

JERSEY / JUDGMENT

AB v AG (Capacity) [2020]

JCA 094 (29 May 2020)

[2020] JCA 094

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Court of Appeal 29 May 2020 Before : James McNeill, Q. C. Clare Montgomery, Q. C., and Helen Mountfield JJA., Q. C. Between AB Appellant And HM Attorney General Respondent The Appellant appeared in person The Attorney General did not appear

judgment

Mountfield JA (With whom McNeill and Montgomery JJA agreed):

Introduction

1. This is a renewed application by the Appellant on his application that Sir Michael Birt JA should have recused himself from sitting as one of the judges on the hearing of his appeal regarding an application to appoint a delegate under article 24 of the Capacity and Self-Determination (Jersey) Law 2016 ("the 2016 Law"). The basis for the application was a submission that there was a real possibility that Sir Michael's being a member of the panel might lead to bias against the Appellant, and so he should not sit as one of the judges in an appeal to which the Appellant was a party, which was due to be heard by the Court of Appeal in the week commencing 23 rd March 2020. The other judges scheduled to sit were Montgomery and Mountfield JJA. On 28 th February 2020, AB v AG

[2020] JCA 038A Sir Michael handed down a judgment in which he declined to recuse himself, and the Appellant renewed his recusal application to the full court. The Attorney General, the Respondent to the appeal, made no submissions on the renewed application. 2. In fact, the substantive appeal could not be heard on that date owing to the commencement of the Covid-19 lockdown period, and is now listed to be heard in July 2020. The background to this renewed application 3. The procedural history is as follows. The Appellant is the father of X, who is a man in his twenties and lacks capacity to manage his property and affairs. X's mother, from whom the Appellant is now separated, has been appointed sole delegate for the purposes of signing a lease on his behalf under the 2016 Law, and the Appellant wishes to challenge that decision. 4. The reason that this is material now is that X's current living arrangements - entered into before the 2016 Law came into force - had to cease in 2019. Consequently, a new property had to be found for him to reside in, with appropriate care. His mother favoured one property; the Appellant

expressed safety concerns over this property and favoured another. 5. In the absence of agreement between X's parents, this matter came before the Royal Court (Le Cocq , Deputy Bailiff with Jurats Olsen and Averty) (unpublished) as a matter of some urgency. On 26 th April 2019, the Court appointed X's mother as his delegate under the 2016 Law for the limited purposes of signing a lease on the property, and also decided that he should reside at the property which she favoured. That is where X now resides and is cared for. 6. On 7 th October 2019 the Royal Court (Commissioner Clyde-Smith OBE with Jurats Olsen and Pitman) (unpublished) sat to consider the wider issue of who should act as delegate to manage X's property and financial affairs more generally. His mother submitted that she should be sole delegate; his father submitted that he and X's mother should be joint delegates, though he has asked us to note that he was also willing to be X's sole delegate. 7. On the same day, the Royal Court ruled that X lacked capacity within the meaning of Article 24(1) of the Law. The Court appointed the mother as sole delegate to manage X's property and affairs. It directed that she should keep the Appellant informed in relation to these matters. X's mother has been acting as sole delegate of X since the October judgment. 8. The Appellant has appealed against the October judgment, and it was that appeal which was due to be heard on 23 rd March 2020. He is acting in person and has sought 34 orders from the Court of Appeal. In short, he wishes the Court of Appeal to order that he, and not X's mother, should be X's sole delegate under the 2016 Law, both for his property and (financial) affairs, but also his health and welfare. His notice of appeal covers a number of matters which would not appear to have been before the Court at the October 2019 hearing, including the substance of the Appellant's safety concerns as to the property in which X is currently living. It also contains submissions criticising the fairness of the hearings in April and October 2019. These are matters which will have to be considered in due course. 9. However, the sole issue before this Court today is whether Sir Michael was right to conclude that there was no basis upon which he ought to have recused himself from sitting on the Appellant's appeal. The legal test on a recusal application 10. The Appellant submits that all litigants are entitled to enjoy a fair legal system, and this is obviously correct. All judges promise to dispense justice equally and fairly, and the starting presumption is that they will do so. However, there are circumstances, where there is a 'real possibility' that a particular judge may appear biased, that he or she should not sit. Only in those circumstances of apparent bias can a judge be asked to recuse him or herself from sitting. 11. 'Apparent bias' is disclosed if there are facts from which a fair minded and informed observer, having considered them, would conclude that there was a real possibility that the tribunal was biased (Porter v Magill

