

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 250 of 2009

BETWEEN

**BASDEO PANDAY
OMA PANDAY**

APPELLANTS

AND

HER WORSHIP MS. EJENNY ESPINET

1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

APPEARANCES: Mr. A. Beharrylal and Ms. M. Panday for the Appellants
Mr. N. Byam for the 1st Respondent
Mr. D. Mendes, S.C. and Mr. I. Benjamin for the 2nd Respondent

PANEL: Mendonça, J.A.
Soo Hon J.A.
Stollmeyer J.A.

DATE OF DELIVERY: May 11th 2011.

I agree with the judgment of Mendonça J.A. and have nothing to add.

A. Soo Hon
Justice of Appeal

I too agree.

C.V.H. Stollmeyer,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal from the judgment of Kokaram, J. dismissing the Appellants' judicial review application in respect of the decision of Magistrate Espinet, the First Respondent, not to recuse herself on grounds of apparent bias from hearing committal proceedings involving the Appellants.

2. It would not be an exaggeration to say that every person above the age of majority and many below that, know of the Appellants Basdeo Panday and his wife, Oma Panday. Mr. Panday, the First Appellant, up to the date of the hearing of the application giving rise to this appeal was a fixture in the political landscape of this jurisdiction. At the time the matter was heard before the Judge it was not in dispute that the First Appellant was the chief political opponent of the People's National Movement (PNM), the political party then in power. He was the leader of the opposition and the leader of the United National Congress Alliance (UNC-A) which he formed in 2007. This party was the successor to the United National Congress which he had founded in 1991. He had been a member of the House of Representative since 1976 and was Prime Minister of this country from 1995 to 2001. He was also prior to that, from 1986 to 1988, a member in the national government. Mrs. Panday, the Second Appellant, it was also not disputed, was politically active in support of her husband, the First Appellant.

3. Within the last year approximately and certainly since this matter was decided in the Court below, the Appellants have retreated from the political spotlight. The First Appellant is no longer the leader of the UNC-A or leader of the opposition. He did not run for re-election in the last general election held on May 24th, 2010. He, therefore, is no longer a member of Parliament. Further, he may no longer be regarded as the chief political opponent of the PNM. That party was defeated in the last general election and no longer forms the government. I will come to the relevance, if any, of these changes later in this judgment.

4. The Appellants, however, are also defendants in certain committal proceedings pending before Magistrate Espinet (the Magistrate). The Appellants are charged under section 3(1) of the Prevention of Corruption Act. It is alleged that in 1998 they corruptly accepted a bribe of £25,000 from Ishwar Galbaransingh and Carlos John, who are co-defendants in the committal proceedings, as a reward for favouring a particular company in relation to the construction of the then new Piarco International Airport. At the close of the evidence for the prosecution a no case submission was made on behalf of the Appellants. The Magistrate however, rejected the submission and enquired of the Appellants whether they intended to call any witnesses. The immediate response of the First Appellant was that the charges were politically motivated.

5. Subsequent to that the Appellants obtained information that the Magistrate was a trustee and the treasurer of the Morris Marshall Development Foundation (the Foundation). In the light of that information on March 12th, 2008 they made an application for the Magistrate to recuse herself from hearing the committal proceedings on the ground of apparent bias. It was the contention of the Appellants that the Foundation was set up to promote the work of PNM politicians and of the PNM and since the Magistrate was the Trustee and an officer of the Foundation and was trying the Appellants, who were the political enemies of the PNM, a fair-minded and informed observer would consider there was sub-conscious bias in the mind of the Magistrate. The Appellants also placed reliance on the failure of the Magistrate to disclose to the parties her involvement in the Foundation.

6. The Magistrate however on March 19th, 2008 refused to recuse herself and dismissed the application. In her reasons she stated, inter alia, that an allegation of bias is “a serious one”. There is however “no basis here established for bias and there is nothing for the Court to disclose”.

7. The Appellants applied for and retained leave for judicial review of the Magistrate’s refusal to recuse herself. The relief sought by the application for judicial review included, inter alia:

- a) a declaration that the decision of the Magistrate to recuse herself from conducting the committal proceedings is unlawful void and of no effect;
- b) an order of certiorari to quash the Magistrate’s decision;
- c) a declaration that the committal proceedings are vitiated by apparent bias and accordingly are unlawful, null and void and of no effect;

d) an order of certiorari to quash the committal proceedings.

8. The application for judicial review was initially grounded on the Magistrate's involvement with the Foundation. However prior to the hearing of the application before the Judge, the Magistrate in response to a request for disclosure confirmed that her father is Alexander Chamberlain Alexis, a former PNM Member of Parliament and a Cabinet Minister in a PNM government. She could not however say when or for how long this was. This admission and the failure to disclose it during the course of the committal proceedings were also relied on by the Appellants in the Court below as grounds for judicial review and the application was accordingly amended.

9. The grounds for judicial review as set out in the Appellants' application are somewhat lengthy. I do not propose to set them out in detail. However a closer look at them would help to illuminate the background to this appeal.

10. In the grounds the political history of the Appellants is outlined, and reference is made to the fact that the Appellants have been politically opposed to the PNM throughout their entire public lives. It is mentioned that the PNM since its formation in 1956 to the present has formed the Government of Trinidad and Tobago for the vast majority of that time. On the occasions on which it did not do so the First Appellant was very instrumental in their defeat. The Appellants also state that the charges against them were contained in information sworn by Acting Inspector Telesford of the Anti-Corruption Bureau. The charges were laid after the PNM regained power, defeating the UNC led by the First Appellant, and when John Jeremie was the Attorney General under which office the Anti-Corruption Bureau was formed.

11. With respect to the Foundation it is set out in the grounds that: 1) the Magistrate is a trustee and treasurer of the Foundation; 2) the Foundation is situated in the constituency of Laventille West which is within the geographical area of Laventille, a stronghold of the PNM; 3) the Foundation is specifically dedicated to the enhancement and empowerment of the community of Laventille; 4) past trustees of the Foundation have included the said John Jeremie, Martin Joseph, who at the time of the hearing before the Judge was a PNM Senator and a minister of Government, and Carlston Clark who, inter alia, was a former director of the National Housing Authority during the 1991 to 1995 PNM administration; 5) the Foundation bears the name of Morris Marshall who was a PNM

member of the House of Representatives for the electoral constituency of Port of Spain East, which included much of the geographic area of Laventille, from 1986 to his death in 1994. From 1991 to the date of his death Morris Marshall was the Minister of Public Utilities in a PNM administration. He was very active socially and politically in his constituency and in Laventille generally. 6) the Foundation is an organization with links to the central government; 7) the Foundation discriminates in the provision by it of assistance to members of the Laventille community by requesting, through its personnel, whether persons seeking assistance are PNM members, and refusing assistance if they are not. It has permitted the use of its premises and personnel by the PNM for obvious political purposes. The Magistrate is consequently connected to and involved in a voluntary association which, while ostensibly charitable in nature, is intimately connected to the PNM and used by the PNM for the provision of social assistance to its supporters and for electoral campaigning.

12. The Appellants also refer to the fact that the Magistrate's father is Alexander Chamberlain Alexis.

13. The Appellants in those circumstances contend:

- 1) They cannot have a fair and impartial hearing before the Magistrate, who is the daughter of their political opponent and that the fair-minded and informed observer would consider that there was a real possibility of bias, i.e. sub-conscious bias, and/or would perceive the Magistrate as being biased against the Appellants.
- 2) The fair-minded and informed observer, made aware of the fact that: (i) the prosecution of the Appellants emanated from the Anti-Corruption Bureau which is under the direction, control and/or supervision of the Attorney General during the tenure of the PNM; (ii) the Magistrate's involvement in the Foundation and its historical connection to the political constituency of Laventille West and the PNM; (iii) the Magistrate's father was a PNM member, Member of Parliament and a minister of Government; and (iv) the failure of the Magistrate, while seised of the matter in the Magistrates' Court, to disclose any of these matters to the Appellants, would inevitably conclude that there is a real possibility that the Magistrate is subconsciously biased against the Appellants, because a fair-minded observer would likely conclude that the Magistrate was predisposed to favour the PNM, to which the Appellants have always been opposed, and to disfavour the Appellants.

14. Several affidavits were filed on behalf of the Appellants and the Director of Public Prosecutions, and the Second Respondent. They focused in large measure on the operations of the Foundation and whether, as the Judge put it, it could be said that the Foundation was "a PNM

institution”. The main allegations for the Appellants were that the Foundation was used to further the political objectives and purposes of the PNM and to obtain support for that party. It was therefore alleged that: 1) the Foundation made its premises and other assets available to the political directorate of the PNM and the various PNM candidates who contested elections in the Laventille constituencies to be used for purely political partisan purposes; 2) the Foundation discriminated in the provision by it of assistance to persons on the basis of political affiliation, it would therefore not assist persons who were not members of the PNM; 3) several members of the board of trustees of the Foundation are all supporters and sympathizers of the PNM; and 4) the Foundation’s chairman, Father Clyde Harvey, advocated political support for the PNM and encouraged people to join that political party.

