

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Port of Spain**

**Civil Appeal Number: S 293 of 2016**

Claim Number: CV 2015-03128

**IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT,  
CHAP. 2:01**

AND

**IN THE MATTER OF A PARLIAMENTARY ELECTION FOR THE CONSTITUENCY  
OF SAN FERNANDO WEST HELD ON THE 7<sup>TH</sup> DAY OF SEPTEMBER 2015**

AND

**IN THE MATTER OF THE ELECTION PROCEEDINGS RULES, 2001**

BETWEEN

**DR. SHEVANAND GOPEESINGH**

Appellant/Petitioner

AND

**FARIS AL-RAWI**

First Respondent/First Respondent

AND

**THE RETURNING OFFICER FOR THE CONSTITUENCY  
OF SAN FERNANDO WEST  
(DEEMED TO BE A RESPONDENT BY VIRTUE OF SEC 107 (2)  
OF THE REPRESENTATION OF THE PEOPLE ACT)**

Second Respondent/Second Respondent

**Panel:**

**Justice of Appeal Smith**

**Justice of Appeal Mohammed**

**Justice of Appeal Rajkumar**

**Date of Delivery: February 6, 2020**

**Appearances:**

Mr. R. Clayton Q.C, Mr. A. Ramlogan S.C, Mr. G. Ramdeen, Mr. Che Dindial, Mr. D. Bayley for the Appellant

Mr. R. Armour S.C, Ms. V. Gopaul, Mr. R. Nanga, Mr. M. Quamina instructed by Ms. Z. Haynes-Soo Hon for the First Respondent

Mr. R. Martineau S.C, Mrs. D. Peake S.C, Mr. R. Heffes-Doon, instructed by Ms. A. Bissessar for the Second Respondent

I have read the judgments of Smith JA and Rajkumar JA. I am in agreement with both and have nothing to add.

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**Justice of Appeal**

**Mark Mohammed**

## JUDGMENT

**Delivered by Rajkumar JA**

### **Background**

1. On September 7<sup>th</sup> 2015 an election was held. Six petitions (the petitions) were filed challenging the results in six constituencies, including one by the applicant. The petitions were dismissed by the High Court, with the applicant's petition being dismissed on August 19<sup>th</sup>, 2016<sup>1</sup>. His appeal was dismissed by the Court of Appeal on October 19<sup>th</sup> 2016. The panel of the Court of Appeal included the Honourable Chief Justice (CJ).
2. In or around 2017 a series of articles began to be published in the daily newspapers containing various allegations in relation to the CJ (the allegations). Among those allegations were included some relating to recommendations made by the CJ in relation to housing provided by the Housing Development Corporation (HDC).
3. This application seeks a determination as to whether the fair-minded and informed observer would have considered that there was a real possibility of bias by the CJ when he sat and determined as part of a panel, the appeals in the election petitions (the appeals) by reason of circumstances relating to the HDC recommendations and alleged follow up communications thereafter (together the HDC allegations).
4. It was also contended, inter alia, that the CJ was required to disclose the HDC allegations to the parties to the election petitions and that the failure to disclose them would give rise to the perception of apparent bias.

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<sup>1</sup> Page 3, 68 of the application bundle.

5. An order is consequently sought that the Court of Appeal's earlier dismissal of the election petitions be set aside and they be heard by a new panel of the Court of Appeal.

6. The allegations, including the HDC allegations, were the subject of an investigation by the Law Association of Trinidad and Tobago (LATT). LATT's executive summary of the report produced on its behalf after that investigation and the legal opinions it received in relation thereto were forwarded to the Honourable Prime Minister (PM) by letter dated December 13<sup>th</sup>, 2018 for his consideration as to whether proceedings under section 137 of the Constitution should be initiated by him<sup>2</sup>. The PM by letter dated July 22<sup>nd</sup>, 2019 (the PM's letter) declined any suggestion that he should initiate proceedings under section 137.

7. On October 3<sup>rd</sup>, 2019 LATT initiated judicial review proceedings against the PM in relation to that decision (the judicial review proceedings or JR proceedings). Those proceedings are currently pending before the High Court. The applicant contends that those proceedings were relevant because some of

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<sup>2</sup> Section 137. (1) A Judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.

(3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a Judge other than the Chief Justice, represents to the President that the question of removing a Judge under this section ought to be investigated, then—

(a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the President acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a Judge, from among persons who hold or have held office as a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeals from any such Court;

(b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that Judge from office to the Judicial Committee; and

(c) where the tribunal so recommends, the President shall refer the question accordingly.

the material in the investigative report of LATT, as well as in the judicial review proceedings, related to the HDC allegations, and disclosures or non-disclosures relating thereto. We permitted reference to the documents filed in the JR proceedings, (filed as an attachment to a supplemental affidavit on behalf of the applicant), de bene esse. This was on the understanding that the issues in the instant matter were separate and distinct from those in the judicial review proceedings, and that extreme care needed to be exercised not to trespass upon the issues in those judicial review proceedings. Further, in these proceedings, which focus on the legal issue of apparent bias, no findings of fact are required to be made.

#### **Issue**

8. The applicant's complaint is summarized succinctly in counsel's outline submissions as follows:

**"A's bias complaint in a nutshell**

*A fair minded and informed observer would conclude in the circumstances of this case that there was a real possibility that the CJ was biased by reason of (i) the undisputed facts, (ii) the proper inferences to be drawn from the material gathered by the Law Association, its executive summary and report and (iii) CJ's failure to dispel serious, specific and detailed allegations made against him and/or his failure to comply with his duty of disclosure".*

9. It was also contended that on the same factual basis there will also arise  
i. a breach of the right to a fair trial before an independent tribunal  
ii. a breach of the right to equality before the law and the protection of the law  
iii. a deprivation of procedural protections necessary for securing the  
aforementioned rights.

10. This application is solely concerned with an issue of law, namely, whether or not the decision in the election petitions before the Court of Appeal

were vitiated by apparent bias on the part of the CJ arising from the HDC allegations.

11. Accordingly, in the instant proceedings no finding is made in relation to any issue in the judicial review proceedings. We are not required to make, and indeed must strenuously avoid making, any findings of fact in relation to the issues in that matter. Additionally, the instant proceedings are not a rehearing of the election petitions or the appeals therefrom.

### **Conclusion**

12. Upon an application of the **legal test** for apparent bias, to the **circumstances** now within the knowledge of the fair-minded and informed observer, there is no basis for him or her to conclude that there was a real possibility of bias on the part of the Chief Justice when he sat on the appeals.