[2002] 2 AC 357 at 103). 12. There are two elements to this test. Firstly, an allegation of a real possibility of bias must be backed by facts, not mere apprehension. A tribunal considering an application for recusal for bias must identify the particular facts upon which reliance is made. 13. Secondly, the person to whom the 'real possibility' of bias should be apparent from those facts is a hypothetical, dispassionate, fair minded and informed observer. This person was described by Sumption , Commissioner, in *Syvret v Chief Minister*

[2011] JLR 343 (quoting Lord Hope in *Helow v Home Secretary*)

[2008] 1 WLR 2416) as someone who views the matter with some detachment, and reserves judgment until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, but nor will she shrink from the conclusion that there is a real possibility of bias, if this can be justified objectively by "things that [the impugned judge or judges] have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially". 14. She will form her judgment on this matter only when she has taken the trouble to inform herself on all relevant matters, and put them in a fair and complete overall context, recognising that this is part of the material which she must consider before passing judgment. 15. We make two observations on this test in the light of the Appellant's submissions. Firstly, the test is whether there are facts from which the hypothetical fair minded and informed observer would conclude that there was a real possibility of bias, not merely facts from which such a person might reach such a conclusion. Whether or not a reasonable person would apprehend such a genuine risk is the issue for this court, and the burden of proving the facts and the conclusions a fair minded and informed observer would draw from them rests on the person making a recusal application. 16. Secondly, we agree that it is important that the possibility of removing a judge for apparent bias exists. It is also important that the approach to considering whether any application for recusal is well-founded should be that of the fair minded external observer (in the Appellant's language 'an onlooker'), rather than the perspective of a person involved - whether as a complainant or person being complained against. But it is equally important that this test is applied rigorously and carefully, and that a judge is not removed merely because one party expresses unease about him, or in circumstances where the test in *Porter v McGill* is not made out, following such scrutiny. It would be as harmful to the equal dispensation of justice if judges were to be removed from tribunals when the test for apparent bias had not been made out, as it would be if they were not removed in circumstances where it had. Whether or not alternative judges are available is irrelevant. The test is not whether it is 'necessary' for the impugned judge to sit, but whether the person making a recusal application has established facts from which an external onlooker, acting in a fair and well-informed way, would conclude that there was a real possibility of bias. 17. The reason why it is so important to state and apply the recusal principles with such care was explained by the English Court of Appeal in *Dobbs v Triodos Bank NV* [2005] EWCA Civ 468 at para 7, and approved in this jurisdiction by Lord Anderson JA sitting as a single judge of this Court in *Bisson v Minister for Infrastructure*

[2019] JCA 181 : "It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses he has in some way been discriminated against. But it is important for a judge to resist the

temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant - whether it be a represented litigant or a litigant in person - criticised them [which sometimes happens not infrequently] we would soon reach a position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised - whether the criticism was justified or not". 18. In his judgment of 28th February 2020, *AB v AG*

[2020] JCA 038A in paragraphs 11-20, Sir Michael surveyed the well-established caselaw on the test for apparent bias, both in Jersey and in the courts of England and Wales. He adopted, with approval, the helpful summary of the law given by Lord Anderson JA sitting as a single judge of the Court of Appeal in *Bisson*, and so do we. 19. Sir Michael relied upon observations of this Court in *Syvret* to support his view that the requirement that 'justice must be not only be done, but seen to be done' is as much part of English law on an appearance of bias (as applied in Jersey) as it is a characteristic of a fair tribunal under Article 6 of with the European Court of Human Rights' caselaw. That is, the test under the law of England and Wales and Jersey is compatible with the observations of the European Court of Human Rights in the cases of *McGonnell v United Kingdom* (App No 28488/95) and *Meznaric v Croatia* (App No 71615/1), to the effect that the court must both be subjectively free from bias and that there must be sufficient guarantees to exclude any legitimate doubt in this respect. The test is whether a fear of bias could be held to be justified, by a dispassionate, informed but objective outside observer. 20. Sir Michael accordingly rejected the submission that the test for a fair hearing under Article 6 modified the test in *Porter v Magill*, describing them (at paragraph 19) as " simply two different ways of saying the same thing". We agree and have applied this test to our consideration of whether Sir Michael was right to refuse to consider that there was a real possibility of bias on the basis of the factual submissions put to him on this matter. The basis for the submission that there was an appearance of bias 21. On his recusal application, the Appellant submitted that a reasonable and fair minded and informed observer would conclude that there was a real possibility that Sir Michael would be biased against him were he to form part of the appellate court determine in hearing his appeal against the October 2019 Royal Court decision that X's mother, and not the Appellant, should be X's delegate for relevant purposes. 22. The Appellant relied on three principal facts as the basis for his submission, that viewed objectively, Sir Michael had said or done things, or formed associations, which might make it difficult for him to judge the case before him impartially. First, that Sir Michael is the patron of a Jersey charity called "My Voice". Second, that Sir Michael is a former Bailiff, and is a current member of the judiciary in Jersey. And thirdly, that he was involved, as Attorney General, in the case of *McGonnell* in the European Court of Human Rights. We have considered each of these facts carefully, and informed ourselves as to the issues in the Appellant's appeal so that we can decide whether any of them may have given rise to associations which may make it

