



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF KINGSLEY v. THE UNITED KINGDOM

(Application no. 35605/97)

JUDGMENT

STRASBOURG

7 November 2000

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
28 May 2002**

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Kingsley v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr L. LOUCAIDES,
Mr P. KÜRIS,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mrs H.S. GREVE, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 14 September 1999 and 10 October 2000,

Delivers the following judgment, which was adopted on that last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 35605/97) against the United Kingdom lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Mr Max Myer Kingsley (“the applicant”), on 23 December 1996.

2. The applicant was represented by Mr N. Valner, a lawyer practising in London, and by Professor C. Greenwood QC and Ms J. Stratford, Counsel. The United Kingdom Government (“the Government”) were represented by their Agent, Mr C.A. Whomersley, Foreign and Commonwealth Office, London.

3. The applicant alleged that the proceedings before the Gaming Board Panel were in violation of Article 6 § 1 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 14 September 1999, the Chamber declared the application admissible.

7. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Between 1984 and 1992 the applicant was the sole managing director of London Clubs Limited ("LCL"), a company which owned and controlled six of the twenty casinos licensed to operate in London. LCL was a subsidiary company of London Clubs International plc ("LCI") of which the applicant was also managing director. Both companies will hereafter be collectively referred to as London Clubs.

9. In June 1991 a raid took place at the various premises of LCL. The raid was carried out by the police in the presence of officials of the Gaming Board for Great Britain ("the Gaming Board"), a statutory body which inspects and monitors the gaming industry. A large quantity of documents were seized. In March 1992 the Gaming Board lodged objections with the clerk to the Licensing Magistrates, with regard to LCL's annual application for renewal of the licences it held in respect of each of its casinos. The Gaming Board also made cancellation applications in respect of the existing licences held by LCL.

A meeting was held between the Gaming Board and the non-executive directors of LCL and their legal advisors on 26 March 1992. As a result of this meeting, the applicant and the other executive directors (with the exception of the finance director) resigned with effect from 30 April 1992, on the understanding that such resignation was involuntary and constituted dismissal by London Clubs.

Subsequently an agreement was reached between the Gaming Board and London Clubs, whereby LCL would apply for new licences for the casinos, via re-constituted operating companies, to which application the Gaming Board would not object. If the applications were successful and new licences were granted by the Licensing Magistrates, LCL would undertake to surrender its existing licences, thereby avoiding the necessity for the applications for cancellation or renewal to be heard.

The Gaming Board issued LCL with certificates of consent, which LCL were statutorily obliged to obtain from the Gaming Board as a pre-requisite to making an application to the Licensing Magistrates for new licences. Objections to the issuing of new licences were made by a rival casino owner. However these objections were rejected and new licences were

granted in October 1992, after a three day hearing before the Licensing Magistrates. The Gaming Board was represented at the hearing and expressed to the Licensing Magistrates its support for the application of LCL, explaining the grounds on which the Gaming Board itself had granted LCL certificates of consent in the following terms:

“In determining that it should issue certificates of consent the Board took into consideration, amongst other relevant factors, the degree to which LCI had addressed the Board’s grave concerns at the matters of complaint referred to above, and in particular had in mind the following:

Those executive directors of LCI and of [LCL] who in the Board’s view carried the principal responsibility for the matters of complaint ... [the applicant was named along with nine others] have left the company and relinquished their management shares:
(.....)

The Board and Police viewed the matters raised in their cancellation applications extremely seriously. However they are satisfied that the practices that were unacceptable have now been eradicated and that those individuals responsible for encouraging or tolerating them have been removed.”

10. In November 1992 the Chairman of the Gaming Board, Lady Littler, addressed the British Casino Association at their annual luncheon. Her speech referred to London Clubs and commented:

“We [the Gaming Board] satisfied ourselves that the practices we and the Police had regarded as unacceptable had ceased, that persons regarded by the Board and Police as not fit and proper had been removed”

11. As a result of this speech, the applicant’s legal advisors entered into correspondence with the Gaming Board’s solicitors, on the basis that the speech was defamatory. The Gaming Board alleged that the “persons” referred to were minority shareholders and no reference to the applicant was intended. The applicant did not accept this explanation, however defamation proceedings were not commenced.