15. These allegations were denied by the Respondents. The Respondents alleged that the Foundation had no political affiliation and involvement; it is not connected to any political organization. They denied that the premises and assets of the Foundation were made available to the PNM or its candidates. They contended that: there has never been any political activity of any kind on its premises; the Foundation did not discriminate in the provision of assistance on the basis of political affiliation; and political connection had no role in determining who would receive assistance from the Foundation. They also contended that although trustees became politically active for the PNM, the general rule was that once they became politically active they did not continue as trustees. It was also denied that Father Harvey advocated support for the PNM and encouraged persons to become members of the party.

16. The parties were given leave to cross-examine the deponents of the affidavits but this was not pursued. Instead the parties filed an agreed statement of facts. The agreed statement of facts is as follows:

1. The First Appellant is a Member of Parliament, a former Prime Minister, Leader of the Opposition and Leader of the United National Congress Alliance (UNC-A). He has been a member of the House of Representatives since 1976 and has been the Chief political opponent of the PNM, which formed the government of Trinidad and Tobago from 1956 to the present, except for the periods 1986-1991 and 1995 -2001.
2. From 1986-1988 the First Appellant was a minister in the national government and from 1995-2001 he was Prime Minister. In 1991 he founded the United National Congress (‘UNC’), the predecessor to the UNC-A, which he formed in 2007. The

Second Appellant is the wife of the First Appellant and there is no dispute that she has been and is politically active in support of her husband.

3. The co-defendants in the committal proceedings are Mr. Ishwar Galbaransingh, a political and financial supporter of the opposition UNC and Mr. Carlos John, a former UNC cabinet minister. The prosecution case arises out of the award of the contract to build Piarco International Airport when the UNC was in government and the PNM was in opposition.
4. The Magistrate is a trustee of the Foundation which is based in Laventille. She has been its Treasurer since 2005. The Foundation is named after a former PNM cabinet minister and MP who established it in 1991 and who had been a PNM MP for most of the area and was Minister of Public Utilities in the PNM government at the time of his death in 1994. The brochure exhibited by the applicant sets out the Foundations aims.
5. Laventille as a matter of historical fact has always been a strong PNM constituency, ever since independence in 1962. It is widely known that Laventille is a deprived area and Mr. John has provided financial support to the Foundation as explained in his affidavit.
6. Morris Marshall was a political opponent of the First Appellant, who recalls that the initiative in setting up the Foundation was for the benefit of his community and his electoral constituency.
7. The following persons who have been trustees of the Foundation have or have had connections with the PNM. They include:
 - (i) Senator John Jeremie (a PNM senator and the Attorney-General);
 - (ii) Martin Joseph (a PNM senator and Minister for National Security);
 - (iii) Albert Joseph (former Laventille West Constituency chairman of the PNM);
 - (iv) Ms. Carolyn Washington (PNM local government councilor); and
 - (v) Ms. Donna Powell-Raphael (a former PNM Senator).
8. Linda Hollingsworth (an active local PNM activist and councilor) and Joslyn McLeod Smith (a former PNM youth activist) are currently trustees of the Foundation. Raphael George (who rents offices to the PNM) is also a Trustee.
9. None of the trustees have any known connection with the UNC.
10. The Chairman of the Foundation is Father Clyde Harvey. The Magistrate has told the State Solicitor that she has never been a member of the PNM.
11. The Magistrate did not disclose to the Appellants or their legal representatives her involvement in the Foundation or the fact that her introduction to it was through Mr. John Jeremie in private legal practice. He later took up a position as Attorney General of Trinidad and Tobago which he presently occupies. The Defendant's response, after the Claimants had informed the Defendant of the discovery of her

connection to the Foundation when making their application to recuse herself, appears from the transcript of the proceedings annexed to the affidavit of Reeti Maharaj.

12. The Defendant first learnt of the Foundation from Mr. John Jeremie. Mr. Jeremie later became a Senator and the PNM's Attorney General from 2002 to 2007 and at present. The charges against the Claimants were laid by officers of the "Anti-Corruption Bureau" which falls under the Attorney General's supervision and direction.
13. Senator Jeremie's cousin Ms. Debbie Jeremie drew up the Foundation's 2005 Foundation deed.
14. Senator Jeremie was the person who, as Attorney General, gave authority for the extradition proceedings to be brought against the co-defendant in the committal proceedings, Mr. Ishwar Galbaransingh.
15. The Magistrate has told the State Solicitor as follows: she first learnt of the work of the Foundation through Mr. John Jeremie who was then in private practice. Mr. Jeremie invited her to become involved in the Foundation. She attended a meeting of the Foundation and decided to become involved. The Defendant was enthused by the fact that the Foundation was located in Laventille, where she grew up, and that its goal was to help residents of Laventille. This type of charitable work was consistent with her participation in civic organizations since she left University. She was also attracted to the Foundation because of the involvement of Father Clyde Harvey who she knew to be someone of integrity who was interested in the betterment of the people of Laventille. The Magistrate does not now recall whether she had ever met Father Harvey before she was introduced to the Foundation but she knew of his reputation as a man of principle before then. The Defendant was made a Trustee of the Foundation and later its acting treasurer.
16. The Magistrate has further told the State Solicitor that as far as she is aware, the Foundation does not cater exclusively for members of the People's National Movement. As far as she is aware, persons seeking the assistance of the Foundation are not required to produce PNM party cards.
17. The Magistrate has told the State Solicitor that she is not aware that Father Harvey has encouraged anyone to join the People's National Movement, if in fact he has done so.
18. The Magistrate is the daughter of Mr. Alexander Chamberlain Alexis, a former PNM MP and a minister in the PNM government. Mr. Alexis served as a member of the Legislative Council from 1956-1961 and as a member of the House of Representatives for the years 1961-1966, 1966-1971 and 1971-1976. Mr. Alexis held the portfolio of Parliamentary Secretary to the Prime Minister during the first Parliament and that of Minister of Labour during the Second Parliament. Mr. Alexis is currently not an adviser to the Prime Minister nor does he hold any post in the Cabinet or within the PNM.

19. The Magistrate's mother was never married to her father. The Magistrate has told the State Solicitor as follows: she did not live with her father but grew up in her mother and step-father's home. The Magistrate knows that her father was once a Member of Parliament on a PNM ticket and a Minister in a PNM Government but does not know for how long or during what period. The Magistrate does not know whether her father was once an adviser to Dr. Eric Williams or has maintained his membership with the PNM since he left Parliament or is still a member of the PNM or advised the PNM after he left Parliament or continues to render advice to the PNM or is an adviser to Prime Minister Patrick Manning or is still in active politics and does not know what her father's attitude is to the Claimants or the UNC or whether her father can be properly considered Mr. Panday's political enemy. The Magistrate does not know anything about her father's work related or personal relationships with any political party now or in the past. As far as she is aware, the Magistrate further says she has not received any favourable treatment from any government.
20. The Magistrate never declared the fact of her involvement in the Foundation or that Mr. Jeremie invited her to become a trustee of it or that her father was a Member of Parliament on a PNM ticket or a Minister in a PNM government to the Claimants or their legal representatives either at the commencement of the committal proceedings or at the stage when the application for her recusal was made.
21. On 30th November 2007 the Magistrate issued a judgment dismissing the Claimants' submission that there was no case to answer, stating in the course of the judgment that although the First Appellant had been absent from the cabinet meeting where the contract in question was approved, "the decision by cabinet is a collective one, whether he was absent or present".

17. The Judge in his judgment accepted the submission of the Director of Public Prosecutions that the appropriate test to determine whether the Magistrate was disqualified by reason of apparent bias was as laid down in **Porter v Magill** [2002] 2 AC 397, that is to say whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The Judge considered the facts of the case, in particular as they related to the Magistrate's association with the Foundation and the relationship to her father. In relation to the latter the Judge asked the question who is Alexander Chamberlain Alexis? The Judge noted that up to 1976 Mr. Alexis was actively engaged in politics but after that year he fell off the "political radar". Nothing is known of his political history thereafter. The Judge stated that it would be "unfair" to characterize Mr. Alexis as "PNM today or at the time the Magistrate gave her decision, or at any time after 1976 without facts as to his current political status". Further the Judge found on the evidence that the Magistrate had no relationship with Mr. Alexis. The Magistrate never lived with him. She grew up in her mother's and stepfather's home. With respect to the Foundation the Judge found:

- a) That the Foundation is not an association which uses its premises for electoral purposes for the benefit to the PNM;
- b) The Foundation does not discriminate in favour of PNM members;
- c) It does not advance the political objectives of the PNM;
- d) The trustees and members of the Foundation are not used for obvious and purely partisan political purposes;
- e) The Foundation is not a political tool of the PNM and does not espouse any political views.

