**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2012-00873**

**IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000**

**AND**

**IN THE MATTER OF THE INTEGRITY IN PUBLIC LIFE ACT, 2000 AS AMENDED BY THE INTEGRITY IN PUBLIC LIFE (AMENDMENT) ACT 2000**

**BETWEEN**

**GLADYS GAFOOR**

**Claimant**

**AND**

**THE INTEGRITY COMMISSSION**

**Defendant**

**Before the Honourable Mr. Justice V. Kokaram**
**Appearances:**
**Mr. Clive Phelps instructed by Ms. Nicole De Verteuil-Milne for the Claimant**
**Ms. Deborah Peake S.C. leads Mr. Ravindra Nanga instructed by Ms. Marcelle Alison Ferdinand for the Integrity Commission**

**JUDGMENT**

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**Introduction**

1. The Integrity Commission ("the Commission") fulfills an important constitutional role in this country. Under the Constitution and the Integrity in Public Life Act[1] ("the Act") the Commission is charged with the responsibility of supervising and monitoring the standards of ethical conduct and investigating corrupt practices of public officials[2]. It consists of persons who are "of integrity and high standing"[3]. With its mandate cast in wide terms under section 5 of the Act, there are several operational procedures which will be adopted by the Commission to carry out its day to day tasks. This application for judicial review concerns one such operational matter, the question of the recusal of one of the members of the Commission from hearing a complaint under the Act.

2. A little short of one year ago, on 21st December 2011, the Integrity Commission decided, based on a request made by Mr. John Jeremie[4], that Mrs. Gladys Gafoor, the Commission's Deputy Chairman, should be recused from hearing an investigation of Mr. Jeremie S.C. which was being conducted by the Commission under section 33 of the Act ("the Jeremie investigation"). He alleged that Mrs. Gafoor, the Commission's Deputy Chairman, may be biased against him for the reasons set out in his letter dated 14th November 2011 addressed to the Registrar of the Commission. His letter amounted to an allegation of a perception of personal animosity by Mrs. Gafoor against him and/or conflict of interest ("the Jeremie application").

3. Mrs. Gafoor saw no basis for making this complaint, indeed she was of the view that it was wholly without merit and quite offended by it. She refused to accede to the request. However her colleagues in the Commission, Chairman Kenneth Gordon, and members Professor Ann Marie Bissessar and Neil Rolingson did not share that view. On 21st December 2011 the Commission voted in favour of her recusal by a majority of three to two.

[1] Chapter 22:01 as amended
[2] The Act refers to every person in public life and to persons exercising public functions. Section 3 of the Act
[3] Section 4(1) of the Act.
[4] The former Attorney General of Trinidad and Tobago

4. Mrs. Gafoor challenges that decision in these judicial review proceedings and contends that such a decision[5] was illegal, irrational, in breach of natural justice and was a decision equally tainted with bias by her three colleagues against her.

5. Essentially the core issue to be resolved in this claim is what is the procedure to be adopted by members of a panel conducting an investigation, in this case the Commission, when an application is made by the subject of the investigation to that panel for the recusal of one of its members on the ground of bias. Is it a decision to be made by that member, the entire Commission or the Court?

6. The test to be applied in determining when an adjudicator should recuse from hearing a matter on the ground of apparent bias is well settled[6]. Further, the several authorities from the Commonwealth cited to this Court on the law of recusal demonstrate that the attitude of an adjudicator in response to a request for her recusal must be characterized by dignified restraint. Such requests are not to be regarded as an assailment of an adjudicator's personal integrity, or a personal affront or should adjudicators be unduly sensitive about such applications[7]. These challenges are an important feature of the principle of natural justice by ensuring that the adjudicating tribunal is impartial and fair.

7. Accordingly, public disagreements by members of the tribunal or investigative body over such matters are to be avoided as it detracts from the core function of the tribunal of carrying out the investigation and may add further to the suspicions of the person making the complaint of bias. Unfortunately in this case a very simple matter of the application of

[5] As a matter of record the Claimant's claim before delivering the judgment was re amended to read the decision of 21st December 2011 I do not think anyone can challenge that as it is apparent that this can only be the decision which is under challenge. See para 15

[6] See **Porter v Magill, Panday v Virgil, Re Medicaments** (supra)

[7] Per **Heffer JA in Moch v Nedtravel Pty Limited** (1996) (3) SA 1 "A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. If he does he is likely to get his judgment clouded and should he in a case like the present openly convey his resentment to the parties the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a judge is primarily concerned with the perceptions of the applicant for his recusal." Justice of Appeal Archie CJ reminded judicial officers that recusals are not a matter to take personal offence – advised that decision makers should have hard backs.

the test of apparent bias and the recusal of the Commission's Deputy Chairman from the panel to adjudicate on the Jeremie investigation came before this Court against the backdrop of public controversy and a schism within the membership of the Commission when in truth, having regard to the very simple dispute, none should have existed.

8. Although the claim, if I understand Counsel for the Claimant correctly, is now largely academic as he indicated in his closing submissions that his client is no longer interested in sitting on the Jeremie investigation, I have proceeded to determine the issues raised in this claim to resolve any future disagreement over the procedure to be adopted by the Commission when an application for recusal is made.

9. In my view as a matter of principle where a decision maker consists of a panel of members and an application has been made to that panel for the recusal of one of its members on the basis of apparent bias it is entirely proper for the individual member to consider the matter. If he or she refuses to accede to the request it is equally proper for the panel to deliberate on the matter and make a decision as to whether the member should step down from the decision making process on the ground of apparent bias. Such a deliberation will accord with the fundamental principle that justice should be seen to be done and to ensure that ultimately the decision of the panel on the substantive investigation is unaffected by bias, will not be exposed to a successful application for judicial review on the ground of bias and can withstand scrutiny in the court of public confidence.

10. The Commission deliberated on the Jeremie application at a meeting specially convened to deal with this issue at which the Claimant was present and participated. Even if the basis for the Commission making its decision was that it was the safe option, even such a decision resonates with learning in the Commonwealth which I alluded to in my earlier judgment on recusal which is that "if in doubt-out"[8]. In that context the decision cannot be said to be perverse or irrational.

[8] See judgment on recusal CV2012-00873 dated 11th October 2012

11. In my opinion the Claimant's claim for judicial review fails principally for the following reasons:

(a) The legal advice issue: Upon an analysis of the evidence in this case I am of the view that the Commission did obtain legal advice both from in house counsel and senior counsel on the relevant test to be applied in determining the issue of a recusal. So long as there is a quorum the Commission can legitimately transact its business. In that event it cannot be said as it has been submitted in this case that the Commission cannot continue without her in that investigation

(b) The recusal issue: Procedure: There is no obligation on the Commission to seek directions of the Court to determine the Jeremie application. Equally Mrs. Gafoor is not clothed with any statutory power as the sole arbiter of the Jeremie application. The issue of recusal can be decided by the Commission collegiately. The practice as to the consideration of a recusal varies depending on the circumstances and certainly in a case where the presence of a member on a panel entrusted with the exercise of a quasi judicial function may infect the entire proceedings by bias, it is legitimate and proper for the entire panel to consider the matter if she refused to accede to the request. Further, there is no proposition in law that restricts lay members from considering the question of bias and in any event Mrs. Gafoor participated in their deliberations and they were guided by the legal test on bias as stated by her.

(c) The recusal issue: Merits: On the facts of this case I hold that the merits of the Jeremie complaint were fully discussed by the Commission at its meeting on 21st December 2011. My findings are based upon the contemporaneous records of the Defendant and the unchallenged evidence of the Commission.

(d) The recusal issue: Fair hearing: It cannot be seriously advanced based on the facts of this case that Mrs. Gafoor did not receive a fair hearing when the Commission deliberated on the Jeremie complaint. The contemporaneous minutes demonstrate that she attended the meeting and participated in the discussions and voted on the Jeremie application.

(e) The bias issue: The decision itself was not affected by apparent bias of Mr. Gordon, Professor Bissessar and Mr. Rolingson. The fair minded and well informed observer

having considered the facts would not have concluded that there was a real possibility that the members of the Commission were biased against her. In any event once the Commission had to decide the matter of the Jeremie application by the doctrine of necessity the members must participate.

12. In those circumstances and for the reasons set out in this judgment the claim for judicial review is dismissed.

13. There is the additional consideration of the Defendant's application to set aside leave based primarily on the alleged non disclosure by the Claimant of material evidence. However because in my view the claim fails it is not strictly necessary to decide this issue. It is true that had the Court been seised of material information at the hearing of leave for judicial review in the discharge of the Claimant's duty of candour, it may not have granted leave. These matters of non disclosure were considered in arriving at the conclusion to dismiss this claim.

14. I have ordered for the reasons set out in this judgment that the claim be dismissed with the Claimant paying to the Defendant two thirds of its costs of the claim and application to set aside leave to be assessed by this Court.[9]

**The relief sought:**

15. In her Fixed Date Claim form (FDC) the Claimant erroneously refers to the decision under challenge as the Commission's decision made on 19th December 2011. Although some members of the Commission met on that day no decision was made on the Jeremie application by the Commission. It cannot be disputed that the Claimant is challenging the decision of the Commission made on 21st December 2011 and I am at a loss to understand why an application to amend to correct this date was only made by the Claimant on the final day of closing submissions. I reluctantly accede to this request pursuant to rule 56.12 (2) CPR, (unsupported as it is by any evidence), if only to make sense of the claim.

[9] The full order as to costs is set out at the end of this judgment.

16. By her claim the Claimant sought the following declaratory relief[10]:

- that the said decision of the Integrity Commission is a nullity, illegal, procedurally improper, irrational and/or *ultra vires* the Act and in particular section 4 thereof;
- that the failure and/or refusal of the Integrity Commission to obtain legal advice and/or directions from the Court on the Jeremie application constituted a breach of duty and is irrational and/or illegal.
- that the failure of the Integrity Commission to consider and discuss the merits of the Jeremie application and to inform the Claimant of the specific allegations made against her and to afford her the opportunity to be heard before a duly constituted Integrity Commission under Section 4 of Act either in person or by Counsel before making the said decision to recuse and/or preclude her is *ultra vires* the Act and in breach of the principles of fundamental justice and/or procedurally unfair and/or irrational and/or her right to be heard.

**The grounds of review:**

17. Before examining the grounds relied upon by the Claimant in these proceedings I make the following observations. First I confess that the grounds and the "pleaded" sequence of events which led to the decision under challenge in these proceedings even in the affidavit in support posed a challenge to follow. The facts are not set out in chronological order and the account of some of the events lack clarity. Whether this is deliberate I will address later in this judgment.

18. Second I agree with the Claimant that grounds of review in a judicial review application ought not to be strictly treated as pleadings. However that does not mean that the

[10] The Claimant also sought an order of certiorari quashing the said decision and an order prohibiting the Integrity Commission from acting or continuing to act in breach of the rules of natural justice and/or *ultra vires* the Integrity Public Life Act specifically contrary to the provisions of Section 4 thereof.

Claimant is free to make any allegation against the Defendant. The claim is to be articulated within the framework of the grounds stated in the FDC. See **CO Williams Construction v Blackman** (1994) 45 WIR 94. The importance of properly setting out the grounds is to identify the issues for determination at an early stage. Popplewell J observed in **R v Vale of Glamorgan Borough Council ex p James**: "Because applications in judicial review are primarily concerned with matters of law and procedure the strict rules which apply to pleadings are sometimes treated by claimants somewhat cavalierly. If it does nothing else Form 86A serves to direct the parties' minds to the issues which are alleged to arise and thereby concentrate their mind on the evidence to deal with those particular issues." Similarly our rule 56.7 (4) (b) (d) and (e) CPR equally focuses the parties' attention to the grounds and the evidence required to meet those issues raised. It certainly would be unfair to the Defendant if it is faced midstream in these proceedings with fresh allegations which are not hinged on any of the grounds.

19. Finally in relation to the Claimant's amended claim which included an allegation of bias I specifically set out the amendment on bias that is to be permitted and the issue to be determined[11] in my earlier ruling on the amendment. In the exercise of my case management powers I limited the issues for determination[12]I do not expect to rehash those decisions which in short means that the issues before this Court cannot be enlarged beyond the permitted amendment. For the sake of clarity issues of bad faith of members of the Commission, taking into account irrelevant considerations by the Commission and breach of legitimate expectations to a fair hearing raised in paragraphs 33, 34 an 35 of the proposed amendment, which were disallowed, do not form part of the Claimant's case and cannot be resurrected.

20. In deference to the Claimant I set out the Claimant's grounds as amended in their entirety:

    I. Some twenty (20) months ago (around 2010 to 2011), a complaint was made to the Commission by a member of the public against former Attorney General John

[11] See written rulings dated 6th June 2012 and 27th June 2012.
[12] See judgment dated 6th June 2012- CV2012-00873

Jeremie S.C. (Jeremie). The Commission remains seised of this investigation up to the present time as it has been forwarded to a foreign, external investigator

II. After the resignation of the previous Chairman Dr. Eric St. Cyr, Mr. Kenneth Gordon (Gordon), Businessman, was duly appointed by the President as Chairman of the Integrity Commission on 29th October, 2011.

III. Upon Mr. Gordon assuming office as Chairman, Jeremie strenuously objected in writing to two Commissioners to wit: the Deputy Chairman and on Mr. Seunarine Jokhoo, being part of the Commission's deliberations into the complaint against him which had been ongoing for 18-20 months prior to Mr. Gordon's assumption of office (a delay of approximately two years before Mr. Jeremie's objection).

IV. No report on the said investigation has, as yet, been forwarded to the Commission, so that, there was no urgency or administrative necessity to take decisive action to cause the Claimant to be recused. This occurrence contributed hugely to the "state of the impasse" referred to at (f) in the President's letter of suspension dated 9th February, 2012.

V. Further, the Chairman of his own volition instructed the Registrar of the Commission to write formally to Jeremie on 21st December 2011 informing him that "the Commission had taken the decision that Mrs. Gladys Gafoor and Mr. Seunarine Jokhoo will not participate in the deliberation of your matter."