### **Order**

13. In those circumstances the appeal is dismissed.

### **Analysis**

#### **Law**

#### **Bias -The legal test**

14. The test for apparent bias was considered in the case of **Panday & Anor v Espinet** Civ. App. No. 250 of 2009 delivered May 11, 2011 per Mendonça JA at paragraph 25

*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.*

15. The test for apparent bias was also considered extensively in the decision of the Court of Appeal in **Panday v Virgil** Mag. App. 75 of 2006. See for example the judgment of the Honourable Warner JA at paragraph 12 (adopted from the case of **Porter & Anor v Magill** [2002] AC 357) as follows (all emphasis added):

*“whether the **fair minded** observer, **having considered the facts**, would conclude that there was a **real possibility** that the tribunal was biased”.*

See also paragraph 24<sup>3</sup>

16. See also the Honourable Archie JA, (as he then was), in **Panday v Virgil** at paragraph 1, who described it as whether:

*“a **fair-minded and well informed observer** would conclude that there was a **real possibility** that the Chief Magistrate, before whom he [the appellant] had been tried, was biased”.*

17. As stated by Warner JA in **Panday v Virgil** at paragraph 26 of her judgment.

*“An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct, or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings. Except where actual bias is alleged, it is not useful to investigate the individual’s state of mind. The courts have recognised that bias operates in such an insidious manner that the person alleged to be biased may be **unconscious** of the effect. It is trite law that if a reasonable apprehension of bias arises, **the whole proceeding becomes infected**. Credibility issues no longer arise; the*

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<sup>3</sup> 24) As to bias, in **Medicaments** at paragraph 37, Lord Phillips said:

*“Bias is an attitude of the mind which prevents the judge from making an objective determination of the issues he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or the issues before him”*

*reasonable apprehension of bias remains and the proceedings cannot be saved.”*

18. In **Panday v Virgil Warner JA** also made the following observations at paragraphs 45, 46, 59, 60

***The Judicial Oath***

45) *In the context of allegations of apparent bias against members of courts or tribunals, weight must be placed on the judicial oath of office and the fact that professional judges are trained to judge and to judge objectively and dispassionately; (per Ward LJ in **Jones v Das Legal Expenses Insurance Co. Ltd. [2003] EWCA Civ 1071**, at para 28 (vi), where he cites a passage from a judgment of the Constitutional Court of South Africa in **President of the Republic of South Africa and others v South African Rugby Football Union and others BLCR CC 725 at 753** and where he later said that courts must be assiduous in upholding the impartiality of judges.*

46) *There is a presumption that judicial officers, mindful of the oath they have taken, carry out their duties impartially. **Despite the strong presumption, they will nevertheless be held to stringent standards regarding bias.** (See **Blanchette CIS Ltd. [1973] SCR 833 at 842-843**)(All emphasis added)*

19. The Honourable Warner JA summarized the principles that she extracted from the cases examined as follows:

59) *I would summarise the general considerations discussed so far and by which I was guided as follows:*

*(i) Ill-founded challenges to the bench are not to be entertained.*

*(ii) Courts must be assiduous in upholding the impartiality of judges; the onus of establishing bias lies with the appellant.*

*(iii) The impartiality of the decision maker [the Chief Magistrate] is to be presumed, **but this presumption can be dislodged by cogent evidence.***

*(iv) The material facts were not limited to those which were apparent to the applicant. **They were those facts as now known which were ascertained upon investigation by the court.***

*(v) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice. **It is the appearance that these facts give rise to, not what is in the mind of the decision-maker.***



(vi) Fairness, although governed by separate considerations, should be considered in the context of all the relevant circumstances and not as an isolated principle.

(vii) The question in this case was whether the conduct of the Chief Magistrate and **the extraneous information** might appear to the **hypothetical observer** to have diverted the Chief Magistrate from deciding the case on its merits.

(viii) This Court had to decide whether, **on an objective appraisal**, the material facts gave rise to a **legitimate** fear that the Chief Magistrate might not have been impartial. If they did, the decision of the Chief Magistrate had to be set aside. (all emphasis added)

20. For a recent formulation in the UK see **Bubbles and Wine Limited v Lusha** [2018] EWCA Civ 468 at paragraphs 17 to 19.

#### ***The law on apparent bias***

17. *The legal test for apparent bias is very well established. Mr Faure reminded us of the famous statements of Lord Hewart CJ in R v Sussex Justices ex parte McCarthy [1924] 1 KB 256 at 259 that “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” and that “[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.” These principles remain as salutary and important as ever, but the way in which they are to be applied has been made more precise by the modern authorities. These establish that the test for apparent bias involves **a two stage process**. The court must first **ascertain all the circumstances** which have a bearing on the suggestion that the judge was biased. It must then ask **whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased**: see Porter v Magill [2001] UKHL 67; [2002] 2 AC 357, paras 102-103. Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case: see Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, para 28; Secretary of State for the Home Department v AF (No2) [2008] EWCA Civ 117; [2008] 1 WLR 2528, para 53.*

18. Further points distilled from the case law by Sir Terence Etherton in *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515; [2014] 1 WLR 1943, at para 35, are the following:

(1) *The fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2003] ICR 856, para 14 (Lord Steyn).

(2) ***The facts and context are critical, with each case turning on “an intense focus on the essential facts of the case”***: *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416, para 2 (Lord Hope).

(3) *If the test of apparent bias is satisfied, the judge is automatically disqualified from hearing the case and considerations of inconvenience, cost and delay are irrelevant: Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28, para 11 (Lord Steyn).

19. In *Helow v Secretary of State for the Home Department* Lord Hope observed that ***the fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias*** and that the test ensures that there is this measure of detachment: [2008] UKHL 62; [2008] 1 WLR 2416, para 2; and see also *Almazeedi v Penner* [2018] UKPC 3, para 20. In the *Resolution Chemicals* case Sir Terence Etherton also pointed out that, if the legal test is not satisfied, then the objection to the judge must fail, even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done: [2013] EWCA Civ 1515; [2014] 1 WLR 1943, para 40. (All emphasis added)

### **The relevant circumstances**

21. The approach of a court considering an allegation of bias was described by Warner JA in ***Panday v Virgil*** as follows at paragraph 60.

60) *The first stage was to **ascertain all the circumstances** which had a bearing on the allegation of bias **by making an objective and impartial appraisal of the evidence**. It was important to **identify with precision those facts on which the suggestion of bias can be based**.*

Inherent in the ascertainment of the relevant facts and circumstances “which have a bearing on the allegation of bias” is that there must be a logical connection between those facts and the feared deviation from impartiality.

22. In summary the reviewing court must consider whether a fair minded and informed observer apprised of all the relevant facts being neither unduly suspicious, nor complacent would conclude in the circumstances that there was a real possibility of bias.

### **Fair minded and informed observer**

23. Especially in the context of this case the characteristics of the reasonable fair-minded and informed observer must be considered. Those characteristics have also been described in a series of cases.

