Neutral Citation Number: [2023] CA (Bda) 9 Civ

Case No: Civ/2022/38

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL DIVORCE JURISDICTION
THE HON. MRS. JUSTICE STONEHAM
CASE NUMBER 2018: No. 190

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 15/05/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE, KCMG
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER, DBE

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IN THE MATTER OF SECTIONS 12 AND 22 OF THE MINORS ACT 1950

AND IN THE MATTER OF A MINOR

Between:

VSE

Appellant

-and-

TRT

Respondent

Mr Jeffrey Elkinson, Conyers Limited, for the Appellant
The Respondent appearing as Litigant-in-Person

Hearing date(s): 9 March 2022

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APPROVED REASONS

GLOSTER JA:

Introduction

1. This is an appeal by the mother ("the appellant" or "the mother") from an interlocutory order made by Stoneham J ("the judge") dated 12 August 2022 declining to recuse herself from sitting in family proceedings between the appellant and the respondent ("the respondent" or "the father") relating to their child ("the child"), a boy born on 2 March 2010, now 13 years of age.

2. By a summons dated 13 July 2022 supported by an affidavit from the mother, the mother applied for an order that the judge:

> "*be recused from taking any further part in these proceedings in her role as judge whether administrative or Judicial, on grounds that a reasonably informed and fair-minded observer would find that there is a real risk of bias in the Hon Justice Stoneham's continued conduct of this matter. Cost [sic] and such further or other relief as appears appropriate."*

3. In the event, the hearing was listed before the judge on 4 August 2022, together with a hearing which was to inform the court of the wishes of the child in relation to his education; these were to be transmitted to the court via the court appointed social worker and the child's counsellor. By this stage the issues as to where the child was to go to school, and who was to pay for his education, were the only remaining substantive matters in dispute between the mother and the father.

4. At the hearing on 4 August 2022, however, Mr Jeffrey Elkinson, counsel appearing on behalf of the mother, submitted that to continue with the hearing in relation to the child's education at the time when the recusal application was before the court was inappropriate. The judge acceded to that submission and accordingly excused the court appointed social worker and the child's counsellor from further attendance that day. Accordingly, it was only the recusal application which proceeded on that date.

5. Although the father appeared at the hearing before the judge, he took no position on the mother's recusal application but did not wish to support it. He contended that the mother's contentions were employed to delay proceedings so that she might enrol the child at Bermuda Institute for another year, rather than ensure that he was enrolled at Saltus where the father wished the boy to go to school.

6. At the close of the hearing the judge reserved her decision. She delivered her judgment on 12 August, refusing the mother's recusal application. The critical paragraphs from her judgment are the following:

> *"**THE MOTHER'S AFFIDAVIT***
>
> *27. The Mother's Affidavit "Affidavit (titled 'Second Affirmation') affirmed on 11 July 2022 filed in support of her application alleges, inter alia, that: -*

a. [Paragraph 6] - Since the date of the initial hearing Justice Stoneham increasingly insisted that she and the Father attend mediation and counselling services. The Mother states that such forms of alternative dispute resolutions are matters that are not appropriate given her relationship with the Father and a finding in the Magistrates' Court against the father;

b. [Paragraph 14] - Justice Stoneham offered no patience and was short and abrupt at the first hearing;

c. [paragraph 45] - Justice Stoneham's bias against me is buoyed by Justice Stoneham's comments reported in the Royal Gazette on 21 June 2022. In an article focusing on no-fault divorce law, Justice Stoneham made the following comments: "It would be an awesome opportunity to offer and or mandate mediation ";

d. [Paragraph 46] - In addition to the Court having a general bias toward me, Justice Stoneham is pushing her own unlegislated agenda;

e. [Paragraph 51] - Justice Stoneham released the Father on bail to attend plea court on 24 December 2018;

f. [Paragraph 52] - Justice Stoneham is the sister of a retired Police Inspector, who is a close friend of the child's paternal grandfather - "the grandparent that has purported to pay for the child to attend Saltus". The child's paternal grandfather renovated the retired Police Inspector's house and the two have been friends for a very long time. Justice Stoneham knows the father and the paternal grandfather, as he is a well-known construction contractor;

g. [Paragraph 54] - Given the conduct of Justice Stoneham as it relates to my application, I believe that her general disdain for my application, her treatment of me at the hearings, coupled with her association with the family of the Father's family would lead the innocent bystander to believe that there is an appearance of bias and that Justice Stoneham should recuse herself from oversight of this matter;

h. [Paragraph 56] - Justice Stoneham has attempted to circumvent the trial process by hoping to dispose of this matter in a nonconventional and unconstitutional manner (through ruling on a blind report).