VI. It is contended that the statutory requirement that an Attorney-at-Law an Accountant must sit on the Commission is mandatory. Implicitly, without an Attorney-at-Law the Commission is not properly constituted to deal with the exercise of its judicial and quasi-judicial functions. The issue of recusal based on either actual or apparent bias is not an administrative matter but an extremely complicated legal matter which cannot be properly dealt with in the absence of an Attorney-at-Law of at least 10 years standing. Consequently, the said decision by the Chairman Gordon and members Rolingson and Bissessar is a nullity and should be quashed forthwith.

VII. In his letter Chairman Gordon erroneously stated that the merits of Jeremie's "reasons" had been fully discussed by all Members of the Commission including the Deputy Chairman **when this was not the case, neither was the Deputy Chairman**

**aware** that a letter had been dispatched to Mr. Jeremie informing him that the Commission had decided that she would not deliberate upon his matter and further that his (Jeremie's) matter will be determined by 17th February, 2012. It should be noted that the investigation referred to in paragraph 1 above is still pending.

VIII. At no time during the currency of the said investigation and under the Chairmanship of Dr. Eric St. Cyr was any objection taken against the Deputy Chairman participating in the said investigation as member of the Commission until some weeks ago almost immediately after Mr. Gordon was appointed Chairman in November 2011.

IX. The Integrity in Public Life Act Chapter 22:01 as amended does not make provision as to how an issue of this nature is to be determined by the Commission and thus the Commission may regulate its own procedure. It is contended that such procedure must not be unreasonable, illegal, irrational or procedurally improper and/or irregular and must accord with due process and preserve the requirements of procedural fairness to all including its own members.

X. The procedure and practice adopted by the Chairman on the issues fail to satisfy the preceding requirements.

XI. At each and every stage of this impasse the Deputy Chairman has sought to resolve this matter amicably in the best interests of the Commission having regard to being the holder of the responsible office of Deputy Chair and has sought only, exclusively and simply to preserve her entitlement and right to perform her statutory duties and functions. Moreover, she is not only a trained lawyer of 51 years standing but has vast judicial experience both as a magistrate and a Judge of the Industrial Court and has, as well, sat as Chairman and member of Tribunals.

XII. The Deputy Chairman has explored each and every opportunity to resolve this impasse (including seeking private discussions with the Chairman) and in order to avoid the spectacle of public embarrassment to the Commission as a whole but cannot and will not sacrifice her integrity, professional reputation and oath of office in order to go along with an approach which is fatally flawed as well as giving rise to the possibility of public ridicule and contempt.

XIII. The power vested in the Commission is so vested by statute and clothed by a public element. The Commission carries out a legal and public duty. The power vested in the Commission, like every other public power, cannot be exercised in a perverse or arbitrary or whimsical manner under the cloak of the ostensibly complying with transparency and fairness to all which is clearly not the case her.

XIV. The Integrity Commission is established by the Integrity in Public Life Act Chapter 22:01, Section 4. Section 4(2) and 4(3) thereof provide that at least one member of the Commission shall be an Attorney-at-Law of at least ten (10) years' experience and another member shall be a chartered or certified accountant. The objection raised by Jeremie the person under investigation takes issue with both the existing judicial officer (Judge Gafoor) as well as the accountant (Mr. Jokhoo) deliberating upon his matter.

XV. At the Commission's meeting on or about Monday 12th December, 2011, the issue of the deputy Chairman's recusal was raised at the meeting without **considering the merits of Jeremie's objection** to the Deputy Chairman being part of the deliberations to be conducted into the allegations and/or complaints. She was asked by the Chairman both privately and at the subsequent meeting to withdraw upon a vote being taken.

XVI. The Deputy Chairman refused to so withdraw on the expressed basis to the Chairman and other Commissioners **both before and after the vote** that the issue of her recusal could not be determined in this fashion and that it was at all material times for the person against whom representations were being made or the Court to consider as a matter of law whether there was any real basis for the objection.

XVII. Nevertheless, the Chairman insisted that the matter of recusal could be voted upon and proceeded to take a vote upon the matter a second time form the members of the Commission. On both occasions, the Chairman voted by a majority against the Deputy Chairman and Mr. Jokhoo.

XVIII. Thereafter, the Deputy Chairman was informed by Chairman Gordon that she is not to attend the subsequent meeting of the Commission fixed for 19th December, 2011

in respect of any discussions and/or response to the second letter sent by Jeremie on or around 6th December, 2011 as the Commission had voted to have her recused.

XIX. The Deputy Chairman requested that the reasons for same be put in writing for her further consideration. By letter dated 13th December, 2011, the Chairman stated his purported reasons for requesting that the Deputy Chairman should not attend the said meeting on 19th December 2011.

XX. The decision of the Commission that the Deputy Chairman recuse herself from the deliberations regarding Mr. Jeremie was taken **without any or any proper consideration** of the merits of Mr. Jeremie's complaint against her particularly where no proper merits were placed before the Commission for consideration prior to the determination that she should recuse herself.

XXI. By letter dated 15th December, 2011 the Deputy Chairman responded to the Chairman's letter (marked private and confidential) and which informed and pointed out to the Chairman that a mere request for her to recuse herself does not provide any legal or other justification or basis for her to adopt such a course, given that she is duty-bound to attend meetings of the Commission.

XXII. In her letter, the Deputy Chairman identified to the Chairman Gordon that the legal test to be satisfied if she is to determine whether to recuse herself is that there must be a real possibility that the fair-minded and informed observer, having considered the facts, would conclude that she would be biased.

XXIII. Moreover, the Deputy Chairman called upon Chairman Gordon to indicate what aspect of Jeremie's objection would produce or provoke such a conclusion. Significantly, no response was ever received thereto by Chairman Gordon.

XXIV. In the circumstances the Deputy Chairman attended, as she was entitled, and indeed so required to do, the meeting of 19th December, 2011 whereby the issue of her recusal was again the subject of discussion by the Commission. Chairman Gordon, as was done before, sought to determine the issue of the Deputy Chairman's recusal by a vote of the members after laying the private correspondence exchanged between himself and herself before the entire Commission notwithstanding her continued and consistent objection thereto.

XXV. Before the vote was taken, Mr. Neil Rolingson indicated by means of a private note to the Chairman Gordon that legal advice should be sought on this issue. This note was passed to the Chairman Gordon after the Deputy Chairman had earlier advised that a legal opinion be sought and obtained on the matter of her recusal. Neither request was acceded to by Chairman Gordon, he then proceeded to take a vote the result of which was that the resolution which he formulated (as before) was that the Deputy Chairman should recuse herself from the Commission's deliberations over the Jeremie matter.

XXVI. At all material times, the Deputy Chairman continued to protest the manner in which the Chairman was treating with the issue of her recusal. No heed by Chairman Gordon was taken of her objections.

XXVII. By letter dated 31st December, 2011, the Deputy Chairman called upon Chairman Gordon to vacate the resolution regarding her recusal, passed on 19th December 2011 failing which she would seek legal redress as appropriate. Chairman Gordon responded to the Deputy Chairman's letter of 31st December, 2011 by letter dated 5th January 2012 indicating that the Commission has already communicated its decision to Jeremie and he was not prepared to vacate that decision.

XXVIII. It is the Deputy Chairman's contention that there are two separate matters upon which she had consistently and at all material times maintained her objection: Firstly, that the matter of her recusal could not be simply voted upon by the Commission without legal guidance; and secondly that the merits of Jeremie's objection to her participating in the Commission's deliberations have not been made known to her nor have they been properly discussed by the Commission, contrary to what the Chairman has stated.

XXIX. In addition, the Deputy Chairman has at no time actively participated in any decision being taken by the Commission on this issue save and except to say that she has protested from first to last that the Commission was not in a position to deal with the matter of her recusal.

XXX. By letter dated 31st December 2011, the Deputy Chairman brought her concerns to the attention of His Excellency and sought his intervention to resolve the impasse amicably in order to prevent embarrassment to the Commission.

XXXI. Bias against the Claimant by the Chairman of the Commission and members Mr. Rolingson and Mrs. Bissessar as evidenced inter alia by three letters written by them dated 23rd January, 2012, 22nd January, 2012 and 20th January, 2012 respectively, to His Excellency the President complaining about the Claimant in relation to the business of the Commission.

**PARTICULARS:**

a. The Chairman stated at paragraph 6 of his letter dated 23rd January, 2012:

*"There has been a pattern of leaks to the media which could only have emanated from one or other of the Commissioners. The Deputy Chairman has been involved on each occasion. In one instance she was the only person other than the Registrar and the Chairman to have had knowledge that a certain attorney had been invited to a very sensitive meeting of the Commission. On reflection the Chairman cancelled the invitation to the attorney. The following day another "leaked" story appeared in the media announcing that the attorney would be present at the meeting of the Commission with relevant details."*

b. Mr. Rolingson stated at paragraph 3 of his letter dated 22nd January, 2012:

*"Although there is no conclusive evidence as to the source of the 'leaks', it is indicative that their sudden appearance in the national media is tied to a breakdown in the relationship between our Deputy Chairman, Mrs. Gladys Gafoor and our Chairman."*

AND at paragraph 5

*"When linked to the very boorish behavior of Mrs. Gafoor at meetings of the Commission of late, I am of the personal view that the required teamwork of*

*Members of the commission required by the integrity in Public Life Act 2000, no longer exists."*

c Professor Bissessar stated in paragraph 2 of her letter dated 20th January, 2012

*"…as a Commissioner I found myself in a most uncomfortable position with Mrs. Gafoor constantly issuing insults to me as a Commissioner and insinuating in a most vicious manner that I was in some way connected to the People's National Movement, at that time the ruling party".*

AND at paragraph 6 the Professor states that at the meeting of 19th December 2011 that a quoram of three being the Chairman, Mr. Rolingson and herself

*"took the decision that there was some merit in Mr. Jeremie's request and that a meeting should be held in which a resolution would be taken by the Commission as to whether the members should be asked to recuse themselves."* [emphasis]

AND at paragraph 7 the Professor stated

*"this meeting was held and a resolution to that effect was subsequently taken"*

*AND at paragraph 7 the Professor goes on to state:*

*"**in one case confidential information which was known to only the Chair, The Deputy Chair and the Registrar was leaked ad verbatim to the media, this meeting was held and a resolution to that effect was subsequently taken."***

*AND AT PARAGRAPH 8 THE Professor implicitly and clearly states in her opinion:*

***"there is no way in which the Commission can proceed with the business of the Commission if Mrs. Gafoor continues to serve as a sitting member of the Commission".***

*d. This trio exhibited bias against the Deputy Chairman but nevertheless sat in judgment on her on 21st December, 2011 and voted her out of participating in the Jeremie investigation.*

**Procedural history:**

21. Application for leave: The application for leave was filed on 2nd March 2012 and came on for hearing on 28th March 2012 after all the parties was served by the Claimant[13]. At that hearing the preliminary point was taken that the Attorney General as well as the members of the Commission in their individual capacity who were named as parties ought not to be parties in this claim. I gave directions for written submissions. The Commission reserved its position on the question of leave but submitted that the members of the Commission who were also sued in their individual capacity should be struck out. In my written decision dated 29th March 2012 those parties were ordered to be struck out and I granted the Claimant leave to apply for judicial review. I noted that there was an arguable case of a breach of natural justice and a failure to discuss the merits of the Jeremie application.

22. Application to set aside leave: Immediately upon granting leave the Defendant indicated that it would be filing an application to set aside leave in addition to responding to the substantive claim. I then gave directions for the management of the claim. The Defendant filed not only its affidavit in response but an application to set aside leave.

23. Amendment: The Defendant also subsequently produced three letters written by Chairman Gordon, Professor Bissessar and Mr. Rolingson to the President. The Claimant since the filing of the claim has been making a request for the documents for these letters but to no avail. The Defendant contended that the letters were not relevant to the decision under challenge and produced the letters without prejudice to that position. This prompted the application to amend the claim to include the ground of bias. In my written judgment dated 6th June 2012 I dealt with that amendment and permitted a limited form of the amendment and evidence in support of the new ground.

[13] The Commission also purported to enter an appearance, even though no claim form had yet been filed, but is evidence of service of the proceedings on them.

24. Striking out evidence: Another significant procedural event was a ruling made by this Court on 24th July 2012 striking out certain parts of the evidence of the Defendant's affidavits. This was the subject of an appeal and the evidence that I had struck out was reinstated. Significantly however, the orders that I had made granting permission to amend and the orders striking out the evidence of the Claimant dated 27th June 2012 was not appealed by the Claimant.

25. Cross examination: This played a critical element in resolving some conflicts of facts in this case. Where there is a dispute of fact and no cross examination is allowed the courts will proceed on the basis of the written evidence presented by the person who does not have the onus of proof. As the onus is on the claimant to make out her case for judicial review this means that in cases of conflict on a critical matter which are not resolved by oral evidence and cross examination the courts will proceed on the basis of the defendant's written evidence[14].

26. Importantly a few days prior to the hearing, applications were made by both parties for the cross examination of the deponents on their affidavits. I considered the application of both parties and although it is rare in judicial review proceedings I granted both parties permission to cross examine the deponents. See section 10(10) of the JRA. I observed that cross examination is not like in an ordinary trial where it is permissible on relevant matters generally. It must be necessary and relevant for the determination of any ground of challenge on which the Claimant relies. In **Sharma v Manning** the Court of Appeal observed:

> "It has to be demonstrated that cross examination is not only relevant to a legitimate ground of challenge but also without it, the court is unable to satisfactorily adjudicate on the ground of challenge"

[14] See Judicial Remedies in Public Law, Clive Lewis 3rd ed paragraph 9-095 -9-096

Later the Court of Appeal re-emphasized the point that there is an acute distinction between cross examination which is relevant to an impugned decision and cross examination which is linked to a ground of challenge of the decision.

> "Cross examination in judicial review proceedings is only permitted when it is relevant to an impugned decision and it is linked to a ground of challenge of procedural impropriety but a prior consideration is, as we have said that the affidavits either contain conflicts of fact central to a material issue in the case or infringe the duty of full and frank disclosure. It is for this reason that cross examination in judicial review proceeding is understandably rare."

27. See also the recent case of **R v Secretary of State for Foreign and Commonwealth Affairs (application of Bancoult) [**2012] EWHC 2115 where there was a dispute as to the authenticity of Wikileaks documents and what was actually said in a meeting. Cross examination in those judicial review proceedings were permitted to determine those factual disputes.