12. By a letter of 22 December 1992, the applicant’s legal advisors received written notice that the Gaming Board was considering whether the applicant personally was a fit and proper person to hold the Board’s certificate of approval, as required by Section 19 of the Gaming Act 1968, in order to hold a management position in the gaming industry. By a letter dated 23 April 1993, the Gaming Board informed the applicant formally that it was “minded to revoke” the applicant’s Section 19 certificates and that the applicant would be given the opportunity to state his case against revocation either in writing or orally at an interview before the Gaming Board (“a Section 19 hearing”).

The letter detailed the matters which the Gaming Board wished to discuss with the applicant and also referred to the particulars of the Gaming Board’s complaints in the application for cancellation of LCL’s licences (the hearing of which had, in fact, never taken place). The complaints,

numbered B1 to B9, claimed, *inter alia*, that there had been breaches of Section 16 of the Gaming Act 1968, in that cheques had been accepted without any expectation that they would be met promptly (B1); that the applicant had been involved in granting cheque cashing facilities to members without proper investigation of their creditworthiness (B2); that cheques had been accepted which exceeded the authors' cheque cashing facility (B3); that third party cheques had been accepted in a way which would permit circumvention of 1984 Guidelines of the British Casino Association (B4); that Japanese players had been assisted in breaching Japanese exchange control regulations (B5); that gifts or hospitality had been made to substantial players in breach of further 1984 Guidelines (B7); and that the method for computing the "cash drop" in casinos produced inaccuracies, and was open to abuse (B9). Examples were given.

13. The applicant's legal advisors objected to the Gaming Board presiding over the Section 19 hearing, suggesting that an independent tribunal be set up as an alternative. The applicant's principal objection was based on the fact that the Gaming Board had already publicly expressed the view (at the hearing before the Licensing Magistrates) that the applicant was not a fit and proper person to remain as an executive director of London Clubs. As such, the applicant contended, the Gaming Board could not be considered an impartial tribunal appropriate to consider the issue of whether the applicant's Section 19 certificates should be revoked.

14. The Gaming Board rejected the request for an independent tribunal and a Section 19 hearing commenced on 11 April 1994 before a panel of three, all members of the Gaming Board ("the Panel"). The hearing was conducted in private and lasted for seven and a half days. The applicant was represented by senior counsel. The Gaming Board's solicitors, a senior Gaming Board official and a representative of the Gaming Board's accountants also attended the hearing.

By a letter dated 28 May 1994, the applicant was informed that the Gaming Board did not consider the applicant to be a fit and proper person to continue to hold the Board's certificates of approval and that, accordingly, the Board would revoke his Section 19 certificates within 21 days of receipt of the letter. This letter detailed the matters which had concerned the Gaming Board and the complaints that it deemed were established against the applicant.

15. The effect of the revocation of the Section 19 certificates was that the applicant was unable to obtain employment in any sector of the gaming industry in the United Kingdom or in any jurisdiction which had a relationship with the United Kingdom gaming authorities.

16. By an application dated 23 August 1994, the applicant sought leave to apply for judicial review of the decision of the Gaming Board to revoke his Section 19 certificates. The decision was challenged on the grounds that

the Panel was biased, or had the appearance of bias, and that its findings were vitiated by errors of law and were irrational.

17. In the course of the judicial review proceedings a document entitled “Confidential Annex to Minutes of the 281st Board Meeting of the Gaming Board for Great Britain,” dated 21 January 1993, was exhibited to an affidavit sworn by the Chairman of the Gaming Board. This document recorded that the Gaming Board had taken a decision at its meeting on 21 January 1993 that it had:

“sufficient evidence before it to conclude that [the applicant] ... was not a fit and proper person to be a director of a casino company.”

18. All the members of the Panel who presided over the Section 19 hearing were present at the Board meeting and were parties to this decision, which was made prior to the hearing itself.

