules of natural justice as a tool of judicial control, illustrate the three points made at the beginning of the section. They are examples of decision-making processes so far removed from the original sphere of natural justice that even after *Ridge* v. *Baldwin* it would stretch the English language to say that the decision-makers must 'act judicially'. Additionally they are decisions taken in a context where the effect of requiring fairness to one group or individual must be considered in the light of the administration's general policy and conduct. Speaking of a duty to act fairly frees the judge to consider whether his decision will result in a general improvement in standards of fairness in that area of government without causing inefficiency, or delay, or insuperable administrative difficulties. Only if he is satisfied that this is so will the individual be afforded a

Discretionary powers

General

Discretion implies power to choose betwe
action. If X applies to a London borough
open a massage establishment, the counci
unconditionally or subject to such conditions a

[101] *Re H.K.* [1967] 2 Q.B. 617.
[102] *R.* v. *Birmingham City Justice, ex p. Chris Foreign F*
W.L.R. 1428.
[103] (1976) I.C.R. 170.