28. Similarly in my view cross examination was necessary in this case to deal with some acute disputes of fact relevant to the ground of challenge which were: (a) whether there was a discussion on the merits of the Jeremie complaint at the meeting of 21st December 2012. (b) whether the Commission obtained legal advice from Senior Counsel and (c) was the Claimant aware of the Defendant's response to the pre action protocol letter which related to the general issue of non disclosure raised by the Defendant in these proceedings in its application to set aside leave.

29. Ultimately at the hearing on 28th October 2011 I was comforted by the fact that cross examination was in fact permitted on these critical issues of fact and I endorse the observation of Sedley J who commented after having allowed cross examination on affidavits on judicial review in **R v London Borough of Camden ex p Paddock** [1995] COD 130 "I must say that I am glad that I took the course I did. In place of a likely sense of grievance on the claimants part that events were being assumed to have been other than they were or of an unsatisfactory attempt to gauge the relative credibility's on paper

an hour of oral testimony made it possible to discern what had in all probability happened in relation to a critical aspect of the procedure". In our case we spent a morning on cross examination of Mrs. Gafoor, Mr. Ramdeen and Mr. Farrell. Inexplicably the Claimant did not cross examine Mr. Gordon, Mr. Rolingson and Mrs. Bissessar on the merits and legal advice issues. This is a fatal error in my view by the Claimant as is discussed later in this judgment as a witness must be challenged in cross examination if the party wishes to submit, as the Claimant has, that that evidence should not be accepted. I cannot see how Counsel can submit after these members set out their own account of the meetings that cross examination of the Registrar binds the other members as he is "the horse's mouth" of the Commission. As the persons who participated in the deliberations and voted at the meeting were not cross examined and noting that the Registrar's statutory role is simply to keep a proper minute, where there is a conflict in the evidence and the evidence was not challenged by the Claimant, I must decide that these members' accounts are to be accepted and it is not open in closing arguments to ask this Court to reject their evidence.[15]

30. On the issue of bias I did not permit cross examination as there was no dispute of facts relevant to the ground of challenge. The ground was limited to the contents of the letters themselves and the authors of the letters simply stated in their affidavits the context in which they wrote the letters. Both parties had in fact submitted that it is not the task of this Court to determine the truth of the allegations made in the said letters and the Court must apply the objective test as set out in **Panday v Virgil**[16] and **Re Medicaments**[17]

31. Most of the procedural applications and case management were initially held in camera for reasons set out in an earlier judgment and eventually I ruled that the confidentiality bar which I had imposed be lifted.

[15] See *Phipson on Evidence 17th ed* 12-12, *Blackstone's Civil Practice 2012* para 59.44 and **In the Matter of an Application by Steve Ramsarop** and others per Mendonca J as he then was
[16] Basdeo Panday v Senior Superintendent Wellington Virgil Mag App 75 of 2006
[17] [2001] 1 WLR 700.

32. Finally I note that on 18th May 2012 the parties attended a judicial settlement conference which was chaired by another Judge. The proceedings in that conference is private and confidential and I am not aware of the nature of the without prejudice discussion that ensued.

**The hearing:**

33. At the hearing Mrs. Gafoor, Mr. Ramdeen and Mr. Farrell were cross examined on the three main issues I had earlier identified. In relation to the issue of the Claimant's receipt of the pre action protocol response the Claimant was adamant that she did not receive it. She however made no attempt to enquire into the whereabouts for same when the time had elapsed to respond. She was familiar with pre action protocol letters and the Commission's position on them generally. Mr. Ramdeen's cross examination was uneventful on this issue of the receipt of the response to the pre action protocol letter. He is an independent witness, really having no issue in the main proceedings. His evidence that he delivered the response to the Claimant was unshaken. It would have been a fairly routine matter for the Claimant to at least make enquiries for the response before embarking upon this litigation.

34. On the issue of whether there was a discussion on the merits the Claimant's cross examination further confirmed the Defendant's version that the merits were discussed. Her simple view was that there was just no merit in the Jeremie application.

35. With regard to legal advice she accepted that the Registrar did consult and obtain advice from in house and Senior Counsel although the content of Senior Counsel's advice was not communicated to her.

36. With regard to Mr. Farrell I do not agree with counsel for the Claimant that he was a coached witness and was evasive in cross examination. He was consistent and unshaken. I also see no basis for the criticism of the minutes as not recording that the merits of the Jeremie application were discussed. It may not have been recorded in the manner in

which the issue of the leakage of confidential information was recorded but this does not detract from the substance of the note that there was discussion on the merits.

**Factual Backdrop:**

37. After perusing all the evidence in this claim[18] I can succinctly set out the chronology of events leading up to the Commission's decision by letter dated 21st December 2012. In doing so I found the evidence of Mr. Farrell and his minutes of the Commission meetings of invaluable assistance[19].

38. The Claimant has had a distinguished career in the civil service culminating with the receipt of a national award the Public Service Medal of Merit (Gold) in 2011. In 2009 she was appointed a member of the Integrity Commission, having served earlier in 2005 to 2007. From 2010 she has been the Commission's Deputy Chairman and her term comes to an end on 14th March 2013. She was suspended from duty by the President by letter dated 9th February 2012. The circumstances surrounding that suspension are the subject of parallel constitutional law proceedings which came up before me for hearing and was determined on 12th July 2012 in CV 2012-876.

39. In 2010 the Commission commenced an investigation in relation to a complaint against Mr. John Jeremie pursuant to section 33 of the Act. During the course of that investigation the Commission was in receipt of a request by Mr. Jeremy addressed to the Registrar, Mr. Farrell, for the recusal of two of the Commission's members Mrs. Gafoor and Mr. Jokhoo. The Commission eventually responded on 21st December 2012

[18] The evidence consisted of the following: Affidavit of Mrs Gafoor filed 2nd March 2012, 9th May 2012, 18th May 2012, supplemental affidavit of 18th May 2012, 13th June 202. Affidavit of Mr. Farrell, Registrar of the Commission 13th April 2012 and 9th July 2012, Affidavits of Kenneth Gordon, Ann Marie Bissessar and Neil Rolingson 13th April 2012 and 9th July 2012

[19] There is no evidence to impeach the authenticity of the minutes. They are contemporaneous records and prepared before even the hint of litigation. I note throughout the minutes the reference to the word "merits" and indeed signals the Commission's approach to the Jeremy application as well as the request of Mrs Gafoor that the merits of the application be considered. I also note the statutory function of the Registrar as set out in section 7 (1) (a), (b) and (c) of the Act : to attend Commission meetings, record the proceedings and keep the minutes in proper form and perform such duties as the Commission may require.

indicating that both Mr. Jokhoo and Mrs. Gafoor would not participate in the investigation in the following circumstances.

Application for recusal (The Jeremie application)

40. By letter 14th November 2011 Mr. Jeremie's request for Mrs. Gafoor's recusal was made in the following manner:

> *"I do not mean either injury or ill will my record in public service has shown a staunch regard and stout defence for every action of the Commission It is in these circumstances that I write respectfully and reluctantly to bring the following matters to your attention.*
>
> *Mrs. Gladys Gafoor*
>
> 1. *I have complete respect for Mrs. Gafoor. Unfortunately when her name was being put up for Membership to the Integrity Commission by the then Prime Minister I objected strenuously. The basis for my objection was a Court matter which has been disposed of in Mrs. Gafoor's favour but which I considered raised questions as to whether she should be appointed to the Integrity Commission.*
>
> *When the then Prime Minister rejected any advice given by me I then raised the matter directly with his Excellency, the President, I provided his Excellency with the Court documents for him to make a judgment on the basis of my objection in his independent judgment. The appointment was subsequently made.*
>
> 2. *Mrs. Gafoor's son heads the Tax Appeal Board of Trinidad and Tobago.*
>
> *From 2005 there has existed a relationship of animosity between his office and me acting in my former position as Attorney General. This culminated in*

*Mr. Gafoor holding a press Conference outside of the office of the Attorney General in which he uttered certain derogatory statements of me in my office. (copies of the Newspaper Article are attached).*

3. *I was advised by the then Chief Magistrate that Mrs. Gafoor had advised him not to use attorneys provided by my office in his defence (Messrs. Mendes, S.C, Mr. Ian Benjamin, Mr. Quamina) because there was an improper relationship between me and those attorneys by which a 'kick back' was paid to me for briefs given to these attorneys..*

*I request in the circumstances that you reconsider the decision to proceed with the second investigation…."*.

41. On 23rd November 2011 the Commission indicated that it was continuing its investigations in the matter and by letter dated 6th December 2011 Mr. Jeremie repeated his concerns of the alleged apparent bias of Mrs. Gafoor. It was in December 2011 that this matter quickly came to a head.

42. On 7th December 2011 the opinion of in-house counsel was sought on the request for the recusal of both Mr. Jokhoo and Mrs. Gafoor. In house counsel advised that Mrs. Gafoor should decline to sit on the complaint:

"*Pursuant to your request on advice regarding the matter at caption.*

*Having regard to any investigation being carried out by the Commission on the issue of bias stated by Mr. Jeremie to be made against him by the son of Mrs. Gafoor, Anthony D. Gafoor, in that such allegation of bias has prevented Anthony Gafoor from gaining employment at the University of the West Indies, Mrs. Gafoor should declare her family relationship and recuse herself at the onset from any dealing with or decision making with regard to a determination of this matter…"*

Commission's Meeting on 12th December 2011:

43. On 12th December 2011 the Commission held its meeting and the issue of Mr. Jeremie's application was discussed. At that meeting the Jeremie application and the in house opinion was considered. The two issues that were considered was the Jeremie application and whether Mr. Jokhoo and Mrs. Gafoor should participate in the deliberations. Mrs. Gafoor indicated her disagreement with the views of counsel and expressed her strong view against the application. She indicated the decision to recuse oneself was an individual one and not to be made by the Commission. Mr. Jokhoo although not seeing any merit in the application was of the view that he would recuse if the Commission so requested. At this point in time in dealing with the issue of recusals the Commission was faced with two opposing views: that of Mr. Jokhoo who though not seeing any merit in the application deferred to the view of the Commission. The other, the Deputy Chairman, insisting that such a decision can only be made by her and her decision was that she will not recuse.

44. The other members had expressed the view that she should recuse as "the bigger issue was the credibility of the Commission as it conducted its work, If a member's presence in the deliberations of a matter could jeopardize the Commission's work that member should as matter of principle recuse himself." The Commission then decided as a matter of good corporate governance to withdraw to decide the issue in the absence of the two members. Mrs. Gafoor indicated that no decision can be made by the Commission debarring her from attending any such meeting. The Commission was also concerned over the undue delay of the Jeremie investigation. The Commission agreed to convene a meeting on 19th December 2011 to discuss the matter and requested that Mrs. Gafoor and Mr. Jokhoo not attend the meeting. Mrs. Gafoor protested and requested that such a request be put into writing.

45. On 13th December 2011 the Chairman complied. He wrote Mrs. Gafoor setting out the reason why she should not attend the 19th December 2011 meeting which was being

convened to consider the only outstanding issue. Mrs. Gafoor's response to that letter is instructive. She indicated that the Commission cannot express the view that she should withdraw unless they consider **the merits** of the application.

> *"In my view the fact that Mr. Jeremy has requested that I recuse myself is not by itself good reason for me to do so. If it were otherwise any subject of investigation by the Commission could have any member or all the members of the Commission recuse themselves from a matter. The important question is whether the request is supported by good enough reason, that is to say whether the fairminded and informed observer having considered the facts, would conclude that there was a real possibility that I would be biased. The fair-minded observer is no unduly sensitive or suspicious (see Hellow vs Home Secretary [2008] 1 WLR 2416 at 2421).*
>
> ***It follows that unless and until the members of the Commission consider the merits of Mr. Jeremy's reasons they cannot properly express the view that I should withdraw.(***emphasis mine*) A member of the Commission has a duty to perform his/her functions under the Integrity in Public Life Act and cannot lightly refuse to do so. I therefore expect that in making your request you would have indicated to me what in Mr. Jeremy's reasons would justify a finding that the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that I would be biased. I have never expressed any view on the complaint against Mr. Jeremy. The complaint against Mr. Jeremy is not one that involves me in any way, other than as a member of the Commission".*

46. She asked the question rhetorically "what therefore is the basis on which I must recuse myself?" In her view there was none. She indicated to the Chairman the legal test that must be applied if one is to consider the question of recusals. It is clear that she signaled to the Commission that before any decision can be made for her recusal the merits of Jeremie's reason for her recusal should be considered by the Commission.

Commission's Meeting on 19th December 2011

47. This meeting was convened solely for the purpose of discussing the recusal issue and how the Commission will approach it. In attendance were the Registrar, the Chairman, Mr. Rolingson and Prof Bissessar. Although they had asked Mrs. Gafoor not to attend she attended the discussion. Mr. Jokhoo had complied with the Commission's request. The minutes of that meeting were annexed to the Farrell affidavit. The meeting was convened "to discuss the deferred item of Mr. Jeremy's request that Justice Gafoor and Mr. Jokhoo recuse themselves from any further participation in the investigation of the complaint against him because of certain issues pertaining to him which he perceived could be a conflict of interest". A draft response letter was discussed which stated in part:

> *"Please be advised that the Integrity Commission has taken due consideration of your concerns as outline d in your referred letter and will take all appropriate steps necessary to safeguard against any conflict of interest in so far as it pertains to any commissioners participating in the determination of your matter as indicated."*

48. At the meeting it was agreed that the Commission will seek the opinion of Senior Counsel as to how it would proceed given Mrs. Gafoor's refusal to recuse herself from the matter. The Commission as of this date had not made any decision that she should be rescued from deliberating on the matter. It also decided not to issue the said draft response to Mr. Jeremie. Insofar as Mrs. Gafoor had a different recollection of the events at this meeting this Court places more weight on the contemporaneous record rather than the recollection of Mrs. Gafoor which is unsupported by any documentary evidence. It is also noted that all three members the Chairman, Mr. Rolingson and Prof Bissessar verified the contents of the Farrell affidavit.

