

THE COURT OF APPEAL PRESIDING AT PUTRAJAYA

CIVIL APPEAL NO: T-01-12-2006

BETWEEN

CHE MINAH BINTI REMELI ... APPELLANT

AND

(1) PENTADBIR TANAH, PEJABAT TANAH BESUT, TERENGGANU  
(2) PENGARAH TANAH DAN GALIAN, NEGERI TERENGGANU  
(3) KERAJAAN NEGERI TERENGGANU ... RESPONDENTS

CORAM:

(1) ZALEHA ZAHARI, JCA  
(2) ABDUL MALIK BIN ISHAK, JCA  
(3) ABU SAMAH BIN NORDIN, JCA

**JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA**

**Introduction**

[1] The learned judge of the Kuala Terengganu High Court dismissed the appellant's application for leave to commence committal proceedings against the alleged contemnors. Aggrieved by that decision, the appellant lodges an appeal to the Court of Appeal. The appeal is now fixed before us.

[2] What appears to be an appeal in regard to the issue of leave has turned out to be an application by the appellant's counsel to recuse members of this panel from hearing the appeal. It is an unprecedented move. There is no formal application to recuse members of this panel and there is no affidavit in support. The application is initiated orally.

**To the heart of the matter**

[3] Mr. Haris bin Mohamed Ibrahim ("**Mr. Haris**"), the learned counsel for the appellant, submits that this appeal should not be heard by any judges belonging to the Islamic faith. He says that this request was communicated during case management in 2007 and, subsequently, by letter. Notwithstanding that he says that this coram has been constituted to hear the appeal.

[4] Mr. Haris politely requests for an adjournment to enable him to file the formal application to recuse this panel from hearing the appeal. He says that he has been directed by the appellant, presumably to say what he is about to say to us by way of an oral submission. He says that it would be most appropriate if a formal application is made supported by the relevant affidavit so that the application for recusal will be fixed for hearing.

[5] Mr. Haris, again politely, suggests that perhaps this court may adjourn the session and hear the formal application of the appellant. He reiterates his suggestion, time and again. It is quite apparent that if this

panel allows the adjournment, the same application for an adjournment would be advanced before another muslim panel. Pure and simple, it is an appeal for leave to commence committal proceedings against the alleged contemnors and this court would not go beyond that. Mr. Haris submits, without elaboration, that this panel should be concerned about the concerns of the appellant.

**[6]** Coming to the rescue, Mr. Malik Imtiaz Sarwar for the appellant submits along the following lines. That it is in the best interest for all concerned for the formal application to be heard. He submits that the underlying concern is that the State Authority of Terengganu has unlawfully demolished the structures on the appellant's land and such demolition constitutes an act of conspiracy between the various State Government officials. According to him, there is a fatwa (edict) that declares the appellant's husband's teachings as deviant.

**[7]** But, it must be borne in mind that the issue of fatwa (edict) has no relevance to the issue of leave.

**[8]** Mr. Haris takes over the floor and requests for an adjournment on the ground that a muslim panel should not hear the appeal. This court refused to allow the adjournment and directed that the hearing should proceed as scheduled. Again, Mr. Haris seeks the permission of this panel to recuse ourselves.

[9] It is quite apparent that the appeal for leave to issue committal proceedings has been converted into an application to recuse the members of this panel.

[10] Undaunted, Mr. Haris continues with his submission. He says that the appellant is the wife of Ariffin Mohamad – better known as Ayah Pin, the former leader of the Sky Kingdom cult in Terengganu. He emphasises the gravity of the fatwa (edict) and the fears on the part of the appellant that Muslim judges would adopt a personal stance that the demolition of the structures on the appellant's land is in line with the principle of **Amal Maaruf Nahi Mungkar** (a principle to encourage good and avoid sin) which was the reason that was given for pulling down the structures in the first place. He says that the appellant is concerned that the fatwa (edict) would have an impact on good muslims. He says that good muslims will accept the demolition of the structures and that such demolition is in accord with the fatwa (edict). He says that the appellant is concerned about the recent statement by the Lord Chief Justice that the common law will be abolished and replaced by the syariah law. According to him, in little Terengganu, a hamlet, the people there do read the newspapers. He expresses the concerns of the appellant in this way. That muslim judges within the hierarchy of our judicial system would be obliged to comply with the fatwa (edict). He is apologetic when he says that he has