18. The Judge concluded that the fair-minded and informed observer having considered the facts would conclude that there was no possibility that the Magistrate was or could be biased. He stated:

“20.2 I turn to him [the fair-minded well informed observer] and ask having considered the facts as set out above, the facts which we now know as to the relationship with Mr. Alexis and the Foundation, do you consider that there is a real possibility that the learned magistrate is biased? He would be surprised to know that she did not share a relationship at all with her biological father or that nothing is known of him since 1976. He would not be surprised to know that magistrates do from time to time, come in contact with members of the legal profession including the Attorney General. He must draw from his experience about the political and social life of Morris Marshall of Laventille. The fair-minded and informed observer will think more about it. He will reflect on the magistrate’s association with a charitable organization that has no political views whatsoever, but where some of the past members were PNM and others are not. He will digest the fact that the Claimants say that the charges are politically motivated, but ask how is it that this magistrate is enjoined in a political battle against the Claimants? How is this magistrate given her associations, as we now know, unable to professionally judge the committal proceedings impartially?”

20.3 This case therefore is a perception about a perception. A perception of bias by the magistrate being associated to an association, which is perceived to be connected to the PNM and perceived to be advocating its views and motivations, and perceived to share the vision of the party to send the leader of opposition to jail without any facts to sustain the perception. As Lord Jacob observed “zero plus zero is zero.” The connection to establish an apprehension of bias is tenuous. By including the notion of “well informed” the law has sanitized the propensity to draw ill informed conclusions. Challenges such as these that are premised on speculation would not cross the bar. In this case the positive evidence demonstrates a connection to an organization whose political views are at best unknown and to a biological father whose political affiliations since 1976 are equally unknown. The political villains with an axe to grind are mere

phantoms and the well informed observer sitting on Brian Lara Promenade and engaged in this dialogue will draw this conclusion.”

19. The Judge then addressed the submission by the Appellants that the failure of the Magistrate to disclose her involvement with the Foundation and her biological parent at the very outset of the committal proceedings or to disclose those facts when called upon by the Appellants demonstrated that she was biased. He stated that having come to the conclusion that the well informed and fair-minded observer would not have concluded that there was a likelihood of bias by the Magistrate, there was no legal duty on the Magistrate to disclose any connection to the Foundation or her biological father.

20. Counsel for the Appellants submitted that the main categories of apparent bias were disqualification by interest, conduct, association and extraneous information. He stated that he was relying on the categories of association and conduct as grounds for apparent bias. With respect to the former, Counsel submitted that the appearance of a political association and the Magistrate’s familial connection were relevant. With respect to appearance of political association, Counsel submitted that the Judge erred in incorrectly assessing the appearance of political association or affiliation on the agreed facts. The Magistrate’s association with the Foundation was critical. The Foundation is dedicated to commemorate a “famous PNM politician” who was described in the tribute paid to him in Parliament at the time of his death by the then Prime Minister as PNM to the core. The Magistrate was introduced to the Foundation by John Jeremie, a former PNM Senator and Attorney General. The Foundation is dominated by PNM personalities. It was contended that the well informed observer would perceive the Foundation to be politically aligned. The concern was not whether it is politically aligned but what is important is the appearance of political alignment. As a consequence the Magistrate, who is a current trustee and treasurer of the Foundation, would also be perceived to be politically aligned. Since the committal of the Appellants would be to the political benefit of the PNM, the well informed fair-minded observer would conclude that there was a real possibility that the Magistrate was or would be biased, because she could not be objective.

21. With respect to the familial connection of the Magistrate, the contention of Counsel is that because of the relationship that the Magistrate’s father had with the PNM, the Appellants were to be judged by the “kith and kin” of their political enemy. Because of the connection of the Magistrate’s

father to the PNM and her inevitable loyalty to her father, the fair-minded and informed observer would conclude that there is a real possibility of bias.

22. Counsel further submitted that the Magistrate failed to disclose her familial connection or her association with the Foundation. Even when specifically asked about her involvement in the Foundation as treasurer she failed to disclose anything. Counsel contended that the failure to disclose these things lends weight to the appearance of bias. If there were no reason to be concerned by the Magistrate's involvement in the Foundation and her familial connection it would have been perfectly proper for the Magistrate to have made the disclosure. The informed observer would draw an adverse inference from the circumstances.

23. Counsel for the Director of Public Prosecutions asked the Court to uphold the Judge's judgment. He submitted that in matters such as this careful consideration must be paid to the facts. On the facts of this case there is no appearance of political association either by reason of the Magistrate's association with the Foundation or her familial connection or both. The informed fair-minded observer, therefore, could not possibly conclude that there was an appearance of bias. The Judge therefore was correct when he concluded that the well informed fair-minded observer would not have concluded that there was a real possibility of bias. On the question of non-disclosure he submitted that the learned Judge rightly concluded that having come to the conclusion that the informed fair-minded observer would not have concluded that there was a likelihood of bias, there was no legal duty on the part of the Magistrate to disclose any connection to the Foundation or her biological father and her failure to do so could not give rise to an apprehension of bias.

24. Before the Judge below there was a dispute as to the proper test for apparent bias. The Appellants contended that the appropriate test was one that followed the Australian jurisprudence (see **Johnson v Johnson**) [2000] 201 CLR 488), whereas the DPP submitted the appropriate test was as set out in **Porter v Magill**, supra. Before this Court however there was no dispute as to the appropriate test for apparent bias. The Appellants, subject to two qualifications to which I will refer below, abandoned any claim that the test should be other than that laid down in **Porter v Magill**. That is clearly the correct approach to adopt. The **Porter v Magill** test, which was adopted by the Judge, has been applied by this Court in, for example, Magisterial Appeal 75 of 2006, **Panday v**

Virgil Civil Appeal Nos. 49, 50, 52 and 53 of 2007 **Leon Nurse and Others v The Commissioner of Prisons and the Attorney General** - decisions which are binding on this Court.

25. In **Porter v Magill**, the House of Lords approved an adjustment to the common law test of bias that had been enunciated in **R. v Gough** [1993] UKHL1. The question now 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. The reference to the tribunal in that formulation would of course include magistrates.

26. There are a few comments I would like to make that are relevant to the test.

27. Disqualification on the basis of apparent bias protects the right to trial before an independent and impartial tribunal. This is both an entitlement under the common law as well as under the Constitution. The test, however, to determine whether the tribunal, in this case the Magistrate, is disqualified by reason of the appearance of bias is the same whether what is invoked is the constitutional or common law right to trial before an independent and impartial tribunal.

28. Bias, it has been said, is an attribute of the mind which prevents the adjudicator from making an objective determination on the issues that he has to resolve (see **re Medicaments and Related Classes of Goods** (No. 2) [2001] 1WLR 700 para. 87). An adjudicator may therefore be biased because he has reason to prefer one outcome of the case to the other or one party to the other. Bias may take many forms. It may for example arise from particular circumstances which for logical reasons predispose an adjudicator towards a particular view of the evidence or issues before him. When we speak of the appearance of bias it describes a situation where circumstances exist which give rise to a reasonable apprehension that the Judge may have been or may be biased (see **RE Medicaments and Related Classes of Goods** (No. 2), *supra*, at para. 88).

29. The test is relevant to the appearance of bias not actual bias. If the fair-minded and well informed observer were to conclude that the Magistrate was disqualified by the appearance of bias it would not amount to a finding that she was actually biased. The Court does not examine the mind of the Magistrate. The Magistrate may therefore have been as impartial as could be, but if the fair-

mindful and informed observer would think that in the circumstances there was a real possibility of bias that is sufficient. The test therefore recognizes that bias might be sub-conscious.

30. The test is an objective one and requires the Court to ascertain from all the relevant circumstances whether the fair-minded and informed observer would conclude that there was a real possibility of bias. It is not the Court's view that is material but rather the Court's view of the public's view as seen through the eyes of the hypothetical observer that is relevant. The test is therefore rooted in the need for the maintenance of public confidence in the administration of justice. As Lord Denning M.R. noted in **Metropolitan Properties Co. (FGC) Ltd. v Lannon** [1969] 1QB 577, 599:

"Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'the Judge was biased'".