24. The attributes of the fair minded and informed observer were recently considered by Mendonça JA in **Panday v Espinet**<sup>4</sup>. Because it is necessary to bear this in mind in any evaluation of the relevant facts and circumstances it is necessary to also set these out at length (all emphasis added).

*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***

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<sup>4</sup> Civil Appeal No. 250 of 2009 delivered May 11<sup>th</sup> 2011

*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 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. ...

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, JA. (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 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 (sic) 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.***

See also **CJ v LATT** [2018] UKPC 23 at paragraph 35

*35. ....applying the test laid down in **Porter v Magill** [2001] UKHL 67; [2002] 2 AC 357: would a fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the LATT was biased? As Lord Hope explained in *eGillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781, para 17:*

*“The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as **Kirby J** put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.”*

*In short, the fair-minded and informed observer is also a sensible and rational person. (All emphasis added)*

25. See also for example **Panday v Virgil** per Warner JA at paragraphs 38, and 85 to 87.

*38) The principle that has evolved, therefore, reflects a concern with the need to maintain public confidence in the administration of justice. The core issue is the manner in which the decision-maker's conduct will be viewed by fair-minded and informed members of the public.*

**Who is the fair-minded and informed observer**

*85) In general terms, as the phrase implies, the individual is someone who is not a party, but who recognises and understands all the relevant circumstances and as a result is able to conclude whether or not the public would perceive the possibility of bias, including unconscious bias.*

*86) The English authorities support the formulation of Kirby J. in Johnson v Johnson 74 AL JR 1380 which was decided in the High Court of Australia, that the observer is "**neither complacent nor is he unduly sensitive or suspicious** when he examines the facts". It is useful to cite the entire passage of Kirby J. at para 53.*

*"The attributes of a fictitious bystander to whom the courts defer have therefore been variously stated. Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being **reasonable and fair-minded** the bystander before making a decision important to the parties and to the community, would ordinarily be taken to have **sought to be informed** on at least the most basic considerations relevant to arriving at a conclusion founded on **a fair understanding** of all the **relevant circumstances**.... Finally, a reasonable member of the public is **neither complacent nor unduly sensitive or suspicious.**"*

*87) I say with confidence that the traits identified by Kirby J. would be present in the fair-minded and informed observer carrying out his balancing task in this legal system.*

26. The circumstances to be analysed at the time are those known to the fair minded observer at the time that the issue of bias is being considered. See for example Warner JA in **Panday v Virgil** above at paragraph 59 (iv). The

relevant circumstances therefore are those known to the fair minded and informed observer at the time the issue of bias is being considered. It is in that legal context that the factual matrix must be examined.

27. This court is not required to make any findings of fact. It is however required to make findings as to the relevant circumstances which would include findings as to the existence of materials available for the consideration of the fair-minded and informed observer up to this point in time. See for example Archie JA and Warner JA<sup>5</sup> in **Panday v Virgil** and Mendonça JA in **Panday v Espinet**<sup>6</sup>.

28. We stress once again that this is not the same as making any findings as to i. the truth of any allegation or any material produced in support thereof, or ii. the effect in law of any such materials in relation to the judicial review proceedings.

## **Factual Background**

### **The relevant circumstances /Ascertainment of the facts**

29. See **Panday v Virgil** per Warner JA at paragraph 60 and **Panday v Espinet** per Mendonca JA at paragraph 45 (set out infra). The relevant circumstances fall into the following general categories:

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#### **<sup>5</sup> The relevant circumstances which this Court considered**

60) The first stage was to ascertain all the circumstances which had a bearing on the allegation of bias by making an objective and impartial appraisal of the evidence. It was important to identify with precision those facts on which the suggestion of bias can be based.

<sup>6</sup> 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.*



- Newspaper reports;
- LATT investigation;
- LATT report;
- Legal advice received by LATT;
- Reference to PM;
- PM's response;
- Judicial review proceedings in relation to the decision of the PM not to initiate proceedings under section 137 of the Constitution.

Inherent in that sequence, is that some matters initially reported have been clarified by subsequent developments.

30. In relation to newspaper reports, while note can be taken of the fact that there were articles in the newspapers in relation to the issue of HDC recommendations which, inter alia, led to the LATT investigation, the fair-minded and informed observer would prefer to rely on the material that has directly emerged from the LATT investigation. On those specific issues he/she would ascribe far greater weight to material emanating directly from ascertainable sources.

31. A critical issue in the newspaper reports and the subsequent LATT report was the allegation that the CJ made **recommendations** to the HDC for the provision of housing for persons, including personal friends, or at the request of personal friends.

32. Another aspect to this allegation is that those recommendations were followed up by the CJ and amounted to seeking favours from the government. The applicants expressed concern was that this could have led to apparent or unconscious bias against the former government if the recommendations made

in June 2015 had not all been processed in favour of the recommendees as of the date of the election, and may have been perceived by the CJ as a “snub” or some form of disrespect. Alternatively, given that some of the recommendees’ applications remained pending after the election there would be the perception of the CJ’s awaiting favours from the current government<sup>7</sup>.

33. A particular concern was a report that WhatsApp messages were sent by the CJ to the PM shortly after the election in relation to following up the recommendations for HDC housing around the time that the appeals in the election petitions were being heard before a panel of the Court of Appeal which included the CJ.

### **Recommendations**

34. It is therefore necessary to consider the material that relates to any such recommendations. The undisputed evidence in this regard comes from a press release dated December 15<sup>th</sup> 2017 issued on behalf of the CJ clarifying and confirming that recommendations were in fact made. The terms of that release speak for themselves. Because this allegation lies at the heart of the application it is set out in full (all emphasis added).

*II. In 2015 the Honourable Chief Justice did forward the names of **some needy and deserving persons** to the Trinidad and Tobago Housing Development Corporation (HDC) for such consideration **as might be appropriate**. **At no time has Chief Justice Archie ever recommended Mr. Dillian Johnson** for HDC housing. It is patently untrue and appears to be purposeful mischief making for one to suggest otherwise.*

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<sup>7</sup> ROA page 744

35. There is also a letter dated June 26 2015 (disclosed on February 28<sup>th</sup> 2019) from the CJ to the HDC. That letter<sup>8</sup> also speaks for itself. For the same reason it is also set out in full (all emphasis added)

*June 26<sup>th</sup>, 2015.*

*Ms. Jearlean John,  
Managing Director,  
Housing Development Corporation,  
#44-46 South Quay,  
PORT-OF-SPAIN.*

*Dear Ms. John,*

*From time to time needy employees or clients of the court seek my assistance in obtaining housing without understanding that the Judiciary, as a **separate** arm of the Government, has **no role** or authority in directing Executive Agencies in matters of this nature.*

*Nevertheless, I am always happy to assist worthy applicants in any way that I can if I discern that there is a genuine and justifiable need.*

