EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2016/0021

BETWEEN:

BENJAMIN EXETER

Appellant

and

[1] WINSTON GAYMES
[2] KATHLEEN JEFFERS
[3] SIR LOUIS STRAKER
[4] SYLVIA FINDLAY-SCRUBB
[5] THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

Respondents

CONSOLIDATED WITH

SVGHCVAP2016/0022

LAURON BAPTISTE

Appellant

and

[1] VIL DAVIS
[2] VERONICA JOHN
[3] MONTGOMERY DANIEL
[4] SYLVIA FINDLAY-SCRUBB
[5] THE ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Keith Scotland with him, Mrs. Kay Bacchus-Baptiste for the Appellant instructed by Ms. Maia Eustace

Mr. Anthony W. Astaphan, SC with him, Mr. Richard Williams for the 1st, 2nd, 4th and 5th Respondents

Mr. Grahame Bollers for the 3rd Respondent

2017: March 7;
June 13.

Interlocutory appeal – Election petition – Apparent bias and/or predetermination – Whether apparent bias and/or predetermination made out – Whether judge should have recused himself even in the absence of recusal application – Waiver – Whether right to fair hearing by impartial tribunal, as guaranteed by section 8 (8) of the Constitution of Saint Vincent and the Grenadines can be waived in election petition cases

Following the general elections in Saint Vincent and the Grenadines on 5th December 2015, petitions were filed challenging the return and/or election of two candidates. The respondents applied to strike out said petitions on the ground that the petitioners had failed to comply with sections 58(1) (b) and (c) of the Representation of the People Act. The respondents' strike out application was heard in Chambers at which point counsel for the petitioners raised as a preliminary point, the court's lack of jurisdiction to hear the application. The learned judge proceeded to hear the application but refused the strike out application. In his written decision delivered on 4th April 2016, the judge held that the strike out application was premature and that the court had no jurisdiction to entertain it by means of an interlocutory application in Chambers. The learned judge, however, went on to indicate that "… having had the benefit of full arguments I am of the view that such an application, if made at the beginning of the hearing of the petition, is bound to succeed."

The respondents subsequently filed a notice of motion to be heard in open court raising the same objections contained in the interlocutory application. The motion for striking out the petitions came up for hearing before the learned judge upon which he ruled in favour of the respondents and struck out the petitions. The appellants appealed on several grounds including that, the learned judge displayed apparent bias and/or predetermination based on his statement. The respondents contended that the appellants had waived the right to rely on bias.

The critical issues arising on the appeal were: (i) whether apparent bias or predetermination was made out; (ii) whether the judge should have recused himself from hearing the matter even in the absence of a recusal application; (iii) whether the appellants by participating in the proceedings and not having asked the judge to recuse himself were precluded by waiver from raising the objection of apparent bias or pre-determination; (iv) in the context of an election petition, whether the right to a fair hearing by an impartial tribunal, as guaranteed by the Constitution can be waived.

Held: allowing the appeal, setting aside the order of the learned judge striking out the petitions, reinstating the petitions, ordering the hearing of the petitions and motion to strike out be remitted to the High Court to be heard by a different judge expeditiously and awarding costs to the appellants in the court below and on appeal to be assessed by a judge if not agreed within 28 days, that:

1. The test for apparent bias is well settled. The question to be asked 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." A real danger of bias might well be thought to arise if on any question at issue in proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.

   Porter v Magill [2001] UKHL 67 applied.

2. There may be nothing wrong in a judge giving some indication of his current thinking during the hearing of a matter. A judge may alert counsel to the difficulties a litigant may face with respect to a matter or point in issue. The overarching principle is that a closed mind should not be shown. The law does not sanction anything which may prematurely indicate a closed mind. In the case at bar, the statement made by the learned judge went far beyond permissible limits. The judge expressed himself in such clear and conclusionary terms that a fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that he was biased or had predetermined the matter, such that he would not have approached the hearing with an open mind.

   Arab Monetary Fund v Hashim (1994) 6 Admin LR 348 applied; **Harada Limited v Turner** [2001] EWCA Civ 599 applied; **Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry) (No.2)** [2014] UKPC 43 applied.

