

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

BVIHCR2009/0031

ANDRÉ PENN

Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances:

Mr. Dane Hamilton QC and Mr. Herbert McKenzie for the Applicant
Mrs. Elizabeth Hinds, Director of Public Prosecutions and Ms. Jude Hanley, Crown
Counsel for the Respondent

2011: February 21
2011: February 22

Application seeking recusal of judge from presiding over his criminal trial – Judge attended government function on abuse of children – Criminal trial involving judge and jury - Becoming a judge with presumed impartiality - Test of disqualification by apparent bias – The fair-minded and informed observer - Eastern Caribbean Supreme Court Code of Judicial Conduct

RULING

Introduction

[1] **HARIPRASHAD-CHARLES J:** Minutes prior to the commencement of the criminal matter against the accused, André Penn (“the applicant”) who had been indicted on 13 counts of offences of a sexual nature, learned Queen’s Counsel for the applicant, Mr. Hamilton made an oral application seeking my recusal from presiding over the applicant’s criminal case. The basis for the application is that there is a real possibility that I will be biased. This “perceived” bias arose from an article that was published in the Standpoint

Newspaper of 24 November 2010. The article, written by staff writer, Fareeza Haniff, is titled "Over 70 cases of child abuse investigated." The article stated "*during the march through Road Town, many shouted, 'No more licks! All we saying is no more abuse, I love me, don't abuse me.'*" The article continued: "*On arrival at the Complex, Minister for Education, Honourable Andrew Fahie, Justice Indra Hariprashad-Charles, Acting Governor, V. Inez Archibald and At Large Representative, Irene Penn-O'Neal lit candles.*"

Official functions of judges

[2] In the absence of His Lordship, the Honourable Chief Justice from this Territory, his assignments at official functions are delegated to the most senior judge in the Territory. Usually, the procedure that is followed is the government department will contact the Registrar of the Supreme Court who in turn, writes to the judge. The judge then performs that function on behalf of the Judiciary. There are three arms of government - the Executive, the Legislative and the Judiciary. In my opinion, there is nothing unseemly for a judicial officer to be invited to a government function and for him or her to perform a task which does not conflict with the functions of a judge. This is done as a matter of course. At this public ceremony, my role was reduced to the lighting of a candle on behalf of the Judiciary. Other government officials did likewise. The gesture symbolized that abuse against children in all forms will not be tolerated in the community.

[3] The applicant is aggrieved about my participation at that government ceremony. The gravamen of his application is that the informed and fair-minded observer, having considered the fact that a judge was seen lighting a candle at the ceremony which symbolized that abuse in all forms will not be tolerated, there is a real possibility or perception of bias on her part. In support of his contention, Mr. Hamilton QC referred to two authorities: **Helow (Ap) v Secretary of State for the Home Department and Another (Scotland) Appellate**¹ and **Johnson v Johnson**.² These authorities will be considered later in this ruling.

¹ [2008] UKHL 62.

² [2000] HCA 48; 201 CLR 488.

Becoming a judge with presumed impartiality

[4] In a paper entitled "*Recusing yourself from hearing a case*", Mr. Justice Hayton³ wrote:

"Becoming a judge starts with a memorable swearing-in ceremony. A judge will swear (or solemnly affirm) that he will faithfully exercise his office without fear or favour, affection or ill-will - and perhaps in accordance with the relevant Code of Judicial Conduct or Ethics if there is one. The judge will also be well aware of a citizen's fundamental constitutional rights to a fair and public hearing by an independent and impartial tribunal, judicial independence in itself being a means of ensuring impartiality, the two concepts being closely linked.

By virtue of their professional background leading up to their appointment, judges are assumed to be persons of "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." "It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions". The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views."⁴ Judges should be selected as independent-minded persons of intellect and integrity. Thus there is a "presumption of impartiality" which "carries considerable weight."