The test therefore acknowledges and gives effect to a critical requirement that justice must not only be done but must be seen to be done. If public confidence in the administration of justice is to be maintained then clearly the view of the public as seen through the eyes of the hypothetical observer is crucial. As was said in **Lawal v Northern Spirit Ltd.** [2003] UKHL 35 (at para. 14), "the public perception of the possibility of unconscious bias is the key."

31. The fair-minded informed observer, as I have already alluded to, is a hypothetical creature. He has been endowed with attributes which, it has been suggested, "many of us might struggle to attain" (see **Helow v Secretary of State for the Home Department** [2008] 1WLR 2416 at para. 1).

32. Being fair-minded he always reserves judgment on every point until he has seen and fully understood both sides of the argument. He will therefore not come to a hasty conclusion. He is not to be confused with the person who made the complaint. The assumptions the complainant made are not to be attributed to the observer unless they can be justified objectively.

33. He is informed. He can distinguish between what matters are relevant and what are irrelevant. He will take the time to inform himself on all matters that are relevant. He is able to determine what weight should be given to facts that are relevant. He is able to put whatever he

has read or seen into its overall context and will appreciate that context forms an important part of the material which he must consider.

34. He is not complacent. He knows that fairness requires that a Magistrate must be seen to be unbiased. He, however, knows that Magistrates have their weaknesses and therefore will not shrink from the conclusion, if it can be justified objectively, that things Magistrates may have said or done or associations they may have formed may make it difficult to judge the case before them impartially. He will note that the oath the Magistrate takes is a factor to be considered but not treat it as a panacea or a guarantee of impartiality.

35. He is a member of the community in which the case arose and will possess an awareness of local issues and social and political reality that forms the backdrop to the case gained from the experience of having lived in that society.

36. He will assume that a Judge by virtue of his or her office is intelligent and will be able to form his or her own views and be capable of detaching his or her own mind from things that he does not agree with and is aware of the legal traditions and culture of this jurisdiction and of those legal traditions, and that that culture played an important role in ensuring the high standards of integrity on the part of the Judiciary.

37. He is not an insider, he is not a party to the action, and is not unduly sensitive or suspicious.

38. Although the **Porter v Magill** test for apparent bias was accepted by the Appellants, they sought to introduce two qualifications to the test which it would be best to refer to at this stage.

39. The first qualification is that the standpoint of the Appellants is an important element when regard is given to the facts of the case. Counsel in support of this submission referred to **Ciraklar v Turkey** (70/1997/854/1061). This was a case decided by the European Court of Human Rights at Strasbourg. In the judgment of the Court (at para. 38) it is stated:

“As in regard to independence, appearances may be of some importance; it follows that when it is being decided whether in a given case there is a legitimate reason to

fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important. It is not, however, decisive; what is decisive is whether the fear can be held to be objectively justified...”

40. It is relevant to note that although the Court considered the standpoint of the complainant to be important, it thought it not to be decisive. What is decisive is whether the fear of the complainant that the tribunal is or would be biased is objectively justified. That clearly must be so. The subjective fears of the complainant cannot be decisive in what is an objective test. I however fail to see that the subjective concerns of the complainant that the Court is biased can be of any real relevance either, as what the Court is to decide is whether viewed objectively from the standpoint of the informed fair-minded observer the concerns of the complainant are justified. The complainants’ fears or concerns can have no significant bearing on that determination. Perhaps the significance that may be attached to the concerns of the Appellants are best expressed in the speech of Lord Hope in **Porter v Magill**, supra, where he said (at para. 104):

“The complainer’s fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they lose their importance once the stage is reached of looking at the matter objectively.”

The stand-point of the Appellants may therefore be considered important when the Court has to decide whether the complaint should be investigated. However in determining whether the complaint has been objectively justified it loses its importance.

41. The other qualification relates to the level of suspicion of the fair-minded and informed observer. Counsel for the Appellants submitted that prevailing conditions in the country take precedence in determining the test. The test will therefore apply differently if local considerations are different. In other words, in this jurisdiction, it is appropriate to regard the observer as suspicious so that he is to be treated as being suspicious and not as not unduly suspicious.

42. I however do not agree. Among the characteristics attributed to the fair-minded observer, as I have already mentioned, is that he is not unduly sensitive or suspicious. To accept the submission that he should be treated otherwise would go against well established authority. In **Panday v Virgil**, a decision which is binding on this Court, Archie, J.A. (as he then was) saw the

attribute that the observer is not unduly suspicious as a “critical caveat in a society such as ours that is deeply polarized and where conspiracy theories are abound”. I too think it is a critical caveat, not because it serves to give the observer immunity against a symptom that is rampant in this jurisdiction, but because it is a natural corollary of the other characteristics of the observer.

43. I do not think that we as a people have any greater tendency to be more suspicious than anyone else. If we tend to be so on occasion it often goes hand in hand with the lack of knowledge of relevant information. The fair-minded observer is however informed. As I have mentioned, he can distinguished what is relevant and what is not. He will take the time to inform himself of all matters that are relevant and be able to determine the weight to be given to those matters that are relevant. So informed, I do not think that the average person in this jurisdiction would tend to be suspicious or overly so. Consistent with the hypothetical person he would not be unduly suspicious.

44. Suspicion also does not sit well with someone who is fair-minded. There are obvious difficulties in accepting that someone who is fair-minded should be treated as someone who is not unduly suspicious.

45. The question therefore is whether the fair-minded and informed observer having considered the facts would conclude that there is/was a real possibility the Magistrate was or would be biased. A two-step approach has been advocated. First, the Court must ascertain all the circumstances which have a bearing on the suggestion that the Magistrate was biased. Second, it must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there is/was a real possibility that the Magistrate was or would be biased.

46. The Magistrate’s impartiality had been brought into question largely under the banner of the appearance of political association. Counsel has contended that it would appear to the informed and fair-minded observer that the Magistrate is politically aligned with the PNM. Of course the importance of political alignment has to do with the personalities of the Appellants. As I mentioned the First Appellant at least up to the hearing of this matter before the Judge was a political fixture in Trinidad and Tobago. He was the leader of the opposition and leader of the UNC-A. He was the chief political opponent of the PNM. It was advanced in the Court below that a decision to commit

the First Appellant would cause serious damage to the UNC-A as it would amount to a finding that the First Appellant, as its political leader is corrupt. Such a decision will correspondingly favour the PNM and would be seen as a political victory by that party, the then ruling party. As such no Judge or Magistrate who deals with the case should have any PNM connection whatsoever whether real or apparent.

47. As I have said, things have changed since the matter was decided below. Mr. Panday is no longer leader of the UNC. He did not run in the last general election and is no longer a Member of Parliament. The PNM is no longer the party in power. The government is held by a “People’s Partnership” coalition of which the UNC is a partner. Mr. John Jeremie is consequently no longer the Attorney General, or a senator for that matter, and Mr. Patrick Manning is no longer Prime Minister. It would be fanciful now to regard the First Appellant as the chief political opponent of the PNM. It was suggested by Counsel for the Appellants that those changes should have no effect on whether these proceedings are tainted by the appearance of bias. I agree with that, not from the point of view that a decision to commit the Appellants will now have any negative impact on the UNC or would be seen as a political victory for the PNM, but for the fact that the Magistrate had begun the hearing of the committal proceedings at a time when the First Appellant was the leader of the opposition and the UNC and chief political opponent of the PNM. At that time a committal order could well have been seen by some as detrimental to the UNC and favouring the PNM. As the Judge puts it; “In the Machiavellian world of politics, the inference that the ruling party [at the time the PNM] in our parliamentary democracy may view the successful conviction of the leader of the opposition [then the First Appellant] as a ‘political victory’ may be irresistible”. If the proceedings were affected by the appearance of bias they cannot now be saved by the subsequent changes in the circumstances. If, however, the proceedings would not then be regarded as vitiated by the appearance of bias then in view of the changes that have occurred the position would certainly not be any different and it may now can be regarded as a fortiori case.

48. The analysis therefore must begin with an investigation of the circumstances that have a bearing on the suggestion that the Magistrate is politically aligned. I do not think that it is in dispute that the Magistrate is not a member of the PNM. The appearance that she is aligned to the PNM is said to arise by reason of her association with the Foundation and because of her father, Mr. Alexis, who was a PNM Member of Parliament and a Member of Cabinet in a PNM administration.

49. With respect to the Foundation it was contended by the Appellants that they were not concerned with whether the Foundation actually is political or what it actually does but whether it is perceived to be politically aligned to the PNM. It was submitted that the fair-minded informed observer would perceive it to be aligned to the PNM. Any analysis, however, of how the fair-minded and informed observer would perceive the Foundation must be influenced by what it actually does and what it actually is.