3. Given the statement made by the judge regarding the sure success of the motion, he should have recused himself from hearing the matter even without an application. At the preliminary stage in the proceedings, when dealing with a point in limine, the learned judge reached conclusive findings on substantive issues and proceeded to hear the same substantive matters and, not surprisingly, reached the same conclusion. The judge did not express his view in an appropriately qualified or tentative manner so as to allow for subsequent persuasion upon further elucidation by counsel and sober reflection on his part. The judge would have created in the mind of a fair-minded observer, the strong impression that he would not listen with an open mind to the full arguments afresh.

   Sir Alexander Morrison and Anr v AWG Group Limited and Anr [2006] EWCA Civ 6 applied.

4. An election petition is not a matter involving litigation of a private right in which considerations of justice arise simply as between the disputants, with no additional public interest element falling to be considered. An election petition, by its very nature, is often a matter of great public interest and importance. The right to the hearing and disposal of an election petition by an impartial tribunal is a matter of tremendous public interest. It is also a right which engages section 8 (8) of the **Saint Vincent and the Grenadines Constitution Order**. The right to a fair trial by an impartial tribunal holds a prominent place in a democratic society and is pivotal for public confidence in the administration of justice. Lack of impartiality on the part of the learned judge of the nature demonstrated by the appellants in this appeal could not be a permissible waiver. Such waiver would certainly run counter to that very important public interest of having an election petition determined without apparent bias or predetermination. Accordingly, the appellants could not have waived their right to rely on apparent bias and predetermination

   Millar v Dickson (Procurator Fiscal, Elgin) and other appeals (Scotland) [2002] 3 All ER 1041 applied.

REASONS FOR DECISION

[1] **BAPTISTE JA**: On 7th March 2015, the Court allowed an appeal against the order of a High Court judge striking out two election petitions. The appeal was allowed on the ground of apparent bias and/or predetermination on the part of the learned judge. The order of the learned judge striking out the petitions was set aside; the petitions were reinstated; the hearing of the petitions and motion to strike were remitted to the High Court to be heard by a different judge expeditiously; and costs were awarded to the appellants in the court below and on the appeal to be assessed by a judge if not agreed within 28 days. Here are the reasons for the decision.

[2] The appeal has its genesis in the general election held in Saint Vincent and the Grenadines on 5th December 2015. Petitions were filed challenging the return and/or election of two candidates. The respondents applied to strike out the petitions claiming that they did not comply with the mandatory requirements of section 58(1)(b) and (c) of the **Representation of the People Act**.[1]

[1] Cap. 9, Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

[3] The respondents' application was set for hearing in Chambers on 4th March 2016. At the hearing of the respondents' interlocutory application, counsel for the petitioners raised as a preliminary point, the court's lack of jurisdiction to hear the application. Counsel submitted that there was no legal basis upon which the respondents could engage the court's jurisdiction via such an interlocutory application, in Chambers, to strike out the petition at this stage of the proceedings. The learned judge however, proceeded to hear the application.

[4] The court ruled in a written decision on 4th April 2016:

> "I agree with counsel for the petitioners that I am compelled to follow the decision of the Court of Appeal per Rawlins CJ in **Joseph v Reynolds** [HCVAP2012/0014 delivered 31st July 2012, unreported]. The application to strike out is premature. This court has no jurisdiction to entertain it by means of an interlocutory application in chambers. I therefore refuse the application to strike out at this stage. However, having had the benefit of hearing full arguments I am of the view that such an application, if made at the beginning of the hearing of the petition, is bound to succeed. This indication may be of some assistance to the parties in deciding the way forward and saving costs, time and national uncertainty."[2]

[5] The respondents then filed a notice of motion to be heard in open court raising the same objections contained in the interlocutory application. The motion for striking out the petitions came up for hearing before the learned judge on 16th June 2016 upon which he ruled in favour of the respondents and struck out the petitions.

