[2021] JMSC Civ 107

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2021CV005004

BETWEEN	**FRITZ PINNOCK**	**1ST APPLICANT**
AND	**RUEL REID**	**2ND APPLICANT**
AND	**HIS HONOUR CHESTER CROOKS CHIEF JUDGE OF PARISH COURTS**	**RESPONDENT**

IN CHAMBERS (VIRTUAL)

Hugh Wildman for 1st and 2nd Applicant Fitz Pinnock and Ruel Reid present and Mrs. Taniesha Cooke Rowe holding for Miss Althea Jarrett instructed by Director of State Proceedings.

Heard: May 19 and June 11, 2021

Application – Leave for Judicial Review – R. 56.1(1)(a), (c)(2). 56.2(1), (2)(a), 56.3(1)(2)(3)(4), 56.4(1)(4)(8)(9)(10)(11)(12), 56.5, 56.6(1) CPR 2002 – Test for Leave – Test for Apparent Bias – Conflict of Interest – Fundamental Right to a Fair Hearing – Section 16 – Charter of Fundamental Rights and Freedom of Constitution

DAYE, J.

Background

[1] On the 10th October 2019 the applicants Ruel Reid, Minister of Education, Youth and Information and Fritz Pinnock, President of the Caribbean Maritime University (CMU) which was administered by the Ministry of Education first appeared in the Kingston and St. Andrew Parish Court (Criminal Division) at the Return Court for mention before His Honour Chester Crooks, Chief Judge of Parish Courts.

[2] They were arrested on the 9th October, 2019 by the Financial Investigation Division (FID) of the Ministry of Finance and jointly charged for several offences of fraud, corruption and misconduct in public office. The case was adjourned a number of times in the Corporate Area Parish Court due to steps taken by their counsel in other proceedings. It returned to this court on the 7th July, 2020. Then the case progressed through the court to the stage of a Plea and Case Management Hearing (PCMH). A special sitting of the PCMH was fixed by the Chief Judge of Parish Court for 29th October, 2019 to hear a preliminary objection by their counsel that the FID had no power to arrest, charge and prosecute the accused and the FID acted unlawfully and consequently the accused ought to be dismissed of the charges.

[3] The Chief Judge of the Parish Court heard submissions for all parties at three sittings 29th & 30th, October and the 11th December, 2020 and then he reserved his decision for the 4th February, 2021. On 4th February, 2021 he denied the application relating to the preliminary objection. It is this decision that the applicant filed an application on 10th February, 2021 for leave or permission for judicial review which is to engage the supervisory jurisdiction of the Supreme Court. The applicant Fitz Pinnock filed evidence on affidavit on even date in Support of the Application for Leave for both applicants. He complained that the applicants were denied a fair hearing of their preliminary objection because at the end of that hearing the learned judge stated that he had a conflict of interest in the matter and he would not continue to hear the case. The applicants contend this conflict of interest caused the judge's decision to be biased and therefore it was unlawful, null and void, and of no effect (para. 27 and 29 of affidavit).

[4] I remind myself that as a matter of law that:

> *"...that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available, the court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review."* ***(R (on the application of Lim and another) v Secretary of State for the Home Department*** *(2007) EWCA Civ. 773.*

And also:

> *"It would require an exceptional case to warrant the grant of special leave to appeal in relation to review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process..." (**Yates v Wilson and another** (1989) CLR.*

Criminal Process

[5] The decision or ruling the applicants complain about was made at a PCMH. Under **The Judicature (Case Management in Criminal Cases Rules) 2011** which was published in the gazette, Nov. 15, 2011 a duty is imposed on a judge to actively manage a criminal case in the Circuit Court. Cases must be fixed for PCMH one of the objectives for this is to "discourage delay, dealing with as many aspects of the case as possible on the same occasion, and avoid unnecessary hearings" (R. 1 and 2(f). Also, the court may require a party to identify whether that party intends to raise any point of law that could affect the trial (R.10 (viii)). Although it is not expressly stated in these rules the practice is that judges at PCMH conduct hearings on point of law that a party may identify or any issue that can be dealt with before trial.

[6] There is no gazetted rule for case management of criminal or civil cases in the Parish Court but that court has a practice similar to the Criminal case management rules in the Circuit Court. There is a final draft of Criminal Case Management rules for the Circuit Court dated April 2018 as also a set of draft rules for the Parish Courts dated April 2018 presumably to be approved for gazette publication by the respective Rules Committees. Case management Hearings are an integral part now of the criminal process. The procedure adopted to hear the preliminary point of law and the ruling or the decision was in terms of this process of which there is really no complaint. The complaint is that the applicant did not get a fair hearing due to a conflict of interest by the decision maker which has the appearance of bias to the applicant

[7] Counsel for the applicants submitted orally, on the grounds I will examine, that it is a simple case to grant this application for leave for judicial review. Equally

counsel appearing for the respondent submitted orally that it is also a simple case that merits the refusal of this application for leave for judicial review of the learned Chief Judge's decision.