*Accordingly, and without prejudice, I am forwarding the enclosed list of persons who have applied for HDC housing and would be grateful for **any appropriate assistance** that you can provide.*

*Thank you for your kind indulgence in this matter.*

*Sincerely,*

*Ivor Archie, O.R.T.T.  
Chief Justice*

36. The reasonable fair minded and informed observer would therefore have been aware that the CJ made recommendations in respect of housing for “needy and deserving persons”. Such observer, if fair minded, would have

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<sup>8</sup> Record of Appeal - page 496

noted the terms in which the request was made. He/She would note especially the matters emphasised above, and in particular the words “*such consideration as might be appropriate*” and “*the Judiciary, as a **separate** arm of the Government, has **no role** or authority in directing Executive Agencies in matters of this nature*”. In that context he would now be aware, based on disclosures arising from the LATT investigations, that documentation now exists which also includes the following:

- i. an HDC record of recommendations made by the CJ in relation to two persons in 2013 under the previous government, in which two applicants were successful;<sup>9</sup>
- ii. the press release above containing the denial by the CJ that, contrary to allegations in newspaper reports, he ever recommended Dillian Johnson for housing;
- iii. A letter dated February 28<sup>th</sup> 2019 from the Registrar on behalf of the CJ also denying any lobbying<sup>10</sup>;
- iv. The documentary evidence as summarised in the applicant’s detailed chronology, which, even if accepted as authentic, and at face value, does not, apart from a. allegations concerning Romero and b. alleged communications with the PM, demonstrate/corroborate any follow up by the CJ post the election on September 7<sup>th</sup> 2015<sup>11</sup>.

## **Romero**

37. In relation to Romero, the material available to the fair-minded and informed observer was that he pleaded guilty to fraud on 1<sup>st</sup> December, 2015. This was in relation to representations to persons that for a fee (TT\$4500 and TT\$4000), he could fast track their applications for HDC housing because of his alleged connection to the CJ. It should be noted that Dylan Huggins and his aunt

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<sup>9</sup> Record of Appeal - page 457

<sup>10</sup> Record of Appeal - page 494.

<sup>11</sup> The appeals were dismissed in May 2016

Carol who were the victims of Romero’s representations and also the subject of the **alleged** WhatsApp messages between the CJ and the PM (on the material in this application) had not in fact received HDC housing as at 21<sup>st</sup> December 2017<sup>12</sup>. Nor were they even on the list of persons recommended. A fair minded and informed observer in this country would be likely to pay regard to the fact that Romero pleaded guilty to fraud. Such observer would therefore be unlikely in those circumstances to leap to the conclusion that Romero could have been facilitated in this by a CJ, far less one who had reported him to the police when he became aware of it<sup>13</sup>. Given all of these circumstances now known to him, a fair-minded and informed observer in this country would, like the LATT committee recognise the unlikelihood of a Chief Justice of this country being involved in this fraud. He would accordingly be at least skeptical concerning any allegations of following up in relation to Dylan and Carol Huggins.

#### **Lobbying/follow up with HDC**

38. The reasonable observer would be aware from the LATT report, now that it has been filed in the judicial review proceedings, that there are also allegations of the CJ’s following up of those recommendations via i. telephone and ii. via an alleged contact on his behalf with an HDC manager.

#### **Allegations of undated follow ups**

##### **WhatsApp messages from the CJ to a senior HDC manager**

39. The report of the Committee of the Council of LATT referred to material which it unearthed relating to the HDC recommendations<sup>14</sup>. It refers for example to an interview with a reporter who “claims to have seen **WhatsApp messages** from the **CJ to a senior HDC manager** making the recommendations

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<sup>12</sup> See Record of Appeal at page 462

<sup>13</sup> See Record of Appeal page 292 paragraph 24 of Executive Summary of final report of committee of LATT.

<sup>14</sup> At paragraph 57 of that report at page 669 of the record of appeal

and asking that the applications be fast tracked.” She claims that that manager, when contacted, confirmed the existence of WhatsApp messages from the CJ and telephone calls asking that the applications be hurried up. Apart from the indirect nature of that material, there is no indication of the dates of any such alleged communications.

#### **Report of call to Ms. John**

40. The LATT report refers to an HDC official informing the president of LATT about being present with Ms. John, former HDC General Manager, and inferring that that call was with the CJ, and further that it related to HDC recommendations.

#### **Alleged undated contact through third party**

41. There is also a reference in the executive summary of the LATT report to an **undated contact** with another former HDC official by someone whom that person knew to be the CJ’s friend, in relation to two applications<sup>15</sup>.

42. The fair minded and informed observer would, on this material, be left in considerable doubt whether examination of this material i. actually supports a suggestion of active lobbying on behalf of the recommendees post the election or ii. any follow up **post** the election.

43. Such observer, though not a lawyer, when making an objective appraisal of the material facts would consider the documentary material in this regard emanating directly from the parties concerned. He would be less inclined to pay regard to material that is not documented, not dated, or that consists merely of one party’s recollection or report of uncorroborated WhatsApp messages

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<sup>15</sup> See for example record of appeal at page 291

reportedly seen on some unidentified person's cell phone. This approach by him would be reinforced by the fact that he would also be aware that the CJ has alleged that WhatsApp messages referred to in some newspaper reports have been doctored and that an expert report commissioned by him allegedly supports that conclusion<sup>16</sup>.

### **HDC Policy**

44. The LATT report and its addendum dated 23<sup>rd</sup> February 2018 refers to a letter<sup>17</sup> from Mr. Lyons, managing director of HDC, dated 9<sup>th</sup> January 2018, stating that the HDC receives recommendations on a daily basis from all sectors of society including somewhat surprisingly, members of the Judiciary. His letter in fact refers to receiving recommendations from Members of Parliament, the President, the PM, non-governmental organizations, trade unions, clergy, Protective Services, corporate sector, various Ministries and other citizens.

45. He also indicates that the allocation of housing was governed by a Cabinet approved allocation policy which provides for allocations as follows: i. 60% Modified Random Selection process, ii. 25% on the recommendation of the Housing Minister to deal with special cases/circumstances, iii. 10% for the Protective Services, iv. 5% for senior citizens and physically challenged persons. By letter dated 12<sup>th</sup> January 2018 the former manager of the HDC referred to a policy under a previous PM whereby recommendations were received from "*senior public officials*" for requests for housing for persons in need<sup>18</sup>. Assuming that these statements of policy and practice are accurate the fair minded and informed observer would look further into the material to determine whether

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<sup>16</sup> See pre-action protocol letter dated 5<sup>th</sup> January 2018 by the CJ – Record of Appeal at page 787.