[6] The appellants advanced several grounds of appeal against the learned judge's order. At the hearing, the Court dealt with one ground being the issue of apparent bias and/or predetermination. The appellants' case on apparent bias and predetermination turns on the statement made by the judge in his ruling on 4th April 2016 and quoted at paragraph 4 above. I must emphasise that there was no suggestion of actual bias or personal interest on the judge's part. Mr.

[2] At para. 37 of lower court judgment dated 4th April 2016.

Scotland pointed out that the learned judge previously heard the application as an interlocutory application in chambers and refused it for want of jurisdiction. Mr. Scotland complained that the learned judge, having stated in his judgment that if the court's jurisdiction were subsequently invoked, the application was "bound to succeed", ought to have recused himself from hearing the motion to strike out the petitions in open court, and was biased in his decision to strike them after hearing the motion a second time in open court. Mr. Scotland submitted that the learned judge should have automatically disqualified himself from hearing the matter.

[7] Mr. Scotland stated that the real issue was whether by participating in the proceedings in the court below, the appellants waived their right to allege bias. Mr. Scotland contended that they did not waive their right and advanced the proposition that in the peculiar circumstances of an election petition, there can be no waiver of apparent bias. Mr. Scotland argued that an election petition is sui generis; the entire society has an interest in its outcome and what is at stake is the preservation of democracy itself, not an individual right that can be waived.

[8] Mr. Scotland submitted that the judge has an overarching duty with respect to the protection and guarding of the public interest. There should be the utmost confidence in the administration of justice and the court should be free from the appearance of bias and predetermination. Mr. Scotland also submitted that counsel should not be placed with the final burden of requesting recusal.

[9] Mr. Scotland contended that the constitutional right to a fair hearing by an impartial authority was engaged in terms of section 8 (8) of the **Saint Vincent and the Grenadines Constitution Order** (the "Constitution")[3] and that bias can lead to a breach of that right. Mr. Scotland cited **Paul Lai v The Attorney**

[3] Cap. 10, Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

General of Trinidad and Tobago,[4] where Moosai JA held that a hearing before a court where there was apparent bias on the part of the judge would violate the right to be heard before a fair and impartial tribunal, as guaranteed by section 5 (f)(ii) of the Constitution of Trinidad and Tobago. This is the kindred section to section 8(8) of the Constitution of St. Vincent and the Grenadines.

[10] Mr. Astaphan, SC strongly resisted the position of the appellants and submitted that the ground of appeal in relation to alleged bias is nothing short of a forensic ambush, and an abuse of the process of the Court. Mr. Astaphan, SC contended that notwithstanding several appearances by the appellants and counsel, the issue of bias was never raised in the court below, neither was there any indication to the judge that he ought to recuse himself. The appellants did not object to the judge hearing the matter and fully participated in the proceedings. Following the judge's interlocutory ruling, the respondents filed the motion to strike, and the appellants filed a pre-trial memorandum seeking directions for the trial and the petitions. The allegations of bias arose for the first time in the notice of appeal. Mr. Astaphan, SC submitted that the appellants had waived the right to rely on bias. Mr. Astaphan, SC contended that it was improper for the appellants to raise the issue of bias for the first time before the Court of Appeal. This was not a case in which the disqualifying factor became known after the judgment was delivered. Mr. Astaphan, SC took serious issue with the proposition that the issue of waiver could not be engaged in an election petition.

[11] Mr. Astaphan, SC further posited that the appellants' reliance on bias is entirely without merit. The issues before the judge in the interlocutory application in Chambers, and in the motions to strike in open court were all issues of construction and law. There was no oral evidence and therefore no cross-examination. There was therefore no dispute of fact.

[4] Civ. App. P129 of 2012 at paras. 66-67.

[12] It appears to me that the critical issues arising on the appeal were: (i) whether apparent bias or predetermination was made out; (ii) whether the judge should have recused himself from hearing the matter even in the absence of a recusal application; (iii) whether the appellants by participating in the proceedings and not having asked the judge to recuse himself were precluded by waiver from raising the objection of apparent bias or pre-determination; (iv) in the context of an election petition, whether the right to a fair hearing by an impartial tribunal, as guaranteed by the Constitution can be waived.