The responsibility of a Judge

[8] A judge's responsibility in determining an application as this can be guided by the statement below by Lord Clyde in **Van Stark v The Queen** [2000] UKPC 5, a decision of the Privy Council on appeal from Jamaica (at para 12):

> *"The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in Xavier v. The State (unreported), 17th December 1998; Appeal No. 59 of 1997, a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise*

> *verdict it is the duty of the judge to explain it to the jury and leave the choice to them. In Xavier the defence at trial was one of alibi. But it was observed by Lord Lloyd of Berwick in that case that "If accident was open on the evidence, then the judge ought to have left the jury with the alternative of manslaughter". In the present case the earlier statements together with their qualifications amply justified a conclusion of manslaughter and that alternative should have been left to the jury."*

[9] Although this passage from Lord Clyde's judgment was in respect to a criminal trial with a jury and was addressing the specific issue of the duty of the trial judge to leave the alternative verdict of manslaughter where there was evidence to support it even though defence counsel avoided it, in my view, it is equally applicable to a judge hearing a civil case, an interlocutory application in Chambers, or a pre-trial issue criminal or civil and without a jury. I find particularly applicable the aspect of this passage that requires the judge to secure the overall interest of justice, according to the law, in the resolution of the proceeding before him or her That is what cause the judge's responsibility to be greater and more onerous than positions of counsel for each party whose primary duty is to represent the interest of their client.

The test for leave for Judicial Review

[10] I turn to the test for the grant or refusal of judicial review which is stated below: Lord Bingham of Cornhill and Lord Walker of Gestingthorpe in the Privy Council decision **Sharma v Brown-Antoine and others** (2006) 69 WIR 379 formulated the test for leave for judicial review as follows, para. 14:

> "(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed. (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in **R(N) v Mental Health Review**

Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:

> "... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."
>
> "It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": **Matalulu v Director of Public Prosecutions** [2003] 4 LRC 712, 733."

[11] It is useful to refer to the minority concurring judgment in **Sharma** (supra) of the emphasis on the factors that ought to be considered for the grant or refusal for leave for judicial review. (para [30] – [36]. The judges agreed with the majority that judicial review to prosecute is an exceptional remedy of last resort. The present application is not about a decision to prosecute though the outcome desired may have the same effect of the dismissal of the prosecution if the applicants are granted leave for judicial review and succeed at the substantive hearing. Further, their view was that any issue of a prosecutorial decision can be raised and fully investigated by an application to stay proceedings on the ground of abuse of process or at the substantive trial. They were inclined to the view that at the leave stage the focus should not be so much on the strength or weakness of the merits of the applicant's application, that is the chance of success but the disadvantage to the public and the parties that can result from the delay to proceed to trial by a long judicial review hearing followed by a criminal trial, where the evidence may overlap, when balanced with the advantage to the individual applicant rights to a fair trial of criminal charges looked at as a whole. They held that all issues should be resolved in one set of proceedings. In relation to the application for leave for judicial review by Chief Justice Sharma of Trinidad and Tobago of the decision of the Deputy Director of Public Prosecution and or the Assistant Commissioner of Police to prosecute him for criminal offences was motivated by political pressure and interference the minority

had no doubt that the Chief Justice complaint could not be resolved in the criminal process.

[12] When one examines the test for judicial review in **Sharma** (supra) it is clear that an applicant has:

1. The burden of proof, that is, to satisfy the court for leave to claim judicial review on a balance of probability, and must show,
2. There is an arguable and not merely a potentially arguable ground for judicial review having a prospect of success, and
3. There are no discretionary bars against the relief, and
4. There is no alternative remedy, and
5. There is no right of appeal.
6. The advantage of permitting the applicant to commence a claim for judicial review to enforce his fundamental right to a fair hearing to an issue essential to his criminal trial outweigh the disadvantage to the administration of justice of delay and costs that inevitably will arise from a separate judicial review hearing followed by a substantive criminal trial.

The fundamental right to a fair trial/hearing

[13] The substance of the applicant's complaint is not that there was no fair trial of the criminal charges against them or that they will not have a fair trial of these charges. They contend that they were deprived of a fair hearing at the pre-trial hearing of their preliminary objection in law because the learned Chief Parish Court Judge allegedly announce after ruling against their preliminary objection that he had a conflict of interest and would not be the trial judge of the criminal charges which was the next stage of the criminal process. The learned judge was in effect disqualifying himself from the trial on the ground of a conflict of interest. The applicants' argument is the same conflict of interest that inhibited the judge from the trial of the criminal charges ought to have inhibited the judge from the pre-trial

hearing of the preliminary objection. Further, they argue as a result of the learned judge's failure to disqualify himself he commenced a hearing with a known bias and thereby the applicants did not have a fair hearing on an important preliminary objection that ought to have resulted in the charges against them dismissed.