Test of disqualification by apparent bias

[5] The learned authors of **Blackstone's Criminal Practice 2009** note that the right to an impartial tribunal is protected by the rule that provides for the judge's disqualification or the setting aside of a decision if on examination of all the relevant circumstances there was a real danger or possibility of bias. It is the judge's duty to consider and exercise judgment on any objection raised which could be said to give rise to a real danger of bias. Disqualification for apparent bias is not discretionary; either there is a real possibility of bias, in which case the judge is disqualified, or there is not: **AWG Group Ltd. V Morrison**.⁵ However, it is generally undesirable that hearings be aborted unless the reality or appearance of justice requires such a step: **Locabail (UK) Ltd v Bayfield Properties Ltd**.⁶

³ The Honourable Mr. Justice David Hayton is a judge of the Caribbean Court of Justice, Trinidad & Tobago.

⁴ See **Helos v Secretary of State for the Home Department** [2008] UKHL 62; [2008] 1 WLR 2416 at [8].

⁵ [2006] 1 WLR 1163.

⁶ [2000] QB 451.

[6] Bias is presumed and gives rise to an automatic disqualification where: (1) a judge is shown to have a personal interest in the outcome of the case; (2) the interest of a spouse, partner or family member of the judge is so close and direct as to render the interest of that other person for all practical purposes indistinguishable from an interest of the judge; or (3) where the judge has an interest in the subject-matter arising from the judge's promotion of a particular cause.

[7] Some important considerations while determining if there is a real danger of bias are set out in **Locabail (UK) Ltd**. At paragraph 25, the Court said:

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. **Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (KFTCIC v Icori Estero SpA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6 #8 8/91)).** By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the

judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.”
[emphasis added]

- [8] More recently, these principles were re-iterated by the House of Lords in **Helow v Secretary of State for The Home Department and Another (Scotland)**⁷. In *Helow*, the appellant, a Palestinian by birth, averred that her family were supporters of the Palestinian Liberation Organisation (“the PLO”). More particularly, she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She alleged that she was at risk of harm not only from Israeli agents, but also from Lebanese agents and because of her links with the PLO; from Syrian agents. On that basis, she claimed asylum in Scotland but her application was refused by the Home Secretary and, on appeal, by the Adjudicator. The appellant was refused leave to appeal by the Immigration Appeal Tribunal. She then lodged a petition in the Court of Session seeking a review of that refusal. The petition was considered by Lady Cosgrove. The appellant did not criticize Lady Cosgrove’s reasons for dismissing her petition. Instead, she launched an attack on the ground that it was vitiated for “apparent bias and want of objective impartiality”. She did not suggest that the judge could not be impartial merely because she is Jewish. Rather, the contention is that, by virtue of her membership of the International Association of Jewish Lawyers and Jurists, the judge gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of a petition for review concerning a claim for asylum based on the appellant’s support for the PLO and involvement in the legal proceedings against the then Prime Minister. The Court noted that:

The basic legal test applicable is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the Association: *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face

⁷ [2008] 1 WLR 2416; [2008] UKHL 62.

value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para. 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which was approved by my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; 2006 SC (HL) 71, paras 17 and 39.

The appellant also invokes or seeks assistance from the principle of automatic disqualification applied in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. It was there held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. In that case the judge's involvement was as the chairman and a director of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International which had intervened in the case as a party to support the prosecution's application for the extradition of Senator Pinochet to Spain."

- [9] The House of Lords found that the fair-minded and informed observer would not impute to the judge the published views of other members because she was a member of the Association. The appellant also contended that the observer would think that by reading the journal which the Association publishes, the judge might well have absorbed the most extreme views expressed in its pages by a process of osmosis so that there is a real possibility that, as a result, she would be biased in dealing with the appellant's petition. In dismissing the appeal, Lord Rodger of Earlsferry had this to say [at para. 23]:

"So, the hypothetical observer would have to consider whether there was a real risk that these articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially. **In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge is biased.** Taking all these matters into account,

I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case." [Emphasis added].

[10] I gratefully adopt these judicious words of Lord Rodger of Earlsferry. And I would respectfully add that the functions of the trial judge in a criminal trial are solely to regulate the proceeding and to give directions as to the law which applies to the case. Whilst the judge must also remind the jury of the prominent features of the evidence, it had always been the jury, as judges of the facts, to decide all the relevant facts of the case.