19. The application for judicial review was dismissed on 11 January 1996 by Mr Justice Jowitt after a hearing lasting over 16 days. He delivered three separate judgments in respect of the applicant’s appeal. The first judgment dealt with the scope of the phrase “a fit and proper person” in Schedule 5 of the Gaming Act 1968. The second judgment considered the applicant’s claim that he had a “legitimate expectation” that the Gaming Board would be precluded from taking account of any breaches of its guidelines unless the breaches were unlawful. The third judgment which dealt with “Wednesbury” challenges and allegations of bias runs to 165 pages. The judgment of Jowitt J. stated that the ambit of judicial review was such that he was not concerned to review findings of fact as on an appeal, but rather to assess whether the findings of the Panel disclosed illegality, irrationality (referred to as “Wednesbury unreasonableness”) or procedural impropriety.

20. On pages 28 to 93 of the third judgment, Jowitt J. dealt with the applicant’s “Wednesbury” challenges to the findings in respect of the various complaints made of him.

21. By way of example, it was accepted that cheques drawn by one player, a Mr S, on a Spanish and a Swiss bank were not cleared within 21 days after payment into a British bank, as would be the normal course of events. Rather, the average time for clearance was 179 days. The Board found that this practice breached Section 16 of the 1968 Act, which prohibits credit betting save when a cheque is exchanged for tokens. The applicant alleged that the cheques he accepted were not shams, as none of the Spanish cheques was ever dishonoured. The judge found that the Board’s conclusion - that what took place amounted to an agreement between Mr S and LCL, such that Section 16 was breached - was a conclusion it was entitled to reach.

22. 57 pages of the third judgment were devoted to the issue of bias. Jowitt J. described the test of bias under English law in the following terms (pp. 93-96 of the judgment):

“[Counsel for the applicant] submits that the decision to revoke the applicant’s Section 19 certificates of approval should be quashed because the Panel was biased. The grounds on which leave to move for judicial review were granted asserted firstly that the Board could not and did not approach its decision with objectivity and impartiality. Secondly, it was asserted that whether or not there was actual bias the applicant reasonably believed there was and that the Board should have had regard to the appearance of bias which had been created by its actions ...

There was no disagreement between the parties as to the approach the court should adopt when bias is alleged. It is a two stage test. The applicant has first to show from the evidence that there is an appearance of bias. *R. v. Inner West London Coroner Ex parte Dallaglio* [1994] 4 All ER 139. [Counsel for the Gaming Board] properly and realistically accepts that in the light of the available evidence the applicant has surmounted this hurdle. Having done so, he has to go on to show that on a proper examination by the court of the evidence before it there is demonstrated a real danger of injustice having occurred as a result of bias ... [The analysis in that case of] the decision of the House of Lords in *R. v. Gough* [1993] AC 646 ... illuminates my task in relation to this second stage.

‘(1) Any court seized of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts. ...

(3) In reaching its conclusion the court ‘personifies the reasonable man’.

(4) The question on which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By ‘real’ is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility.

(5) Injustice will have occurred as a result of bias if ‘the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him’. I take ‘unfairly regarded with disfavour’ to mean ‘was pre-disposed or prejudiced against one party’s case for reasons unconnected with the merits of the issue’.

(6) A decision-maker may have unfairly regarded with disfavour one party’s case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously biased.

(7) ... the court is [not] concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias. ...

(9) It is not necessary for the applicant to demonstrate a real possibility that the ... decision would have been different but for the bias; what must be established is the real danger of bias having affected the decision in the sense of having caused the decision-maker, albeit unconsciously, to weigh the competing contentions, and so decide the merits, unfairly’.”

23. Jowitt J. then applied the test of bias which he had set out to the facts of the case, and concluded that, on the evidence before him, he could not say that the applicant had established that there was a real danger of injustice having occurred as a result of bias. He concluded that there was no unconscious bias on the part of any of the Panel members.

24. Jowitt J. stated, further, that if, contrary to his finding, there was unconscious bias on the part of the Panel, the “doctrine of necessity” fell to be considered. He said:

“When a body is charged by statute with the power or duty, which cannot be delegated, to make a decision in circumstances in which a question of bias arises because:

(i) in pursuance of that statutory power or duty an initial view has been formed upon a matter affecting the interests of someone in respect of whom the body in the exercise of its statutory power or duty has thereafter to make a decision, or final decision, after receiving and considering representations which he is entitled to make or

(ii) in the exercise of a statutory power or duty to make a decision a conflict arises between the interests of another or others which have to be taken into account and the body’s own interests:

the decision will not be liable to be impugned on account of bias provided that:

(i) if only some of those charged with the power or duty to decide are potentially affected by bias such of them as can lawfully withdraw from the decision making do so and

(ii) those of the decision makers who are potentially affected by bias but cannot lawfully withdraw use their best endeavours to avoid the effect of bias and, consistently with the purpose for which its decision has to be made the body takes what reasonable steps are open to it to minimise the risk of bias affecting them ...”