[14] In **Locabail (UK) Ltd v Bayfield Properties Ltd. and another** [2000] 1All E R 65, which was five separate applications for permission to appeal to the Court of Appeal of England and Wales on the common questions of disqualification of a judge on the ground of bias (a case relied on by counsel for the applicants in his oral submission and distinguished by counsel, for the Respondent who is the learned Chief Judge of parish courts, in her written response to authorities), Lord Bingham of Cornhill CJ addressed the issue of bias and the effect on the right to a fair trial.

[15] He declared that the right to a fair trial is a fundamental right which is guaranteed to every litigant and any decision of a judge or decision maker which is affected by bias in sense of partiality or prejudice violates one of the most important fundamental principle underlying the administration of justice (para 2 and 3). He showed this right was guaranteed or protected by the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) 1953 which was signed and ratified by the United Kingdom. It is article 6 of the Convention that provides that a person is entitled to a fair trial in the determination of his or her criminal and civil rights and obligation.

[16] An issue arose whether this right to a fair trial was guaranteed in proceedings other than a criminal or civil trial. This was an issue in post-conviction confiscation proceedings of proceed of crime under the predecessor legislation of the Proceed of Crime Act 2002 UK. The European Court of Human Rights (ECHR) (Strasbourg) incompatibility hearings from England after the Human Rights Act, 1998 which came into in 2000 and also the Judicial Committee of the Privy Council decided that the right was also applicable to hearings and or proceedings other than trials. The decision of the House of Lords in **Magill v Porter and Magill v Weeks** [2001] H.L. 63, [2002] 2 AC 357(another case relied on by counsel for the applicants and

respondent in their submissions in the instant application for the test in law for bias) referred to the issue of a person right to a fair hearing in proceedings to determine their rights or liabilities other than a trial.

[17] The guarantee and protection of the right of a fair trial under the European Convention are the same in the jurisdiction of Jamaica. For Lord Wilberforce in the decision of the Privy Council in **Minister of Home Affairs and Another v Colin MacDonald Fisher and Another** [1980] AC319 at 328-332 when considering the interpretation of the Constitution of Bermuda held that the chapter dealing with Fundamental Rights and Freedom of the individual was similar to other Caribbean territories with chapters on Fundamental Rights and Freedom which were greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). Lord Diplock in **Hines v R** [1977] AC 195, (delivered July 28, 1975) (p.5 para 4) an appeal to the Privy Council from a decision from Jamaica, observed the recent Constitution on the Westminster Model which includes a Chapter dealing with Fundamental Rights and Freedom imposed a fetter on the powers exercised by the Legislature, the Executive and the Judiciary.

[18] **The Charter of Fundamental Rights and Freedoms** (Act 12 of 2011) which repeal and replace Chapter III of the Jamaican Constitution on fundamental rights and freedom now provides in sec.16(2).

> *"In the determination of a person's civil rights and obligations or* ***any legal proceedings which may result in a decision adverse to his interests,*** *he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law." (emphasis supplied).*

[19] Therefore the framers of the Charter had in mind how this issue of the right to a fair hearing in proceedings other than a trial was treated by the Judicial Committee of the Privy Council and the European Court of Human Rights and expressly provided for this right to be guaranteed in our Constitution. It means every litigant in any legal proceedings, pre-trial, trial, or post-trial is entitled to a fair hearing.

[20] Section13(4) of the Constitution provides that Chapter III of the Constitution (i.e. the **Fundamental Rights and Freedom**) applied to all laws and bind the legislature, the executive, and all public authorities which have been interpreted to include the court.

The Test for Apparent Bias

[21] In order to determine if the fundamental right to a fair hearing is infringed or violated it must be shown that the judge or decision-maker was affected by some element of bias, prejudice, or partiality. The test of apparent bias of a judge or a decision-maker that warrant a judge to recuse or disqualify his or herself from sitting on a case was formulated in recent times by Lord Goff of Chieveley in **R v Gough** [1993] AC 646 at 673, [1993] 2 All ER742 at 740. He said:

> *"I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias on the part of the relevant member of the tribunal in question in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him..."*

[22] Lord Bingham of Cornhill CJ in **Locabail v Byfield** (supra) said this test of the House of Lord was binding and settled could be applied "provided" the courts personify the reasonable man "who is reasonably well informed". He adopted this formulation:

> *"' whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not and will not bring an impartial mind to bear on the adjudication of the case."*

[23] Lord Hope of Craighead in the House of Lords in **Magill v Porter** (supra) approved the Court of Appeal's formulation with what he described as a "modest adjustment" to read:

> *"... whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

[24] This is now the test which this House reviewed while the House declined to do in **R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)** [1999] 1 All ER 577, [1999] 2 WLR 272, HL. (c/f Morrison, JA, as he then was, discussion on the effect of bias in **The Police Service Commission, The Commissioner of Police, The Service Commission v Donovan O' Connor** [2014] JMCA Civ. 35, para [39] - [42].