SUBMISSIONS

28. Mr. Elkinson confirmed that the basis of the Mother's recusal application is that there is an appearance of bias. Mr. Elkinson emphasised that her case is not that the Judge is biased. He went on to submit that where there are "connections" between a Judge and family members of one party to proceedings, the judge must recuse herself to protect the integrity of Bermuda's Judiciary.

29. Mr. Elkinson referred the Court to the well-established test set out in Porter v Magill [2001] UKHL 67 – "if a fair-mined and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased, the judge must recuse him/herself".

30. In closing, Mr. Elkinson referred the Court to the most recent judgements of the Bermuda Court of Appeal, on 18 March 2022, in The Queen v Rebecca Watlington [2022] CA (Bda) Criminal Jurisdiction 3, and to the decision of my fellow sister Judge, Justice Subair-Williams, on 17 May 2022, in The Queen v Ewart Brown (2022] SC (Bda) 34 Civil Jurisdiction, where the test for recusal was undoubtedly confined (sic?) to be that set out in Porter v Magill.

THE LAW

31. The Court is most grateful for the professionalism demonstrated by Mr. Elkinson and the guidance provided by him on the law in these proceedings. On considering a recusal application the test to be applied is indisputably that of the fair-minded and informed observer as established in the well-known House of Lords case of Porter v Magill.

32. Sir Christopher Clarke, President of the Court of Appeal of Bermuda, delivering the judgment in The Queen v Rebecca Watlington provides further guidance as to the characteristics of this notional observer. Citing Saxmere Company Limited et al v Wool Board Disestablishment Company Limited [2009] NZSC 72 Blanchard J, Sir Christopher Clarke stated:-

> *[Paragraph 34] - "The observer must also be taken to understand three matters relating to the conduct of judges. The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases which are randomly allocated. Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel."*
>
> *(Paragraph 36] - "Bias may take many forms. It may arise from some connection (either amicable or hostile) of the judge, or those close to or connected to him, to one of the parties, or to a witness, or because of his membership of some organisation or devotion to some cause".*

33. The problems which Judges face in small jurisdictions were addressed by the Lords of the Judicial Committee of the Privy Council in Grant v The Teacher's Appeals Tribunal & Anor (Jamaica) [2006] UKPC 59 (present were Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Mance) in their judgment on the 7 December 2006. Lord Carswell delivering the judgment, stated at:-

> *[Paragraph 38] "……Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In .such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned two sit. It is incumbent on the judge apply a careful and sensitive judgment to the question whether he close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution bv too much, he may make it impracticable for him to carrv out his judicial duties as effectively as he should. If on the other hand he is not ready enough to recuse himself however unbiased and impartial his approach mav in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality in the proceedings. As Lord Bingham pointed out in the Locabail case, if the credibility of the judge's friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself." (Emphasis added)*
>
> *[Paragraph 39] - If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he "may have encountered him no more than ten times over the last twenty years ". The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships consider that such a degree of acquaintance in these circumstances would not? have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias." (Emphasis added)*

34. Most recently, in a judgment of the Cayman Grand Court (reported via social media) a small island with a comparable population to Bermuda, the Cayman Court reportedly stated that "potential abuse" may occur in the form of "judge shopping" and that, in such a scenario, "improper applications" may arise and it may become "fashionable" for attorneys to play the "recusal card" when it best suits their own interest, rather than the interests of justice. The Cayman Court judgment referred to a court case which said:-

> *"It is all too easy for a litigant who does not want his case heard by the assigned Judge or wishes to postpone a hearing to conjure up reasons for objecting to a particular judge. It is contrary to justice for? one party to be able to able to pick the judge who will hear the case. In small jurisdictions or in specialised areas of work it is not always easy to find an appropriate judge, and if his objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost of the parties and court."*
> *(Emphasis added)"*

7. The judge then went on to quote extensively from the English Court of Appeal family case of *AZ (A Child) (Recusal)* [2022] EWCA Civ 911 and stated that she was guided by the various authorities.