Jowitt J. indicated that if, contrary to his finding, there was unconscious bias on the part of the Panel, the doctrine of necessity would apply, and the decision of the Panel would stand. Counsel for the applicant submitted before Jowitt J. that the Board had failed to take the reasonable step of appointing an independent panel to hear evidence and report to the Panel. Jowitt J. rejected the submission, on the grounds that no useful reference could have been made to an independent tribunal which did not involve an impermissible delegation.

25. In respect of all other allegations brought by the applicant, Jowitt J. concluded that the applicant had failed to establish that the Panel’s decision was irrational or unreasonable or to make out any sufficient ground for judicial review. Jowitt J. noted that, by trying to frame his allegations in the context of *Wednesbury* unreasonableness, the applicant was in fact making an impermissible attempt to re-argue the case as though on appeal in order to re-examine the factual merits of the case.

26. The Court of Appeal, after an oral hearing on 4 July 1996, refused an application for leave to appeal from Jowitt J.'s decision. Morritt L.J. (with whom Hobhouse L.J. agreed) held, on the “doctrine of necessity,” as follows:

“I am prepared to assume in favour of [the applicant] that he would have an arguable case sufficient to justify leave to appeal, that there was a real risk that the decision of the Tribunal had been actuated by bias even though they were not in fact biased against him. That would leave the question of how the doctrine of necessity would be applied to the facts of the case.

[Counsel for the applicant] did not seek to suggest that the propositions of law which Jowitt J enunciated, and which I have quoted, were not accurately formulated by him, but he sought to challenge the final conclusion, to which I have just referred, that there could have been a useful reference to an independent Tribunal which did not involve an impermissible delegation. The question of bias, therefore, depends on the very limited point on whether it is arguable that Jowitt J was wrong in that respect. I am bound to say that, on that limited point, I think he was manifestly right. The decision for the Board was, at the end of the day, whether or not Mr Kingsley was a fit and proper person. That could not be delegated to an independent panel and if they were actuated by bias, apparent or real, then the decision would still have to be made by them. Therefore, on the doctrine of necessity, which is accepted, there could have been no meaningful independent panel and the decision would stand because the decision has to be made by the Board and could not be delegated to the independent tribunal. It seems to me that there is no arguable point, susceptible on this part of the case, which would justify giving leave to appeal.”

II. RELEVANT DOMESTIC LAW

27. The Gaming Board for Great Britain (“the Gaming Board”) is a statutory body, established under Section 10 of the Gaming Act 1968 (“the 1968 Act”) to inspect and monitor the gaming industry. In order for any company to obtain the requisite gaming licence for premises, a certificate must first be issued by the Gaming Board consenting to the company applying for such a licence (Schedule 2, paragraph 3 (1) of the 1968 Act).

28. Under Section 19 of the 1968 Act the Gaming Board issues certificates to individuals in order that they be permitted to hold certain positions in the gaming industry. A certificate, once issued, continues in force unless and until it is revoked. The Gaming Board may revoke the certificate at any time if it appears to the Board that the person to whom it relates is not a fit and proper person to perform the specified function or act in the specified capacity (Schedule 5, paragraph 6 of the 1968 Act). Twenty one days’ written notice of the revocation must be given to the certificate holder. The Gaming Board has developed a procedure whereby an individual is sent a letter in which the Board states that it is minded to revoke his certificate. This is followed by the submission of written representations and/or an oral hearing.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

29. The applicant complains that he did not receive a fair hearing in the determination of his civil rights and obligations by the Gaming Board and that the review by the High Court of the Gaming Board's decision could not adequately remedy any deficiencies in the Section 19 hearing because of the restricted nature of judicial review.

30. Article 6 § 1 of the Convention provides, so far as relevant, as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal”

31. The Government accept the applicant's submission that the Section 19 hearing and the subsequent judicial review proceedings determined the applicant's civil rights or obligations within the meaning of Article 6 § 1 of the Convention.