50. As I have mentioned earlier it was the case of the Appellants originally that the Foundation was used by the PNM to promote its political objectives and to obtain support for the PNM. In other words it was essentially a PNM organization or institution. I have referred to the affidavits filed on behalf of the Appellants and the allegations made therein, such as the Foundation discriminated on the basis of political affiliation and made its premises available to the PNM to be used for purely partisan purposes. The allegations were denied and although leave to cross-examine was granted, cross-examination was not pursued. The allegations were therefore not pursued and were abandoned. The Foundation cannot therefore be regarded as an institution promoting the work of the PNM or as a PNM institution. The Appellants, however, relied on the fact that the Foundation was named after Morris Marshall as lending weight to the perception that it was a PNM organization and correspondingly that those associated with it would be viewed as being politically aligned with that party.

51. Morris Marshall was a PNM politician, a Member of Parliament and a Cabinet Minister. In a tribute in Parliament after his death he was described by the then Prime Minister, Patrick Manning, as having died as he lived “utterly PNM to the very core and center of his person”. But that is only one aspect the observer would bear in mind. In the same tribute the then Prime Minister acknowledged a side of Morris Marshall that is not political but simply humanitarian. He then stated:

“Much has been spoken by way of tribute, eulogy and memoriam of our departed brother. A great deal more will be spoken. He will be remembered as a champion of those who lost their jobs, the defender of the jobless and the dispossessed, and he will be missed when there are marches and demonstrations for bread and justice.”

History is likely to remember him as a man who fearlessly faced down the forces of negativity in the pursuit of a better kind of life for those who were unequal, not because of the circumstances of their birth, but because of the circumstances of their lives. That is the inequality to which he was implacably opposed, as you will find that the issues which he raised or in which he joined in this House could almost always be traced to this root principle."

In the late hon. Member's very last contribution to this Parliament, ... [he] made the point that a certain public utility was not 'in the business of doing community service.' He went on to note emphatically in what was to be his last debate:

'... no attempt will be tolerated to deny, for any reason whatsoever, deliberately so, any community whether it is Penal Rock Road, Laventille, Diego Martin or wherever, for any other reasons other than problems with resources.'"

52. It is this side of Morris Marshall that led to the formation of the Foundation. According to the evidence, Morris Marshall had a vision of the role of education in the community of Laventille. That was the reason he first set up the East Port of Spain Scholarship Fund. He however felt the need, according to Father Harvey, to broaden his approach because of his commitment to all people beyond those who shared his political allegiance. Arising out of a meeting of the people of Laventille, chaired by Father Harvey in about April/May 1992 the Laventille West Foundation was set up. According to Joslyn McLeod-Smith, a trustee of the Foundation:

"5. When he came to set up the Laventille West Foundation it was because he wanted to go beyond the confines of the Scholarship Fund and tackle some of the problems that had been identified at a meeting of the Laventille community. This would have been around 1991. That meeting was entitled Laventille Great As We Think, and it was a meeting of Community Organizations from all Laventille. So that it included religious groups from all the denomination, the Steelband groups and all the civic organizations. That meeting was a success and the various committees that were established at that meeting caused the Laventille West Foundation to crystallize.

6. The genesis therefore of the Laventille West Foundation was not political and in setting up the organization, Morris Marshall was determined to reach out to interests beyond that of his own party but all of whom had to have the well-being of Laventille at heart"

The name of the Laventille West Foundation was changed in 1994 after the death of Morris Marshall to the Foundation. In 2005 a deed of trust formally establishing the Foundation outlined

its objects. They are not political in nature. According to the deed the Foundation is declared to be established for charitable purposes only and in particular it is established:

- “(i) To promote for the benefit of communities in the island of Trinidad and in particular the community in the district of Laventille the advancement of education, the furtherance of health and the relief of poverty, distress and sickness.*
- (i) To promote and organize co-operation in the achievement of the above purposes and to that end to bring together representatives of the statutory authorities and voluntary organizations engaged in the furtherance of the above purposes.”*

53. The work the Foundation does and the services that it provides are consistent with its objects. These include:

- a) the provision of scholarships for secondary and tertiary level and the provision of book grants; and
- b) the offering of courses in food preparation and garment construction and the establishment of the Laventille Education Accelerated Programme which is aimed at adolescent boys and young adults in the area with the purpose of teaching certain skills such as self-esteem, computer literacy, masonry and electrical management and literacy skills.

54. The Foundation is a non-governmental organization and like any other such organization receives support from the Government. However according to the evidence it does not receive much assistance from the Government and most of its funding comes from private bodies such as the J. B. Fernandes Memorial Trust of Trinidad and Tobago, the Rockefeller Foundation and the Canada Fund.

55. There is no evidence that the Foundation publishes any political views whatsoever. The brochure that was published by the Foundation containing information about it bears no trace of any political alignment and is consistent with its objectives and the vision that led to its formation. The brochure sets out the Foundation’s mission and vision statements as follows:

“Our vision:

The Morris Marshall Development Foundation is dedicated to the enhancement and empowerment of the Community of Laventille. Education will be used as the path to

lifelong self-empowerment through the delivery of high-quality alternative instructional interventions.

Our Mission Statement:

To serve as a vehicle for the human and structural transformation of Laventille.”

56. It seems to me that the fair-minded and informed observer knowing the history that led to the establishment of the Foundation, the purposes for which it was established, the work that it does, that it espouses no political views, that it is a charitable organization which is dependent on most of its funding from non-governmental sources, would conclude that such an organization is not politically aligned and that anyone associated with it ought not to be perceived as being politically aligned. The Appellants, however, say that the Foundation is dominated by PNM personalities, some of whom are most influential in any Commonwealth democracy. These include the former Minister National Security, Mr. Martin Joseph, and the former Attorney General, Mr. John Jeremie, who, in fact, introduced the Magistrate to the Foundation.

57. It is, however, inaccurate to say that the Foundation is dominated by PNM personalities. The Chairman of the Foundation and one of its active trustees is Father Clyde Harvey. He is a Catholic priest and according to his evidence Catholic priests are not allowed to participate in partisan political activity. As one would expect, he is not a member of the PNM or any other political party.

58. The active trustees other than the Magistrate and Father Harvey are Joslyn McLeod-Smith, Atiba Braithwaite, Raphael George and Linda Hollingsworth. The first three named are not members of the PNM, nor do they have any known connection to the UNC, nor are they currently active in politics. Ms. McLeod-Smith was active and this was at the youth level. According to Father Harvey the practice of the Foundation has been that if any of the trustees wished to become politically active he or she must cease to be active as a trustee since to become politically partisan is untenable for the Foundation as it would lose credibility overnight. There is apparently one exception and this is Linda Hollingsworth who is active on the local government level. This however does not make the Foundation politically partisan or dominated by PNM personalities.

59. There were other trustees who were PNM personalities. These included Mr. John Jeremie and Mr. Martin Joseph to whom reference has already been made. However when they held

political office they were not trustees of the Foundation. Although the Magistrate was introduced to the Foundation by Mr. Jeremie he was not then the Attorney General and it appears from the evidence that he was not then a member of the PNM. He was an attorney-at-law in private practice and as the Judge noted the informed fair-minded observer would know that Magistrates do from time to time come into contact with members of the legal profession.

60. The reasons the Magistrate got involved in the Foundation had nothing to do with politics. They are outlined at paragraph 15 of the agreed statement of facts. She was enthused by the fact that the Foundation was located in Laventille where she grew up and that its role was to help residents of Laventille. This type of charitable work is consistent with her participation in civic organizations since she left university. She was also attracted to the Foundation because of the involvement of Father Harvey, whom she knew to be someone of integrity and interested in the betterment of the people of Laventille.

61. Among the circumstances which the informed fair-minded observer will consider is any explanation by the Magistrate. The Court does not have to rule on whether the explanation should be accepted or rejected. The Court however has to decide whether or not the fair-minded and informed observer would consider that there is a real possibility of bias notwithstanding the explanation advanced (see in **re Medicaments and Related Classes of Goods (No. 2)**, supra, at para. 86)

62. In my judgment the well informed observer knowing the objects of the Foundation, the work it does, how it is financed and its membership would have no concerns with the Magistrate's explanation. Her reasons were entirely benevolent and not to promote the objective of any political party including that of the PNM. He would think that it is not unusual but indeed quite a normal response for the Magistrate, who has risen to the position she has, to desire to give something back to the community in which she had grown up, especially where the community, like Laventille, would be in need of such assistance.