[11] In **The Queen v Gary Jones**⁸, the court issued a reminder that every recusal application must have a proper, concrete foundation and should, therefore, be scrutinised with appropriate care. McCloskey J quoted extensively from **Locabail (UK) Ltd**, in particular, paragraphs 22 and 24:

"22. We also find great persuasive force in three extracts from Australian authority. In *Re JRL, ex p CJL* (1986) 161 CLR 342 at 352 Mason J, sitting in the High Court of Australia, said:

'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' [emphasis added]

24. In the *Clenae* case [1999] VSCA 35 Callaway JA observed (para 89(e)):

'As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.'

⁸ [2010] NICC 39.

[12] In **Bennett v London Borough of Southwark**⁹, an advocate had made an application on behalf of the applicant in a race discrimination case for an adjournment, which the Tribunal refused. The advocate, who was black, renewed the application to the Tribunal the following morning, remarking: "if I were a white barrister I would not be treated in this way" and "if I were an Oxford-educated white barrister with a plummy voice I would not be put in this position." The Tribunal members decided that they could not continue to hear a case on race discrimination in which they themselves had now been accused of racism. Accordingly, the Tribunal discharged itself and put the matter over to a fresh tribunal. In the Court of Appeal, Sedley LJ had this to say (at paragraph 19):

"Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation (emphasis added).

[13] I return to the applicant's submission regarding apparent bias and want of objective impartiality on my part. The question is one of law, to be answered in light of the relevant facts. It is a well-established principle of law that when an application of this type is made, an asserted risk to the fairness of the trial which is unconvincing or fanciful will not suffice. However, the converse proposition applies with equal force. The court is required to make an evaluative judgment based on all the information available. In doing so, the court will apply good sense and practical wisdom.

[14] The importance of an impartial tribunal is a longstanding feature of the common law and finds itself in our Constitution. It is undoubtedly a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion. Kirby J in **Johnson v Johnson**¹⁰, stated that "the fair-minded observer is not unduly sensitive or suspicious."

⁹ [2002] IRLR 407.

¹⁰ (2000) 201 CLR 488, 509, para. 53.

- [15] Thus perceptions are all important: the terms of the immutable rule that justice should not only be done but should manifestly and undoubtedly be seen to be done are familiar to all practitioners: see Lord Hewart CJ in **R v Sussex Justices, ex parte McCarthy**.¹¹ These principles apply to both judge and jury.
- [16] The basic legal test applicable is not in issue. The applicant says that, because I lit a candle symbolizing zero tolerance to the abuse of children in this Territory, at an official government function, on behalf of the Judiciary, a fair-minded and informed observer will conclude that I am against those who abused children and consequently, that I will be prejudiced against him if I am to preside over his criminal trial in which it is alleged, that he sexually assaulted a young child.
- [17] So, the issue is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there exists a real possibility that I will be biased? The test for apparent bias requires consideration of a "possibility", applying the information known to and attributes of the hypothetical observer. It is well established that the hypothetical observer is properly informed of all facts, is of balanced and fair mind, is not overly sensitive and is of a sensible and realistic disposition. Such an observer would, in my opinion, readily conclude that a judge will presumptively, decide every case coldly and dispassionately and only in accordance with the evidence. This principle is deeply rooted with the policy of the common law and our constitution.
- [18] In my opinion, this is an unfounded and unsubstantiated allegation which cannot justify the automatic disqualification of a professional judge. In **Locabail**, the court said that they cannot even conceive of circumstances in which an objection could soundly be made of a judicial officer who has made extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers). None of these circumstances has been alleged here. In any event, the applicant is before the criminal court in which there is a jury and a judge. The jury has the sole responsibility of deciding questions of facts.

¹¹ [1923] All E Rep. 233 at page 234.

[19] In addition, the performance of an official duty does not contravene any of the canons of the Code of Judicial Conduct.¹² Canon 3 lists six circumstances when a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. None of these circumstances is present in the instant application.

[20] In all these circumstances, I would hold that the application seeking my recusal is without merit and I would dismiss it.

Indra Hariprashad-Charles
High Court Judge

¹² See Eastern Caribbean Supreme Court Code of Judicial Conduct.