The Impacts and Implications of Human Rights upon the EU and the UK Arbitration Process

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Abstract
One of the most significant and fundamental sources of law regarding legal rules agains bias can be found in the European Human Rights Law, which has intrinsically stipulated that a decision maker must be independent, impartial and hence clear of bias. In 1950, the 47 states of the Council of Europe, including the United Kingdom, signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[1] Accordingly, provisions contained in the ECHR have been incorporated into domestic laws of member states. In 1998, the guaranteed rights of the ECHR have been successfully incorporated into the United Kingdom domestic law by means of the Human Rights Act (HRA). Accordingly it is essential to apprehend the magnitude of the human rights impact and its extended application and implication bon the arbitration process across the EU and UK. In the attempt to answer such question, I will divide my answer into three main parts. In the first part, I will set out and unpack Article 6 of the Convention and explain how theses provisions contained in Article 6 are applicable to Arbitration. Secondly, we will be looking at the shifts between the applications of the tests against bias used in the EU, the UK in particular. In the final part of this essay, the main discussion would be placed upon assessing the efficiency and effectiveness of the current bias test and to examine whether or not the test currently and commonly employed in the UK should be improved or replaced.
Keywords: Human Rights, Arbitration, European Union, UK Human Rights Act

Part I
The most important and relevant provision of the HRA concerning both the judicial and arbitral proceedings is laid down in section 6. This provision essentially guarantees the right of every person to fair trial before an impartial and independent tribunal. It can be derived from an interpretation of section 6 that this provision is also applicable to arbitration proceedings as well. That is to say, section 6 states that 'It is unlawful for a public authority to act in a way which is incompatible with convention rights'. An inclusive definition of the term 'public authority' can be found in section 21(1) which states that this term includes 'a court tribunal' and 'tribunal' is defined as 'any tribunal in which legal proceedings may be brought'. Therefore, it seems that such given definition would be wide enough to encompass an arbitral tribunal. This would render arbitrators to act in accordance with the provisions laid down in the HRA (Altaras, 2007).

[1] The United Kingdom signed in 1953.

Consequently, as regard to the requirement of independence and impartiality imposed on the arbitrators, it must be established that, firstly, the arbitral tribunal has been appointed with the manner that guarantees against outside pressures (Independence) and, secondly, the tribunal must be subjectively free of personal prejudice or bias and it must also be impartial from an objective viewpoint (Impartiality) (Altaras, 2007). It should be noted that the court has viewed the issues of independence and impartiality as closely linked with each other and generally considers these requirements together.

Nevertheless, certain provisions contained in the HRA can be construed to exclude parties from obtaining section 6 rights. That is to say, it has been strongly upheld by both English courts and the European Court of Human Rights (ECrtHR) that by entering freely into an arbitration agreement by the parties, they, consequently, expressly waive their rights of access to an ordinary court. The scope of such waiver could possibly extend and cover other rights such as the right to a public hearing, the right to judgment being pronounced in public and the right to an independent tribunal. Therefore, arbitral proceedings entered into willingly by the parties are considered as being generally in accordance with Article 6 of ECHR and section 6 of the HRA. However, particular rights contained in this provision may not be so simple to relinquish and the right to an impartial judge or to a fair hearing are one of the most difficult rights to waive under the Human Rights jurisprudence.

Under the English Arbitration Act 1996, it has been established that the mandatory provisions of the Act cannot be waived. This establishment has certainly echoed and reinforced the parties' Article 6 Convention rights. In Particular, section 1 sets out the overarching object of arbitration 'to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'. Section 24 also gives the court power to remove arbitrators on certain grounds including justifiable doubts concerning their impartiality, incapacity and refusal or failure properly to conduct the proceedings. Section 33 explicitly states that the tribunal shall act fairly and impartially as between parties. The significance of these provisions has also been highlighted in the recent 2007 case of *Stretford v. The Football Association* (Stretford v. The Football Association, 2007).

Part II

It can be observed that the requirement for the judiciary and the arbitrators to be impartial is significantly emphasised. Nowadays, as arbitration has been rapidly rising in popularity in international transactions as alternative model of dispute resolution, parties are seeking to have their disputes arbitrated by independent and impartial arbitrators especially when facing with the prospect of high stakes and the relatively high expense of the process. Many international attempts have been made towards the unification of the independence and impartiality standards. Despite such attempts by organisations like the UNCITRAL, the International Bar Association (IBA), and the ICC, there is still no uniform establishment regarding the requirement of impartiality amongst different jurisdictions.