8. In paragraphs 37 – 47 of the judgment the judge set out her analysis which led to her conclusion to refuse the application to recuse herself. She stated:

> *"**ANALYSIS***
>
> *37. In all proceedings concerning the up-bringing of a child, that child's welfare is the paramount consideration of the Court. In the circumstances and context of this case, it required the Judge to look beyond the issues and arguments identified by the Mother and Father.*
>
> *38. After early and successful case management, the Judge properly identified the components of the Mother's child maintenance claim against the Father and fairly facilitated an agreement on all of the Mother's financial claims against the Father, save for disagreement on the circumstances of the child's enrolment at his current private school and the Father's objection to the child's continued enrolment there.*
>
> *39. The only issue remaining before the Judge is the child's voice - his wishes generally, and in the context of his parents disagreement regards his educational up-bringing.*
>
> *40. In this modem era, it is well established within family law that to give a child a voice in proceedings concerning aspects of his up-bringing, is not giving him a choice. Nor, is it a directive to the Court on the manner it should decide the matter. Instead, the child's voice gives the Judge an understanding of the child's views in the context of his parent's conflict.*
>
> *41. The Mother and Father appeared before the Judge on six (6) occasions prior to filing her recusal application. At no time during the course of the hearings on (i) September 2021, (ii) December 2021, (iii) January 2022, (iv) February 2022, (v) 31 March 2022, and (vi) June 2022 did the Mother ever voice any concern regards her perceptions about the Judge and/or her perceived connections to the Father's family.*
>
> *42. It is commonplace for any judge to be robust in confining proceedings within allocated time limits. It is acknowledged that the consequence of such a robust approach may be perceived by litigants, especially those appearing without the assistance of an attorney, as impatience and or abruptness on the part of the Judge. For this, the Court extends is [sic] most sincere apologies.*
>
> *43. In this modern era, the Judge is expected to carry out her statutory duties pursuant to Rule I A of the Rules of Supreme Court 1985 which include, encouraging parties, particularly in family proceedings, to use an alternative dispute resolution procedure and to facilitate the use of such procedure, whilst at the same time making use of the Court's capacity to facilitate remote hearings given the history of contention between the parties.*
>
> *44. The Mother's perception of the Judge's connection to the retired Police Inspector*

> *and his relationship with the Father's family is just that - her perception. The Mother's perception must not be confused with the fair-minded and informed observer, having considered the facts, "connections" and the issue before the Court in the context of Bermuda's geography, population size, cultural and social history.*
>
> ***CONCLUSION***
>
> *45. On the 14 day of January 2008, I swore the judicial oath to do right to all manner of people after the laws and usages of Bermuda, without fear or favour, affection or ill will. I do not take this oath lightly.*
>
> *46. I have carefully applied the well-established test set out in Porter v Magill and subsequent guidance that has evolved including those referred to above at paragraphs 30 -34.*
>
> *47. Considering all the circumstances of this case and the issue before the Court, in the context of Bermuda's geography, population size, cultural and social history, the Mother's application for the Judge to recuse herself from any further part in these proceedings in her role as Judge, whether administrative or Judicial, is refused. An informed and fair-minded observer in Bermuda with knowledge of Bermuda's geography, population size, cultural and social history including the Judge's specialist role within the Supreme Court, and the issue before the Court, would not perceive an appearance of bias."*

THE RESPECTIVE POSITIONS OF THE PARTIES

9. In his helpful submissions before this court, Mr Elkinson, on behalf of the mother, focused his challenge to the judge's refusal to recuse herself on the grounds that Stoneham J was a family friend of the father's father and had previously intervened in the criminal justice system in order to get the father released from jail. In other words he did not pursue the allegation made at first instance that Stoneham J's conduct of the hearings was one-sided, and that she had adopted an abrupt and condescending tone towards the mother, had lectured her and inappropriately demanded that the Mother attend mediation with the father and talk to him.