63. On the evidence the Foundation is not a PNM organization. It does not do the work of or promote the PNM. It is not dominated by PNM personalities. It does not publish political views. It is a charitable non-governmental organization that performs charitable works for the upliftment of

the community of Laventille. The Magistrate was drawn to the Foundation because of that and there appears to have been no political motivation in the Magistrate getting involved in the Foundation. She herself is not a member of the PNM. The Foundation receives most of its funding from private bodies. Although the Foundation bears the name of a former PNM politician - “a famous PNM politician” to use the Appellants’ phrase - and a political opponent of the First Appellant, the Foundation was formed for purposes that transcended politics. There were of course trustees of the Foundation who came to occupy high office within a PNM administration. The fact however is when they achieved such office they were no longer trustees. The fair-minded and informed observer would consider these matters and would conclude that clearly the Magistrate is not affiliated to the PNM and would not appear to be so.

64. What the case for the Appellants on the appearance of political association seems to reduce itself to is that the Magistrate being involved in the Foundation would have served alongside persons or come into contact with persons who were affiliated with or supported the PNM. It was submitted that inevitably in an organization such as the Foundation there would be political discussions among the trustees.

65. That argument assumes a number of things. It assumes that there would have been political discussions. There is no evidence of this but even if it is said that that it is to be expected the argument assumes that views expressed would be pro-PNM and would support the contention that a committal of the Appellant to stand trial in the committal proceedings would be in the best interests of the PNM, and these views would be shared by the Magistrate. These assumptions cannot be made.

66. It is to be noted that the majority of those trustees were not all members of the PNM and there is no evidence that they all supported that party. It also cannot be assumed that those who supported the PNM would have supported the contention advanced by the Appellants that it would be a political victory for the PNM to have him committed to stand trial. The submission of Counsel for the DPP that there were members of the PNM who by 2008 might have come to the view that the best way for the PNM to remain in power was for the First Appellant to remain at the helm of the UNC cannot be ignored. Those who thought that way, it may be argued, were proven right by the results of the 2010 elections. In any event and more importantly there is no evidence that the

Magistrate shared any views of the PNM or any views that might have been held and expressed by those who supported the PNM.

67. The facts of this case are far weaker than in **Helow**, supra, where apparent bias was not established. In that case the appellant was a Palestinian refugee living in Lebanon. She claimed to be a sympathizer of the Palestinian Liberation Organization (PLO) and on arrival in the UK claimed asylum on the basis that her personal safety would be at risk if she were to return to Lebanon. Her application was refused by the Immigration Appeal Tribunal and she applied to review the decision of the Tribunal. The matter came before Lady Cosgrove the Lord Ordinary, who refused leave. It was subsequently contended that she was tainted by the appearance of bias on the basis of her membership in an association that published a magazine that carried articles and pronouncements which were significantly supportive of Israel and markedly anti-Palestinian and anti pathetic to the PLO. The House of Lords held that disqualification by the appearance of bias had not been established.

68. Lord Mance in his judgment noted that the association is not a one-sided anti-Palestinian association. Its objects were unobjectionable and it published a variety of articles not only those complained of. He noted that a judge who had expressed the opinions in the articles and pronouncements complained of could not sit on an application such as that which the Lord Ordinary determined. But they were not expressed by her and there was nothing, save membership in the association, which was not sufficient, to link the Lord Ordinary to the views expressed. In his judgment the fair-minded and informed observer would not conclude that the authors of the articles and the pronouncements complained of were speaking on behalf of the Lord Ordinary or that she was in any way endorsing or associating herself with what was stated.

69. In this case too the objects of the foundation are unobjectionable and certainly cannot be regarded as supportive of the PNM or for that matter any political party. There is no evidence that the Foundation and any of its members published any pro PNM material or made any pro PNM pronouncements much less that by doing so they were speaking on the Magistrate's behalf or that she was in any way endorsing or associating herself with such material or comments. Similarly if it is to be assumed that members of the Foundation held or expressed views that were pro PNM, the

Magistrate's involvement with the Foundation by itself would not be sufficient to link the Magistrate to such views and there is no evidence that the Magistrate associated herself with them.

70. In all the circumstances I am satisfied that the fair-minded and informed observer would not conclude that the Magistrate was associated with the PNM or would appear to be so by reason of her association with other members of the Foundation who might have supported the PNM.

71. The Appellants attached some relevance to the fact that the Foundation is located in Laventille which is a PNM stronghold and that the Magistrate herself grew up in Laventille so that she was aware of the loyalty of the area to the PNM. I however fail to see that the fair-minded and informed observer would see this as relevant to the question of the appearance of political association. He would have regard to the reasons the Magistrate joined the Foundation and the circumstances surrounding the Foundation alluded to earlier and would not impute any political motive. He would certainly not conclude that the Magistrate became involved in the Foundation because of any real or perceived association with the PNM.

72. Before I proceed to consider the Appellants' arguments on the familial connection of the Magistrate, I should refer to an application for disclosure made by the Appellants in the Court below. The Appellants sought an order compelling the Magistrate to provide answers to five questions which are fully set out in the Judge's judgment relating to the application. From the Appellants' viewpoint these questions had a direct bearing on the issues of political association and the familial connection of the Magistrate.

73. The Judge heard the application before the trial of the matter and dismissed it on April 29th, 2009. The Appellants had a right of appeal from that decision to the Court of Appeal. Such an appeal is treated as a procedural appeal under the Civil Proceedings Rules 1998 (CPR) (see Part 64) and must be filed within seven days of the date of the decision. Where an appeal is not filed within that time, there is no appeal unless the would-be appellant obtains an extension of time within which to file the appeal. To do so the appellant must satisfy the relief from sanction provisions in the CPR - rule 26.7. The Appellants did not appeal within the time allowed. Instead they seek by this appeal to challenge the Judge's decision. The appeal is therefore out of time and the Appellants have advanced nothing that would satisfy rule 26.7 to permit them to appeal out of time. The appeal

from the Judge's decision on the application for disclosure is therefore not properly before this Court and cannot be entertained.

74. In oral argument Counsel for the Appellants emphasized one of the questions the Appellants were seeking to have the Magistrate answer. This had to do with whether the Magistrate had made an application for the post of Solicitor General at the time that the PNM was in power. Counsel initially argued that any person who made such an application had to be supremely confident that his application might be successful. This it seems is on the basis that the Prime Minister retained a constitutional power of veto over such an appointment. Counsel, however, later downplayed his submission and said that the Magistrate would have "some confidence that she would be eligible and may be acceptable for the post". He contended that the fair-minded informed observer would therefore conclude that by making the application for the post there would be an appearance of political association.

75. I think that really has to be stated to be rejected. The fair-minded observer would not think that an applicant for the post of Solicitor General would be supremely confident that he would obtain the position. He might however consider that the applicant would have "some confidence" that he would be eligible and acceptable for the post since the applicant in all likelihood would not apply if he had no confidence in obtaining the post. However, without more, the observer would be unbalanced, and anything but fair-minded, if without more he thought the fact that an applicant may have some confidence in the success of his application was an indication of a political connection to the ruling party. The natural appropriate and fair-minded inference would be that the applicant would have such confidence because of his qualifications, competence and character. It is therefore difficult to see that this information would have advanced the case for the Appellants.

76. I turn now to consider the appearance of political affiliation or alignment arising from the Magistrate's familial connection. The Appellants' submission on this point is that there is an appearance of bias arising from the fact that the Appellants are to be judged by the "kith and kin" of their political enemy. It was argued that the fair-minded and informed observer would consider the "inevitable loyalty" of the Magistrate to her father derived from natural feelings of love and affection and respect for her father, pride in his political achievement through his senior role in the PNM, the performance of his parental duty to contribute financially to her upbringing and education

and his availability to always support her. It was also submitted that the observer would also consider that the Magistrate had been advised by her father and had discussions with him about the nation and its politics, and had been exposed from an early age to his preferences for and commitment to the PNM over the opposition led by the First Appellant. He would also consider that “blood is thicker than water”, and that “the sins of the father” can be visited upon his daughter and that children are deeply affected by their parents’ belief. Having considered these factors the informed and fair-minded observer would conclude that there was a real possibility that the Magistrate would be subconsciously biased as a consequence of her father’s belief.

77. There are pieces of information that the Appellants seek to attribute to the observer that are not in evidence. There is no evidence that the Magistrate’s father performed his parental duties to contribute financially to her upbringing and education and had always been available to support her. The Appellants had asked the Magistrate to say whether her father supported her financially. In reply the Magistrate enquired as to the relevance of the question. The response of the Appellants was to make the application for disclosure already alluded to. The application, as had been mentioned was dismissed and there was no timely appeal. There is therefore no evidence on the point and in absence of evidence I do not think that in this jurisdiction it is safe to infer that a biological father not married to or living with the mother of the child would perform his parental duties. In this case it is a safer inference that he did not. The Magistrate’s mother was not married to Mr. Alexis and the Magistrate grew up in her mother’s and stepfather’s home. The Judge found that “save for the learned Magistrate’s genetic makeup, there is in fact no association with her father whatsoever.” This finding has been challenged but it is one that is well supported by the evidence. It would not therefore be correct in this case to attribute to the observer the information that the Magistrate’s father supported her.