Under the English jurisdiction, the court has traditionally approached the issue of the requirement of impartiality in arbitral proceedings in the same way as for judges in court proceedings. That is to say, although Article 6 requirement of impartiality may not explicitly and directly apply to arbitral proceedings, the legal 'test' for bias under section 24(1) of the Arbitration Act essentially mirrors the test for bias in English judicial proceedings (Hodges, 2007). Hence, in the following part of this essay, where issues regarding tests against bias are discussed, I would form my opinion and discussion based on certain landmark precedents concerning requirement of impartiality, which would be derived both court cases as well as arbitral rulings.

The Law of Bias in England Prior to the Enactment of the HRA

Under the English law regarding the requirement of impartiality, it has been suggested that,

prior to the Human Right Act, there are two main options applied by the court in order to supervise an arbitral proceedings, namely the Sussex Justice test and the Gough test. The first one is to remove an arbitrator provided that a fair minded and informed observer would have a '*reasonable apprehension'* that the arbitrator was biased (Luttrell, 2009). This long established notion by Lord Hewart in the ruling of *R. v. Sussex Justices* (R. v. Sussex Justice Ex p. McCarthy, 1924) has been the cardinal principle in determining the tests of bias- 'Justice should not only be done but should manifestly and undoubtedly be seen to be done'. It could be seen that in Sussex Justice, a two-arm test has been established. These two arms of Sussex Justice are: (1) Assessment of the impugned conduct from the vantage of a 'reasonable observer' and (2) A 'reasonable apprehension' (or 'reasonable suspicion') threshold.

The second option is to remove arbitrators provided that the 'court' itself would perceive that there was a *'real danger'* that the arbitrator was biased. Such contradictory notion against the ruling in Sussex Justice has been established in the Gough test for bias. It could be arguably said that the Gough test has consequently gained its dominant position and replaced the Sussex Justice test. In *R. v. Gough* (R. v. Gough, 1993), Lord Goff reviewed the earlier precedent case of Sussex Justice and discerned two prominent tests that had been generally applied by the English courts, which are the tests of whether there was a 'real danger' of bias test (Gough) and the test of whether a 'reasonable person might reasonably suspect bias' (Sussex Justice). His Lordship, by endorsing the first test of 'real danger' test, had set out a two-arm approach to be applied by courts when determining the allegation of bias. He suggested that firstly, the court should ascertain the relevant circumstances, knowledge of which may not be available to an observer and then see if there is a real danger of bias, in terms of a real possibility of bias (Singhal, 2008). To reiterate, the approach of two arms assessed in Gough are: (1) Assessment of the impugned conduct through the eyes of the court and (2) The 'real danger' threshold.

The Gough real danger test was subsequently applied to arbitral proceeding *in Laker Airways Inc v. FLS Aerospace Ltd* (Laker Airwarys Inc v. FLS Aerospace Ltd., 1999) where it concerned the status of impartiality of the arbitrators appointed. In this case, the appointed arbitrators from both the appellant and the respondent came from the same barristers' chambers. The court considered that the test of bias was not satisfied here due to the point of view that even though the arbitrators may share certain resources such as libraries and staff, they are essentially self-employed and work independently. It could be seen that the court derived its decision relying on section 24 of the English Arbitration Act, which according to the court, reflected the real danger test. It seems that the Act only requires the arbitrator to be 'impartial' and not necessarily 'independent', unless the lack of independence gives rise to justifiable doubts as to impartiality.

However, soon after *Laker Airways* had been decided, there was an immense criticism arguing that the court had been wrong in the application of test to the facts in this case. It should be noted that the challenge did not concern the validity and the applicability of the *Gough* test, the main concern was rested on the topic of how the court apply the test to the facts. In other words, the question concerned with the second arm of *Gough* of how the court had viewed the case: subjectively or objectively. It was argued by the American party that the court was wrong in applying the facts to the test subjectively by using the standard of a reasonable Englishman. If the court were to apply by using the American standard, it could be the case that an association with the same barristers' chamber could constitute a real possibility of bias. Therefore, it was contested that the correct approach concerning the second arm of *Gough* test should be assessed objectively and not subjectively (Riches, 1999).

Moreover, the broad common sense approach in the personification of a reasonable man suggested in *Locabail* was also manifested in the judgement of May L.J in *AT&T Corp v.*

Saudi Cable Co. In his ruling, even though his Lordship eventually reached the same conclusion as Lord Woolf and Lord Potter did[2], still, he felt that the non-executive directorship of the arbitrator could have called into question his independence in the eyes of one of the parties.