49. According to the Registrar both he and the Chairman had a telephone conference with Senior Counsel that day to obtain advice as to the issues raised by Mrs. Gafoor. The Registrar later met with Senior Counsel. He advised both the Chairman and Mrs. Gafoor that he consulted with Senior Counsel and she was expected to attend the next meeting.

Publication in the press:"Bitter Row"

50. In the daily newspaper the "Newsday" an article was published referring to this issue as a "Bitter row". Interestingly the report published details of the disagreement between the Commission members a matter which was privy only to those who attended the meeting. More importantly however it also notes that a special meeting of the Commission "has been called for tomorrow in order to, for the first time, formally determine the substantive merits of Jeremie's request." It was now in the public domain that the 21st December 2012 meeting was carded to discuss and determine the merits of the Jeremie request.

Commission's meeting on 21st December 2012

51. All the members of the Commission were present at the meeting on 21st December 2011. The minutes of that meeting are exhibited to the Farrell affidavit and the Court relies on this contemporaneous record of the events preferring it over the unsupported statement of Mrs. Gafoor as to what transpired at this meeting[20]:

> *2.6 Having discussed at length Justice Gafoor's objection to item 2 on the Agenda, the Chairman asked for a motion for the Agenda to be adopted. The motion was moved by Professor Bissessar, seconded by Mr. Rolingson and was carried. Justice Gafoor objected to the motion.*
>
> *2.7 The Commission considered Justice Gafoor's letter and the merit of Mr. Jeremy's request that Justice Gafoor and Mr. Jokhoo recuse themselves from deliberations on the investigation of his complaint.*
>
> *2.8 Professor Bissessar stated that the perception will be that once Justice Gafoor and Mr. Jokhoo sit on this matter there will be bias. She therefore saw merit in Mr. Jeremie's request that they recuse themselves.*

[20] An attempt was made in cross examination to discredit these minutes generally by Counsel for the Claimant asking for the whereabouts of the notes of the meetings. The simple and acceptable response was that they are shredded after the minutes are adopted.

*2.9 Mr. Rolingson was of the firm view that Justice Gafoor and Mr. Jokhoo should recuse themselves because of the perception of bias, even though it may not exist.*

*2.10 Mr. Jokhoo indicated that he saw no merit in Mr. Jeremie's request for him to recuse himself and referred to the advice of in-House Legal Counsel which supported the recusal of Justice Gafoor but saw no merit in Mr. Jeremie's request for Mr. Jokhoo to recuse himself.*

*2.11 Justice Gafoor stated: "There was absolutely no merit in Mr. Jeremie's request. He could no ex post facto introduce objections to me and Mr. Jokhoo some 18 to 20 months after the matter was being considered by the Commission. Mr. Jeremie was required to state the basis and not merely his request from my recusal"*

*2.12 The Chairman stated that in addition to the views expressed by Professor Bissessar and Mr. Rolingson, the leaked article in the Newsday had now informed Justice Gafoor that Mr. Jeremie had objected to her appointment to the Integrity Commission. He would therefore now have additional grounds to feel that Mrs. Gafoor would be biased against him.*

*2.13 Justice Gafoor cited the third paragraph of her letter and the legal reference to whether the "fair-minded and informed observer" having considered the facts would conclude that there was a real possibility for her to be biased. (Helow vs Home Secretary [2008] 1 WLR 2416 at 2421).*

*2.14 Having fully discussed the matter with all opinions being allowed to be heard, the Chairman put the following resolution to a vote: "Be it resolved that as a result of the contents of the letter dated November 14, 2011 from Mr. John Jeremie re:4/1/32 Mr. Seunarine Jokhoo should recuse himself from deliberations of the matter".*

*Mr. Rolingson – agreed; Professor Bissessar – agreed; Mr. Gordon – agreed.*
*Mr. Jokhoo – did not agree; Justice Gafoor – did not agree.*

*The resolution was approved: three in favor, two against.*

*2.15 Having fully discussed the matter with all opinions being allowed to be heard, the Chairman put the following resolution to a vote: "Be it resolved that as a result of the contents of the letter dated November 14, 2011 from Mr. John Jeremy re: 4/1/32 Justice Gladys Gafoor should recuse herself from deliberations of the matter".*

*Mr. Rolingson – agreed; Professor Bissessar – agreed; Mr. Gordon – agreed.*
*Justice Gafoor – did not agree;*
*Mr. Jokhoo – abstained.*
*The resolution was approved: three in favor, one against, one abstained.*

*2.16 Justice Gafoor stated that any resolution concerning her recusal from the Jeremie matter being put to the Members of the Commission was an exercise in futility because recusal is a matter for her and no one can vote for her recusal unless a Court of Law so directs that she should do so and a proper basis is supplied for her doing so.*

52. I pause to make the following observations about this record. First it is a contemporaneous record of the meeting of the Commission and is the best evidence as to what transpired at that meeting. There was no evidence to impugn the authenticity of the document save for the word of Mrs. Gafoor who alleges that it is incomplete but is unable to produce a record of her own as to what transpired. Second the Commission members were recorded as making their response to the objections raised in the Jeremy application. Third it is clear that in her view the request of Mr. Jeremy was insufficient to warrant her recusal though other members saw the need based on a perception of bias. Fourth it is clear that her complaint at the meeting was not that she was not given an opportunity to participate in the discussion, not that she was denied a hearing on the recusal issue, not

that the Commission was not applying the proper test as stated in **Porter v Magill**[21] but that it was a wasted exercise because the Commission cannot made a decision for her as to whether she can recuse or not unless a Court of law so directs. In her opinion therefore the only difficulty she had at this meeting was that the Commission was making a decision on this issue when she felt she was the only one who was competent to do so or for a Court to direct her not to sit on a particular complaint. I note that her story changed under cross examination on this question of the discussion on the merits when she said there was no merit in the Jeremie application and so none could be discussed. Finally she voted against the resolution. When confronted with this evidence Mrs. Gafoor sought to explain this away in her affidavit in response by saying Mr. Gordon forced the Registrar to record that. There was no request to cross examine Mr. Farrell on this and more importantly the minutes of both the 19th and 21st December were confirmed in the January 11th 2012 meeting at which Mrs. Gafoor attended. All the members even Mr. Jokhoo confirmed that they were accurate.

53. The letter to Mr. Jeremie dated 21st December 2011 was issued by the Commission indicating that both Mr. Jokhoo and Mrs. Gafoor will not sit on the investigation.

54. Mrs. Gafoor immediately responded to this letter where she voiced her complaint as (a) there was no reason advanced for her to recuse herself (b) that it is not a matter on which it was appropriate for the commission to vote. Her request for the decision to be vacated was refused by the Chairman by his letter dated 5th January 2012. In his letter he stated that the decision was taken "after the matter was discussed fully and after taking account of the views of all members including your good self".

55. Following this activity in December 2011 matters unfortunately spiraled into controversy in the public domain and eventually leading to Mrs. Gafoor seeking the intervention of the President in the fracas and the members Gordon, Rolingson and Bissessar issuing the three letters to the President. Eventually the President established a Tribunal to investigate the conduct of Mrs. Gafoor. The facts leading up to that event is set out in my

[21] **Porter and Another v Magill** [2002] AC 357

earlier judgment in the constitutional proceedings and is not relevant to these proceedings.

56. Understandably Mrs. Gafoor may have felt offended by Mr. Jeremie's accusations. However fundamentally Mrs. Gafoor does not sit on the Jeremy investigation as a single judge but as an officer appointed under the Act to investigate together with the other members of the Commission and within the context of the provisions of the Act.

**The issues:**

57. Quite apart from the allegations made by the Claimant in these proceedings against the Commission of breach of natural justice and bias, in my view the main questions raised in this application for judicial review are very simple. I can summarize them as follows: who must apply the test of apparent bias where the decision maker comprises a panel of more than one person, is it the person who is asked to recuse him or herself or the entire panel? A related question is this: if this obligation lies first with the member whose impartiality is challenged, if he or she declines to recuse must the other members continue to sit with that member or withdraw and is it proper for them to consider the matter collegiately? In the case at bar did the members consider the Jeremie complaint on its merits? The issues are simple and the facts are very straightforward.

58. For completeness I set out and address all the issues raised as follows.

(a) Legal Advice:

(i) Whether the Commission is lawfully constituted in deliberating upon the Jeremie investigation without the Deputy Chairman who is the only attorney on the Commission;

(ii) Whether the Commission failed to obtain legal advice in considering the Jeremie complaint.

(b) Recusal:

(i)Procedure: whether it was for the Claimant alone or for the High Court to consider as a matter of law the Jeremy application and not the Commission.

(ii) Merits: Whether the Commission considered the merits of the Jeremie application.

(iii) Natural Justice: Whether the Claimant was entitled to and denied an opportunity to be heard before a decision was made that she be recused.

(c) Bias:

whether the Commission was biased against the Claimant as evidence in the 3 letters written by the Chairman and two members as particularized in paragraph 32 of the amended claim or at all.

(d) Whether the Claimant has any right recognized in public law to a "self determination" of recusal applications which relate to her.

(e) Non Disclosure:

(i) Whether the Claimant failed to disclose material evidence at the application for leave which will warrant the setting aside of leave.

(j) Whether the Defendant is in breach of its duty of candour.

**Legal Advice:**

59. The Claimant submitted that the Commission cannot deal with the issue of recusal in the absence of the Deputy Chairman. Without her the Commission is not properly constituted or acting without legal guidance. It was also submitted that the Chairman ignored the suggestion of his own member to seek and obtain legal advice on the Jeremie complaint.[22] Both of these submissions fail for the following reasons.

[22] See paragraph 6, 14, 16, 26 and 28 of her grounds: It is contended that the statutory requirement that an Attorney-at-Law and an Accountant must sit on the Commission is mandatory. Implicitly, without an Attorney-at-Law the Commission is not properly constituted to deal with the exercise of its judicial and quasi-judicial functions. The issue of recusal based on either actual or apparent bias is not an administrative matter but an extremely complicated legal matter which cannot be properly dealt with in the absence of an Attorney-at-Law of at least 10 years standing. Consequently, the said decision by the Chairman Gordon and members Rolingson and Bissessar is a nullity and should be quashed forthwith. The Integrity Commission is established by the Integrity in Public Life Act Chapter 22:01, Section 4. Section 4(2) and 4(3) thereof provide that at least one member of the Commission shall be an

No mandatory requirement for the Deputy Chairman as an attorney at law to deliberate on the Jeremy application/or be present in all investigations.

60. Firstly by a proper reading of the Constitution and the Act the business of the Commission can be conducted without the Deputy Chairman so long as there is a quorum. The Commission is a body created by the Act. The powers of the Commission to investigate a complaint is provided for in section 33 and 34 of the Act.[23]The Commission consists of the following persons appointed by the President: a Chairman, Deputy Chairman and three other members "who shall be of integrity and high standing". At least one member of the Commission shall be an attorney at law of 10 years standing and one member shall be a chartered or certified accountant. A quorum shall comprise three members of the Commission including either the Chairman or Deputy Chairman[24].

61. There are no provisions in the Act that regulate who should sit on the investigations or who should preside on an investigation or whether it is mandatory that the member who is an attorney at law shall sit on all investigations[25]. Therefore the full panel of five or at minimum three members consisting of either two members and the Chairman or two members and the Deputy Chairman may deliberate upon investigations under the Act. In this instance as a result of the Commission's decision the minimum panel of the

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Attorney-at-Law of at least ten (10) years' experience and another member shall be a chartered or certified accountant. The objection raised by Jeremie the person under investigation takes issue with both the existing judicial officer (Judge Gafoor) as well as the accountant (Mr. Jokhoo) deliberating upon his matter. Issue of her recusal could not be determined in this fashion and that it was at all material times for the person against whom representations were being made or the Court to consider as a matter of law whether there was any real basis for the objection. This note was passed to the Chairman Gordon after the Deputy Chairman had earlier advised that a legal opinion be sought and obtained on the matter of her recusal. Neither request was acceded to by Chairman Gordon, he then proceeded to take a vote
Firstly, that the matter of her recusal could not be simply voted upon by the Commission without legal guidance;
The statutory requirement is that an attorney at law must sit

[23] Amongst the functions performed by the Commission include that receipt and investigation of complaints regarding alleged breaches of the Act or the commission of any suspected offence under the Prevention of Corrupting Act.

[24] See section 4 of the Act

[25] There are no regulations made by the Commission under the Act although section 41 (1) empower the Commission to make regulations for the manner in which respect of which it may be necessary for carrying the Act into effect.

Chairman and two members will deliberate on the Jeremie investigation. This is permissible under the Act.

62. From the Act therefore there is no statutory entitlement in any one person to sit or to adjudicate over an investigation save that the Commission must discharge its obligations as properly constituted under the Act.

63. The Commission is also a creature of the Constitution. But there are no provisions in the Constitution either which is capable of being interpreted to give the Claimant any right to sit on an investigation in the same manner as a judge of the Supreme Court. Section 138(1) makes provision for the establishment of an Integrity Commission "consisting of such number of members upon such tenure as may be prescribed" [26]

64. There is therefore no constitutional or statutory power to buttress any right in the Claimant to consider a complaint of recusal alone. It is not mandatory that the Attorney at law be present in order for the Commission to make decisions. The Commission is properly convened with a minimum of three members. With that number it can legitimately transact the business of the Commission and discharge its functions under the Act regardless of the presence of the attorney at law or chartered accountant for that matter. The Commission itself was properly constituted when its entire complement of persons were appointed by the President and the decision made by the Commission on 21st December 2011 did not prevent the Claimant from discharging her functions as Deputy Chairman or sitting on any other investigation.

65. Insofar as the Claimant is contending that as she is the only Attorney at law on the panel then as of necessity (a) she should deliberate on the Jeremie complaint which is a legal issue and (b) she should be a member of the panel to exercise investigative powers, both of those propositions do not exist in a vacuum and there must exist a statutory substratum to support them. In contrast in **Pacific Cinemas (Canberra) Pty Ltd v Administrative**

[26] Section 138 (2) provides that the Commission shall be charge with the task of monitoring and investigating honest or corrupt practices and procedures and conduct. By section 139 Parliament is charged with the function of making provision for the procedure in accordance with which the Commission is to perform its functions.