78. There is also no evidence that the Magistrate had been advised by her father and had discussions with him about the nation and its politics etc. It would be wrong to infer that he did. According to the evidence, the Magistrate does not know whether her father was once an advisor to Dr. Eric Williams, a former prime minister of this country, or whether he has maintained his membership with the PNM since he left Parliament, or if he is still a member of the PNM, or continues to render advice to the PNM, or was an advisor to Patrick Manning when he was prime minister, or if he is still in active politics. She does not know what her father’s attitude is to the

Appellants or the UNC or whether her father can properly be considered the First Appellant's political enemy. The Magistrate does not know anything about her father's work-related or personal relationships with any political party now or in the past. If the Magistrate had discussions with her father as contended by the Appellants she would have known a number of these things and certainly would have known of her father's attitude to the Appellants and the UNC. The evidence points to the fact that the Magistrate virtually had no relationship with her father and is estranged from him.

79. With respect to the inevitable loyalty derived from feelings of natural love and affection and pride in her father's achievements I would not however rule out the possibility that the Magistrate could entertain such feelings notwithstanding the absence of a relationship with her father.

80. The Appellants have also alluded to the expert evidence of a Dr. Orbach. This evidence was excluded by the Judge. The Appellants have however contended that the evidence would have explained why "daddy issues" produce subconscious bias especially if there has been any estrangement. The Appellants have challenged the Judge's refusal to admit this evidence. From a perusal of the Judge's reasons I am not prepared to say that he exercised his discretion wrongly.

81. However even if the Magistrate did entertain feelings of love and affection for her biological father and pride for his achievement and "daddy issues" could theoretically produce unconscious bias, the corner stone of the Appellants' submission is that the Appellants are being tried by the Magistrate who is the daughter of their political enemy and who would be subconsciously affected by her father's political belief and affiliation. The fact of the matter however is that nothing appears to be known of the Magistrate's father's politics after 1976.

82. From 1971 to 1976 the father was a Member of the House of Representatives. Thereafter he dropped off the political radar. Since the PNM computerized its records in 1993 he has not been a member of the party. According to the evidence there is no record of receipts for party dues for Mr. Alexis since that time. At the time the matter was heard before the Judge the Magistrate's father was not an advisor to the political leader of the PNM and held no position in Cabinet or within the PNM. According to Ms. Janneire, the Assistant General Secretary of the PNM, Mr. Alexis has not been seen by her at any party functions or activities since she became a member of the PNM in 1980. As the Judge found, his political affiliation after 1976 is unknown.

83. The Judge also noted, as can hardly be denied, that “flip flops in politics is a natural feature of that landscape”. The Judge in making that observation took judicial notice of the fact that Mr. ANR Robinson who was a PNM politician in his early years later became the political enemy of the PNM. The Appellants however contend that the Judge was wrong to take judicial notice of the fact that Mr. Robinson had become a political enemy of the PNM because in 2001, on the outcome of the tied general election, being the then President he appointed as Prime Minister the PNM candidate, who was then leader of the opposition, instead of the First Appellant who was then the incumbent Prime Minister. This, submitted Counsel for the Appellants, was in contravention of the Westminster convention to appoint the incumbent Prime Minister. This was an example of “once PNM always PNM” and the Judge was wrong to draw the inference that people’s political allegiance to the PNM can change.

84. However the Westminster Convention has no application in the face of our Constitution that requires the President to appoint as Prime Minister a member of the House of Representatives who is most likely to command the support of the majority of members of that House. There is no evidence that Mr. Robinson’s previous association with the PNM had anything to do with the appointment of the PNM candidate.

85. There are of course others to whom the Judge could have referred to conclude that changing one’s political affiliation is a feature of politics. The fact therefore that Mr. Alexis was once a PNM Minister and Member of Cabinet at least more than 30 years ago does not make him so today or at the time the application was heard before the Judge. In the face of positive evidence of the Magistrate’s father’s absence from the political scene and from any association with the PNM for several years it would be wrong to conclude that his political association with the PNM continued. I therefore agree with the Judge that it would be wrong to characterize Mr. Alexis as “a PNM today or at the time the Magistrate gave her decision or at any time after 1976 without facts as to his current status”.

86. It would seem to me that for the well informed observer to conclude that the Magistrate was subconsciously affected by her father’s political views or beliefs that he would need to be satisfied of what are those views or beliefs. He could not on the facts as known to him conclude that the

Magistrate's father is affiliated with the PNM and would desire an outcome in the committal proceedings adverse to the Appellants.

87. The informed and fair-minded observer would also consider that the Magistrate stated that she is unaware of the political views of her father. Given the relationship between the Magistrate and her father this would hardly be surprising to the observer. As the Magistrate is unaware of her father's belief there is no danger of them having influenced her judgment and consequently the appearance of possible bias is dispelled. She could not be unconsciously affected by that which she knows nothing.

88. Counsel for the Appellants referred to the case **Perot Systems Europe Ltd. v Johnson** [2003] EWHC 1635. This he submitted is relevant to show how the Magistrate should have conducted herself when dealing with the complaint that her family connection gave rise to an appearance of bias. In this case the Judge treated the case as one where there was real doubt and he stated that this doubt should be resolved in favour of recusal.

89. The facts of the **Perot Systems** case are not reported with the greatest of clarity. The case seems to involve a claimant who had claims against a company that had been considered by the board of the company of which the brother of the Judge was its chairman. The Judge was not sure that any decision in the case before him would affect the company. The facts therefore are very different from the facts of this case but the short point however is that at the end of the day the Judge was not sure whether the case was frivolous or whether the test in **Porter v Magill** was satisfied. I accept as a correct proposition of law that where the tribunal is in such doubt that that doubt should be resolved in favour of recusal. In this case however I do not think that there is a basis for any reasonable doubt. It is clear to me that the fair-minded and informed observer would not conclude that there was a real possibility of bias.

90. It is convenient here to note before I deal with the submission on non disclosure, that the Magistrate herself did not file any affidavit. She gave answers to the Chief State Solicitor in response to questions posed to the Magistrate through the Chief State Solicitor. Counsel for the Appellant submitted that the Magistrate should have gone on record, and further as the responses

came through the Chief State Solicitor it was hearsay. In those circumstances the responses should be given less weight than if the Magistrate had gone on affidavit.

91. In his judgment the Judge mentioned that attorney-at-law for the Magistrate had indicated at a pretrial review that affidavits sworn by the Magistrate would be filed if they were so required by the Court. The Court however gave no directions for the Magistrate to file any evidence. It seems therefore that the Magistrate was ready and willing to swear affidavits but no directions were given. Counsel for the DPP submitted that at no point during the hearing of the matter was any objection taken as to the absence of affidavits on the part of the Magistrate and the use of the Chief State Solicitor as a channel of communication. This was not denied by Counsel for the Appellants. It would be unfair to now attach any significance to the absence of any affidavit on the part of the Magistrate. In those circumstances it is also relevant to note that much of what the Magistrate communicated to the Chief State Solicitor has found its way into the agreed statement of facts. In the circumstances I am unable to accept Counsel's submission on this point

92. The Appellants contend that the Magistrate failed to disclose to the parties who her father is and her association with the Foundation. They argued that this lent weight to the reasonable apprehension of bias because it can be inferred that the Magistrate had no good reason to keep her familial matters secret. The failure to disclose raises questions of the partiality of the Magistrate.

93. There can be no dispute that the Magistrate did not disclose what she knew of her association with the Foundation when it was made the basis of the application before her to recuse herself from hearing the committal proceedings. There was no dispute that she was a trustee of the Foundation but when invited to disclose whether she was its treasurer she declined to volunteer any information. She also gave no information as to Father Harvey, although he was well known to her. Indeed she did not give any information that was known to her regarding the Foundation.

94. There is no doubt that the Magistrate's refusal to disclose the information that she was privy to particularly when invited to do so, would raise concerns in the mind of the Appellants. I do not however think that such concerns are justified in this case.