10. The father's position before this court was the same as that before the judge. He restated that he took no position on the mother's recusal application but did not wish to support it and repeated his allegation that the mother's recusal application was a device to delay proceedings so that she might keep the child at Bermuda Institute for another year. He did not file any evidence either below or for the purposes of the appeal.

11. The relevant evidence given by the mother, a police officer, as contained in her second affirmation, in relation to the grounds upon which she relied before this court, was as follows:

> *"47. On 6 May 2018, I made a criminal complaint against [the father] for sexual assault. A file was prepared and submitted to Cindy Clarke of the Department of Public Prosecutions (DPP) and charges were not approved, despite the DPP being informed*

that forensic evidence had been collected. Clarke advised [the mother] to request Domestic Violence Protection Order (DVPO). On 28 September 2018, the Respondent was granted a Domestic Violence Protection Order for a period of eleven months.

48. On 21 December 2018, [the father] breached the DVPO and subsequently I made a report to the police. [The father] was arrested on 23 December 2018, and a file was prepared and submitted to the DPP for charge approval. It was later communicated to me by the officer in charge that [the father] was released from police custody without charge.

49. In April/May 2019 [the father] was charged with Sexual Assault and Common Assault after repeated request to the DPP's office to review my file. On 1 August 2021 [the father] was found guilty of Common Assault only and given an 18-month conditional discharge.

50. Since the conclusion of the criminal trial, I have reviewed the initial conduct of the DPP's office towards me and the decision not to initially charge [the father] with sexual/ common assault until one year after the incident. Additionally, I have been reviewing the decision as to how [the father] was released from police custody without charge for breach of a DVPO.

51. I am aware that Justice Stoneham released [the Father] on bail to attend plea court on 24 December 2018. I now understand that a judge's intervention in relation to a DVPO to release/bail someone from police custody is most extraordinary given the nature of my DVPO was to protect me from further domestic abuse from [the father].

52. I am also aware that Ms Stoneham is the sister of Mark Clarke, a former Police Inspector and close friend of [the father]'s father, [the grandfather] (the grandparent that has purported to pay for [the child] to attend Saltus). I am aware that [the grandfather] renovated Mark Clarke's house and that the two have been friends for a very long time. I am also aware that Mark Clarke has been contacted by [the father] and [the grandfather] to assist them in the past as it relates to traffic penalties. Justice Stoneham knows [the father] and his father, [the grandfather] as he is a well-known construction contractor. Further, I believe Justice Stoneham knows [the father] through her brother Mark Clarke's relationship with [the father] and [the grandfather].

53. Given the circumstances where Justice Stoneham was involved in the extraordinary step of bailing [the father], who the police charged for breach of a DVPO and the family connection between her, her brother Mark Clarke, [the grandfather] (the grandparent) and [the father], I believe that it would have been appropriate for Justice Stoneham to recuse herself from having conduct of this matter. I believe, in no uncertain terms, that any innocent bystander observing would also agree that in the circumstances explained above in paragraphs 47 to 53, they too would conclude that there is an appearance of bias."

12. Prior to the hearing before us, Mr Elkinson wrote a letter dated 12 January 2023 to Stoneham J enquiring whether she wished to respond to the allegation in respect of her intervention to help the father, particularly identified in paragraphs 47 to 53 of the second affirmation of the mother. The letter stated that:

> *"We appreciate that her Ladyship may not wish to do so and if we do not hear from the Registry within 21 days, we shall assume that the Learned Judge does not intend to do so".*

The judge did not respond to that letter.

13. At the hearing before us the evidence relating to the father's arrest was somewhat confused. It was clear that the father was indeed the subject of a Domestic Violence Protection Order (DVPO) made by consent by Magistrate Tyrone Chin on 28 September 2018 pursuant to the provisions of the *Domestic Violence (Protection Orders) Act 1997* ("the 1997 Act"). That order (of which this court had a copy at the hearing) was to expire on 4 September 2019 and had attached to it a power of arrest, pursuant to section 15 of the 1977 Act: see paragraph 6 of the order. Under its terms the father was precluded from, *inter alia*, contacting the Complainant, who was the mother, his wife, or remaining within 50 metres of any place that she might be.