The Rule of Automatic Disqualification for Bias

[25] It is appropriate at this point to consider the rule in **ex p. Pinochet (No. 2)** (supra). The rule is that a judge is automatically disqualified from sitting on a case on the ground of bias if he or she has a pecuniary (economic) or proprietary interest in the subject matter or outcome of the litigation which is now interpreted and extended to include the promotion of a cause (non-economic). This was the complaint against Lord Hoffman in the extradition appeal in the House of Lords in exp. **Pinochet (No. 2).** Their Lordships accepted that Lord Hoffman was promoting a cause, human rights as a director of a subsidiary charity company of Amnesty International (AI) who was joined as an intervening party in the extradition litigation against Ugarte Pinochet to be extradited to Spain for crimes against humanity. This was a ground for automatic disqualification for bias if there was no disclosure and the House of Lords set aside the order to extradite Ugarte Pinochet and thereby did not hold themselves bound to follow their previous decision.

[26] At this hearing of the application for leave for judicial review, counsel for the applicants commenced and grounded his application on **ex p. Pinochet (No. 2)** on the premise that once the learned Chief Judge of Parish Courts admits he had a conflict of interest after he ruled on the preliminary objection whatever his reason it

was a simple case that his decision was affected by bias and that was sufficient evidence and all that was necessary to grant leave for judicial review.

Oral Submission/Written response to Authorities – Bench and Bar

[27] There was an exchange between the bench and counsel for the applicants at the bar at this point on four aspects of his submission.

1. The facts of **ex p. Pinochet (No. 2)** were distinguishable from the presumed facts because there was no purported conflict of interest that the Chief Judge of Parish Courts was associated with a party who was promoting a cause (non-economic interest in the outcome of litigation.) Counsel concedes the facts of the instant application for leave were distinguishable but he contends the law or principle applicable was not distinguishable. He then cited the test of bias as to whether a fair minded observer with full knowledge of the circumstances would entertain a suspicion of bias on the part of the decision-maker. Counsel in her written response to authorities, filed on May 28, 2021, submitted the rule in **ex p. Pinochet (No. 2)** deals with automatic disqualification on the ground of bias while the instant application is concerned with a different rule of disqualification on the ground of apparent bias. She argued, counsel Mr. Wildman was confusing two separate rules. The applicable rule she said is the test whether the fair minded reasonable informed observer of the relevant circumstances of the purported conflict of interest would conclude the judge's decision was biased. I hold this is a correct view of the applicable law and the one I will apply to this application for leave for judicial review.

2. I posed the question to counsel for the applicant is it the proposition that if a judge denies bail to an accused in an application for bail before his trial does it mean the accused cannot have a fair trial of the criminal

charges against him by the same judge due to his prior adverse ruling in law. His response was that is not so. But in the instant application, the judge in question had a conflict of interest before the application. I must now say the example posed to counsel relate to allege conflict of interest that one claim does affect a subsequent trial whereas his claim is one of conflict of interest that affects a prior hearing. The problem which arises in the latter claim is different although both claims are based on the ground of bias and complaint of a violation of the right to a fair hearing.

3. The disclosure of the judge in paragraph 15 of his affidavit evidence filed May 17, 2021 that the potential conflict of interest he had in his mind was that he and the applicant Ruel Reid attended Munro College in the parish of St. Elizabeth and the applicant was senior to him and was Head Boy does not show any adverse or unfavourable position towards the applicant. Mr. Wildman's response was the disclosure makes the conflict of interest a stronger case for disqualification on the ground of bias and the case is a simple one. It is here that one detects that Mr. Wildman is relying on automatic disqualification on the ground of bias. But I accepted that this rule in **ex p. Pinochet (No. 2)** is not applicable in this application but rather the rule of apparent bias.

4. The conflict of interest relates solely to the applicant Ruel Reid but he did not file any affidavit but only the applicant Fitz Pinnock filed an affidavit about conflict of interest affecting his co-applicant. Mr. Wildman's responded, the applicants are jointly charged and their liabilities are joint and several, meaning individual and the preliminary ruling affect both of them. There is merit that both applicants are affected by the preliminary ruling and each of them has sufficient interest to apply for leave for judicial review.

Counsel for the Respondent submitted that there was no evidence in any affidavit by the applicants of any conflict of interest by the judge that amount to bias when the judge heard their application. Neither did the applicants allege any animosity between themselves and the judge. The disclosure by the judge is that he attended the same school some years before with the applicant Ruel Reid, was not averse to him and counsel reasoned there was no evidential support that the denial of the preliminary application was affected by bias. She argued further that the preliminary objection was based and decided on a point of law.