<sup>17</sup> At paragraph 76 page 672 of the Record of Appeal

<sup>18</sup> See paragraph 78 of the report page 673 record of appeal.

any link could be perceived between such recommendations and the parties before the court or those directly interested in the outcome of the appeals.

**Alleged internal HDC email dated August 5<sup>th</sup> 2015**

46. He or she might be less ready to dismiss the alleged internal email dated August 5<sup>th</sup> 2015 between HDC staff, although HDC was unable to confirm it. He/she would however note that even if authentic:

- i. it is the only alleged **documented** material in relation to possible follow up of the recommendations,
- ii. it is dated **before** the election,
- iii. that four of the persons named therein allegedly had interviews scheduled for 4<sup>th</sup> December 2015 **after the election**, while five were already awaiting allocation **before the election**. The recommendations were being acted upon by the HDC. The contention that there could have been a perception of a snub or disrespect in their handling would, therefore, not stand up to the scrutiny of a fair-minded and informed observer.

47. Further, the documentary material now available to the informed observer reveals:-

- a. Recommendations which expressly recognise the absence of any role for the Judiciary in the allocation process.
- b. Allocation of housing to recommendees in 2013 under the previous government.
- c. A reported statement by the Minister of Housing under the previous government confirmed by his letter dated January 10<sup>th</sup> 2018<sup>19</sup>, that the

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<sup>19</sup> Record of Appeal page 748



CJ never contacted him with regard to housing and that anyone was free to recommend.

d. A letter dated January 12<sup>th</sup> 2018<sup>20</sup> from the former HDC general manager referring to an alleged policy enabling recommendations from senior public officials for requests for housing for persons in need.

e. No **documented** evidence of follow ups, far less lobbying, **after the election**, save for disputed WhatsApp messages between the CJ and the PM which will be examined hereunder.

f. If the alleged HDC internal email were to be accepted, they reveal that the recommendations were actually being processed.

48. It is in the context of that material that the applicant makes his claim to apprehension of bias including paragraphs 47, 48, and 49<sup>21</sup>, of his affidavit. See for example paragraph 49 (all emphasis added)

*The real risk to the fair-minded and informed observer is that, either during the hearing of the petition appeals or shortly beforehand, the Honourable Chief Justice **may** have been seeking favors from the **Government** of the day in respect of HDC housing applications. This gives rise to real and substantial concerns of apparent bias and/or apparent unfairness in relation to the Honourable Chief Justice's participation in decisions affecting the election appeals. I am particularly concerned about the fact that the Honourable Chief Justice wrote the then Managing Director of the HDC on **June 26**,*

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<sup>20</sup> Record of Appeal page 749

<sup>21</sup> pages 47 and 48 of the record of appeal

*2015 after the general election date was **announced**, to recommend persons for housing.*

*If the Peoples Partnership administration did not expedite these requests to ensure that they were granted before the general election, then this **could**, in my view, have led the Honourable Chief Justice to **think** that it was not as co-operative and supportive as he had **hoped or expected** or worse yet, that the failure to ensure that his recommendees were granted houses before the general election amounted to a “snub” or some form of disrespect. **If** the Honourable Chief Justice followed up and pursued his recommendation with the newly elected Peoples National Movement administration, then I **feel** that there is a real risk that he **could have been** biased in favour of **their** successful candidates whose elections were the subject of challenge vis the election petitions in **anticipation of a more favourable response**.*

*The conduct of the Honourable Chief Justice gives rise to real and substantial concerns of **apparent bias and/or apparent unfairness** in relation to the Honourable Chief Justice’s participation in decisions affecting the election appeals, **in favour of the Government**. The danger is of a public perception by many citizens that the Honourable Chief Justice **may have been** seeking favors - **either as a reward or as part of an on-going relationship of favour – exchanges** (if the HDC had already decided whether to grant housing to the 2015 recommendees), **or** in order to influence the **HDC** (if the HDC had not yet decided the 2015 applications). The **risk** is that this perception might be reinforced by the evidence, accepted by the LATT as having a credible basis, that the Honourable Chief Justice had played an “...active role” and “...aggressively canvassed*

*a senior HDC official"- as well as seeking to advance the recommendees' cases by **WhatsApp messaging the Prime Minister**. These factors would inevitably give rise to serious disquiet in the mind of any fair-minded and informed observer and significantly undermine public confidence in the judiciary.*

49. Based on the chronology supplied by the appellant, and examination of the material in the report of the LATT, the fair minded and informed observer would be hard pressed to perceive i. material evidencing even follow-ups, post September 9<sup>th</sup> 2015, far less lobbying of the Government, in relation to these recommendations. ii. any material evidencing disrespect or snub in relation to those recommendations iii. any material supportive of the multiple levels of speculation identified as the applicant's concerns as highlighted and emphasised above.

#### **WhatsApp messages**

50. The remaining matter identified in the material available to the fair minded and informed observer, and set out in the chronology, would be the following allegation - namely that, at or around the time that the CJ was hearing the appeals on the election petitions, he communicated via WhatsApp messages with the PM in relation to housing recommendations for Dylan Huggins, Carol Huggins and Felicia Pierre. While that alleged communication is on a date not specified, given that it was alleged to be with the PM such observer would infer that it had to be after the election.

51. If accepted, the fair-minded and informed observer would be concerned about a. any failure to disclose such messages, and b. the clear impression from any such messages that i. the CJ was seeking a favour from a party directly concerned with the outcome of a matter being heard or pending before the CJ

and ii. that the CJ and the PM enjoyed a relationship that was sufficiently close that he would feel comfortable in communicating such a request privately and unofficially directly to him. Those concerns need to be confronted.

52. The fair minded and informed observer would be alive to the fact that he lives in a democracy where free and fair elections are mandated by the Constitution. He would also be aware that there is no right of appeal to the Privy Council in respect of election petitions. He would therefore take quite seriously any allegation that an appeal to the Court of Appeal may even appear to have been influenced by the possibility of any member of that Court hearing the appeals having unofficial contact with, or seeking favours from the PM. He would therefore reasonably be expected to pay particular attention to an allegation of any such improper contact. Being reasonable and fair minded he would seek to form his own conclusions from the material available to him. It is in that context that the alleged WhatsApp messages must be examined.

53. Any initial disquiet by the fair minded and informed observer occasioned by the newspaper report would necessarily need to take into account the entire context relating thereto. This would include subsequent developments in relation to this allegation encompassing:

- i. the investigation by the Law Association and its **interview with the reporter** who published that allegation, (material relied upon by the applicant and placed by him before the Court); and,
- ii. the CJ's denial of that allegation in paragraph 5 of the **response**<sup>22</sup> dated February 28<sup>th</sup> 2019 to **letter** dated February 6<sup>th</sup> 2019 from the applicant's attorney at law, in particular in relation to paragraph 54 concerning lobbying.<sup>23</sup>.