[13] I will first consider apparent bias and predetermination. The test for apparent bias is well settled. The question to be asked 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."[5] In **Otkritie International Investment Management v Mr George Urumov**,[6] the Court of Appeal regarded this as a basic principle of English law and went on to say:

> "It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias … extends … to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case."

[14] A real danger of bias might well be thought to arise if on any question at issue in proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind.[7]

[15] With this background, it is important to examine what the learned judge said in his judgment. As indicated earlier, the learned judge refused the application to strike out the petitions at that stage, on the ground that he had no jurisdiction to entertain them by means of an interlocutory application in Chambers. The

[5] Per Lord Hope in Porter v Magill [2001] UKHL 67at para.103.
[6] [2014] EWCA Civ 1315.
[7] Per Lord Bingham in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451.

learned judge did not, however, end there. His Lordship went on to say: 'However, having had the benefit of full arguments, I am of the view that such an application, if made at the beginning of the hearing of the petition, is bound to succeed'.

[16] There may be nothing wrong in a judge giving some indication of his current thinking during the hearing of a matter. A judge may alert counsel to the difficulties a litigant may face with respect to a matter or point in issue. The overarching principle is that a closed mind should not be shown. The law does not sanction anything which may prematurely indicate a closed mind. These points were borne out in the cases of **Arab Monetary Fund v Hashim**[8] and **Harada Limited v Turner**.[9]

[17] In **Arab Monetary Fund v Hashim**, Bingham M.R said at page 356 A-C:

> "But on the whole the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking, it does not sanction the pre-mature expression of factual conclusions or anything which may prematurely indicate a closed mind."[10]

[18] In **Harada Limited v Turner**, Pill L.J said at para 31:

> "[Counsel] for Harada accepts that judges may make remarks at the beginning or in the course of hearings which indicate the difficulties a party faces upon one or more of the points at issue. Provided a closed mind is not shown, a judge may put to counsel that, in the view of the judge, the counsel will have difficulty in making good a certain point. Indeed, such comments from the Bench are at the very heart of the adversarial procedure by way of oral hearing which is so important to the jurisprudence of England and Wales. It enables the party to focus on the point and to make such submissions as he properly can."

[19] Mr. Scotland submitted that the learned judge went much further than necessary in determining the preliminary point that was raised before him. The unnecessary findings and conclusions, in highly pellucid unambiguous

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[8] (1994) 6 Admin LR 348.
[9] [2001] EWCA Civ 599.
[10] Cited at paragraph 27 of London Borough of Jiminez v London Borough of Southwalk [2003] EWCA Civ 502.

language, can only lead to the inescapable conclusion that the learned judge at the hearing would be unable to approach the case with an open mind. I agree. Mr. Scotland also submitted that a judge can disqualify himself from hearing a case, or hearing it further where he had pronounced conclusory findings at an earlier stage of the hearing, and those findings suggest that he would not be able to deal with the issues at a subsequent stage with a sufficiently open mind. I also agree.

[20] The case of **Re K**[11] provides a poignant illustration of apparent bias or pre-judgment. In that case, a father had appeared before a judge on 3rd April 2014 and at the outset, made his application that the judge should recuse herself on the grounds of actual or apparent bias. The father appealed against a committal order on a series of grounds, contending, among other things, that the judge wrongly refused to recuse herself or direct that the committal application should, in any event be heard by a different judge. The trial judge had made it plain to the father that, if he did not take action against the child's grandparents in Singapore for the return of the child to the United Kingdom, he would be likely to be imprisoned for a lengthy term. The father took no such action and the judge declined to recuse herself from the subsequent committal hearing.

[21] The Court of Appeal held that a fair-minded observer would have been minded to conclude that, by 3rd April 2014, the judge had made up her mind, or was at least strongly disposed to find, that the father was in clear breach of the orders requiring him to return or secure the return of the child to the jurisdiction, that those breaches were deliberate and that the father should be given a substantial custodial sentence. The Court of Appeal referred to the judge's dismissal, in "very short order", of the father's recusal application and stated that the judgment was entirely conclusory. It contained no explanation or reasoning which would be sufficient to satisfy a fair-minded observer that, despite the comments and observations she had earlier made, the judge had not already

[11] [2014] EWCA Civ. 905.

decided that the father was in deliberate breach of her orders and should be sentenced to a substantial period of imprisonment. In other words, the judge had predetermined the matter.