95. The reason the Magistrate adopted the position on disclosure seems to be that she thought she was under no obligation to disclose anything. This is what can be deduced from the reasons she gave for refusing to recuse herself. In her reasons the Magistrate acknowledged that as a ground for her disqualification the Appellants were relying on her failure to disclose her involvement in the Foundation. She then quoted Archie, J.A. (as he then was) in **Panday v Virgil**, supra, where he stated “a duty to disclose only arises where there is already something that can give rise to an apprehension of bias. Otherwise there is no obligation to disclose”. The Magistrate then stated that for there to be an obligation to disclose, the Appellants would need to establish some measure of bias arising from the other grounds for disqualification on which the Appellants were relying. The Magistrate found that there was no merit in the application. The well informed observer would no doubt consider what the Magistrate had to say in the reasons regarding her failure to disclose her involvement in the Foundation. He would not likely conclude that it supported the Appellant’s contention that her decision to disclose gave rise to an apprehension of his.

96. It has been commented that judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair-minded and informed observer as raising a possibility of bias. This was said by Lord Woolf in **Taylor v Lawrence** [2002] EWCA Civ 90. He continued (at para. 64):

“If such a relationship was disclosed, it unnecessarily raises an implication that it could affect the judgment and approach of the judge. If this is not the position no purpose is served by mentioning the relationship. On the other hand, if the situation is one where a fair-minded and informed observer might regard the judge as biased, it is important that the disclosure should be made. If the position is borderline, disclosure should be made because then the judge can consider, having heard the submission of the parties whether or not he should withdraw. In other situations disclosure can unnecessarily undermine the litigant’s confidence in the judge.”

97. Consequently, it has been said that nondisclosure is only one factor which the observer would take into account and a marginal one at best. This point was made in **Helow**, supra, where Lord Mance stated (at para. 58):

“The other consideration is that Lady Cosgrove did not volunteer a reference to her membership of the Association. Had she disclosed this, the very fact of disclosure could have been seen by a fair-minded observer as a ‘badge of impartiality’, as showing that

‘she [had] nothing to hide and [was] fully conscious of the factors which might be apprehended to influence ... her judgment’: Davidson v Scottish Ministers (No. 2) [2005] 1SC (HL) 7, paras. 19 and 54, per Lord Bingham of Cornhill and Lord Hope of Craighead. Again, however, this could only be one factor and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge, who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing.’

99. In this case having considered the facts relating to the Magistrate’s relationship with the Foundation and her father the well informed observer would not consider the failure to disclose the relationship a factor which would carry any significant weight. He would more likely conclude that her involvement with the Foundation and her relationship to her father involved nothing that was relevant for her to disclose.

100. The Appellants raised one other point to which I would like to refer. First, in the course of the oral argument Counsel for the Appellants raised an issue that was not argued in the Court below, or mentioned in the grounds on which they sought judicial review. This related to the fact that the Magistrate had in other proceedings involving the First Appellant refused to recuse herself and was ordered to do so by the High Court. This is against the background where Counsel for the other party in that matter had agreed that the Magistrate should recuse herself. Counsel for the Appellants submitted that the observer would add that to the facts he had to consider. Counsel seemed to suggest that the observer would conclude that the Magistrate had decided that come what may she would try these Appellants. Counsel seems to be suggesting that there was some undisclosed sinister motive why the Magistrate would refuse to recuse herself.

101. The previous proceedings to which reference was made involved charges brought against the First Appellant under the **Integrity in Public Life Act 1987**. The First Appellant was convicted. On appeal however the conviction was quashed and a retrial ordered. The retrial came before the Magistrate and an application was made by the First Appellant for her to recuse herself, it appears, on the basis that the prosecution intended to rely on evidence in the retrial that had been led before the Magistrate in the committal proceedings. The Magistrate was therefore involved in an assessment of the evidence which was against the First Appellant. The application to recuse herself was supported by the prosecution. The reasons for the Magistrate’s refusal to recuse herself were

recorded in the judgment of the High Court (see CV 2007-04133, **Panday v Espinet and the DPP**) and are as follows:

- i) The fact that no allegation of impropriety in the course of her exercise of her duty had been made against her distinguished the present circumstances from those outlined in the authorities cited;
- ii) The heavy workload of the Court made it inevitable that a magistrate would be called upon to adjudicate upon more than one matter for which a litigant is charged;
- iii) In the course of proceedings a magistrate may be called upon to rule on the admissibility of a document or oral statements. Should the document or statement be held to be inadmissible the magistrate is required to disabuse her mind of the contents of that document or statement;
- iv) Similarly under the Bail Act magistrates are required to examine the criminal record of the litigant yet the magistrate usually adjudicates upon the matter for which the litigant is charged;
- v) The issues in both proceedings are not the same, in one the prosecution is only required to establish a prima facie case, in the other the prosecution has to prove the case beyond a reasonable doubt.

102. The Judge did not agree with the Magistrate. The critical issue in the Judge's view was whether the fair-minded and informed observer would appreciate the distinction between the finding of a prima facie case on the evidence led before the Magistrate in the committal proceedings and the determination of guilt on what would include that evidence in the retrial. The Court held that he would not. The Judge stated (at para. 43):

“In my view a fair-minded observer, informed but not a member of the legal profession, on ascertaining that the evidence upon which the Magistrate had to assess the guilt or innocence of the Claimant is the same evidence upon which the Magistrate had already determined was credible enough to found the basis for committal would be hard pressed to make any distinction with respect to the differences between the two procedures. In my opinion this hypothetical observer would have concluded that there was a real possibility

that by accepting that in one case the evidence was sufficient to put the Claimant on trial, the same Magistrate would not be in a position to approach the evidence in the retrial with the required impartiality. In my view it would be highly likely that this hypothetical observer would come to the conclusion that the Magistrate would be predisposed to a particular view of the evidence before her”.

103. The fair-minded and informed observer would be aware that Magistrates should not lightly agree to an application to recuse herself otherwise this might encourage forum shopping. He would know that the Judge did not agree with the Magistrate but would know that Magistrates like Judges err and are corrected by higher courts. He would consider the reasons of the Magistrate and the Judge. Having considered these factors I do not think that the fair-minded informed observer would conclude that there was any ulterior motive in the Magistrate’s refusal to recuse herself or that by so doing there would be an apprehension of bias. He would be overly suspicious to conclude otherwise.

104. In my judgment therefore the fair-minded and informed observer having considered the facts would not conclude that there is any real possibility that the Magistrate was or would be biased. In summary, the fair-minded and informed observer would consider that the Foundation carries the name of a former PNM politician and is located within a PNM stronghold and that trustees have or had political connection to the PNM and some have achieved high office within a PNM administration. He would also, however, consider the full character of Morris Marshall not just his political side, the facts that led to the formation of the Foundation, its objects, the work it does and how it is funded. He would consider that it is not a PNM institution and that it does not espouse any political views. He would be aware of the general rule that once someone becomes involved in active politics that that person could not be a trustee. He would be aware that the Magistrate was introduced to the Foundation by Mr. John Jeremie but would know that he was not at the time the Attorney General but an attorney in private practice and that Magistrates do from time to time come into contact with members of the legal profession. He would consider the reasons the Magistrate became involved in the Foundation, that she is from Laventille and that it would not be unusual for her to want to give something back to that community. He would know that the Magistrate is not a member of the PNM but would consider that the Magistrate would come into contact by reason of her involvement with the Foundation with persons who support the PNM. He would however consider that even if those persons expressed views that are pro-PNM, there is nothing to indicate that those views would be consistent with securing the committal of the Appellants or that the

Magistrate associated herself with those views. He would not think that mere involvement with the Foundation is sufficient to link the Magistrate to any pro-PNM views, even if such views were expressed. He would also consider who the father of the Magistrate is but would know that they enjoyed no relationship together. He would consider that the Magistrate has indicated that she does not know her father's political views or beliefs and that she could not be influenced by something of which she knows nothing. He would know that the father was once with the PNM but that political allegiances do change. He would not conclude in light of the evidence that the Magistrate's father is still aligned with the PNM. He would consider that on the evidence nothing was known of the father's current political views and so could not conclude that they were adverse to the Appellants or that they would influence the Magistrate to arrive at an outcome in the committal proceedings adverse to the Appellants. He would consider the failure of the Magistrate to disclose her involvement with the Foundation and her family connection but would think nothing of it. He would draw no adverse inference from the Magistrate's refusal to recuse herself from other proceedings involving the First Appellant. Having considered all the facts he would not conclude that there was any real or perceived political alignment by the Magistrate with the PNM. He would not conclude that there is a real possibility that the Magistrate was or would be biased.

105. In the circumstances this appeal is dismissed. The Appellants shall pay to the Second Respondent the costs of this appeal determined at two-thirds of the costs allowed in the Court below.

Dated the 11th day of May, 2011

Allan Mendonça
Justice of Appeal