difficult for Sir Michael to judge the Appellant's appeal against the October 2019 appeal impartially. My Voice 23. My Voice is a Jersey charity which offers help to people with mental health issues, including those who lack capacity, by providing a trained mental health advocate - known as an Independent Capacity Advocate (ICA) in certain circumstances to help such people in their dealings with Health Services or Social Services. It receives an annual grant from the States of Jersey which help fund its work, as well as charitable donations. 24. The circumstances in which an ICA may be appointed are set out in the 2016 Law. Section 63 of the 2016 Law sets out the functions of an ICA, which, in broad terms, are to make sure that a court has before it information and analysis relevant to determining an incapacitated person's best interests, and in ascertaining what, if that person had capacity, would be his wishes and feelings in relation to particular matters, or would be the beliefs and values likely to influence him. 25. We do not consider that Sir Michael's role as a patron of this charity per se would cause a fair minded and informed observer to conclude that he might be biased one way or another on an appeal which turned on which of two parents ought to be the delegate for X, as a person who lacks capacity. That remains our view even if the appeal were to go so far as the issue of whether the power as delegate should be extended to cover X's health and welfare as well as his property and affairs. 26. First, My Voice is not an advocacy body in the sense of campaigning for a particular approach to the issues of people who lack capacity. There is no evidence before us that My Voice as an organisation has expressed a view or taken a position which might bear upon the appeal. Rather, it appears to be a charity which provides the services of trained persons who will assist such people in ensuring that their interests are properly represented in cases where relevant information or analysis may otherwise not be brought to bear. 27. Second, even if it were, this is not a case where such an approach might have a bearing. It is not (for example) an appeal or application by way of judicial review brought by a person lacking capacity against the decision of a public authority, where the association of a judge in a charity advocating (say) resources for, or a particular approach to, the interests of people lacking capacity might raise as a question as to a real possibility of bias or sympathy for a particular point of view. 28. The Appellant suggested that if, at some stage, an ICA were appointed for X, then an outside observer might fear that Sir Michael would favour a point of view advanced by such an ICA because that person would be paid by the charity of which he was a Patron. We do not think a fair minded external observer would have such a fear. In any event, while we accept that X is a person for whom an ICA may conceivably be appointed at some future juncture, we are satisfied that Sir Michael was right to conclude that the subject matter of the appeal from the October 2019 decision could not, however broadly stated, be an issue where there was a real possibility of an ICA being appointed on X's behalf. 29. The appeal is not concerned with the question of whether or how X's liberty may be restricted by a Minister, so it is not a case where Article 51 of the 2016 Law is in play, and not one where the Court's power to appoint an ICA under Article 57 or its inherent jurisdiction would arise in order to ensure that X's best interests in relation to his liberty are properly considered. Nor is this a case where anyone