From the discussion earlier, it could be observed that the applicability of the test in Gough was gradually diminished throughout the years as witnessed in the above mentioned cases. A new approach, nevertheless, seems to be significantly emerged from recent cases developed after the implementation of the HRA. In the following part of this essay, we will be looking at the impact of the HRA and the ECHR jurisprudence on the application and the requirement of impartiality imposed on the English arbitrators.

After the HRA

The highly significant turning point regarding the requirement of arbitral impartiality has manifested itself right after the HRA 1998 came into force in October 2000. Relying on the ECHR jurisprudence, Article 6 of the Convention stipulates that everyone shall have a right to a fair hearing by an independent and impartial tribunal established by law. As a consequence, the Human Right jurisprudence was taken into account when the court considering the case a month later after the enforcement of HRA. In *Medicaments and Related Classes of Goods, Re*, it was held by the court that the *Gough* test was no longer satisfactory for it only focuses on the court's view of the facts. Accordingly the Court of Appeal suggested and recommended a 'modest adjustment' to the test in Gough. This proposition was later affirmed by the House of Lords in the case of *Porter v. Magill*. Interestingly, it should be noted that the newly established standard test set out in *Magill* actually derives its formulation from both *the Sussex Justice* and the *Gough* tests. That is to say, for *Porter v. Magill* test, the first arm of the test is the one used in *Sussex Justice* and the second arm was the one posted in *Gough* test. Such modification was seen as an attempt of the English Court to bring the standard test in line with the ECrtHR case of *Findlay v. United Kingdom* where it was viewed that the standard of *Sussex Justice* had been applied by the court.

Nonetheless, there is still an on-going question as to the validity and the applicability of the *Magill* test. This is because the second arm of the *Magill* test incorporates the very same standard used in *Gough*, which is the standard of 'real danger' or 'real possibility'. These two notions have practically the same meaning and this has been explicitly stated by Lord Goff: *'For the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability or bias*'. Therefore, it can be noticed that the, with respect to Lord Goff's primary intention, the term 'real danger' should be understood as carrying the same meaning as the term 'real possibility'. This acknowledgement then leads to one of the most contested propositions against the application of *Magill* test. That is to say, it has been argued that the second arm of *Magill* is incompatible with the HRA which derives its jurisprudence and authority from the ECHR. Evidently, in the ECrtHR, there is an insistence in applying *Sussex Justice* using 'reasonable apprehension' and most of the ECHR member states are following Strasbourg in this regard.

Nevertheless, despite the fact that there are still certain doubts concerning the compatibility of the 'real possibility' test with the ECHR jurisdiction coupling with the dicta of the Court of Appeal in *Director General of Fair Trading v. Proprietary Association of Great Britain* (ECWA, 2000), English courts have found little difficulty in applying the 'real danger' or

[2] In this case the arbitrator in question was a non-executive director of a competitor of AT&T Corp, having a very small shareholding. According to Lord Woolf and Lord Potter, this indirect interest was not likely to influence him the discharge of his arbitral duty.

'real possibility' test.

The following two important decisions will be used to illustrate that the second arm in *Magill* test is, in fact, viewed to be in accordance with the HRA and the ECHR rhetoric and does not constitute a breach of a fair trail guaranteed rights under Article 6 of the ECHR. In the first case of *Lawal* (2003), the appeal point was whether *'the practice of using senior barristers as part time members of statutory tribunals conflicted with the requirements of ECHR Article 6'.* The real possibility pleaded was that these members might unconsciously favour submissions of their colleague who was the senior counsel for the Respondent over those of the Appellant. The House of Lords allowed the appeal and ruling that the practice of using members of the inner Bar as part time judges and also allowing them to appear before members with whom they have sat must be discontinued. More importantly, his Lordship also held that there was no difference between the Common law test for bias laid down in Magill and the requirement of impartiality contained in ECHR Article 6.

In the second decision of *AWG* (2006), it directly addresses the effect of the HRA upon the Common law test for bias. In the leading judgement of Lord Mummery, he concluded that convenience, cost and delay are subordinate considerations where concerns as to judicial impartiality are properly invoked. The court also found that Evans-Lombe J should have recused himself because it was in the interests of justice and all the parties involved that another judge try the case.

Evidently, the above ruling was contradicting with the ECHR test for bias, which is the *'reasonable apprehension'* test applied in *Sussex Justice*. Nonetheless, the key importance of the decision in *AWG* is that the 'real danger' test is cited immediately after the description of the guarantee of judicial impartiality in ECHR Article 6 as 'the fundamental principle of justice'. Accordingly, it could be derived that, judging from the silence on the matter, it is evident that the members of the Court of Appeal saw no disagreement between the terms of the ECHR Article 6 and the 'real possibility' test applied in this decision.