14. The mother's evidence, in summary, was that on Friday, 21 December 2018 the father had breached the DVPO and the mother had made a report to the police. On Sunday, 23 December 2018 he was arrested. A file was prepared and submitted to the DPP for charge approval. After his arrest, the father was released on bail to attend the plea court on Monday 24 December 2018. According to the mother, that release occurred on the direction of Stoneham J. This court had before it email communications between the mother and a police officer of the BPS, in relation to this issue, including one dated 9 October 2021 in which the officer indicated that he had had a conversation with a PS Kellman who had stated that the judge who authorised bail for the father was indeed Stoneham J.

15. The father's assertions at the hearing in the Court of Appeal were somewhat different. The father told the court that, although he had been asked to come to the police station, which he did, he was never arrested, never bailed, and never told to appear in front of the Magistrates' Court. If that account were to have been correct, there would seem to have been no question of Stoneham J having given any direction for his release.

16. Because of the uncertainty, and the obvious relevance to the issue of recusal as to whether Stoneham J had indeed authorised bail, the Court of Appeal, by an email dated 9 March 2023 sent by the Registrar for the Courts of Bermuda, requested the Commissioner of Police to provide answers to the following questions:

    (a) Was [the father] arrested on 23 December 2018 for breach of the DVPO?

    (b) Was he released on bail to attend the plea court on 24 December 2018?

    (c) When did that release occur?

(d) Did that release on bail arise on the direction of Stoneham J?

(e) If not, who decided on, or directed, his release on bail?

(f) Did the father attend plea court on 24 December 2018 or any subsequent date in connection with the alleged breach of the DVPO?

(g) If not, how did it come about that he was released on bail to attend the court and thereafter nothing happened?

(h) Was a report submitted to the DPP for charge approval in relation to the alleged breach of the DVPO.

(i) If so, what was the upshot of that report?

17. By email dated 15 March 2023, which enclosed copies of the relevant custody records, the Commissioner of Police helpfully responded to these questions as follows (as set out in italics):

> "(a)Was [the father] arrested on 23 December 2018 for breach of the DVPO?
> *Yes – 7:08pm on 23rd December 2018 by PC Best. (see below)*
>
> (b) Was he released on bail to attend the plea court on 24 December 2018?
> *Yes – bailed to 24th December 2018 plea court HMC. (see below)*
>
> (c) When did that release occur?
> *23rd December 2018 at 10:31 pm. (see below)*
>
> (d) Did that release on bail arise on the direction of Justice Stoneham?
> *It is indicated in the custody record that this was at the direction of Justice Stoneham. (see below)*
>
> (e) If not, who decided on, or directed, release on bail?
> *N/A*
>
> (f) Did [the father] attend plea court on 24 December 2018 or any subsequent date in connection with the alleged breach of the DVPO?
> *No – plea court record attached for 24th December 2018. (see attached)*
>
> (g) If not, how did it come about that he was released on bail to attend the court and thereafter nothing happened?
> *The charge of breach of DVPO was not approved by the DPP. (see below)*
>
> (h) Was a report submitted to the DPP for charge approval in relation to the alleged breach of the DVPO?
> *Yes*

(i) If so, what was the upshot of that report?
Below is the update from the officer and who reviewed and forwarded the file. There is no original file or notes to see that are available to me. These may possibly be stored in CRO."

18. In addition, so far as relevant, the custody records showed that:

a. under "Circumstances of Arrest" the record stated:

"About 20:40 hours on Friday, 21 December 2018 [the father] is alleged to have breached the Consent Order issued by the Magistrate Court by remaining within 50 meteres [sic] of the complainant and by making contact with the complainant directly or indirectly."

b. the stated "Reason for release" was that the father was "bailed to attend HMC on Monday 24th December on instructions of Puisne Judge Stoneham";

c. a "General Update" note dated 27 December 2018 at 01:48 33 stated that:

"file sent to Inspector Telemaque on Monday 24 - December - 18 about 0330 hrs for his perusal and comments.

Summary of evidence, complainant's statement, charge sheet and consent order sent to DPP's office via email.