not the slightest doubt that this panel is non-aligned. If that is the case, why is he seeking to disqualify this panel from hearing the appeal? In the same breath he says that the principle that justice must not only be done but be seen to be done should be put to the forefront. For these varied reasons, it is his submission that this panel should consider generously the concerns of the appellant and recuse ourselves.

**[11]** The oral application to recuse was dismissed. This court was constrained to hear the appeal for the reasons which are set out hereunder. Orally, Mr. Haris then asked for a stay. This court adjourned briefly and finally granted the stay.

**[12]** The complaint of the appellant may be summarised in this way. The appellant is afraid that the muslim judges in the Court of Appeal would be influenced by the fatwa (edict) and would, consequently, be bias and unfair in adjudicating the present appeal bearing in mind that the common law might be replaced by the syariah law. The impartiality of all the judges in this country, irrespective of race or religion or gender, cannot be questioned. It is presumed. The fear is certainly unfounded. There is a strong presumption of judicial impartiality in this country. Our courts are still applying the common law of England and the rules of equity as administered in England on the 7<sup>th</sup> of April 1956 subject to such qualifications as the local circumstances render necessary by virtue of

section 3(1) (a) of the Civil Law Act 1956 (Revised 1972) (Act 67) – the said Act. The reception or application of English law to Malaysia is governed by the said Act. Section 3 of the said Act deals with the application of English law generally while section 5 of the said Act deals with the application of English mercantile law. Of course, the application of the English law via section 3 of the said Act is qualified by the words “**save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia**”. Similarly, section 5 of the said Act applies English law “**unless in any case other provision is or shall be made by any written law.**” It is with these limitations in mind that our courts should look at the language of the relevant statute uninfluenced by English law upon the subject and interpret it accordingly (**Ramanandi Kuer v. Kalawati Kuer (1928) 55 IA 18; Secretary of State v Sarin (1930) AL 364; Keshavlal v Pratap Singh (1932) AB 168; State of West Bengal v B.k. Mondal and Sons (1962) AIR SC 779; Wrigglesworth v Wilson Anthony (1964) 30 MLJ 269; Chhunna Mal v. Moolchand Ram (1928) 55 IA 154; State of Punjab v Hindustan Development Board (1960) A Punj 585; and Superintendence Company of India (P.) Ltd. v. Krishnan Murgai (1980) AIR SC 1717**). Be that as it may, I subscribe to the proposition by Byles J., in **R. v. Morris (1861-73) ALL E.R. Rep. 484, 486** that:

“..... it is a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law.”

So, it is wrong to say that the common law will be abolished and replaced by the syariah law. The fear is unfounded. Baseless. Common law still reign supreme in this country. It is still in vogue. Let it be known to all and sundry that the common law is here to stay.

### **Analysis**

**[13]** For my part, I am surprised at the oral application to disqualify this panel. It is a legally constituted panel. I must at the outset make the following germane observations:

**(a)** That public confidence in our judicial system is rooted in the fundamental belief that those judges, irrespective of race or religion or gender, who adjudicate the manifold cases must always do so without bias or prejudice and they must be perceived as such. It is an acceptable proposition to say that a judge's impartiality is presumed and any party seeking for a disqualification must establish the circumstances and situations to justify the disqualification of the judge. What is the criterion for disqualification? It is the reasonable apprehension of bias. Another pertinent question would be this. What would an informed, reasonable and right-minded person, viewing the whole matter realistically and practically

conclude after having deliberated the matter? Yet, another pertinent question is this. Would that person think that it is more likely than not that the judge, whether consciously or unconsciously, decide the matter fairly? Fairness is the name of the game. Once fairness is established, the application for disqualification or recusal would fall through. It would collapse like a deck of cards.