**Appeals Tribunal** and Others[27] the Court considered an application for an order of review of a ruling made by the President of the Australian Capital Territory Administrative Appeals Tribunal under s 6 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (the Act). The President was the only legally qualified member on the panel. The applicant objected to the President continuing to hear the matter on the ground of apparent bias but the President ruled that he would not disqualify himself. In arriving at its decision the Court considered the principle that as of necessity the President could not disqualify himself. The statutory underpinning for that position was 20A of the *Administrative Appeals Tribunal Act*:

> "(1) The Tribunal may, of its own motion or on application by a party, request the President to reconstitute the Tribunal to give a ruling on a question of law or on a question that, in the opinion of the requesting Tribunal, is a question of law." Subsection (4) limits the composition of such a tribunal to:
>
> "(a) the President, (b) the Deputy President; (c) a senior member who is enrolled as a legal practitioner … for not less than 5 years."

66. It is clear that under those circumstances, as the Court held, the statute contemplated that questions of law be decided by legally qualified members and it would frustrate the purpose of that provision if the President was to refer this matter to an unqualified member. Higgins J observed that "of significance in deciding this question is the perceived intention of the legislature."

67. That places in context the Claimant's challenge in this case. Even in the Act where section 15 makes provision for the President to appoint a tribunal comprising of "two or more of its members" to conduct an enquiry into declarations, there is no requirement that any of those members should be the Deputy Chairman or the member who is an attorney at law. There is no intention of the legislature expressed in the Act therefore which makes it mandatory that the member who is an attorney at law sit in all

[27] Supreme Court of Australian Capital Territory Higgins J 3 February 1999, 9 March 1999

deliberations or is the only person to give advice on questions of law. The Claimant's contention therefore that the decision is a nullity, it having been arrived at without an attorney at law, fails.

Legal advice and or advice of Senior Counsel was obtained by the Commission

68. Secondly the Claimant submitted that in the circumstances of this case there was an obligation of the Commission to obtain a legal opinion in writing from Senior Counsel which it failed to do. I doubt whether legal advice from Senior Counsel was necessary to guide the Commission as distinct from simply obtaining legal advice on the issue. Regardless, on the facts of this case the Claimant's submission carries no weight. I accept from the evidence that Mr. Gordon and the Registrar obtained the oral advice from Senior Counsel. The fact that legal advice was obtained from Senior Counsel was communicated to Mrs. Gafoor. This was not disputed in Mr. Farrell's cross examination; he was not cross examined on this issue. She was aware that Senior Counsel's position was to follow the guidance of Mrs. Gafoor in her letter of December 2012. That guidance was (a) the test to be applied and (b) the methodology to consider the request which is that the Commission should consider Mr. Jeremie's application on its merits. In my view that was the invitation for the panel collegiately to consider this objection made by Mr. Jeremy.

69. From the evidence I hold that the Commission was in receipt of the legal advice of both in house counsel and Senior Counsel. The in-house counsel had delivered her opinion by memoranda referred to earlier in this judgment. This is not in dispute. Secondly, and even if it was necessary to obtain a second opinion, the Chairman and Mr. Farrell obtained Senior Counsel's advice to follow the guide of Mrs. Gafoor's letter. I say so for the following reasons:
    (a) The Claimant admitted in cross examination that the advice of Senior Counsel was obtained by the Registrar;
    (b) The evidence of Mr. Farrell and Mr. Gordon that this advice was shared with Mrs. Gafoor was not challenged in cross examination;

(c) It is true that Mr. Gordon did not share this advice with anyone at that meeting but it would appear from the evidence of Mr. Farrell and Mr. Gordon that they proceeded in the meeting following the advice of Senior Counsel which was to follow the guide of Mrs. Gafoor's letter. Prof Bissessar presumed this to be the case.

(d) Mrs. Gafoor admits in her 9th May 2012 affidavit that she became aware of the advice of Senior Counsel at the meeting held on 11th January 2012. If so it is misleading to rely on an alleged lack of legal advice as a ground for judicial review.

(e) The Claimant made heavy weather of the fact that the Chairman ignored Mr. Rolingson's note to seek legal advice when the deliberations of the 21st December 2012 meeting were ongoing. But the unchallenged evidence is that Mr. Gordon did not stop the meeting but proceeded along the advice that he received. There was no cross examination when it was open to the Claimant to challenge this evidence.

(f) The Claimant's argument is in fact rather circuitous. On her own evidence the Claimant provided the legal guidance to the Commission. In her letter to the Commission which was also on the agenda for the 21st December 2012 meeting, she provided the legal test as to bias. The Claimant being an attorney of 51 years standing and former Judge of the Industrial Court having provided this advice and the Commission having followed it there can really be no basis for her complaint.

70. The challenge of failing to obtain legal advice cannot be sustained.

**Recusal- procedure:**

71. The Claimant contended that as a matter of procedure the only manner in which the issue of recusal can be determined is by herself (self determination) or by the Court and not the Commission. I simply cannot see the force of this argument. As I noted above it is the duty of the Commission to discharge various functions under the Act, one of which is to regulate its own procedure. The decision on the investigation would have been that of the

Commission. The Jeremy application was addressed to the Commission for it to arrive at a decision based on the complaint[28]. The Commission could not delegate that decision to a third party[29]. It was its duty to arrive at its own decision. The panel was therefore entitled to review the challenge and determine its merits. From a practical point of view the Claimant should be allowed to determine if she would accede to the request but if she did not step down it is a matter for the Commission to decide the issue. This is done to maintain the appearance of an impartial and fair investigation. If the Commission had voted the other way then presumably the Claimant would not have taken issue with the decision. But it does not make the procedure less legal.

72. For Mrs. Gafoor to complain that it is for her alone to make the decision on the Jeremie complaint while at the same time submit that there was no discussion of the merits of the Jeremie application, is an inconsistent argument. Indeed she cannot seriously contend that the Commission was incapable of making a decision on the Jeremie application when it was she herself by her letter to the Chairman dated 15th December 2011 who invited the Commission to consider the Jeremie complaint on its merits and advise her whether she should recuse herself. Indeed such an invitation conforms with the collegiate approach to determining the issue of a recusal as distinct from self determination of recusals and some commentators suggest that this may well be the modern approach. Indeed although self determination of recusals where the judge sits alone is the practice, academics have noted that it is somewhat difficult to justify when that procedure appears on its face to be incongruous with the very principle that one should not be a judge in one's own cause. For this reason Hammond in his recent treaty also commended the modern approach for a consideration of the matter collegiately[30].

[28] See the letter dated 11th November 2011

[29] See Supperstone, Judicial Review paragraph 11.52: "In law decision can be delegated only where there is express or implied power to do so and in the absence of an express power the courts are slow to imply a power to delegate a judicial determination such as a disciplinary decision. As Denning LJ pointed out practical problems can often be bypassed by fixing a small quorum this will achieve much the same effect as delegation to small committee."

[30] Supra. See also the paper dated May 4 2012 pg 12 of Justice Nelson, Judge CCJ.

73. More importantly however, what compels this Court to accept the collegiate approach to recusals where the decision maker is a panel or tribunal, is that it is a serious matter for the entire panel or tribunal to ensure that there is nothing in its decision making process "which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment", and where this factor, interest or influence must necessarily be assessed as a matter of appearances and of perception.

74. It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them. In order to fulfil this duty the decision-maker must be and appear to be unbiased. The principle has been applied not only to the judicial system but also, by extension, to many other kinds of decision making and decision maker and is the application of the principle of procedural fairness. The application of this principle in connection with decision makers outside the judicial system such as with the Commission must sometimes recognise and accommodate differences between court proceedings and other kinds of decision making administrative decision makers who do not enjoy the degree of independence and security of tenure which judges have and the duty to sit buttressed by a judicial oath.

75. While one cannot accede too readily to such challenges equally when in doubt it is permissible to err on the side of caution and step down. These challenges should be dealt with calmly and where the circumstances exist collegiately. Ultimately the tribunal or administrative body has a function to perform of fairly deciding a substantive investigation and for administrative bodies exercising quasi judicial functions it is important that it is perceived to have acted independently and fairly. As Lord Bingham remarked[31] "In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear so". Indeed in **Ex p Pinochet**[32] *(No 2)*, in the context of an application of the automatic disqualification doctrine, Lord Browne-

[31] ([2004] HRLR 34 at [7]):
[32] **R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte** (No.) [2000] 1 AC 119

Wilkinson invoked Lord Hewart's famous dictum about the importance of appearances[33]. It goes without saying that actual bias must disqualify. The difficulty for tribunals and for most decision makers is in determining the disqualifying circumstances which may be argued to have the appearance of bias.

76. In deliberating on the issue of bias the panel is required to consider the grounds of the application, the members' response, and apply the relevant test of apparent bias as set out in our Court of Appeal in **Panday v Virgil** endorsing the test of **Porter v McGill**[34]. The panel must ascertain all the circumstances which have a bearing on the suggestion that the member is biased and ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was biased. To do otherwise would be to act irrationally or illegally. Such a discussion was characterized by the parties in this claim as a discussion on the merits of the application.

77. I note in passing **Ansar** and in **Peter Simper** (No 1) in the scheme of the Employment Appeals Tribunal in the UK guidance was given in determining the question of apparent bias within the scheme of the EAT:

> a. The test to be applied as stated by Lord Hope in Porter v Magill 620021 2 AC 357 , at para 103 and recited by Pill LJ in Lodwick v London Borough of Southwark at para 18 in determining bias is: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.
>
> b. If an objection of bias is then made, it will be the duty of the Chairman to consider the objection and exercise his judgment upon it. He would be as wrong

[33] The famous and worn phrase of Lord Hewart CJ "*It is not merely of some importance but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done'*"" applies equally to decisions of the Integrity Commission when it is deliberating upon complaints against persons in public life under the Integrity Act.

[34] The test confirmed by our Court of Appeal in **Panday v Virgil**

to yield to a tenuous or frivolous objection as he would to ignore an objection of substance: **Locabail** at para 21.

c. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour: Re JRL ex parte CJL [l9861] 161 CLR 342 at 352, per Mason J, High Court of Australia recited in **Locabail** at para 22.

d. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application: Clenae Ptv Ud v Australia & New Zealand Banking Group Ltd [l9991] VSCA 35 recited in **Locabail** at para 24.

e. Parties cannot assume or expect that findings adverse to a party in one case entitle that party to a different judge or tribunal in a later case. Something more must be shown: Pill LJ in Lodwick above, at para 21, recited by Cox J in Breeze Benton Solicitors (A Partnership) v Weddell UKEAT/0873/03 at para 41.

f. Courts and tribunals need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment (or stay) cannot: Sedley LJ in **Bennett** at para 19.

g. There should be no underestimation of the value, both in the formal English judicial system as well as in the more informal Employment Tribunal hearings, of the dialogue which frequently takes place between the judge or Tribunal and a

party or representative. No doubt should be cast on the right of the Tribunal, as master of its own procedure, to seek to control prolixity and irrelevancies: Peter Gibson J in Peter Simpler & CO Ltd v Cooke [l986] IRLR 19 EAT at para 17.

h. In any case where there is real ground for doubt, that doubt should be resolved in favour of recusal: **Locabail** at para 25.

i. Whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise (**Locabail** at para 25) if:

> a. there were personal friendship or animosity between the judge and any member of the public involved in the case; or
>
> b. the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or,
>
> c. in a case where the credibility of any individual were an issue to be decided by the judge, the judge had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or,
>
> d. on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind; or,
>
> e. for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues."

78. There are several authorities which accept without argument however when the challenge of apparent bias is made against a panel consisting of one or more members it is the panel as a whole that considers the question. In **Meerabux v Attorney General** (2005) 66 WIR 113. This decision of the Privy Council, concerned a judge of the Supreme Court of Belize who had been removed from office by the Governor-General on the advice of the Belize Advisory Council (BAC) following complaints of misbehaviour filed by the local Bar Association. There were proceedings before the BAC. The chairman of the BAC was a member of the Bar Association, and this led to a submission that he was disqualified by the doctrines of either *Ex p Pinochet (No 2)* or *Porter v Magill*. Importantly in that case the Council as a whole considered the application and not only the Chairman.

79. In **Re Medicaments No 2** [2001] 1 WLR 700 the application was made to a panel, the Restrictive Practices Court, comprising a Judge as Chairman and two lay members for one of its lay members Dr. Rowlatt to be recused on the ground of apparent bias. The tribunal heard the application, not Dr. Rowlatt, and ruled on it, dismissing the application for one of its members should step down. In the Court of Appeal that decision was reversed on the ground that the panel misapplied the test. However what is important in this case is the endorsement of the duty of the entire Court to consider the challenge. Noteworthy is that the Court of Appeal held that the entire proceedings of the tribunal in determining the substantive matter was infected by the bias of the one member and demonstrates the serious effect a member who is accused of bias may have on the outcome of the proceedings if she continues to sit on the panel. In that event with regret Lord Phillips observed "Its consequence is that an immense amount of industry will have been done for nothing, and very substantial costs will be thrown away."[35]

80. This poisonous effect of bias which may well diffuse throughout the entire work of the tribunal if the person affected with bias is not removed was also observed in **The**

[35] With some irony in the postscript of the re Medicaments judgment it was noted that while preparing the judgment it came to the attention of Lord Phillips that Dr Rowlatt was known to him although only by sight because she is a near neighbour. It would appear that collegiately the Court of Appeal was of the view that this did not affect the issues they had to decide.

**President of the Republic of South Africa v South African Rugby Football Union and Ors**:

> *"If one Judge in the opinion of the other members of the Court incorrectly refuses to recuse herself or himself that decision could fatally contaminate the ultimate decision of the Court and the other members may well have a duty to refuse to sit with that judge..."*

81. See also Warner JA in **Panday v Virgil**

> *"The courts have recognised that bias operates in such an insidious manner that the person alleged to be biased may be unconscious of the effect. It is trite law that if a reasonable apprehension of bias arises, the whole proceeding becomes infected. Credibility issues no longer arise; the reasonable apprehension of bias remains and the proceedings cannot be saved."*

82. **Pinochet** is remarkable in demonstrating this fatal effect on the substantive decision caused by the bias of one member on a panel and the utility of having a full panel decide the issue of whether or not a member of the panel of Law Lords should recuse when faced with an objection of apparent bias. Even Lord Hoffman was in error in failing to disclose his apparent conflict of interest. Lord Hoffmann was held to have been disqualified automatically by reason of his directorship of a charitable company. That company was not a party to the appeal, nor had it done anything to associate itself with those proceedings. But the company of which he was a director was controlled by Amnesty International, which was a party and which was actively seeking to promote the case for the extradition and trial of Senator Pinochet on charges of torture. Lord Browne-Wilkinson observed that there was no room for fine distinctions in this area of the law if the absolute impartiality of the judiciary was to be maintained.'