Email response received from Senior Crown Counsel Nicole Smith stating at 07:11 hrs on Monday 24 - December - 2018 stating that the DPP's office is not proceeding with this matter due to insufficient evidence to conclude that [the father] breached any specific term of the consent order. Email thread from Ms. Smith attached to the incident.

The complainant [the mother] informed of DPP's decision by APS Best; [the father] also informed of DPP's decision by APS Best."

19. Copies of the above emails containing the information supplied by the Commissioner of Police pursuant to the Court's requests and the supporting documents, were sent by the Court to counsel for the mother and to the father.

The applicable legal principles

20. Mr Elkinson did not quarrel with the judge's acceptance of his submission that the test for recusal was the one set out in *Porter v Magill* [200 I] UKHL 67, namely:

"whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias".

21. The law on bias was recently summarised by this Court in *R v Wallington* [2022] CA Bda Crim 3. Having referred to the test in *Porter v Magill*, Sir Christopher Clarke P continued as follows:

> *"33. ……Guidance as to the characteristics of this notional observer is to be found in Helow v Home Secretary [2008] UKHL 62 where Lord Hope of Craighead pointed out [2] that the fair-minded observer:*
>
> > *"is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious… Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment."*

Clarke P then went on to describe what might constitute bias at [36]:

> *"Bias may take many forms. It may arise from some connection (either amicable or hostile) of the judge, or those close to or connected to him, to one of the parties, or to a witness….".*

22. Mr Elkinson articulated what he submitted were the relevant principles in this context. First, and as the authorities make clear, the degree of connection is highly relevant. That is particularly so in a small jurisdiction, as Stoneham J correctly recognised in paragraph 33 of her judgment. Thus in *Easton Wilberforce Grant v The Teacher's Appeal Tribunal & Anor (Jamaica)* [2006] UKPC 59, the Privy Council, in an apparent bias case, held that a casual acquaintance was not sufficient for there to be a real possibility of bias, especially in a small community where a judge will know many people. In that case, the judge, whose recusal was sought, knew the party but (as the judge himself had explained) only in passing and had seen the party only ten times in the past twenty years. At paragraphs 36 to 39 of the judgment of the Judicial Committee (delivered by Lord Carswell), their Lordships said:

> *"36. The final issue is that of the allegation of bias on the part of Cooke J in the Supreme Court. It may be said at once that no question has been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge. The complaint was rather of what one might term apparent or perceived bias. This was based upon the proposition that because of his friendship with the family of the Chairman of the Board there was a real possibility that the fair-minded and informed observer would conclude that the judge was biased: see the discussion by Lord Hope of Craighead of the applicable principles in Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, paras 99-103.*
>
> *37. The Court of Appeal in the earlier case of Locabail (UK) Ltd v Bayfiel Properties Ltd [2000] QB 451 gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair-minded and informed observer to exist. In paragraph*

> *25 of his judgment Lord Bingham of Cornhill CJ pointed out that 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, as everything will depend on the facts, which will include the nature of the issue to be decided. He did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection. Among the latter he enumerated personal friendship 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.*
>
> *38. It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself. however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the Locabail case, if the credibility of the judge's friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself.*
>
> *39. If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he "may have encountered him no more than ten times over the last twenty years". The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships do not consider that such a degree of acquaintance in these circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias."*

23. Second, as paragraph 39 above makes clear, and as Mr Elkinson submitted, the issues before the Court are relevant to the analysis. An objective observer will be less concerned if a judge has a

connection with a fact witness when determining a case which hinges on issues of law. Conversely, the objective observer will be more concerned if the judge is connected to one of the parties and is determining personal family issues impacting that party, particularly where the determination depends upon the judge's subjective views (such as which school a child should attend or who is the better parent).