32. However, they submit that the applicant had a fair hearing before the Panel which was an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. The functions of the Gaming Board are divided between its Inspectorate and Secretariat so that the investigation and prosecution phases are separate. The refusal by the Gaming Board to accept the applicant's suggestion that an independent tribunal should be established to hear the Section 19 proceedings was because the Gaming Board, as a statutory body, cannot delegate its ultimate decision-making function. The context of the meeting on 21 January 1993 was that the Gaming Board was considering whether it could defend the defamation proceedings threatened by the applicant against the Chairman by asserting the truth of her comments. The applicant never asked the Gaming Board to hold the Section 19 hearing in public or to make public its decision. The members of the Board are not appointed on an ad hoc basis, as the applicant suggests, but for a term of three years which may be extended to five.

33. The Government point out that the applicant maintains his complaint that the Panel members were actually biased against him whereas, in the domestic proceedings, he disclaimed any allegation that the Panel was actually biased and sought only to prove that the Panel had the appearance of bias or was unconsciously biased. If the applicant had wanted to pursue a claim of actual bias or bad faith, he could have done so by applying for judicial review on the basis of such grounds, but he chose not to because the test of apparent or unconscious bias is easier to meet. They consider that he

has therefore not exhausted the domestic remedies available in respect of this complaint, as required by Article 35 § 1 of the Convention.

34. Even if the applicant did not receive a fair hearing before the Panel, the Government submit that the judicial review proceedings were sufficient to correct any earlier deficiencies and ensure compliance with Article 6 of the Convention. The Government maintain that Jowitt J. adopted an objective approach towards the question of apparent or unconscious bias and not a “Wednesbury” approach (see paragraph 19 above). Given that the Gaming Board conceded that the Panel failed the test under English law of such apparent or unconscious bias, the judge went on to make his own careful and detailed examination of the factual and legal merits of the applicant’s allegation to decide whether there was a “real danger” of injustice having occurred as a result of apparent or unconscious bias. Using affidavit evidence, the judge investigated the merits of the allegation of bias.

35. The Government add that, if their submission regarding the test for bias is wrong and the High Court’s review involved a more limited, “Wednesbury” approach, such a review would still satisfy the requirements of Article 6 § 1 because of the judgment of the European Court of Human Rights in the case of Bryan, where it found that in judicial review proceedings the High Court does have the power to quash decisions not made independently and impartially (see Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, §§ 44 and 46).

36. The Government contend that Jowitt J.’s reference to the “doctrine of necessity” was *obiter*, and therefore not determinative of the outcome of the applicant’s application for judicial review, but that in any event the operation of the doctrine in the present case would have been in accordance with Article 6 § 1 because the purpose of the doctrine is to prevent a “failure of justice” in circumstances where there is no alternative body which can take a decision. Thus, they submit that the public interest in having gaming regulated, by the Panel making a decision in respect of the applicant’s Section 19 certificates, would have outweighed the harm to the applicant in the decision being made by an apparently biased Panel. They submit, further, that the doctrine is applicable only in relation to a finding of apparent bias, and that if the applicant had pursued an allegation of actual bias, and succeeded, the doctrine would have had no application.

37. The applicant contends that the procedures adopted by the Gaming Board to decide on the revocation of his certificates of approval failed to provide him with the necessary protection to ensure a fair hearing within the meaning of Article 6 § 1 of the Convention. The applicant alleges that the Panel members were already committed publicly and privately to concluded views which made a fair hearing impossible, and that this was compounded by the fact that no reasons for the revocation decision were given to the applicant or pronounced in public.

38. The applicant notes the Government's submission that the Gaming Board's functions are allocated between the Inspectorate and the Secretariat but submit that, in his case, the members of the Gaming Board already had considerable involvement in and knowledge of the matters of complaint against the applicant at the hearing, and had expressed their views in public before the Licensing Magistrates and at the British Casino Association luncheon. Further, the members were not experts or specialists who were qualified either legally or in terms of industry experience. The applicant argues that, although he was not able to prove actual bias on the part of the Panel members on judicial review, this does not mean that there was no actual bias. The applicant denies the Government's suggestion that the possibility of a full and public hearing was open to him, as well as the suggestion that he wished to avoid a public hearing.