Conflict of Interest/search

[28] The first of five applications in **Locabail** (supra) for permission for leave to appeal on the ground of bias the court of appeal indicated that a solicitor deputy judge should conduct a conflict search in his law firm to determine if any party in the trial assigned to him was represented by his firm. The applicant raised late in the hearing that the judge's firm acted for the other party in the case. The judge had no knowledge of this and the Court of Appeal found it was a large firm of many solicitors and the judge could not reasonably know about this case. They held applying the fair minded reasonable informed observer test there was no bias on the part of the judge and refused leave to appeal.

Disclosure/waiver

[29] A judge has a duty to disclose a conflict of interest he or she may discover after a conflict of interest search in advance of a hearing or as soon as it is brought to his attention. A party may consent to the judge hearing or continue hearing the case or may exercise the right to object to the judge to recuse him or herself from the case. Then the judge is obliged to consider that objection in light of the fair minded reasonable informed observer test and take the appropriate decision.

[30] Counsel for the Respondent, the Chief Judge of Parish Courts submitted the first duty of the judge is to sit and hear the case assigned to him and not to entertain any tenuous or frivolous application for recusal. (para 13 written response) Her view is that the instant application on the ground of bias was tenuous and frivolous and without merit in light of the nature of the disclosure of the conflict of interest that the judge and the applicant Ruel Reid attended the same school. (para 15 written response) She referred to the fourth application for permission for leave to appeal in **Locabail** which was **Williams v Inspector of Taxes and Others. (para 3-6 of written response).** There the Court of Appeal held that no right-thinking person knowing of the connection (the claimant and the chairman worked in the same department when he was a junior staff over 30 years before the hearing) of the chairman of the panel of the Employment Appeal Tribunal who dismissed her claim for sexual harassment against a staff of the Revenue Department on the basis she refused to cooperate with the investigation in her complaint.

[31] A non – exhaustive list of factors which may not be soundly base to give rise to a real danger or possibility of bias in a judge was enumerated in **Locabail** (para 25). They are:

(a) Religion, (not applicable in this application)

(b) ethnic or national origin, (not applicable in this application)

(c) gender, (not applicable in this application)

(d) age, (not applicable in this application)

(e) class, (not applicable in this application)

(f) means, (not applicable in this application)

(g) sexual orientation, (not applicable in this application)

(h) background or history, (may be applicable in this application)

(i) or that of any member of the judge's family.

(j) or previous political association, (not applicable in this application)

(k) or membership of social or sporting or charitable bodies, or Masonic association, (not applicable in this application) (c/f **Meerabux v the Attorney General of Belize** [2005] UKPC p.12])

(l) or previous judicial decisions, (may be applicable in this application, see **Linton Berry v DPP and Others** UKPC 5 del. Feb. 28, 2000)

(m) or extra-curricular statement, in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers, (not applicable in this case)

(n) previous receipt of instructions to act against any party, (not applicable in this case)

(o) or membership of the same Inn, circuit, local Law Society or chambers (may be applicable as it is similar to (h))

[32] This is a wide spectrum of social and personal activity. The Court was careful to preface this list by the caution that the nature of the decision that the judge has to make and the facts and circumstances will determine the final outcome if a judge is disqualified for apparent bias. I may add it is not a list of factors that relate to judicial conduct generally for which there is guidance by a judicial code of ethics.

[33] **Lacobail** listed also some factors that can raise a real danger or possibility of bias in a judge hearing a case:

(a) Personal friendship or animosity between the judge and any member of the public involved in the case where credibility is a vital issue

(b) Where the judge made any unbalanced comment or statement in the course of a hearing that cast doubt on his impartiality,

(c) Any other good reason that may cause doubt on the impartiality of the judge.

(d) If there are real grounds for doubt the judge should recuse his or herself.

(e) If for good reason the judge feels personally embarrassed in hearing a matter he or she recuse themselves from the case before any objection is raised. (para 20 **Locabail**).

Finding and Analysis

[34] My duty is:

a) to ascertain the facts and circumstances of the applicants' complaint at this stage; and

b) to relate the test of apparent bias to my provisional findings of the facts and circumstances; and

c) decide whether permission for judicial review should be granted or refused.

I am obliged to consider:

a) the nature of the decision that is challenged by the applicants,

b) the nature of the conflict of interest in issue,

c) the applicants 'statement and views of their complaint which is relevant but not decisive; and

d) also the respondents' statement and views of the complaint which is also relevant but not decisive.