- a Minister or anyone else - is making a proposal for serious medical treatment in relation to which X lacks capacity to consent. So, it is not a case where an ICA might be appointed under Article 64 of the Law. Finally, the Appellant's forthcoming substantive appeal does not concern a situation where a person having responsibility for X's care or treatment proposes to make arrangements for the provision of accommodation for him in a hospital or approved care home, which is a situation where an ICA may be appointed by a Minister or person with care for a person lacking capacity under Article 65 of the 2016 Law. 30. It is true that if such a question were to arise in future, and a person had been appointed as X's delegate in this respect, that person might be regarded as a person whom it would be appropriate to consult in regard to such a question, and this might inform any subsequent decision of whether an ICA needed to be appointed. But that is very far removed from the issue upon which the Court of Appeal of which Sir Michael may form a part will be asked to reach a judgment. The substance of X's treatment will not be a question before the Court of Appeal when the Appellant's appeal against the October 2019 decision is heard. The issue on that appeal will be whether or not the Royal Court erred in appointing X's mother, and not the Appellant, as his delegate. 31. Accordingly, applying the relevant test, we do not consider that Sir Michael's role as a patron of My Voice could possibly be thought by an independent fair minded observer who had informed himself as to the live issues in the appeal, to cast doubt on his impartiality as an arbiter of it, or give rise to any reasonable apprehension of bias on his part in relation to it. Sir Michael's position as a former Bailiff and member of the Royal Court 32. Sir Michael was Bailiff from 2009 - 2015 and has sat regularly as a Commissioner of the Royal Court since his retirement as Bailiff. He has been a member of the Jersey Court of Appeal since 2000 (apart from a period of a week between his retirement as Bailiff and re-appointment to the Court of Appeal). 33. The Appellant submitted that this constituted an institutional link with the Royal Court and its members which was so close that he would be psychologically subject to 'ingroup favouritism' which would predispose him to reject an appeal against decisions reached by members of that Court, who would inevitably be well known to him. He characterised this as a structural or institutional criticism of the fairness of the structure of the Jersey courts. The second paragraph of his grounds of appeal reads as follows: "The Human Rights (Jersey) Law 2000 identifies the need for a fair hearing and it is well established that "not only must justice be done; it must be seen to be done" (R v Sussex Justices, McCarthy, 1924) which has since been endorsed by the ECHR. The Appeal Court being entirely composed of members who sit variously as the inferior number, and associate freely, creates a real and substantial possibility of 'in-group bias' and/or 'ingroup favouritism' which are well established phenomena within the realms of psychology. Given that there should be 'no bias' it is axiomatic that even a slight sub-conscious or conscious bias can change the starting point of any decision. As such, it is difficult to find an instance where the Court of Appeal in the Island of Jersey can regard itself or expect others to objectively consider the Court to be truly impartial and truly fair. Islanders are entitled to courts that put justice first and where justice is seen to be done. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge (including Jurats as judges of fact) in respect of whom there is a

legitimate reason to fear a lack of impartiality must withdraw. In addition to ensuring the absence of actual bias, courts must remove any appearance of partiality to promote the confidence which the courts in a democratic society must inspire in the public (in the case of *Meznaric v Croatia*, The European Court of Human Rights 2005)." 34. The Appellant based this criticism, in particular, on a concern that one of his grounds of appeal was a submission that the Royal Court had acted unfairly and in breach of Article 6 ECHR (in April as well as October 2019) by failing to give him enough time to make his submissions, and by treating them with less respect than those made by a professional advocate. He said that a person who sat regularly in the Royal Court would be prone to favouring views expressed by one of that group and might not be considered impartial when hearing an appeal from a decision made by them. 35. Sir Michael rejected this institutional criticism as a basis upon which a fair-minded and informed observer would conclude that there was a real possibility that a tribunal of which he was a member would be biased against an Appellant. He was right to do so. 36. As Sir Michael pointed out, the submission that all the judges of the Court of Appeal sit or have sat as members of the Royal Court is factually incorrect. The majority of members of the Court of Appeal sit only in that Court, and come from England and Wales or Scotland. Nonetheless, if it were the case that the fact of any single judge sitting or having sat in the Royal Court gives rise a real possibility of bias, then that would preclude any such person as sitting on an appeal from a decision of the Royal Court. That is so because, as Sir Michael properly acknowledged at paragraph 46 of his judgment, the test of apparent bias must be applied to each individual judge on a court, and if one judge in a full panel of three should have recused himself on grounds of apparent bias but fails to do so, the whole court will fail the test. 37. However, we reject the suggestion that a judge who sits both in the Royal Court and the Court of Appeal is institutionally at real risk of being biased against Appellants merely because of a psychological tendency to prefer the judgments which his colleagues below have already reached. If that were the case, then in the higher echelons of almost every judicial system in the world, especially in small jurisdictions like Jersey, appellate judges would have to recuse themselves from almost every decision because they were acquainted with many of the judges in the courts below. It is part of the judge's role to analyse a case based on the legal arguments advanced, and not the identity of the judge or judges below. 38. We do accept that the appearance of independence is important. However, the mere fact that two judges are acquainted or colleagues, or even share the same office is insufficient to give rise to a real risk of bias. We contrast the case of *Findlay v UK* (1997)