39. The applicant further submits that the limited review of the High Court did not remedy the procedural defects of the Section 19 hearing. The applicant argues that he wanted to challenge the merits of the Panel's decision before the High Court and would have asked the High Court to consider for itself whether or not he was a fit and proper person. The applicant was prejudiced by the limitation of judicial review because he was unable to do this. His only chance was to persuade the High Court that his case on these matters was so strong that the decision of the Panel was perverse. Any attempts by the applicant to raise primary issues of fact before Jowitt J. were rejected as impermissible attempts to challenge the Panel's findings of fact, against which there was no right of appeal. The applicant submits that it was not open to the High Court to substitute its own decision for that of the Panel.

40. The applicant argues that the judgment of the European Court of Human Rights in the case of Bryan is distinguishable from the present case in that the initial decision in Bryan was taken by an expert tribunal, the inspector's decision was reasoned, there was no dispute about the primary facts, the inspector was independent and the consequences of the Panel's decision for the applicant in the present case were much more serious than the consequences of the inspector's decision for the applicant Mr Bryan.

41. The applicant also refers to the fact that the Court of Appeal was prepared to assume, for the purposes of the application for leave to appeal, that the applicant had an arguable case on the issue of apparent bias, but that the Court of Appeal nevertheless refused leave to appeal on this ground, in reliance on the "doctrine of necessity".

42. The Court must first ascertain whether or not Article 6 § 1 of the Convention is applicable to the proceedings in the present case, that is, whether the proceedings determined the applicant's "civil rights and obligations" within the meaning of that provision.

43. In this respect, the Court notes the parties' agreement that Article 6 § 1 is applicable and recalls the European Commission of Human Rights' decision in the case of *X. v. the United Kingdom* (No. 28530/95, Dec. 19.1.98, unpublished) where the applicant was prevented from taking up the position of chief executive of a large insurance company because of the Secretary of State's decision that he was not a "fit and proper" person to hold such a position. The Commission found that the Secretary of State's decision deprived him of the opportunity of accepting a specific post which had been offered on terms which had been agreed and that the procedure by which the Secretary of State actively intervened to prevent the appointment of the applicant to the post which he had been offered amounted to a "determination of [the] civil rights" of the applicant for the purpose of Article 6 § 1.

44. In the present case, the withdrawal of the applicant's Section 19 certificates, although relating to specific premises, in effect prevents him from holding any management position in the gaming industry, as he would not be granted the requisite Section 19 certificate necessary for a management post at any other premises.

45. The Court considers that the proceedings before the Panel and the High Court determined the applicant's "civil rights and obligations."

46. The Court must next determine whether the Panel which adjudicated at the Section 19 hearing was an "independent and impartial tribunal" for the purposes of Article 6 § 1 of the Convention.

47. The Court recalls that in order to establish whether a body can be considered "independent," regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence. As to the question of impartiality, a distinction must be drawn between a subjective test, whereby it is sought to establish the personal conviction of a given adjudicator in a given case, and an objective test, aimed at ascertaining whether the adjudicator offered guarantees sufficient to exclude any legitimate doubt in this respect (the *Langborger v. Sweden* judgment of 22 June 1989, Series A, no. 155, p. 16, § 32).

48. As a preliminary point, the Government argue that the applicant is precluded from raising before the Court a claim of actual bias since he disclaimed any such allegation during the domestic proceedings. The Court notes in this regard that it was open to the applicant to seek judicial review of the Panel's decision on the ground that the Panel was personally biased and had acted in bad faith. During the judicial review proceedings, the applicant abandoned this allegation in favour of a claim of apparent bias. It is therefore not now open to the applicant to bring such a complaint before the Court.

49. The Court notes that at the meeting on 21 January 1993 the Gaming Board had already formed the opinion that the applicant was not a fit and proper person to hold a Section 19 certificate of approval. The three Panel members who adjudicated in the Section 19 proceedings in April 1994 were all present at the 1993 meeting and voted in favour of the decision of the Gaming Board that there was sufficient evidence to conclude that the applicant was not a fit and proper person to be a casino director. The Government's argument that the decision was taken so that the Gaming Board could be confident that it had evidence to support the Chairman's statements at the British Casino Association luncheon, if the applicant were to bring defamation proceedings against her, only confirms that the Gaming Board had already come to a conclusive decision in respect of the applicant one year prior to his Section 19 hearing.