24. Third, and perhaps most relevant to this case, the assessment of apparent bias may critically depend upon the judge's response if and when concerns are raised before her as to her apparent connection to the parties. As Mr Elkinson pointed out, judges are expected to be transparent about the degree of any connection. As we have seen above, in *Grant* the judge had explained the full extent of the relationship. The need for transparency on the part of judges faced with a recusal application was emphasised as an important duty by Patten LJ in the English Court of Appeal case of *Re L-B (Children)* [2010] EWCA Civ 1118 at [22] as follows:

> *"Where a judge is faced with an application that he should recuse himself on the ground of apparent bias* ***it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application****. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test set out by Lord Hope in his speech in Helow v Home Secretary [2008] 1 WLR 2416. In this case the Recorder has not done this and, as my Lord Thorpe LJ has pointed out, has in fact given no reasons at all for her rejection of the argument that her professional relationship with the guardian is not such as could give the informed observer any reason or cause for concern."* (My emphasis.)

Discussion and determination

25. All the above principles are applicable to the analysis in the present case. First, and critically, Stoneham J disclosed nothing in her judgment, or indeed subsequently when she was asked by Conyers in their letter of 12 January 2023 to supplement her ruling, about:

a. her connection or friendship (if any) with the grandfather, or the nature of her brother's friendship or connection with him; or

b. her involvement in the release of the father on bail on the night of 23 December 2018, when he had been arrested for an alleged breach of the Domestic Violence Protection Order.

That was so despite the fact that the mother had set out in her evidence a clear statement as to what she thought was the position about the connection/friendship between the judge and the father's family, and that the judge had been given a further opportunity by Conyers to respond post-hearing. The judge's response, refusing to engage with the mother's evidence was, as Mr Elkinson submitted, indeed Delphic, [if not evasive]. All that she said in her judgment was *"The Mother's perception of the Judge's connection to [the Judge's brother] and his relationship with the Father's family is just that – her perception*." [Ruling, 44]

26. It is unclear what is meant by this paragraph of the Ruling, but it is wholly unsatisfactory as a response in the circumstances of the recusal application. On one construction, the judge appears to be suggesting that her connection with her own brother is itself mere perception; in any event she has avoided addressing the extent (if any) of her connection with the father's family; and, most importantly, she has not addressed the issue of whether she did indeed intervene – apparently by telephone – to release the father from prison, and, if so, the circumstances in which she did so.

27. On any basis, a Puisne Judge's intervention to obtain the release of a person arrested under the 1997 Act would appear to be irregular at best and unlawful at worst. Because we have not had any submissions on the issue to the contrary, whether from the father or from the judge, I refrain from reaching any conclusion on that matter. However, the position would appear to be as follows:

    a. Sections 15 (2) and (3) of the 1997 Act provide that:

        "(2) Where a power of arrest is attached to a protection order, a police officer may arrest without a warrant a person who he has reasonable cause to suspect is in breach of the order.

        (3) Where a person is arrested without a warrant in reliance on subsection (2)–

        (a) he shall be brought before the court within the period of 48 hours beginning at the time of his arrest, or as soon as reasonably practicable thereafter, to be dealt with under section 23; and

        (b) he shall not be released within that period except on the direction of the court,

        But nothing in this section authorises his detention at any time after the expiry of that period."

    b. The "court" is defined for the purposes of section 15 as a court of summary jurisdiction (i.e. a Magistrate's court); see section 2 of the 1997 Act.

    c. The mechanism of section 15 appears to be that, in the event of an arrest without warrant of a person who is reasonably suspected to have committed a breach of a DVPO under section 15:

        i. such person is to be brought before a court of summary jurisdiction (i.e. a Magistrate's Court) within a period of 48 hours of his arrest, or as soon as reasonably practicable thereafter **to be dealt with under section 23 of the 1997 Act**; and

        ii. he is not to be released within that 48 hour period **except on the direction of the Magistrate's Court.** (My emphasis).

28. Accordingly, it would appear that Stoneham J had no jurisdiction or power to direct the release of the father on bail to appear before the Magistrates' Court the following day. Mr Elkinson, upon being asked by this Court, informed us that, as far as his researches showed, there was no power in a Puisne Judge to exercise the powers of a Magistrate, whether under the constitution or

otherwise. In any event, the 1997 Act is mandatory in that it requires the arrested person actually to be brought before the court. Presumably this is to enable the beneficiary of the DVPO, who has complained to the police about the alleged breach, to attend court.