[1997] ECHR 8 in which the convening officer who was central to the prosecution in a court martial was senior in rank to the members of a court martial, and could vary its sentence (which did breach the Article 6 right to a hearing by an independent and impartial tribunal) with the situation in the case of *Steck-Risch & Others v Liechtenstein* App No 63151/00, upon which the Appellant relied. 39. In *Steck-Risch*, litigants who had lost a case concerning land zoning before the Liechtenstein Administrative Court appealed to the Constitutional Court. Liechtenstein is a small jurisdiction with a part-time judiciary whose members also practise as lawyers. One of the judges on the Constitutional Court was a

member of the same law office as the judge whose decision was being appealed, but the Strasbourg Court held that this did not give rise objectively justified concern that the Constitutional Court did not constitute a fair and impartial tribunal. The operative part of the judgment is at paragraphs 38-50. The European Court of Human Rights held that in the absence of any formal professional, financial or hierarchical dependence, the mere fact that two judges might form part of the same law office did not mean that an appellate tribunal presided over by one in relation to appeal against a decision reached by another was not an 'independent and impartial tribunal'. We consider that the same principal applies here. Sir Michael is not subject to any professional, financial or hierarchical dependence on members of the Royal Court when he sits on appeals against decisions reached by it as a member of the Court of Appeal, and an independent, impartial and fair minded observer would not hold that there was a real risk that he was 'institutionally' biased in favour of upholding decisions of the courts below merely because its members were professionally known to him. Acting in *McGonnell* 40. Finally, the Appellant suggested that Sir Michael's involvement in the *McGonnell* case acting as part of the legal team for the UK Government before the European Court of Human Rights meant that a fair minded and informed observer might form the view there was a real risk that he might be biased in any hearing which concerned application of the principles in that case. 41. We unequivocally reject that submission. First, as we have observed above, the test is whether a fair minded and reasonable observer would form the view that there was a real risk of bias, not that she or he 'might' form that view; and that test is compatible with the Strasbourg caselaw. Secondly, the fair minded informed observer would be acquainted with the different roles of different players in the legal system. The job of an advocate is to advance his or her client's case to the best of his or her ability. The job of a judge is to determine a case according to the law. A judge will not infrequently be called upon to consider the effect on proceedings of a past legal case in which she or he has been involved as an advocate, but in that role, the judge's job is to determine what the law is in the light of that authority. The submissions the judge may have made on behalf of a client as an advocate in the past case are irrelevant, and it would undermine the concept of an independent bar if it were to be assumed that an advocate who had made submissions on behalf of a client would be biased in favour of upholding those submissions, rather than analysing the findings of the Court in such a case. 42. To an extent, the Appellant's submissions on this issue overlapped with his submissions on Sir Michael's role as a former Bailiff. The issue in the *McGonnell* case was whether a Bailiff (in that case, of Guernsey) who presided over a debate in the States could subsequently sit judicially on a matter relevant to that debate. But that issue is irrelevant in the present case because none of the legislation in question was passed while Sir Michael was Bailiff. 43. For all these reasons, we find that the fair minded informed observer would not consider there to be any real risk that a Court of Appeal upon which Sir Michael sat on appeal from the October 2019 judgment would risk being tainted by bias, and we reject the submission that he ought to have recused himself from the hearing of it. McNeill JA : 44. I agree. There is nothing that I can usefully add. Montgomery JA : 45. I agree with the judgment of

Mountfield JA. The Appellant argued that, whether taken separately or looked at cumulatively, there was a real risk that Sir Michael Birt might be biased if he were to sit on the Court of Appeal which is to hear the appeal listed in July 2020. I do not consider that any of the individual points establish that there is such a risk. Taking them together does not, in my judgment, add to their weight. The real possibility of bias is therefore not established. Authorities Capacity and Self-Determination (Jersey) Law 2016. AB v AG

[2020] JRC 038A. Porter v Magill

[2002] 2 AC 357 . Syvret v Chief Minister

[2011] JLR 343 . Helow v Home Secretary

[2008] 1 WLR 2416 . Dobbs v Triodos Bank NV [2005] EWCA Civ 468. Court in Bisson v Minister for Infrastructure

[2019] JCA 181 . McGonnell v United Kingdom App No 28488/95. Meznaric v Croatia App No 71615/1. Findlay v UK (1997)

[1997] ECHR 8 . Steck-Risch & Others v Liechtenstein App No 63151/00. Page Last Updated: 15 Jun 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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