50. The Court considers that this aspect of the Section 19 proceedings alone indicates that the Panel hearing did not present the necessary appearance of impartiality to constitute an Article 6 § 1 tribunal.

51. However, even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1, there is no breach of the Article if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1". The issue in the present case is whether the High Court and the Court of Appeal satisfied the requirements of Article 6 § 1 as far as the scope of jurisdiction of those courts was concerned (the aforementioned *Bryan v. the United Kingdom* judgment, p. 16, § 40, with further references).

52. In the case of *Bryan*, the Court gave examples of the matters which were relevant to assessing the adequacy of the review on a point of law in that case: "the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal" (*ibid.* p. 17, § 45).

53. The Court notes that the present case concerns the regulation of the gaming industry, which, due to the nature of the industry, calls for particular monitoring. In the United Kingdom, the monitoring is undertaken by the Gaming Board pursuant to the relevant legislation. The subject matter of the decision appealed against was thus a classic exercise of administrative discretion, and to this extent the current case is analogous to the case of *Bryan*, where planning matters were initially determined by the local authority and then by an inspector, and to the above-mentioned case of *X v. the United Kingdom* (no. 28530/95), in which the applicant was held by the Secretary of State not to be a fit and proper person to be the chief executive of an insurance company. The Court does not accept the applicant's contentions that, because of what was at stake for him, he should have had the benefit of a full court hearing on both the facts and the law. Even though the members of the Panel were not experts in the gaming industry, they

were advised by officials who were experts, and the Court finds administrative regulation of the gaming industry, including questions of whether specific individuals should hold particular posts in it, to be an appropriate procedure.

54. The Court further notes that the Panel's decision was arrived at after quasi-judicial proceedings with a seven and a half day hearing at which evidence was called by the applicant, who was throughout the proceedings represented by senior counsel. The applicant was given ample opportunity to consider the various elements of the case against him, and to comment on the way in which the proceedings should take place. Further, it was open to the applicant to make a wide range of procedural complaints in the context of the judicial review proceedings which he subsequently brought.

55. The question remains, however, whether, in a case such as the present where the applicant's primary complaint was that the Board, as the sole decision-making body, was actuated by bias, the extent of the High Court's review was sufficient to amount to "subsequent control by a judicial body that has full jurisdiction ...". In determining this question, the Court must consider the way in which the case developed on judicial review.

56. On the question of bias, Jowitt J. noted the acceptance by counsel for the Gaming Board that there was an "appearance of bias". However, he went further to examine whether this appearance of bias was such as to give rise to a real danger of injustice. Having examined the evidence in detail and having, in particular, drawn attention to the preparations made to give the applicant a fair and open-minded hearing, to the time devoted to the hearing, to the findings in favour of the applicant on certain issues and to the way in which the Panel distinguished between the different impact of their various findings on the "fit and proper person" issue, as well as to the calibre and experience of the Panel members, it was his view that no real danger of injustice arose in the present case. Jowitt J. further concluded that, even if there had been unconscious bias on the part of the Panel, the Panel's decision had to stand because of the application of the doctrine of necessity (see paragraphs 24 and 26 above for the manner in which the domestic courts described and applied the doctrine).

57. The Court of Appeal, for its part, was prepared to assume that the applicant had an arguable case, sufficient to justify leave to appeal, that there was a real risk that the decision of the Panel had been actuated by bias but, applying the doctrine of necessity, held that the decision had to stand, since the decision had to be made by the Board and could not be delegated to an independent tribunal.

58. The Court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is

made of a lack of impartiality on the part of the decision-making body, the concept of “full jurisdiction” involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body.

59. In the present case the domestic courts were unable to remit the case for a first decision by the Board or by another independent tribunal. The Court thus finds that, in the particular circumstances of the case, the High Court and the Court of Appeal did not have “full jurisdiction” within the meaning of the case-law on Article 6 when they reviewed the Panel’s decision.