[35] My provisional findings, as this is an interim application, on the affidavit evidence:

1. The Chief Parish Judge had a conflict of interest at and before he heard the preliminary application of the applicants at the PCMH. (para 13 and15 of his affidavit)

2. He did not disclose the nature of the conflict at or during the PCMH (para 15 of his affidavit).

3. He described his position as a potential conflict of interest (para. 10). Nonetheless, it was a conflict of interest. There is a conflict in the affidavit whether he disclosed this only after he refused the preliminary application or during the hearing. I am unable and not constrain to make a finding of this for the reason that what matters in this application is the nature of the conflict was not disclosed until after the Chief Judge of the Parish Courts ruling at the PCMH. It was disclosed for the first time on May 17, 2021 (para 10 of Affidavit, May 17, 2021).

4. The Chief Judge of the Parish Courts was alert to and wanted to ensure that the applicants obtain a fair trial for the offences for which they were charged and was disclosed in advance of that trial he would not be the trial judge due to his conflict of interest, the nature of which was undisclosed at the time he ruled on the preliminary objection. (para 10 and 13 of Affidavit). The concern of the judge for fairness as a result of his conflict of interest was more directed to the trial than the hearing of the preliminary objection at the PCMH.

5. There was a general discussion in the Return Court about the transfer of the case for PCMH to another courtroom and counsel for the applicants made utterances that he wanted the hearing to remain before the Chief Judge of the Parish Courts. The affidavit of Fitz Pinnock in response to the affidavit of Chester Crooks, May 19, 2021

though it denies any discussion of conflict of interest does not particularly address any exchanges about the transfer to another court. I do not find that such exchanges amount to disclosure of the nature of the judge's conflict of interest resulting in a consent and waiver by the applicants of any objection for the judge to hear the preliminary objection at the PCMH. Lord Bingham of Cornhill opined in **Locabail** "any waiver must be clear and unequivocal, and made with full knowledge of all facts relevant to the decision whether to waive or not ..." (p.73. para b). Morrison J.A., as he then was, adopted this statement of waiver for apparent bias in **Winston Finzi and Mahoe Bay Company Limited and JMMB MERCHANT BANK LIMITED** [2015] JMCA App 32, para 19.

6. The judge was labouring under a conflict of interest at the time he commenced the preliminary hearing which was sufficient for him to announce in the interest of fairness in advance of the trial. However, he did not consider it was of the same force to announce before the hearing the preliminary objection. Even when he disclose the nature of his conflict of interest it was directed to the trial and not the hearing It would appear he may not have considered that there should be equal weight to the right to a fair hearing at the PCMH stage of the criminal process. The fact that the preliminary objection concerned a matter of law does not diminish the benefit to the right to a fair hearing at the PCMH stage. These are matters that are fit for a reviewing court to investigate.

[36] A fair minded reasonable and informed observer may conclude the learned Chief Judge had some unexpressed personal embarrassment that weighed heavily on him from very early in the day in this matter. At the same time, his disclosure of the nature of the conflict of interest reveals an innocuous past personal association with the applicant Ruel Reid. I agree with counsel for the judge in the absence of evidence to the contrary the reasonable inference is there was no bias in the judge

when he heard the preliminary objection. But there is another dimension and it is there was uncertainty as to the nature of the judge's conflict of interest up to the time of the preliminary hearing and a reasonable and informed observer knowing this background may find there was doubt whether the judge was personally embarrassed in hearing the preliminary point of law and he ought to have recused himself. Also, the fair minded reasonable informed observer may find there was doubt about the judge's appreciation or due regard to the effect his conflict of interest could have on the fundamental right to a fair hearing at the pre–trial stage. This is another matter amenable to the jurisdiction of a reviewing court. As this is an interim application and not a substantive hearing my findings of facts are provisional. They are not any adverse comments on the judge's good faith. He showed he desired, a fair disposal of the trial. There may be an error of judgment in how he treated or failed to treat his conflict of interest at the stage of the hearing of the preliminary objection. These are facts and circumstances for a review court to determine in light of the standard of the fair minded reasonable and informed observer.

Arguability

[37] In view of the facts and circumstances, I have found and the fundamental nature of the preliminary objection and implication of the protection of the fundamental right to fair hearing the applicants have an arguable complaint that the respondent had a conflict of interest before he heads the preliminary objection and a fair minded reasonable and informed may conclude, the effect of this, even when disclosed after the hearing, it is possible that the Chef Parish Court Judge refusal of the preliminary objection was biased.

Burden of Proof

[38] This argument is not speculative or academic or only a potential one. It is not fanciful but real. It has a prospect of success. They have satisfied me on a balance of probability that it is an argument fit to be heard by a reviewing court.

Discretionary Bar

Delay in commencing the application for leave for judicial review may result in the refusal of the application. There is no delay in this application. The application for judicial review was filed within six (6) days of the Judge's refusal of the preliminary objection. The application is in time. Also, if leave for Judicial Review will not produce a practical result the court may also refuse the application at this stage. So too the availability of an alternative remedy is likely to cause the judge to exercise his/her discretion to refuse the application.