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<sup>22</sup> Record of Appeal page 493

<sup>23</sup> Record of Appeal page 337

iii. the **PM's letter to the Law Association** dated July 22<sup>nd</sup>, 2019 which addressed that allegation.

### **Interview with reporter**

54. Because the allegation of WhatsApp messaging from the CJ to the PM is so important the relevant parts of that interview<sup>24</sup> dated 21<sup>st</sup> December, 2017 are set out verbatim hereunder (all emphasis added):

DM: Your 19<sup>th</sup> November, 2017 article "CJ gets house..." You say that the CJ communicated by social media with a Senior HDC official. You later reported that the means of communication was by WhatsApp.

DR: Yes. I can confirm that it was by WhatsApp that the CJ communicated with a Senior HDC Official. I cannot reveal the person's identity. I asked them if I could inform you and they said no. I can tell you that the messages were exchanged between the CJ and the Senior HDC official between **2010** and **2015**.

DM: **Was Johnson's name listed** in one of these messages?

DR: Yes.

DM: Do you recall the exact wording of the contents of the messages?

DR: No. I saw them and I read them but **I cannot recall the exact words. Huggins** name was not mentioned in the exchange between the CJ and the Senior HDC official. **His name was included in an exchange between the CJ and the Prime Minister (PM)**. It was a WhatsApp message as well but **I don't have a copy of it. I have seen and read it. There were names mentioned in the message from the CJ to the PM. These names included Huggins, his aunt Carol and another friend of Huggins** but not the Coastguardsman who is not affiliated with Huggins except for the fact that they were **both scammed by Kern Romero. The message from the CJ to the PM was between 2015 and 2016.**

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<sup>24</sup> Record of Appeal page 458 starting at page 461

KH: In your article you said that there was “correspondence” from the CJ to the PM but it’s not a letter and it’s not an email?

DR: Correct. It’s a message. I did not see any response from the PM...

DR: I contacted several persons named in the email. I was not able to contact all of them as some of the numbers were not in service. The persons who I did contact confirmed they received houses and they got them through Romero but they did not want to be named. There’s supposed to be a list published by the HDC which shows two people who received houses as having been recommended by the CJ. I have a copy of the list. Based on my investigation there are more than two who were actually fast tracked by him but they are listed as having been recommended by someone else.

DM: On what basis are you saying that these persons were “fast tracked”?

DR: Based on documents I have seen. The initial dates of these people’s applications and the dates on which they received housing. When you look at the HDC system there is a prolonged timeframe from application to actually getting housing...based on who you know. I’m concluding from what I’ve seen that these persons were fast tracked. You can also ask HDC for the List.

TH: But it will only show two persons being recommended by the CJ?

DR: Correct.

**TH: Did Huggins get a house?**

**DR: The Huggins guy, his aunt Carol** and the Coastguardsman did not get their houses. ...

DM: You are reporting on a conversation between the CJ and a Senior Manager at HDC, did you confirm with the Senior Manager?

DR: The Senior Manager confirmed that the CJ had contacted them at least twice to enquire about houses for people.

*DM: Do you know when these calls by the CJ to the Senior Manager were made?*

DR: *The Senior Manager was supposed to check their phone but they also told me that they have since changed phones and may not have the records.*

DM: *You referred to a message on the 5<sup>th</sup> August, 2015 between the Senior HDC official and the CJ?*

DR: *I saw that message. He WhatsApped the Senior Manager and **then an email followed between the HDC people. I was shown the WhatsApp message by the third party** who was neither the CJ nor the Senior Manager.*

DM: *How do you know the message was authentic?*

DR: *The messages, based on where they came from, were authentic. **I can't tell you how I know they are authentic because then you will know who my source is.** The Senior Manager also confirmed the WhatsApp messages and the telephone calls that the CJ made to them.*

....

DR: *I reported that he **communicated with the PM** to make requests for needy people. I did investigate. I was able to verify that **the persons whose names I saw on the whatsapp message to the PM all had contact with Kern Romero.***

.....

DR: *There are categories of recommender like "law enforcement" that I am aware of. I would have to double check whether there is an internal policy. I can ask the HDC to forward it to you if I obtain it. **The CJ never officially communicated with the HDC.** When I asked the Senior HDC official how the CJ would ask to fast track applications they told me "Well he WhatsApped me" The Senior HDC official also said that the CJ would ask for the applications to be "hurried up".*

...

DM: ***Does Huggins' name appear on the WhatsApp messages?***

DR: ***Between the CJ and the PM.** When some people didn't get their houses they would call the CJ. I am informed that Huggins did and so too did the Coastguardsman. **Romero would take the money and tell people that his contact was the CJ.** He would then give the names to the CJ...*

55. From the notes of the interview the following matters emerge:-

- i. the alleged WhatsApp messages were allegedly seen by the reporter.
- ii. no copy of the alleged WhatsApp messages has been produced and the reporter did not obtain a copy of it.
- iii. that the logical inference must be that the reporter was relying upon her recollection of the content of the alleged WhatsApp message (s).
- iv. that the purported WhatsApp message from the CJ to the PM allegedly concerned Dylan Huggins and Carol Huggins. The informed observer would be aware of the fact that Romero has pleaded guilty to defrauding persons **including the persons allegedly referred to in the alleged WhatsApp messages between the CJ and the PM**. He/She, being intelligent and fair minded would probably wonder why would the CJ be communicating privately with a PM, possibly about provision of HDC housing, for persons whom, (the CJ having reported Romero to the police), were clearly and indisputably, in the CJ's perception, victims of Romero's fraud.<sup>25</sup> He would remember that that fraud involved representing that Romero could obtain fast tracking of HDC housing because of pretended facilitation through contact with the CJ. However, even if such an observer might arguably have had lingering doubts about the authenticity of the reported, though unproduced, WhatsApp communications between the CJ and the PM, he would be aware that, subsequent to the interview with the reporter on December 21<sup>st</sup> 2017, further material became available.

#### **Response to pre action protocol letter**

56. That material was:

- a. Letter on behalf of the CJ referred to above in response to the letter from Mr. G. Ramdeen which denied the allegation of lobbying. (See paragraph 57 of the Ramdeen letter)

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<sup>25</sup> (See statement of Huggins to the police – see record of appeal page 718)



## PM's Letter

b. Further, the PM, in letter dated July 22<sup>nd</sup>, 2019 to LATT at page 5 emphatically denied receiving WhatsApp messages from the CJ or sending any to him. Because the specific terms of that denial are alleged to be relevant, (with the contention being made that it is ambiguous), the extract needs to be set out hereunder.