83. So insidious is the ground of bias that it is recognized even in the Privy Council collegiate steps should be taken to ensure that its decisions are immune from the perception of bias. Following on the heels of the **Pinochet** judgment Lord Chancellor

Lord Irvine of Lairg had written to the senior Law Lord Browne Wilkinson requesting that a procedure be put in place to avoid such a situation ever recurring:

> *"My request to you therefore, as the senior Law Lord, is that you or the Law Lord in the chair, ensure at the time when any committee is being composed to hear an appeal, that its proposed members consider together whether any of their number might appear to be subject to a conflict of interest; and in order to ensure the impartiality and the appearance of a impartiality of the committee, require any Law Lord to disclose any such circumstances to the parties and not sit if any party objects and the committee so determine."*

84. This guidance was given in the context of any conflict of interest and certainly the Privy Council being a court of last resort, such guidance is extremely prudent. It is true that in applications made to a judge for recusal the principle of self determination of the application applies. A practical example is revealed in an earlier challenge by the Claimant to my continued sitting on this case[36]. There are several other recent instances of judges in our jurisdiction making a determination on recusal. See the judgments of Jones J and recently of Boodoosingh J and Aboud J. However the difficulty raised in **Pinochet** with the Lord Hoffman's lack of disclosure raises one of the inherent difficulties with a self determination of recusal. There is the paradigm of the challenged judge being a judge in his or her own cause however the adoption of the objective test as settled in **Panday v Virgil** and the introspection of the Judge walking in the shoes of the informed observer is believed to sooth this difficulty. But in situations with disputed facts, questionable behavior or attacks that are close to the Judge's interests this introspection may prove to be the Judge's blind side. J Leubsdorf suggested:

> *"Introspection has obvious advantages and disadvantages as a disqualification procedure. The judge hearing a case knows better than anyone else what she really feels about the parties and issues. She can therefore tell better than others whether she should sit. Yet even honest judges-and disqualification law is primarily directed to conscious thought-may be swayed by unacknowledged*

[36] See this Court's earlier judgment on recusal CV2012-00873 dated 11th October 2012

*motives. The most biased judges may be the most persuaded that their act are just. Moreover, judges need guidance to tell them what tendencies to look for. Hence though judges should be free to withdraw voluntarily no sensible judicial system would leave disqualification entirely to the discretion of the judge in question."*

85. Detecting the underlying tensions and difficulties posed by personal judicial determinations Grant Hammond in his text "Judicial Recusal" has advocated for at the trial level that a request should first go to the allocated trial judge. But if she declines to recuse, there must be clear review mechanisms within the local court structure. Such mechanisms include the statutory precedent in the United States of requests for reallocation of judges. Alternatively a standing review panel chaired by a chief judge can be maintained for quick recusal determination. With a recent spate of applications for recusals perhaps the time has come to examine such alternative structures to further bolster confidence in our decision making.[37]

86. However these recommendations not only point to the difficulties of personal judicial determination but the attempts made to ensure that the decision maker is unaffected by bias. For this reason it follows that where the decision maker is a panel comprising more than one member there is inbuilt in such a structure the type of "independent" review being advocated by Hammond.

87. With collegiate Courts (as it is with tribunals or panels of more than one member like the Commission), Hammond observed:

*"the problem is surely straightforward. The principle should be that the panel appointed to the case should consider whether the objection is well founded. In what might perhaps be seen as a concession to old practice, it is difficult to see why the impugned judge should not have input and perhaps even sit with his colleagues. But the outcome should be for the panel as a whole."*

[37] A useful suggestion is made in Appendix E to Hammond's text which is set out at the end of this judgment.

88. This is precisely the procedure adopted by the Commission. Indeed such an approach also resonates with similar approaches taken by administrative panels. In **West LB AG (London Branch) v Pan** 2011 WL 274781723 the Court referred to the following statement of Browne Wilkinson J in reference to industrial tribunals as good law : "An industrial tribunal, at the hearing, essentially consists of three people, each with an equal voice. The chairman is in no sense in a dominant position. Accordingly if an application is made to abort a hearing before a tribunal of three, in our judgment a decision whether or not to put an end to the existing hearing and to direct a rehearing is one which essentially must be taken by every member of the tribunal and not by one." It is plain that the decision is taken by the whole panel and if an objection of bias is made it will be the duty of the Tribunal to consider it, giving full weight to the relevant considerations.

89. **In Gage v General Chiropractic Council**[38] the panel comprised three chiropractors and one pharmacist. An application was made for the chairman, a distinguished pharmacist to recuse. The Panel unanimously rejected this submission and Justice Jackson upheld the decision of the panel that having regard to the issues in this case, no fair-minded observer could conceivably think that there was any possibility of bias. Similar decisions of the entire panel comprising lay persons on whether a member should recuse was made in **B. (C.), Re**[39] In the matter of DA patient[40].

90. A feature to be highlighted in the case at bar and the principle of being vigilant to maintain the appearance of impartiality is that the Integrity Commission is charged in essence with the maintenance of integrity in public life. They no doubt would be, above all else, even more concerned with the appearance of bias infecting their proceedings which will call for a collegiate approach to recusal determinations.

[38] 2004 WL 2866200 Queen's Bench Division (Administrative Court) per Justice Jackson
[39] 2010 CarswellOnt 7030
[40] Ontario Consent & Capacity Board Beverley Hodgson Member, Nural Alam Member, and Shirley R. Wales Presiding Member Heard: July 28, 2009 Judgment: July 28, 2009

91. Interestingly the Claimant referred to an internal memorandum concerning an apparent conflict of interest between the Chairman and a supplier who it is alleged is a family member. The advice was that he should step down. I asked Counsel for the Claimant what would happen if the Chairman refused to accede to this advice and determined that he will participate in decision concerning his family's business? It cannot be said that the die is cast for the entire Commission and they must run the risk of their proceedings being vitiated by bias. They must decide whether the Chairman should step down if he refuses to do so voluntarily.

92. In this case having considered the statutory and constitutional provisions of the Commission, the authorities on the law of recusal and the circumstances in which the request was made in this case, it is entirely a matter for the Commission to decide the Jeremie application when the Deputy Chairman refused to voluntarily step down. There is no statutory basis conferring sole authority on the Deputy Chairman to decide this issue on her own. The challenge was made to the Commission and having regard to the serious impact such a challenge may have on the investigation it is entirely appropriate for the Commission to consider the Jeremie application. It stands to reason therefore that any challenge to the Commission deciding this issue as irrational or procedurally improper must fail.

**Recusal: considering the merits**

93. A main aspect of the Claimant's challenge was mounted on the fact that the Commission did not consider the merits of the application for the recusal. There was no appeal to this court by the Claimant to reconsider afresh the question of whether based on the letter of complaint that the decision was perverse or irrational. The irrationality limb of the Claimant's argument was based solely and limited to the factual dispute of whether the Commission considered the merits of Mr. Jeremie application on 21st December 2012.[41]

[41] The limited nature of this challenge is found in, The grounds , The relief, The skeleton argument in support of leave, The affidavit of Gafoor in support and in reply, The skeleton argument on July, The speaking note and closing Oral submissions

94. The very simple position was as articulated in the closing submissions of Counsel for the Claimant "if they agreed with Gafoor's advice and guided by Mrs. Gafoor that would have been the end of the matter. Her advice on recusal was to be decided by her and in any event the merits were not considered, that is her back up position." I agree that this could only be the Claimant's "back up" position as from my analysis of the evidence it is clear than the Commission did discuss the merits. I say this based upon:

(a) The contemporaneous records of the two meetings of the Commission on 21st December 2012 and 11th January 2012

(b) The unchallenged evidence of Mr. Gordon, Professor Bissessar and Mr. Rolingson

(c) The evidence of Mr. Farrell on affidavit and his unshaken testimony under cross examination that the merits were discussed.

(d) The evidence of Mrs. Gafoor under cross examination.

The Commission took the time to obtain advice from in house Counsel and Senior Counsel. The Commission had before it the advice of Mrs. Gafoor in her letter of 17th December 2011 wherein she stated the test to be applied and the invitation to consider the application. The unshaken and untested evidence of the Commission is that the Chairman acted on the advice of senior Counsel and guided the meeting along the lines of the advice given by Mrs. Gafoor. The minutes of the meeting reflect contemporaneously what occurred. There were discussions and opinions expressed on the Jeremie application. Mrs. Gafoor participated in these discussions and the vote was taken. I see no basis on the evidence therefore to remotely suggest that the Commission did nothing but consider the merits on 21st December 2011 in Mrs. Gafoor's presence.

**Recusal- natural justice**

95. The Claimant contends that she was entitled to a right to be heard before the decision of recusal was made. The general statement of principle of the duty to act fairly in **ex parte**

**Doody** demonstrates that the right to be heard is contextual where Lord Mustill[42] had this to say at page 560:

*"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*

96. I also summarized the law on the right to a fair hearing as the right to substantive justice which varies from case to case in my previous judgment in CV 2011-876. I confess I was anxious at the leave stage that this decision was somehow done "behind the back" of the Claimant. Nothing could now be further from the truth. I fail to see how any intelligible argument can be made in these proceedings, now that I have the benefit of the full record of events and cross examination, that Mrs. Gafoor was not afforded a hearing. The Claimant was afforded that opportunity at the 21st December 2011 meeting. In fact she was present at every sitting of the Commission's meeting on 12th December 2011, 19th December 2011, 21st December 2011 when the topic of the Jeremie complaint was discussed. The fact that she participated in the discussions of the 21st December 2012 meeting was in fact confirmed in the later meeting on 11th January 2012 by all the members including Mr. Jokhoo that the issue was fully discussed and all opinions were allowed to be expressed. What is clear to me after the cross examination of Mrs Gafoor

[42] **Ex parte Doody** [1994] 1 AC 513

was that her argument is not that there was no discussion of the merits at the 21st December 2012, but that whatever discussion took place in her view there could never be any merit to Mr. Jeremie's application and therefore presumably nothing for her to answer. Her own introspection on the Jeremie application proved perhaps to be her "blind side" but does not however detract from the fact that the opportunity was afforded for her to provide her response and that she together with her colleagues discussed the matter on the 21st December 2012 meeting.

97. In his oral submission Counsel for the Claimant submitted that the issue is whether Mrs. Gafoor was treated fairly. It is difficult to see how she can say she was treated unfairly when the Commission sought legal advice, followed her own guidance and she fully participated in the 21st December 2011 meeting. Her simple case really in my opinion is that she is dissatisfied with the Commission's decision; this does not translate to a breach of natural justice.

**Bias: the "secret letters"**

98. The allegation of bias formed part of the amended grounds for judicial review. I have already commented upon the reason why the amendment was granted earlier in this judgment. The allegation of bias made by the Claimant in this ground is quite clear. She contends that the bias against her is as evidenced "inter alia by three letters written by Prof Bissessar, Mr. Rolingson and the Chairman dated 23rd January, 2012, 22nd January, 2012 and 20th January, 2012 respectively, to His Excellency the President complaining about the Claimant in relation to the business of the Commission". The Claimant thereafter set out extracts of the letters as particulars of her claim of bias.

99. I can see no justification based on this ground for the Claimant to make the wide and sweeping submissions of bias as articulated in oral submissions, written submissions of July 2011 and speaking notes. In those submissions the Claimant alleges firstly that based upon the totality of the evidence there was clear bias against the Claimant and second there was systemic or institutional bias where since 19th December 2011 the Commission

had made up its mind against Mrs. Gafoor. None of this forms part of her grounds and if there was some difficulty with my earlier ruling it was open to the Claimant to appeal that decision.

100. In this new allegation of bias the Claimant alleges that arriving at the decision goes beyond the inference of an apparent bias but includes the possibility of bias or the possibility of unconscious bias in the constitution of the defendant as a body against the Claimant having regard to inter alia: personal confrontation, acrimony, alleged mutterings of violence, alleged want to engage in violence, hostilities and the report to the police on 20th December 2011. Counsel contended that the Claimant is not restricted to his argument on bias by the Court's ruling which he characterized as a preliminary ruling and that the evidential basis for the allegation of bias are the facts as contained in the affidavits filed and the whole of the surrounding circumstances. If that was the Claimant's case all along how simply those very words could have found its way in the amendment. However if the case of bias goes beyond the letters or their extracts, then there is no explanation why those allegations of systemic bias could not have been made originally. In my view there is no justification to traverse beyond the stated grounds for review on this issue of bias limited as I have earlier ruled on those portions of the letters that she pleaded. Importantly that ruling on the amendment was an exercise of this Court case management powers in limiting the issues for determination. It is impermissible for the Claimant to now seek to broaden the enquiry on the issue of bias moreover when some of these matters were quite open to the Claimant to plead from the outset of the proceedings. Counsel for the Claimant will not be surprised therefore that this Court views those arguments as a collateral attack on its earlier ruling on the management of this case and an impermissible attempt to widen the scope of the dispute.

101. To circumvent the obvious difficulty that some of these new claims of bias do not form part of the grounds of review, the Claimant relies on the doctrine of fresh evidence to prove its allegation of bias. Unfortunately the evidence relied upon in this case is not "fresh evidence within the knowledge" of the Commission as discussed in **R v Environment Sec ex p Powis** [1981] 1 WLR 584. In that case the Court laid down the

guidelines for the admission of fresh or additional evidence to show what material was before the decision maker. Apart from the letters which post dated the decision there is no additional material which goes to the question of misconduct on the ground of bias. I agree with the Claimant's submissions that this Court cannot disregard relevant evidence. Equally it ought not to consider irrelevant evidence.