Alternative Remedy

[39] Campbell J in **Regina ex parte Livingston Dwayne Small v Comm. of Police and the Attorney General** CL 2003/HCV 2362 del. Sept. 2006 applied these principles of discretionary bar to the facts of an application before him. He refused leave for Judicial Review of the applicants to commence proceedings for judicial review (p.11-14), among other things, for the delay. This was an application for leave for judicial review by a student constable of police in training .at the police academy that was dismissed for misconduct. Then the learned judge examined the basis for the discretionary bar of alternative remedy. He said at para. 15 adapting the words of Lord Oliver in **Leach v Deputy Governor of Pankhurst Prison** (1988) AC 533 of 580c

> *"An alternative remedy ... may be a factor, and a very weighty factor, in the assessment of whether the discretion ... to grant or refuse*

> *judicial review should be exercise, (**R v Chief Constable of Maryside Police ex parte Coverly** (1986) 1 All ER 257."*

[40] Straw J. referred to and accepted Campbell J's reasoning of the basis for an alternative remedy for judicial review in **Malica Reid v INDECOM, the Attorney General, DPP, Isaiah Simms and Eric Daley,** CL. 2011 HCV 00981 del March 18, 2011 at para 19-20:

> *"The adequacy of the alternative remedy to deal with the question that is raised in the given case is a vital consideration. If the alternative remedy is not suitable or effective, then there will be no bar to the Applicant seeking relief by way of judicial review ..."*

[41] The learned Judge went on to apply the following test used by Beatson J in **Regina (on an Application by J D Whetherspoon plc) v Guilford Borough Council 2**006 EWHC 815 admin para 90:

> *"The test of whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the "adequacy" "effectiveness" and "suitability" of that alternative remedy ... it was said that the test can be boiled down to whether the real issue to be determined can sensible be determined by the alternative procedure and in **R v Newham LBC ex p R** [1995] ELR 156 at 163, that is whether "the alternative statutory remedy will resolve the question at issue fully and directly". ..."*

The applicants plead that there was no alternative remedy and the respondent did not contest this claim.

Existing Remedy/Substantive Trial

[42] The Judicial Committee of the Privy Council in **Sharma** reasoned the initial grant of leave for judicial review was not correct because the complaint of Chief Justice Sharma could be addressed by an application before the criminal trial for a stay of prosecution for abuse of process or during the criminal trial itself. As I showed Plea and Case Management Hearings (PCMH) are part of the criminal process. (See paras. [3] - [6]). This process was the very one the applicant used for the preliminary objection. It would be a futile effort to file another application to settle

this complaint in the Parish Court. I do not see this course practical. I do not believe a grant of leave for judicial review would disregard the concern of minority judgment in **Sharma** that the criminal process should not be fragmented. Then is there no remedy? Does this mean the application for leave ought to be dismissed? Counsel for the Chief Judge of Parish Courts answer is "Yes".

Judicial Review and or Appeal

[43] In her oral submission counsel argue the applicants' grounds for judicial review (para 3 to 8) in The Notice of Application about the judge's refusal of the preliminary objection were matters of law which were appropriate for an appeal and not for judicial review. Counsel argued there is ground for the court to decline its discretion to permit leave for judicial review. Lord Hope of Craighead in **Magill v Porter** (supra.) held that if the auditor committed an error of law by applying the wrong test of apparent bias to recuse himself on the ground of bias from hearing the objection of local government counsellors of Liverpool City Council who were assessed for a surcharge in that the auditor made at a press conference about their liability. The court of Appeal stated if the auditor made an error of judgment then that was the kind of mistake that can be corrected on an appeal and not for judicial review. This is judicial support for counsel's submission ordinarily a complaint of a ruling on a point of law should be taken on appeal. But the issue of conflict of interest and bias surfaced in relation to this ruling on the preliminary point of law. I am obliged to examine the applicant's recourse to an appeal of their complaint.

Issues arose in **William Andrew Chang v The Commissioner of Taxpayer Appeals (Income Tax) [2016] JMCA Civ. 16, paras 70-75** whether a trial before the Revenue Court was a trial de novo in which procedural defects in the hearing at first instance may be cured. The Court of Appeal approved Anderson J. decision that this was the correct rule. Morrison J.A., as he then was, then considered the issue in **Tannadyce,** an income tax case from Canada whether a taxpayer should be

allowed to maintain a challenge by way of judicial review to an assessment to tax raised by the Commissioner or be confined to the statutory right of appeal. The learned judge applied the principle, in relation to the effect of rights of appeal on claims of breach of rights to natural justice, if an appeal is on the merits by way of *de novo* hearing then the appeal may be able to provide all that procedural fairness requires.