*I can confirm that there (sic) I have not received from the Chief Justice nor have I sent any WhatsApp messages to him regarding HDC housing, nor indeed have I had any communication with the Chief Justice regarding HDC housing. Further I have no records from or to the Chief Justice regarding HDC housing. (All emphasis in the original)*

57. At page 8 his denial is expressed in slightly different terms, but it is a denial nonetheless and adopts his previous denial at page 5, as set out hereunder:

*As I have said, **I have no recollection** of having received any **WhatsApp or any other communication** from the Chief Justice regarding HDC housing **nor have I sent any form of communication to him**. The consequence of this is that the case against the Chief Justice in respect of the HDC housing complaints is considerably weaker, bearing in mind the doubtful status of the alleged HDC email and the non-specific hearsay evidence on which the second HDC complaint depends. The fact that the alleged WhatsApp communication with me is likely to have been a fabrication (**since I never sent nor received any such communication**) also raises the distinct possibility that someone sought falsely to implicate the Chief Justice. (Emphasis added in this paragraph)*

58. While the fair minded and informed observer is not required to consider rules of evidence, and while this Court is not required to make, and expressly refrains from making any findings of fact, or comment on the recommendations, it is required to assess the circumstances that he would take into account in considering whether there exists a real possibility of bias in the hearing of the election appeals.

59. The fair-minded and informed observer would therefore take into consideration all of the circumstances as they are now known to him. These include:-

- i. the emphatic and categorical denial of one party, (the PM), to the alleged email exchange as set out above.
- ii. the less categorical but no less emphatic denial by the other party, (the CJ), to the alleged exchange.
- iii. the fact that no copy of the alleged WhatsApp message from the CJ to the PM has been produced, though allegedly seen (and reported upon).
- iv. the fact that alleged WhatsApp messages, (though it is alleged on behalf of the CJ that they were doctored), were produced by the same reporter but **not** this critical one.
- v. the inherent implausibility of a Chief Justice seeking to facilitate provision of housing by communicating privately with a PM in respect of Dylan Huggins and Carol Huggins, persons known to be victims of Romero, a self-confessed fraudster. Such observer would not forget that Romero had been reported to the police by that same CJ. Such an observer would recall that Romero had pleaded guilty to fraud committed by pretending to be able to obtain such housing for persons, including those very victims, in exchange for fees of TT\$4500 and TT\$4000. Such an informed observer, knowing that a fraud had been perpetrated on the persons alleged to be the subject of the purported WhatsApp messages, would hardly remain of the view that two of the highest office holders in the country were yet communicating via WhatsApp to facilitate provision of HDC housing for those persons, far less doing so shortly after the election.

60. He/she, would not necessarily unthinkingly accept denials, no matter how emphatic, solely because they emanate from holders of high office.

However being possessed of the common sense and intelligence ascribed to him by law he or she would take into account:

- a. **the nature of the material produced** in support of the alleged WhatsApp messages; and
- b. the inherent plausibility of their content **in the circumstances outlined above.**

61. It is in that context he would take into account and assess the emphatic denials by the persons directly concerned. It is hardly conceivable that such a fair minded and informed observer in this country would do otherwise.

#### **The denials**

62. The context in which the less than categorical denial by the CJ was being made, namely, the threat of investigation, and possible section 137 proceedings, would be part of the factual matrix that the fair minded and informed observer would take into account. While criticism was directed by the applicant to the non-specific nature of the denial, a fair and informed observer would note the statement in paragraph 8 of the affidavit of the CJ in previous proceedings- **Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago** Civ. App. No P075 of 2018 delivered May 22<sup>nd</sup> 2018 (referred to at page 6 of the judgment of the Honourable Bereaux JA at page 80 record of appeal) to the effect that the allegations made were untrue and that legal advice constrained a more specific response to the multiple allegations being made. In that context, not being unduly suspicious, he would therefore not read more into the failure to **specifically** address the allegation of WhatsApp communications by the CJ to the PM.

### **Denial by the PM**

63. The fair minded and informed observer, not being unduly suspicious, would be slow to conclude that the denial by the PM, of the receipt or issue by him of WhatsApp messages with the CJ in relation to housing, yet allowed the possibility that the CJ may have **sent** such messages. The fair minded and informed observer could not be criticized as dismissing as fanciful such a suggestion and rejecting the mental gymnastics required to accept this possibility. This is especially so because he would have no information about whose phone it was on which these messages were supposedly seen, or how they came to be seen. He would be faced with a choice between accepting as true a WhatsApp message unseen by him, and of unidentified provenance, and the clear, emphatic, and repeated denial of at least their **receipt**, by a Prime Minister, in official correspondence to the Law Association. It would be difficult to contemplate an independent, fair minded, informed and rational observer preferring to accept the former over the latter. He would therefore rationally accept the first- hand denials of their existence in the circumstances outlined above, by the alleged parties thereto.

### **Disclosure**

64. It follows from the above that the fair minded and informed observer could not expect disclosure of communications, which apart from being denied by the parties thereto, he would not rationally expect to exist. Again it must be emphasised that this is not a conclusive finding as to the non-existence or otherwise of WhatsApp communications between the CJ and PM. This is, and only is, an application of the test applicable in relation to the apprehension of a real possibility of bias, in the circumstances as now known to the reasonable, fair-minded, and informed observer.

65. It was contended that inadequate disclosure of matters related to HDC recommendations would enhance the perception of bias. While the fair-minded and informed observer may have had initial misgivings concerning those allegations while they remained unrefuted,

i. their clarification, refutation, and explanation by persons with direct knowledge concerning those matters, and

ii. the extensive material unearthed by the investigation of the Law Association, would all now be available to that hypothetical observer.

66. He/she would now be in a position to assess a wider array of directly sourced material and documentation, and would no longer need to rely exclusively on unsourced newspaper reports. In that context allegations of inadequate disclosure would no longer be relevant.

67. The fair minded and informed observer would be entitled to form his own conclusions, on the material now available to him, in making his determination of whether there existed a real possibility of bias on the hearing of the appeals.

#### **HDC Recommendations**

68. Having objectively analysed and assessed the material above, the fair minded, impartial, and informed observer would reasonably conclude:

i. that recommendations were made by the CJ in 2013 as well as 2015 made in the context of an HDC policy which accommodated recommendations in respect of HDC housing.

ii. that recommendees in respect of the 2013 recommendations, made during the previous government's tenure, were successful in having housing allocated to them.