Part III

In this part of this essay, I will attempt to argue that the enactment of HRA and the influence of the ECHR have somehow produces, to a certain extent, an adverse effect on the English arbitration system. The adverse impact of the HRA and the ECHR jurisprudence is that it changes and lowers the standard of the test against bias. Consequently, according to certain scholars and empirical studies, such lower standard on the requirement of impartiality is not entirely beneficial to the justice system as a whole.

For arbitration today, as any commercial disputes lawyer would know, delays of the proceedings could be beneficial for their clients, for instance, it could allow them more time to perform creative book keeping, to make money for the award or even to hand the client an opportunity to shed assets. Evidently, it has been suggested that delays also tend to re--establish settlement negotiations, which again tend to give positive results. Nevertheless, causing delays inevitably constitute an abuse of process and a breach of professional ethics. This possibly gives rise to an increasing in arbitration bias challenges witnessed since the early 1990's in many leading forum.

The Need for a Tougher Standard

As more and more 'Black Arts' arbitrators are becoming widely recognised, this might be the explanation for the rise in demand by clients who are now seeking to resort to these arbitrators who deploy such particular tactics especially when their cases involve high value disputes. A number of international commercial actors, including companies and states, demonstrate an apparent willingness to resort to the Black Arts. Also, it is likely that as more

and more clients are exposed to these tactics, they might instruct their lawyers to utilise such skills. It has been suggested that there are new ways of removing arbitrators emerging every year. Some even described the Orange List as *'a malignly imaginative check-list for tactical challenges by recalcitrant parties'* (ICC Bulletin, 2007); it therefore suggested that the IBA Guidelines should be updated soon. Accordingly, a tougher standard of the bias test should be established in order to prevent such abuses of process.

As England is considered to be one of the most popular seats for arbitral proceedings, by following the Strasbourg insistence in applying 'real apprehension' test, this can certainly attract parties who wish to employ Dark Arts skills to choose England as their seats because the chance of successfully removing arbitrators would be greater than those states where a higher standard test is applied.

The Real Danger Test and the HRA

The earlier discussed argument leads me to the proposition of bringing back the application of the *Gough* test in the English arbitration system. However, the complete replacement of *Magill* test with *Gough* might seem too far-reaching. Therefore, I am of the opinion that it would be more efficient and appropriate to reintroduce the second arm of *Gough*, which will be replacing the standard test set out in the second arm of *Magill*.

Although the reason for bringing back the second arm of *Gough* has been reviewed earlier, it is still necessary to examine as to whether such test would survive the jurisprudence of the ECHR. Apparently, many commentators are trying to bring back th application of *Gough* test. In doing so, they seek to establish that the ECHR procedural rights enshrined in *Sussex Justice* standard can be waived in favour of *Gough*. Accordingly, in *Suovaniemi* 1999, the importance of this case lies in the fact that the Strasbourg court has become more tolerant towards the idea that ECHR procedural rights can be waived. That is to say, it was held by the court that the waiver of a procedural right under the Convention would be allowed provided that three requirements can be satisfied. These requirements are namely: *(i) waiver of the relevant right is 'permissible under the Convention, (ii) the waiver is 'unequivocal' and (iii) the waiver is accompanied by 'minimum guarantees commensurate with its importance.* In this case, the three requirements were found to be satisfied. Thus, the waiver was considered valid and effective.

Accordingly, when applying the wording of the *Gough* clause with the three requirements set out in *Suovaniemi*, it can be observed that *Gough* would pass the first two requirements relatively easily. Regarding the third and final requirement where the significance of '*minimum guarantee'* is emphasised, it would seem that *Gough* could still overcome this hurdle. This is because obviously *Gough* does not *'abandon the parties to the wilds of prejudice and corruption'* This argument has been put forward clearly by one scholar who wrote that:

'Firstly, if we accept that Gough deals with apparent (or 'objective') bias only, then nemo judex still stands to disqualify any arbitrator with an interest in the cause. Secondly, actual bias will always pass the Gough test so there is a minimumm guarantee in place in this sense.'

Accordingly, as examined above, it can be observed that the *Gough* clause would be highly likely to survive the Strasbourg review.

Conclusion

As having set out as the main purpose of this essay, the discussion throughout this paper has attempted to argue and convince its readers that the Human Rights Act has consequently changed and lowered the standard of the test against bias under the English arbitration system. Such adverse impact produced by the ECHR jurisprudence should not be

continuously welcome and certain changes should be implemented in order to benefit the society as a whole.

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