Consequently, there has been a breach of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damages

61. The applicant claims GBP 1,868,000 in respect of loss of salary and GBP 2,500,000 in respect of loss of pension rights. He contends that he has suffered these losses as a direct result of the unfair procedures adopted by the Gaming Board. He also asks the Court to make an award of damages for non-pecuniary loss on the basis of loss of reputation and distress which he has suffered as a consequence of the withdrawal of his Section 19 certificates.

62. The Government submit that the losses claimed by the applicant were caused by the decision of LCL in April 1992 to press for the applicant’s resignation and the sale of his shares. They contend that it was only in May 1994, after the Section 19 hearing, that the Gaming Board decided to withdraw the applicant’s Section 19 certificates, and that it was this decision which the applicant contended was tainted with bias, and challenged in the judicial review proceedings before Jowitt J. They submit that the applicant’s loss was incurred well before the occurrence of the events of which he complains in the application to the Court. Further, the Government contend that the Court should not speculate about what the outcome of the Section 19 hearing might have been had there been no violation of Article 6 § 1.

63. The Court cannot speculate about the outcome of the domestic proceedings had those proceedings been in conformity with Article 6 § 1 of

the Convention. In any event, it considers that no causal link has been established between the violation found and the damage claimed. Accordingly, the Court dismisses the claim for damages for pecuniary loss. Moreover, the Court considers that the finding of a violation of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

B. Costs and expenses

64. The applicant seeks a total of GBP 31,380.01 in respect of the costs of the application to the Commission and the Court. He also seeks GBP 202,977.70 in relation to the costs of the Section 19 hearing, and GBP 254,982.72 in relation to the costs of the judicial review proceedings.

65. The Government contend that the costs claimed in respect of the application to the Commission and the Court are excessive, and suggest that a reasonable amount would be in the order of GBP 10,000 including value added tax. They submit that the Court's normal practice is to disallow costs incurred in the domestic proceedings, and that the applicant has suggested no reason why this practice should not be followed in the present application.

66. Making its assessment on an equitable basis, the Court awards the applicant GBP 13,500 in respect of the application to the Commission and Court, plus any relevant value added tax. No award is made in respect of the costs of the domestic proceedings.

C. Default interest

67. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* by 6 votes to 1 that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, GBP 13,500 (thirteen thousand five hundred), plus any value-added tax that may be chargeable;
 - (b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and notified in writing on 7 November 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Mr Loucaides is annexed to this judgment.

S. D.
J.-P. C.

PARTLY DISSENTING OPINION OF JUDGE LOUCAIDES

I fully agree with the judgment of the Court except as regards the finding that an award of non-pecuniary damage is not justified in this case. The majority held that the “finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant”. I am unable to accept this approach.

The Court found a violation of Article 6 § 1 of the Convention in that the three Panel members who adjudicated in the proceedings - which resulted in a revocation of the certificate allowing the applicant to hold a management position in the gaming industry - did not present the necessary appearance of impartiality. The Court further found that there was no domestic remedy in respect of that defect.

The applicant claimed an award of damages for non-pecuniary loss on the basis of loss of reputation and distress suffered as a consequence of the withdrawal of the certificate in question.

In my view this is a proper case for awarding non-pecuniary damages to the applicant for his feelings of distress and frustration as a result of living through proceedings affecting his professional status, which did not offer the safeguards of impartiality required by Article 6 of the Convention.

The Court has on many occasions awarded non-pecuniary damages in order to compensate applicants for their feelings of disappointment and frustration in respect of violations even of a procedural nature, such as excessive length of proceedings, irrespective of whether the particular violation resulted or not in actual pecuniary damage.

I cannot understand in what way the mere finding of a violation in this case “constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant” as found by the majority. I believe that such a finding does not take into account the feelings of the applicant. In any case the Convention gives the Court the right to award “just satisfaction” which implies more than the mere finding that there has been a violation. A declaration of such a finding by itself, without any compensation, is of no consequence for the applicant’s complaint, which was found by the Court to be justified and for which he had no remedy in the domestic legal system - even though the domestic Courts were prepared to accept that there was an appearance of bias of the part of the Panel.

For the above reasons I am in favour of awarding an amount of money for the non-pecuniary damage sustained by the applicant.