29. Moreover, the circumstances in which Crown Counsel informed the police, in the early hours of Monday, 24 December 2018, stating that the DPP's office was *"not proceeding with this matter due to insufficient evidence to conclude that [the father] breached any specific term of the consent order"* also gives rise to some concern. It seems to me (without deciding the matter, since we have not received submissions in relation thereto) that it is highly questionable whether in such circumstances it was open to the DPP unilaterally to take the decision not to proceed with an alleged breach of a DVPO by the father, without actually bringing him before the court in compliance with the procedure under the 1997 Act. That would have given the mother an opportunity to present her evidence supporting the complaint, which in the event she was denied. The scheme of the 1997 Act, and the fact that DVPO orders are made *inter partes* between the complainant and respondent, strongly suggests that that is the correct approach. All this might well have raised questions in the mind of a fair-minded and informed observer as to: (i) why the DPP had so speedily decided not to proceed with the alleged breach against the father nor to require him to attend court; and (ii) whether Stoneham J herself had expressed any views to the relevant authorities as to the strength or weakness of the evidence allegedly supporting the mother's complaint.

30. In this case, in my judgment, Stoneham J's failure to give any explanation as to the true extent of her connection (if any) with the father's family, and of her participation in the release of the father on bail, does indeed provide support for a real concern of bias. Absent a transparent account of the extent of the connection, the objective observer is left fearing the worst. Accordingly, in such circumstances I have no doubt that Stoneham J should have recused herself and that, in the light of her refusal to do so, this court should allow the appeal and accede to the mother's application.

31. Accordingly, I would direct that Stoneham J should stand recused from this case and that another Judge should be assigned to the case urgently. Thereafter that Judge shall schedule a hearing at the earliest opportunity to hear all remaining issues in the case. There has been considerable unnecessary delay to date and no further delay should be permitted.

SMELLIE JA:

32. I agree, as I do as well with the comments of my Lord President in relation to the costs of these proceedings, both below and before this Court.

CLARKE P:

33. I agree. It is singularly unfortunate that the judge neither recused herself nor provided any meaningful response to the two principal matters upon which the application to recuse was made. As a result, a decision as to the child's education which should have been made months ago has been stood over for many months.

34. So far as the costs of this application are concerned, we do not consider that it is appropriate to make any order for costs as against the father, since he took a neutral position on the matter both in this court and below. Of course, it would have been open to him to have proffered an explanation about the extent of the connection (if any) between his family and Stoneham J. However, we do not think this justifies an adverse order for costs against him.

35. This Court enquired as to whether it had any jurisdiction to award the mother her costs out of public funds. Mr Elkinson informed us that, although Order 2/25 of the Rules of the Court of Appeal gives jurisdiction to the Court *'to make such further or other order as the case may require including any order as to costs'*, there was no public fund as such in Bermuda out of which such an order might be paid and he was not aware of any instance in Bermuda where costs have been paid out of government funds where the Government has not been a party.

36. He suggested that another possible route, but more cumbersome, would be an order for payment for damages by way of redress for breach of constitutional rights, namely under Articles 6(8) and 15 of the Constitution; he submitted that it could be said that the failure to provide an independent judge had led to all these costs which should be paid as damages by the Government as the responsible State.

37. We consider that any claim for damages for breach of constitutional rights would need to be brought as a separate claim in the Supreme Court. Understandably, no such claim was made before Stoneham J since the mother was entitled to rely on her common law rights to claim recusal and was not required to complicate matters by making a constitutional claim with the further complications which that would have involved. However, in the absence of such a claim having made below, and proper argument being presented thereon in response by the relevant Minister of State, we do not consider it is appropriate for us now to make such an order indemnifying the mother in respect of her costs by way of an order for payment of damages by way of redress for breach of her constitutional rights.

38. In our view, the sensible way forward is for this Court to refer the matter to the Legal Aid Committee and to invite it to make a retrospective order in respect of the mother's costs both here and below, as we now do. To that end we invite Mr Elkinson to provide details of Conyers' costs of and incidental to the application both in this Court and below and also to provide to the Legal Aid Committee details of the mother's means. That should be done within the next 14 days. We strongly urge the Committee to make such an order. If, for some reason no such order is made, it may be necessary for Conyers to make an application on behalf of the mother for redress to the Supreme Court.