**(b)** There is a strong presumption of judicial impartiality. That being the case, the standard of reasonable apprehension of bias must necessarily refer to an apprehension based on serious grounds. Each case must therefore be examined contextually and the inquiry is based entirely on the facts. This panel is impartial. The appeal comes before this panel for the very first time. The appeal relates to the question of leave and the issue on the fatwa (edict) and its ramifications have no role to play at all.

**(c)** An allegation that the decision of this panel may be tainted by bias or by a reasonable apprehension of bias is a very serious matter. Such an allegation calls into question the impartiality of this panel and it raises doubt on the public's perception of the court's ability to dispense justice according to law. It is rather unfortunate that the serious allegations advanced by Mr. Haris stands unaided by an affidavit.

**[14]** Be that as it may, I must categorically say that in adjudicating a case the judge must always keep an open mind. That would in essence be

the meaning to be attached to the word “**impartiality**”. It is impossible to determine the state of mind of a judge. The state of the judge’s mind is as much a fact as the state of his indigestion. Cory J., in **Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities) (1992) 1 S.C.R. 623**, at page 636 rightly said that it is obviously impossible to determine the precise state of mind of an adjudicator. The English Court of Appeal in **Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. And Another, Locabail (U.K.) Ltd. And Another v. Waldorf Investment Corporation And Others, Timmins v Gormley, Williams v. H.M. Inspector Of Taxes And Others, Regina v. Bristol Betting And Gaming Licensing Committee, Ex parte O’Callaghan (2000) QB 451**, with a coram of Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.C. aptly said at page 472 of the report :

“The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.”

[15] There is no suggestion here that members of this panel are consciously allowing extraneous influences to affect our minds in adjudicating the appeal. There is no proof of actual bias against members of this panel and the appellant will find it very difficult to prove it even if she attempts to do so.

[16] It is now opportune to articulate the meaning of the word “bias”. It is often used interchangeably with the word “prejudice”. In **R. v. Gough (1993) A.C. 646 (H.L.)**, at page 665, quoting Devlin L.J. in **The Queen v. Barnsley Licensing Justices (1960) 2 Q.B. 167 (C.A.)**, Lord Goff aptly said that :

“Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.”

[17] In **Liteky v. U.S. 114 S. Ct. 1147 (1994)** at page 1155, Scalia J., defined the words “bias” or “prejudice” in this way:

“The words (bias or prejudice) connote a favourable or unfavourable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant’s prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant’s prior criminal activities that he will vote guilty regardless of the facts).”

[18] With respect, how could this panel be said to be biased towards the appellant when members of this panel have yet to hear the appeal proper. The English Court of Appeal in **Locabail (U.K.) Ltd v Bayfield Properties Ltd. And Another, Locabail (U.K.) Ltd. And Another v. Waldorf Investment Corporation And Others, Timmins v Gormley, Williams v. H.M. Inspector Of Taxes And Others, Regina v. Bristol**

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(supra), at page 487, rightly asked the following question:

“How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?”

[19] How could members of this panel be disqualified from hearing the appeal based on the oral submissions of the learned counsel without the benefit of affidavit evidence? If the appellant's affidavit is filed accompanying the formal application for the recusal, the learned State Legal Adviser of Terengganu, who is present, would be able to file an affidavit in reply. This panel would then benefit from reading these two affidavits. Another pertinent question to pose would be this. Would there be a reasonable apprehension of bias on our part after having heard the oral submissions of the learned counsel as regards the appellant's perceived notions of bias? This brings to the forefront the criterion advanced by de Grandpré J. in **Committee for Justice and Liberty v.**

**National Energy Board (1978) 1 S.C.R. 369, at page 394:**

“..... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is ‘what would an informed person, viewing the matter realistically and practically ..... and having thought the matter through ..... conclude. Would he think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would not decide fairly’.”