[44] In **Lloyd and others v McMahon** and **Magill v Porter** each of the counsellors who were aggrieved by the surtax assessment of the respective auditors had a right of appeal (Local Government Act, 1988, Sec. 20(3)) to the Divisional Court of the Queen's Bench which right they exercised. The Divisional Court had jurisdiction to rehear the complaint which includes hearing the evidence and grants any certificate the auditor could give. In other words, the court had original and appellate jurisdiction.

[45] In the instant application which was in the criminal jurisdiction of the Corporate Area Parish Court, a person has a right of appeal to the Court of Appeal in a case tried by the Parish Judge on indictment or information in virtue of special statutory summary jurisdiction. (sec. 293 Judicature (RM) Act, c/f sec. 22 Judicature (Appellate Jurisdiction Act)).

[46] Under the Court of Appeals Rules, 2002 an appeal shall be by way of re-hearing (R.1.16).

[47] On the civil side in the Parish Court, an appeal shall lie from the judgment, decree, or order of the Court in all civil proceedings on appoint of law or evidence and on grounds similar to grounds to appeal in the Supreme Court in the criminal and civil jurisdiction. (s.251 of Judicature (RM) Act, c/f s. is Judicature (Appellate Jurisdiction Act) The Court of Appeal has the power to affirm, reverse or amend an order. No provision in the Resident Magistrates' Act gives a right of appeal to an aggrieved person such as the applicant against a decision of the Parish Judge. A person would have to get permission to appeal. The five applications in **Locabail**

were for permission to appeal. The procedure for permission to appeal and the right to appeal is not the same. Time for filing an appeal and the process for permission to appeal require the applicant to satisfy more conditions. (R.1.8 Court of Appeal Rules, 2002). These rules provide the time between filing the appeal and hearing in the court of appeal is fifty-six (56) days. This is on the assumption there is no other application before that court for leave to extend time to file appeal and for leave for permission to appeal. In summary, the applicant can appeal the refusal of the preliminary objection but they do not have a right of appeal. It may have been timely; to have provided for the right of appeal from decisions in proceedings apart from trials in the criminal or civil jurisdiction in the Parish Court the moment Sec.16 of the Charter of Rights separately guaranteed the right to a fair hearing to these proceedings. An amendment to the Judicature (RM) Act could have achieved this desired result.

[48] In the absence of this the applicants if they were to appeal now to the Court of Appeal would be out of time. They would not obtain the benefit of a court of a superior jurisdiction from the one that made the initial decision correcting any defect or alleged breach of a fundamental rule of natural justice by de novo hearing. At the same time if this court finds they have arguable grounds for leave for judicial review and then decline to exercise its discretion to grant leave the applicants would be deprived of all opportunity to have a court enquire into their complaint.

[49] I accept the principle of the rule of law that a person or persons who hold a high public office should not be singled out for a more generous exercise of the discretion of a court because of that office. Equally a person or persons should not be singled out for a more restrictive exercise of a court's discretion because of serious charges alleged to have been committed in that office. All persons are entitled to equal treatment before the law.

[50] I consider further the disadvantage of judicial review proceedings causing delay and increased costs in the criminal trial by multiple action claims and the public interest in the efficient administration of justice and the maintenance of public

confidence in the integrity of the administration of justice. Where a litigant may enforce his or her rights before a court of original jurisdiction and on appeal may result in what Forte J.A., as he then was, termed "misuse of the court process". Forte J.A. sitting on a five-member Court of Appeal in **R v Noel Samuda SCCA NO. 134/96. Delivered December 18, 1998,** dealing with a preliminary objection to the jurisdiction of the court of appeal in the hearing of the constitutionality of the sentence of corporal punishment of whipping by the tamarind switch, said this problem can be solved by adjourning the original application pending the appeal. He implied the problem is not solved by excluding the right to access a court and in that case the right to the court of appeal. However, I balance the public interest against the fundamental and protected right of the individual to a fair hearing by an independent and impartial court established by law. The public also have an interest not only in the efficient administration of justice but that justice should be administered fairly to all. My discretion is in favour of ensuring the risk of a biased hearing does not infringe this solemn right.

Disposal

[51] For these reasons, I explained, I now grant the applicants' application for leave for judicial review. No order as to costs.

Courtney Daye

Daye J:

June 11, 2021

Post Script

The perfected orders are stated below:

1. Leave to apply for Judicial Review is granted.
2. This grant of leave to apply for judicial review operates as a stay of the criminal proceedings (R. 56.4 para. (9))
3. The claimants to file a fixed date claim form and supporting affidavits within fourteen days of the date hereof, that is, of the order for leave (R.56.4 para. (12))
4. First hearing of the fixed date claim form is fixed for September 29, 2021 at 2:00pm for one (1) hour. (R.56.4 para. (11))
5. The application for Judicial Review must be made to a Full-Court. (R. 56.8 para (1))
6. Claimants' attorney-at-law to prepare, file and serve order.
7. No order as to costs.

Daye J:
June 15, 2021