102. In *Judicial Review by Supperston Goudie and Walker* 4th ed paragraph 12.1.1 the authors examined the variety of forms that bias may manifest itself:

> *"The second limb of natural justice (which, like the first, arises not only in the field of judicial review, but also in the fields of civil and criminal procedure) is the rule that in general no one should be a judge in what is to be regarded as his own cause, whether or not he is named as a party. The decision-maker must have no reasonably avoidable material interest (by way of gain or detriment) in the outcome of proceedings, save such as is candidly, fully and openly declared and object to which is waived, expressly or by necessary implication. Interest may take many forms. It may be direct. It may be indirect. It may arise from a personal relationship, or from a tenuous one. It may be apparent. It may be undisclosed. It may entail actual bias, i.e. a predisposition, based upon fear or favour affection or ill-will, to decide in a particular way rather than upon a proper and balanced consideration of the true merits of the issue. There may be no actual bias at all. A vitiating interest may even be non-existent or non-provable, but there may be sufficient of an appearance of it nonetheless, either because a reasonable outsider might think that there was a real possibility that the issue could not or would not be fairly determined on its merits, or because undue favour or partiality or antipathy was in the event manifested. There are a variety of interests which may infringe the rules of natural justice, but there are times when the interest will not constitute an infringement. The circumstances may be such that that is not reasonably practicable, or at least is not compatible with the construction of relevant legislative provisions. The interest may be substantial. It may be trivial. It may even be beneficial. It may be an interest of the entire decision-making body, or of only a part (influential or influential) of it. It may be what is*

*sometimes termed structural bias, built into the system, also described as institutional bias or systemic bias."*

103. The test of apparent bias is well settled and clarified by the House of Lords in the case of **Porter and Another v Magill.** The question to be determined is whether the fair-minded and well informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. This test has received intense scrutiny and endorsement by our Court of Appeal in **Panday v Virgil**. Except where actual bias is alleged, it is not useful to investigate the individual's state of mind. In **Gillies v Secretary of State for Work and Persons** 2006 1 WLR 781 at 789 Lord Hope said:

> "*The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by the public generally bearing in mind that it is the appearance that these facts give rise to that matters, not what is the mind of the particular judge or tribunal member who is under scrutiny."*

The characteristics of the fair minded and informed observer was discussed at length by Archie JA (as he then was) and Warner JA in their decision in **Panday v Virgil**. The duty of the Court when investigating an allegation of apparent bias is to consider the matter objectively by considering whether the hypothetical observer who is both '*fair minded'* and *'informed'* would conclude there is a real possibility that the tribunal was biased.

104. Would the fair minded observer having considered the facts and circumstances set out in the letters conclude that there was a real possibility that the tribunal was biased against Mrs. Gafoor? The fair minded observer would note that there were strong views expressed in the three letters, that there was widespread publication of the board minutes and its private deliberations, that at the time of publishing the letters there was a virtual shut down of the Commission's investigation, that Mrs. Gafoor unlike Mr. Jokhoo had taken a belligerent stance on the recusal issue, that the Commission members frequently recused in earlier investigations where the circumstances warranted it, that the leaks to the media coincided with the end of commission meetings, and that unless the impasse was resolved it is difficult to see the business of the Commission functioning properly. In those circumstances I do not hold the view that the fair minded observer would conclude

that there was a real possibility that the three members were biased against Mrs. Gafoor by their writing to the President after they took its decision on 21st December 2012 that the Claimant be recused from hearing the Jeremy investigation.

105. In deference to the Claimant I also consider her bias claim on the totality of the evidence presented. Can it be discerned by the fair and reasonable observer from the chronology of events set out that the three members were biased against the Deputy Chairman. There is no allegation of any personal interest to be gained by not having Mrs. Gafoor present at the investigation. The Farrell affidavit deposes that previously members had willingly stepped down from hearing matters, this is not in dispute. The Chairman adopting a course of referring matters to outside counsel for advice cannot be interpreted as a pre disposition against Mrs. Gafoor. It is a prudent course for the Commission to obtain independent legal advice. The relationship with Mrs. Gafoor and the other members were cordial until this incident. The letter to the Commissioner of Police is not an irrational response by the Registrar as the publications of the Commission's deliberations was indeed an alarming state of affairs and Mrs. Gafoor herself expressed her own concerns over the serious breach of confidence. All the members were unanimous that it must be investigated.

106. The fair minded observer will also note that the meeting of the 19th December was convened to discuss the options available to the Commission. It was public knowledge and stated in the Newsday that no decision on the merits was taken at that meeting. Mr. Jokhoo did not attend but Mrs. Gafoor was allowed to attend. Indeed the Chairman could have cancelled the meeting if it was that he had a personal agenda against the Claimant. The Claimant was well aware of the meeting and she responded saying she will be attending. The Claimant had full audience at the 21st December 2011 meeting. There was nothing untoward of the actions of the members at the meeting. The fair minded observer who is not unduly suspicious would note that the relationship between the members obviously turned for the worse having regard to her according to Mr. Farrell "unusually bellicose attitude" at the 21st December 2011 meeting and later refusal to abide by the Commission's decision on 21st December 2011. Her position is to be contrasted to Mr.

Jokhoo's who co-operated for the sake of the organization's business moving forward. The well informed observer will know that the Commission must be concerned that its ultimate decision in the investigation may be tainted by bias. The well informed observer would have been aware of the controversy the issue of a pre action protocol against the Commission after the decision was taken which also garnered unwarranted publicity. The complaints to the President were made against that backdrop and do not reflect a pre disposition to "vote out" Mrs. Gafoor from deliberating on the Jeremie objection on 21st December 2011. There is no evidence of any useful value or motive for the members in doing so if that was true. Bad faith formed no part of the Claimant's claim against the Commission.

107. A fair minded observer will look upon these facts and would not conclude that there was a real possibility of bias of the three members when they took their vote on 21st December 2011.

108. I actually agree with the Claimant that the Court has the power to grant declaratory relief that the Commission was biased in arriving at its decision on 21st December[43] even though this is not a specific relief sought on the FDC. However no such relief can be granted as (a) the grounds of the application for judicial review do not support the relief and (b) in any event even if I examine the totality of the evidence as I did above there is enough evidence from the Defendant which will be eschewed by the fair minded observer who will say there is no real possibility that the three were biased against Mrs. Gafoor. There is a strong possibility that the fair minded observer would conclude that the Commission had to make a decision, that they considered the legal test of recusal and that they considered her position and made a decision which in their view was the best decision for the Commission. The decision to report her to the President is quite another matter and arose out of a sequence of events subsequent to the decision having been made.

[43] See Declaratory Judgment : Zair and Woolf 2nd ed para 4.009 to 4.001 **Metzer v Department of Helath and Social Security** [1977] 3 AER 451 Greenwich Heltath care National Health Service Trust v London and Quandrant Housing Trust and Others [1988] 1 WLR 1749

Systemic or Institutional Bias

109. The Claimant now contends for the first time that since the meeting of 19th December 2011 the trio had decided to "remove the Deputy Chairman **from office** in the Commission". There was no decision to remove the Claimant from office. She is still the Deputy Chairman. It may have been a Freudian slip, on the part of the Claimant but it highlights that some of her challenges are overlapping her claim in the constitutional law proceedings in which she challenged the setting up of the tribunal. However I have already found as a fact that no decision was taken at the 19th December 2011 meeting that she should recuse from hearing the Jeremie investigation. This is confirmed in the minutes, the evidence of Mr. Farrell, Prof Bissessar's letter confirms this where she said that the decision was taken for the matter to be put to a vote before the Commission. To actually come to a vote there must have been discussion on the matter. Those discussions took place on 21st December 2011.

Doctrine of Necessity

110. In any event even if there was bias on the part of the three members as a matter of necessity they must deliberate as without those three there would have been no quorum. The minimum quorum to conduct the Commission's business is three. See De Smith Judicial Review paragraph 10-09 and **Integrity Commission v The Attorney General**[44] per Jones J:

> "It is a fundamental principle of law that, in the absence of statutory authority or consensual agreement or operation of necessity no man may be a judge in his own cause. According to Professor Wade
>
> > "There are many cases in which no substitution is possible since no one else is empowered to act. Natural justice then has to give way to necessity for otherwise there is no means of deciding and the machinery of justice or administration will break down"
>
> This principle commonly referred to as the doctrine of necessity has been invoked by courts from time to time to allow an otherwise disqualified adjudicator to hear

[44] HCA 1735 [2005] dated 19th December 2005 (TT unreported)

and dispose of a case when no other qualified person is available n order to prevent a failure of justice."[45]

**Is the Claimant articulating a right in public law?**

111. As I noted earlier an unusual feature of this claim is that it is a member of the panel, and not the person making the complaint of bias, who is challenging the decision of the panel that the member should be recused from hearing the investigation. In the case of a statutory body, and not a Court, this raises an important point: is there any public law right that can be articulated in judicial review proceedings?

112. Normally proceedings for judicial review in this type of claim are brought by the subject of an investigation against a tribunal or administrative body on the ground of bias for failure of one or more of its members to recuse. Such a challenge is made on the basis of the individual's entitlement in law to a fair hearing by an impartial tribunal untainted by bias. This is an incident of the broad principle of natural justice and "fair play in action".

113. In this case the decision of the Commission is in fact made to maintain the appearance of an impartial tribunal. The challenge made by the Deputy Chairman against that decision of her colleagues is therefore on a totally different basis from a challenge made by the person making the request for the recusal. The Deputy Chairman's challenge is not one which articulates a right to a hearing before a fair and impartial tribunal, as clearly she is not being tried by the tribunal and not the subject of inquiry. It is in fact a challenge presumably in support of an alleged entitlement to sit as an adjudicator and whose presence is essential for the constitution of a fair and impartial tribunal. It is this alleged right in public law which forms the genesis of these judicial review proceedings.

[45] See the **Judges v AG of Saskatchewan** (1937) 53 TLR 464. See also Justice Nelson treatise on the Law of recusal and the treatise of Justice Heyton "recusing yourself from hearing a case".

114. In **R v Disciplinary Committee of the Jockey Club Ex p. Massingberd-Mundy**[46] and **Charmaine Johnson v Commissioner of Prisons**[47] per Mendonca J. The court considered that in the private/public law divide the question really is whether there is a sufficient public law element so that the claim can be brought by judicial review proceedings. The Court will look at various aspects whether there is a statutory underpinning, whether the power to do the act complained of is based in public or private law, whether the role fulfilled by the person or body is of national importance, whether if refused there is an effective remedy, whether the particular functions exercised affects the applicants rights qua subject or does it affect the applicant's rights in any way peculiar to him or a limited class of persons. Kangaloo JA also considered in detail the private/public law debate in **NH International v UDECOTT**[48].

115. This decision does not affect the Claimant in any material way or affect pecuniary interest, or a constitutional "duty to sit". There is no statutory underpinning for the power save for the fact that as a tribunal it is empowered to regulate its own procedure. In relation to the Claimant it is an operational matter of the Commission to determine the question of recusal. While the decision is reviewable at the instance of the subject of the investigation if there is a breach of natural justice as a corollary to his right to a fair hearing before an impartial tribunal. It is a quantum leap to say that the Deputy Chairman has a public right to sit on every case that comes before the Commission and a right to self determine recusals.

116. In fact there are several operational procedures adopted by the Commission to carry out its day to day tasks in the discharge of Investigative powers, recording and registering declarations, receiving and investigating complaints. As a matter of course the Commission will meet and make decisions on procedures to be adopted to conduct such operational matters. The question of dealing with the recusal of one of the members of

[46] [119] All ER 207
[47] HCA No. 949 of 1999
[48] **NH International (Caribbean) Limited v Urban Development Corporation of Trinidad and Tobago Limited & Hafeez Karamath Limited** Civil Appeal No. 95 of 2005 Kangaloo JA

the Commission from hearing a complaint can be treated similarly as an internal operational matter which does not sound in public law.

117. It is unnecessary to characterize the right therefore as public right. Further I might add that the alleged right to insist that the Claimant self determines the matter of recusals simply does not exist.

**Setting Aside Leave**

118. On all the grounds advanced before this Court for judicial review the Claimant has failed. It is not really necessary for me to consider the Defendant's application to set aside leave however because it deals with some troubling aspects of non disclosure which has also influenced the outcome of this claim I will set out my findings in relation to same.

119. The application to set aside leave was made on the basis principally on non disclosure by the Claimant. I was anxious when I granted leave that the decision to "force" the Claimant's recusal was made "behind her back". The facts as I pointed out were not easy to follow in the manner in which the Claimant set it out. When compared to the sequence of events as deposed by the Defendant the Claimant's evidence seems to be incoherent at best and at worse deceptive.

120. For the Defendant it is a main string in their bow to set aside leave that the Claimant failed to discharge her duty of candour to this Court. The Claimant is under an important duty to make full and frank disclosure to the Court of all material facts. See **Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Patrick Manning**[49]. The application to set aside leave is made very sparingly for the reason that the Court is loath to create satellite litigation, that is, hear the application to set aside and then follow with the full hearing. Recognizing that this would be a waste of resources I ordered the application to set aside be heard together with the substantive claim. It means at the full

[49] Civil Appeal No. 174 of 2004, Kangaloo JA

hearing the principles of non disclosure and the Claimant's lack of candour were fully "in play".

121. In **Brinks Mat Limited v Elcombe** [1988] 1 WLR 1250 essentially "a full and fair disclosure of all material facts" means "those which it is material for the Judge to know in dealing with the application as made and proper enquiries before making the application." See also Bereaux J's (as he then was) instructive decision on non disclosure in **Fidelity Finance and Leasing Company Limited & Ors. v His Worship Sherman Mc Nicholls**[50].

122. One of the most obvious duties of a claimant in judicial review proceedings is to produce and exhibit the Defendant's pre action protocol response. The pre action protocols were specifically designed to deal with administrative law claims and carefully sets out the pre action protocol activity that is engaged by the parties which sets out the duty of the Defendant. See PD 3 CPR and in particular Appendix D. PD 3.4 CPR setting out the contents of a pre action protocol response which information would be valuable to a court when exercising its discretion to grant leave to apply for judicial review:

- Whether the claim is being conceded,
- Where appropriate containing a new decision identifying what aspects of the claim are being conceded and setting out a timescale within which the new decision will be issued,
- Providing a more detailed explanation for the decision if considered appropriate,
- Address any points of dispute,
- Enclose relevant documentation.