[20] As the King's judges, this panel acts in good faith and do not allow extraneous influences to affect our minds. This panel is also mindful of Lord Hewart C.J.'s aphorism 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"** in **The King v. Sussex Justices, Ex parte McCarthy (1924) 1 K.B. 256, at page 259**. Flowing from that, it is appropriate to state that the relevant question to pose is not whether there is in fact either a conscious or an unconscious bias on our part but rather, the crucial question to ask is whether a reasonable person properly informed would apprehend that there is such a bias. That reasonable person must understand that as the King's judges, the Judge's impartiality is presumed and there are no circumstances and situations to justify the disqualification of members of this panel from hearing the appeal. No litigant can shop for judges of their own choice in this country. The fatwa (edict) that Ayah Pin's teachings were deviant was pronounced by the Terengganu Islamic Council Fatwa and Malay Customs Committee and as judges that apply the common law of England and the rules of equity as administered in England on the 7<sup>th</sup> April 1956 this panel accepts it as one of the facts that surfaced pertaining to the oral application to disqualify ourselves. Speaking for myself, I must say that I have always been fair minded and my concern is to ensure that

justice is not only done but must be seen to be done. I have always been fair to all litigants and I will continue to do so until I relinquish my cherished position upon retirement. I have this to say. That judges dispense justice according to the law. If the application to disqualify members of this panel is allowed for the reasons as advanced orally by the learned counsel for the appellant, this would open the floodgates to other legal practitioners to choose judges in the Court of Appeal to hear their cases in the near future. That should not happen and this panel will not allow it to happen and will not condone it.

**[21]** In the common law world over the past decade there is rooted in our legal system the fundamental belief that judges who adjudicate must always do so without bias or prejudice and it must be perceived to be so. It is a correct assertion to say and I so say that a judge must be impartial and it is his impartiality that forms the core attribute of the judiciary. The presumption of impartiality of a judge must be upheld. It is the cornerstone of the judiciary. No one should carelessly argue that a particular judge is bias because the credibility of the judge depends on the presumption of his impartiality. And that presumption is deeply rooted in our legal system. That being the case, the burden is on the party arguing for a disqualification to establish that the circumstances justify the finding that the judge must be disqualified. Put in another way, the onus of demonstrating bias lies with

the person who is alleging that it is so. In **R. v. Smith & Whiteway Fisheries Ltd. (1994) 133 N.S.R. (2d) 50 (C.A.)**, at pages 60 to 61, the court observed that the reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect.

[22] There is a passage that appears in the case of **United States v. Morgan, 313 U.S. 409 (1941)**, at page 421 that merits reproduction. It is this. That judges “**are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.**” This is food for thought for the appellant and her learned counsel.

[23] It is significant to note that any allegation of reasonable apprehension of bias would bring into sharp focus and would call into question not only the personal integrity of the judge but also the integrity of the entire administration of justice. It is advisable that any counsel who proposes to embark on this perilous course of action must be certain lest he runs foul of the law and be cited for contempt. Lord Denning MR in **Morris v Crown Office (1970) 2 QB 114 at 122, (1970) 1 ALL ER 1079 at 1081**, gave this sound advice:

“The phrase ‘contempt in the face of the court’ has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is

here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power.”

**[24]** However, where reasonable grounds exist to recuse a judge, counsel must be free to act fearlessly and raise the allegation in a polite manner. It must be remembered that this is a serious step that should not be undertaken lightly. A formal application must be filed supported by the relevant affidavits.

**[25]** If it can be established that there is a reasonable apprehension of bias then it may inevitably lead to the disqualification of the judge. It all depends on the facts of the case. When one says that there is no actual bias, it may mean that actual bias need not be established or it may mean that it is sufficient if there is a reasonable apprehension of bias. Since it is impossible to determine the precise state of mind of a judge then it can be argued that it is unwise or unrealistic to require the presence of actual bias.