- iii. that such recommendations to the HDC did not involve communication with the then Minister of Housing.
- iii. that recommendations in relation to HDC housing were also made in June 2015, also during the tenure of the previous government, in respect of persons considered to be needy and deserving.
- iv. that the material now available, even if all the allegations are accepted for the purpose of this analysis, does not demonstrate follow ups, or lobbying of Government officials, post September 7<sup>th</sup> 2015.
- v. that as at August 2015, (the date of the alleged HDC internal email), (before the election), applications of the 2015 recommendees were already being processed, with some awaiting allocation of housing and others having interviews scheduled in December 2015. Any allegation of perception of a snub or disrespect could not therefore survive scrutiny.
- vi. that there is therefore no reason, apart from the purported WhatsApp messages, to consider that the 2015 recommendations would have had a greater chance of success under the present government than under the previous government.
- vii. that the allegation concerning WhatsApp communications with the PM, a party interested in the outcome of the election petitions, when subjected to even minimal scrutiny, is too tenuous to excite concern by the fair-minded and informed observer.

#### **Alleged Communications with HDC – nexus/whether logical connection**

69. As a matter of common sense, logic, and law, there needs to be a logical connection **between the matters** which it is being alleged may give rise to lack of impartiality or the perception thereof, **and the decision** that it is contended may be affected. See for example **John Henry Smith, Barbara Gomes, Ishwar Galbaransingh, Amrith Maharaj, Northern Construction Limited v His Worship the Late Chief Magistrate Sherman McNicholls, The Director of**

**Public Prosecutions, The Attorney General** Civil Appeals No. 34 and 35 of 2009,  
CA 045/2009 at Paragraph 72:

A logical connection must be established **between the matters** which it is being alleged may give rise to lack of impartiality or the perception thereof, **and the decision** that it is contended may be affected. See for example the judgment of the Honourable Archie JA in **Panday v Virgil** citing **Ebner v The Official Trustee in Bankruptcy** at page 7

*The case of **Ebner v The Official Trustee in Bankruptcy** (2000) 205 CLR 337 lays down a three-step test:*

- *First, one must identify what it is said might lead a judicial officer to decide a case otherwise than strictly on its merits;*
- ***Second, a logical connection between the matter/s and the feared deviation from impartiality has to be articulated;***
- *Third, an assessment must be made whether a fair-minded observer would conclude that there was a real possibility that the case would not be decided impartially.*

As indicated previously the second step highlighted is a facet of the first step. Whether described as a two-step or three-step test is therefore a matter of semantics.

70. It is not the function of this court, dealing solely with allegations of apparent bias, to make findings of fact. However, if the fair minded and informed observer were to conclude that there were communications between the CJ and the HDC **after** the election, despite no documented material to this effect, such observer would need to apprehend a real possibility of bias on the part of the CJ, arising from such communications, **in relation to the election petitions before him**. The same would apply to any communications with the HDC before the election.

71. The way in which such connection is alleged to arise is articulated in paragraphs 47-49 of the applicant's affidavit<sup>26</sup>. In counsel's speaking note he

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<sup>26</sup> See paragraph 40 above.

further advanced that the apprehension of bias could arise on the part of both the previous and the current government because of alternative scenarios. These were set out as follows:

*g. That his request which he was actively pursuing or at minimum was still interested in either remained live and pending or had found favour and was successful under the new government whose elected representatives were the subject of the election petition.*

**OR**

*That the request for assistance was not successful under the PP government and there was a real possibility that the applications may have to be processed and granted under or by the new government. (whichever was true)*

*The observation.... that the evidence shows that most of the lobbying actually took place under the **PP government** doesn't weaken the argument. The Respondents assert that if anything, this shows **that they may have had good grounds to be concerned about bias against the PNM.***

***The importance of disclosure and the principles about apparent bias are not concerned with showing bias to one particular party.** What is important is that the FMIO has confidence in the judicial process and fairness to all parties concerned. **Even if it could have been perceived by the Respondents that the CJ could be guilty of apparent bias in favour of the PP government,** this underscores why disclosure was necessary **to both parties.** **Bias to anybody taints the proceeding whether it is to one side or the other is not the determining factor in this case.** (All emphasis added)*

72. The fair-minded and informed observer would also note and take into account the statements of the previous Minister of Housing that he had no communication with the CJ and conclude that recommendations made to the HDC, certainly prior to September 2015, did not imply communication with the Executive in the person of the Minister of Housing. He would also note the further reported and confirmed statement by him that any one was free to recommend and there was a process.



73. In all the circumstances outlined above the fair- minded and informed observer would be hard- pressed to consider that such recommendations, in respect of purported “needy and deserving persons”, would be a matter of such significance as to require disclosure in a matter not involving the HDC. That is because such observer would be unlikely to perceive why, in those circumstances, any such recommendations would stand a greater chance of success under a new government, as opposed to one under which recommendations had been successful. On the evidence there would be no reason for any communications with any party post August 2015 as according to the August internal HDC email the recommendations were being processed. There is also no evidence of any such communication with the executive, (apart from the alleged WhatsApp message to the PM discussed previously). The fair- minded and informed observer would not expect that at the date of the hearing of the election petition appeals that there would be any communications to disclose.

74. Guidelines have been established for judicial conduct. It was alleged that recommendations of persons for HDC housing transgressed those guidelines. We are not required to make a determination on that allegation. We are required to consider that issue only in the context of the test for apparent bias.

75. Even if the fair- minded and informed observer maintained any lingering perception of the possibility of post-election follow up communications with the HDC subsequent to the admitted recommendations, a logical connection has not been convincingly articulated between any such communications and a party before the court, or the outcome of litigation in favour of one or the other.

76. The issue of whether the forwarding of names of purported “needy and deserving persons”, for such consideration as appropriate, in the context of such policy by the HDC which:

- i. apparently recognises recommendations from a wide range of persons, and
- ii. apparently even extends to all members of the public,

is a matter that the fair -minded and informed observer is required to take into account in considering whether there was a real possibility of bias in the hearing of the appeals.

77. The fair- minded and informed observer, whose opinion on the issue of apparent bias is determinative, would put these matters into context. He would therefore consider (in the absence of the alleged WhatsApp messages between the CJ and PM) whether any logical connection could be demonstrated, between the CJ’s recommendations, and any party to the election petitions, or their outcome. In fact this point is only emphasised by the submission on the part of the applicant (as set out above), that **both** political parties interested in the outcome of the election petitions could equally complain of bias. This in fact demonstrates that the circumstances surrounding the recommendations, rather than suggesting bias in regard to each, are more suggestive of bias in relation to neither.

### **Constitutional Limbs**

78. Given our conclusions that the relevant circumstances will not give rise to an apprehension of a real possibility of bias, the constitutional limbs of the applicant’s argument, which are founded on the same factual basis, would equally not be sustainable.

**Conclusion**

79. Upon analysis, there is no basis to conclude that an application of the **legal test** for apparent bias, to the **circumstances** now within the knowledge of the fair-minded and informed observer, would cause him/her to consider that there was a real possibility of bias on the part of the CJ when he sat on the appeals.

**Order**

80. In those circumstances the appeal is dismissed.

.....

**Peter A. Rajkumar**

**Justice of Appeal**