123. It is expected that consistent with the duty of candour that this document be exhibited amongst the papers of the Claimant seeking leave to apply for judicial review. Mrs. Gafoor contends that she never received the pre action protocol response while the

[50] CV2008-1228

Defendant contends that it was issued within the time specified by the pre action protocol letter. On a balance of probabilities I am of the view that a copy of the response was shown to Mrs. Gafoor. I say this based on the unshaken evidence of Mr. Gerard Ramdeen, attorney at law who she described as a go-between between herself and attorney Chrislyn Moore. I granted leave to cross examine Mr. Ramdeen specifically on this issue as to whether or not he delivered the response of the pre action protocol to Mrs. Gafoor whom he described as his client. The cross examination on this issue was uneventful and Mr. Ramdeen emerged unshaken in his testimony.

124. Mrs. Gafoor also was unshaken on this point in that she was adamant that she did not receive any response to the pre action protocol. However most of her evidence in this claim has proved to be unreliable. Further (a) the duty is on her to search for a response and she was well aware that a letter was issued or that the Commission had convened a meeting to discuss it. She failed to determine if there was a response before issuing these proceedings. (b) the duty is on the attorney on record and prudence dictates in any event that they obtain the file from the previous attorney at law.

125. I must confess now that all the evidence is before me I could see no reason for the grant of leave in the first place and I am troubled by the lack of candour of the Claimant. I have found as principal facts that

    (a) The Claimant was not denied an opportunity to be heard when the decision was made on 21st December 2011;
    (b) There was then a full discussion on the merits at which she participated.
    (c) The Commission was in receipt of legal advice before it made its decision.

    Not only have I made those findings, from the evidence and cross examination it now appears the Claimant was aware of all these matters.

126. In making these principal findings of fact the several aspects of the Claimant's own non disclosure which are material in my view are as follows:

- Failure to disclose that legal advice was obtained and admitting same under cross examination;
- Failure to disclose that the Claimant was aware that the contents of the Jeremy application was tabled at several meetings at which the Claimant attended;
- Being present at the 21st December 2011 meeting when the decision was made that she should recuse when she gave the impression that this was done behind her back. In fact I recall my surprise when I read those minutes;
- Being present at subsequent meetings when the minutes of the previous meetings were confirmed by the members of the Commission;
- Backtracking from her "no discussion of the merits" allegation to "there could be no merit in the objection" which emerged under cross examination;
- Suggesting that the decision was taken at the 19th December 2011 that she should recuse from hearing the Jeremie investigation when clearly this did not happen. Even the publication in the Newsday said as much;
- Failing to disclose the pre action protocol response or at least indicating that she made checks for a response.

Although it is not necessary to decide this application as I have already found that the claim fails on the merits, had I to decide the matter on the application to set aside leave or had this matter been taken separately at an earlier stage I would have set aside the grant of leave.

**The Defendant's duty of candour**

127. The Claimant equally alleges that the Defendant is guilty of a lack of candour. This is important when this Court considers the issue of costs. Rule 66.6 (2) CPR empowers the Court to order a successful party to pay all or part of the costs of an unsuccessful party or a specified portion of costs See rule 66.6 (3) CPR. The court must have regard to inter alia the conduct of the parties in determining who should be liable to pay costs. See 66.6 (4) and (5) (a) and (6) (a) CPR.

128. The Defendant is also under a responsibility to provide full and fair disclosure of relent material and evidence. Not only is this required of public authorities in judicial review proceedings but above all else it is required of the Integrity Commission. I would hardly have expected this Commission to be unduly technical when it came to the issues of disclosure. There were two aspects of the duty of candour when it comes to this Defendant that has troubled me. I must stress however that my discomfort does not in this case translate to any adverse findings against the Defendant.

129. First is the delay in the disclosure of the three letters which were requested by the Claimant from the outset. It is clear in my view that the Defendant had those documents either within its custody or control as it was eventually able at a very late stage to produce these documents. When it eventually emerged it was with the demur by counsel that is being done without prejudice to the Commission's position that it is not relevant to the proceedings. If that was so then there was no justification for its late production when it was clear that it was being requested from the outset and before the commencement of the proceedings. I shared these views with Counsel for the Defendant who defended the Defendant's position based upon the relevance to the issues as framed by the Claimant. This is technically a correct argument however in this case where the member is challenging a decision of her colleagues and calling on documents that affect her written by them I would have expected a high degree of forthrightness from a body comprised of men of "integrity and moral standing" not to stand on legal niceties and to place all cards on the table making a "clean breast of it".

> "Although the standard of civil rules of disclosure do not apply to judicial review proceedings all public authorities who are defendants to applications for judicial review are subject to a duty of candour. Once a claim is issued the duty requires a defendant to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide The duty is a wide one and requires defendants to provide the court and the claimant with all documents and information that may help the Claimant's case or give rise to additional grounds of challenge." The objective of the duty is to ensure that public law litigation is a

process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands"

130. Archie CJ summarised the general principles of full and frank disclosure in **Winston Gibson v The Public Service Commission**[51]:

"a. It is for the applicant to make out his case and not for the respondent to do it for him;

b. However, since it is often the case that much of the pertinent information that will assist the courts lies in the possession of the respondent public authority, it has a duty to respond as fully and as transparently as the circumstances require. This has been described as conducting the proceedings "with all the cards faced upwards on the table";"

131. Michael Fordham observed at paragraph 10.4.1 Laws LJ in R (**Quark Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs** [2002] EWCA Civ 1409 "there is a very high duty on pubic authority respondents, not least central government, to assist the Court with full and accurate explanations of all the facts relevant to the issue the court must decide." **R v Lancashire County Council v ex p Huddleston** [1986] 2 AER 941 Sir John Donaldson MR referring to judicial review as a "process which falls to be conducted with all the cards face upwards on the table and [where] the vast majority of the cards will start in the [public] authority's hands" Of course the Defendant in this case makes the distinction that its duty of candour is limited only to the decision under challenge and relevant to the issues to be determined. For this reason the failure to produce the letters is not fatal as having regard to the manner in which the Claimant used those letters to support a claim of bias. However this is an insufficient answer to the cards face up approach to litigation which may give rise to additional grounds.

"Para 10.4.3 Defendant's candour leading to emergence of additional grounds. **R v Barnsley Metropolitan Borough Council ex p Hook** [1976] 1 WLR 1052 claimant permitted to raise matters not in original grounds because. "It must be

[51] Civil Appeal No. 56 of 2006, Archie CJ

remembered that in application for quashing orders the claimant knows very little of what happened behind the scenes. He only knows that a decision has been taken which is adverse to him and he complains of it. His statement of grounds should not be treated as rigidly as a pleading in an ordinary civil action. If the Divisional Court gave permission the practice is for the defendant to put on affidavit the full facts as known to it. The matter is then considered at large upon the affidavits." **R v Waltham Forest London Borough Council e p Baxter** [1988] QB 419 Sir John Donaldson MR commenting that: 'the council rightly responded with additional information as a result of which four principal issues emerged".

132. It is true that the letters post dated the decision under review and so technically speaking may be irrelevant to the proceedings and to the grounds for review. Faced with the authorities on non disclosure I understand the Defendant's position however as I have stated for an Integrity Commission facing a request from its own Deputy Chairman to see letters written about her to the President, I would have expected a greater degree of co-operation and urgency. The short point is that the delay in producing the letters resulted in the late application for an amendment and the further delay in the resolution of these proceedings. I refer to my earlier observations on this issue in my earlier ruling on 16th July 2012.

133. I am also troubled by the fact that the Defendant was content to sit at the application for leave hearing when it was served and not at least point out to the Court that the Claimant had failed to disclose the response to the pre action protocol letter. It was a very easy thing to do. It may have put this Court on a train of enquiry which may have made this entire litigation unnecessary. I would urge parties to be more helpful even if sometimes it goes against the advocate's instinct of strategy. Parties are enjoined to co-operate with the Court to advance the cause of dealing with a case justly and furthering the Overriding Objective. It is for both parties to "fess up" and for the Court to decide what course it will take to determine or otherwise resolve the matter.

**Conclusion**

134. I have found all of the submissions made by the Claimant unsustainable. It is quite possible that I have not dealt with all the permutations and subtle variations of the Claimant's case as it evolved over the course of the proceedings. I am content however in relying on the advice made by Lord Templeman[52] although speaking in a private law context who made some useful observations of the duty to assist the Court in properly identifying issues for determination: "It is the duty of counsel to assist the Judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad point the judge will be capable of fashioning a winner..There has been a tendency in some cases for legal advisers pressed by their clients to make every point conceivable and inconceivable without judgment or discrimination"

135. Ultimately Mrs. Gafoor's rights, interests and entitlement as the Deputy Chairman of the Commission remain intact and unaffected by the Commission's decision on 21st December 2011. There is no slur on her character or imputation of impropriety. She has not been voted out of office. In making the decision, the interests of the Commission was paramount and there was no personal agenda to devalue the work and contribution the Claimant as Deputy Chairman may have made to the Commission over the years. She plays a key role as Deputy Chairman and therefore a senior member appointed by the President on the Commission. The Claimant has indicated her dedication to the work of the Commission and her colleagues have deposed to their cordial working relationship with her. But even she must concede that there will be times when she will have to step down from deliberating from a matter on the ground of bias in that event the work of the Commission presses on. This will not be the last time that the Commission will have to deal with applications for recusal for whatever reason.

[52] **Ashmore v Corporation of Lloyds** [1992] 1 WLR 446

136. The question of apparent bias on the ground of perceived personal animosity is a fine one and so long as the proper legal test is applied, the decision maker is entitled to arrive at a result which is not perverse.

137. There is no allegation of bad faith made against the Commission. Even if I may have come to a different opinion on the Jeremie application from the Commission that is entirely irrelevant for these proceedings, as by invoking the supervisory jurisdiction of this Court, the Court is not concerned with the merits of that decision but its legality within the four corners of the challenge articulated by the Claimant. There was no suggestion in this case that this Court should substitute its views for that of the Commission.

138. The claim is dismissed.

**Costs**

139. It is indeed unfortunate that this claim has been exacerbated by high emotion on both sides with swirling controversy amongst the Commission members, overshadowed by leaks of confidential information to the media, alleged breaches of confidentiality orders made by this Court and a Tribunal established by the President to investigate the conduct of the Deputy Chairman in her dealing with this issue. Despite my urgings to the parties to have the matter resolved, no party was able to find a solution to calm the storm in the proverbial teacup.

140. As I have dismissed the Claimant's application the normal rule is that she will bear the Defendant's costs of the claim. I have considered the Claimant's submission that she should not bear the costs of the litigation. However I cannot give preference to this litigant over any other based on her station in life or on the basis that this is a public interest litigation which it is not. Under rule 66.7 CPR however I can legitimately however take into account the following circumstances: the relationship of the parties as members of an important institution charged with a function of constitutional importance,

the evidence of the members of the Commission with respect to their good working relationship with the Claimant and their harboring no feelings of ill will against her and (although not making any adverse findings against the Defendant) the high standard which I held the Defendant to which if discharged in the manner that I perceived it should have been, this matter may have ended earlier than it eventually did. I will order that the Claimant do pay to the Defendant two thirds of its assessed costs on the claim and application to set aside leave.

141. The costs will be assessed by this Court by the Defendant filing its statement of costs and upon service of same the Claimant's filing and serving its points of objections within 28 days of the date of service. The Defendant will then file and serve a notice of hearing of the assessment. There were four procedural applications on which I reserved costs: two of Defendant's striking out applications, the application to amend and application for recusal.

142. My order is as follows:

i. The Claim is dismissed.

ii. The Claimant do pay to the Defendant two thirds (2/3) of the Defendant's cost of the claim and of the application to set aside leave to be assessed by this Court in default of agreement.

iii. Unless this Court receives submissions by the parties on the question of costs within twenty eight (28) days of this Order in relation to:

(a) the Claimant's application to amend the Claim dated the 18th day of May, 2012.

(b) the Defendant's application dated the 18th day of May, 2012 to strike out portions of the Claimant's evidence.

(c) the Defendant's application dated the 18th day of June, 2012 to strike out portions of the Claimant's evidence.

(d) The Claimant's application for recusal.

The Court's Order as to costs shall be as follows:

(a) no order as to costs on the Claimant's application to amend her Claim filed on the 18th day of May, 2012.

(b) the Claimant to pay half (1/2) of the Defendant's costs of the Defendant's application filed on the 18th day of May, 2012.

(c) no order as to costs on the Defendant's application filed on the 18th day of June, 2012.

(d) no order as to costs on the application for recusal.

The cost of these procedural applications referred to in (b) above shall be assessed in default of agreement.

Dated this 17th day of December 2012.

**Vasheist Kokaram**

**Judge**

**Appendix I**

*Who Decides?*

(a) A recusal application should always be delivered, in the first instance, to the judge whose recusal is sought.

(b) That judge may recuse, on the merits, or for prudential reasons, after considering such submissions as have been made at that point by counsel, and after such consultation as he/she considers appropriate with colleagues.

(c) In the event that the judge elects not to recuse, and there is still a contest:

i. In the case of trial courts that contested application should be determined, under whatever procedures are appropriate in the particular trial court, either 9a) before another trial judge (appointed for that purpose by the head of court). Or (b) a judge from a standing judicial recusal committee in the particular court.

ii. In the case of intermediate appellate courts, the contested application should be heard by the panel appointed to hear the appeal, with the impugned judge as a member of the panel.

iii. In the case of final appellate courts, the contested application should be heard by the appointed panel of judges, or the court as a whole, as appropriate. In the case of a court without the ability to 'substitute' a judge, consideration should be given to obtaining, if necessary by legislative measures, the ability to 'substitute' a judge, preferably by the secondment of a retired judge of the court. Such substitute judges would sit, age and health permitting, in rotational order of retirement seniority.

*Appendix E, Judicial Recusal Principles, Process and Problems by Grant Hammond*