**[26]** It may be argued that an unconscious bias may exist even where the judge is acting in good faith. Such a probability may be inferred from the circumstances of the case. And when a person says that there is no actual bias on the part of the judge, that person is conceding that the judge has acted in good faith and is not consciously relying on an

inappropriate pre-conceptions. One must remember that “**there is an overriding public interest that there should be confidence in the integrity of the administration of justice**” (per Lord Goff in **R. v. Gough (supra) at page 659**). Honesty and integrity go hand in hand and they are the two fundamentals which judges are presumed to have. They cannot be compromised.

**[27]** In reality, the criterion of disqualification is focussed on the judge’s state of mind viewed from the objective perspective of the reasonable person. And the reasonable person is asked to imagine the decision-maker’s state of mind.

**[28]** Another area of the law that impinges upon the judge’s decision is the rule of automatic disqualification. It is derived from the speech of Lord Goff in **R. v. Gough (supra), at page 661**, where his Lordship said:

“..... there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand..... . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings..... . In such a case, ..... not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.”

[29] The House of Lords in **Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No: 2), (2000) 1 A.C. 119**, revisited the rule of automatic disqualification. In that case, the House of Lords dealt with a situation in which Lord Hoffmann had participated in a decision where Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of “**automatic disqualification**” extended to a limited class of non-financial interests, where Lord Hoffman has such a relevant interest in the subject matter of the case that he is effectively in the position of a party to the cause. Consequently, Lord Hoffman was disqualified, and the decision of the House of Lords was set aside. Lord Browne–Wilkinson, writing a separate judgment for the House of Lords, said at pages 132 to 133 of the report:

**“2. Apparent bias**

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second

application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see *Shetreet, Judges on Trial (1976)*, p.303; *De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5<sup>th</sup> ed. (1995)*, p.525. I will call this ‘automatic disqualification’.”

[30] Of course, the judgment of the House of Lords in **Pinochet** drew a lot of attention around the world and it provoked academicians to write a lot of articles on it. But that is the law.

[31] All these authorities are certainly thought provoking. The facts of the present appeal are no where near the case of **Pinochet**. Here, no one can suggest that members of this panel are bias. An objective reasonable person having full knowledge of the facts and context of the appeal at hand would not conclude that members of this panel have crossed the line so as to result in a reasonable apprehension of bias and of pre-judgment.

[32] Hypothesis about how judges react where the issue of recusal is raised early, like the present case at hand, cannot be severed from the

abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this connection, it may well be that judges have recused themselves in the past in cases where it was, strictly speaking, not legally necessary to do so. Put differently, it can be argued that the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post facto*.

**[33]** There is no need to reaffirm the well-settled principle of the impartiality of the courts of justice. This principle has been a matter of common knowledge across the common law world over the past decade or so. The fundamental belief that those who adjudicate must always do so without bias or prejudice has withstood the test of time. Cory J., in **R.v. S. (R.D.) (1997) 3 SCR 484**, at **paragraph 106** quoted **R.v. Bertram (1989) O.J. No. 2123 (QL) (H.C.)** when defining bias or prejudice. That definition reads as follows (and I quote):

“a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.”

**[34]** It is too premature to disqualify members of this panel at this point of time. There is no indication that members of this panel are not willing to hear the appeal with an open mind by being fair to all the parties. Members of this panel are aware that they must be fair and such awareness is consistent with the highest tradition of judicial impartiality.

**[35]** My learned brother Abu Samah Nordin JCA has seen this judgment in draft and has expressed his concurrence with the reasons herein.

19.9.2007

Dato' Abdul Malik bin Ishak  
Judge, Court of Appeal  
Putrajaya

Counsel

- |                         |   |   |
|-------------------------|---|---|
| (1) For the Appellant   | : | Mr. Haris bin Mohamed Ibrahim and<br>Mr. Malik Imtiaz Sarwar      |
| Solicitor               | : | Messrs Haris & Co<br>Advocates & Solicitors<br>Kuala Lumpur       |
| (2) For the Respondents | : | YB Tuan Hj Mohd Sekeri Mamat<br>State Legal Adviser<br>Terengganu |