[22] Mr. Scotland submitted that the conclusive nature of the findings reached and pronounced at a preliminary stage is a decisive factor that gives rise to the appearance of bias. This led the Privy Council in **Mitchell v Georges (sole commissioner of the Ottley Hall Commission of Inquiry) (No.2)**[12] to hold that a Commissioner should take no further part in a Commission of Inquiry. A fortiori, even though there was no application for recusal, in the instant case, the judge ex proprio ought to have excused himself from further hearing. In **Mitchell v Georges,** the Privy Council held that a retired judge's conduct as a Commissioner in an enquiry gave rise to a reasonable apprehension of bias because of the views expressed by the Commissioner in an interim report. The key reasoning of the Privy Council is contained in its conclusion at paragraph 33:

> "The Board has reached the conclusion that, contrary to the conclusions of the courts below, the Interim Report was expressed in such terms that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the respondent was biased such that he would not approach the remainder of the inquiry with an open mind or, put another way, that he would not conduct an impartial inquiry, so far as the conduct of the appellant is concerned."

[23] Lord Clark's judgment in the Privy Council emphasised that the judge in his interim report "used the decisive language of a concluded finding".[13] The Board opined that the fair-minded observer would conclude that there is a real possibility that the respondent had made up his mind that the appellant was at the heart of wrongdoing which led to the project and its collapse.

[24] In **Mitchell v Georges**, at paragraph 10, the Board accepted that in applying the test for bias, the court must have regard to the context. The Board endorsed the

[12] [2014] UKPC 43.
[13] See para. 41.

statement of Rix LJ in **R (on the application of Lewis) v Redcar and Cleveland Borough Council**,[14] that the test falls to be:

> "applied to the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances, and that those circumstances must have an important and possibly decisive bearing on the outcome."[15]

[25] The question here is whether, having considered the facts, the fair minded and informed observer would conclude that in the light of the judge's statement, there was a real possibility of predetermination on his part or of apparent bias. In my judgment, applying the relevant legal principles, the answer must be in the affirmative. The statement made by the learned judge went far beyond permissible limits. The learned judge expressed himself in such clear and conclusionary terms that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that he was biased or had predetermined the matter, such that he would not have approached the hearing with an open mind. The learned judge had clearly indicated what the outcome of the motion would be – "it is bound to succeed". The outcome was a foregone conclusion. His judgment was vitiated by apparent bias and predetermination thus rendering it unlawful. In my judgment, given the statement made by the judge regarding the sure success of the motion, that is, if the motion were heard at the beginning of the hearing of the petition it is bound to succeed, he should have recused himself from hearing the matter.

[26] In my view, this was a classic case of predetermination and apparent bias. In the circumstances, the burden ought not to have been placed on counsel for the appellants to decide whether or not to make an application to the judge to recuse. As Lord Justice Mummery stated in **Sir Alexander Morrison and Anr v AWG Group Limited and Anr**[16] 'disqualification of a judge for apparent bias or

[14] [2008] EWCA Civ 746, [2009] 1 WLR 83 at para. 93.
[15] At para.93
[16] [2006] EWCA Civ 6 at para. 20.

predetermination is not a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him.'

[27] I agree with Mr. Scotland's submissions that there were profound reasons why the learned judge ought to have recused himself at the hearing stage even without an application. At the preliminary stage in the proceedings, when dealing with a point in limine, the learned judge reached conclusive findings on substantive issues and proceeded to hear the same substantive matters and, not surprisingly, reached the same conclusion. The learned judge did not express his view in an appropriately qualified or tentative manner so as to allow for subsequent persuasion upon further elucidation by counsel and sober reflection on his part. In fact he stated that:

> "However, having had the benefit of hearing all arguments I am of the view that such an application, if made at the beginning of the hearing of the petition, is bound to succeed."

The learned judge would have created in the mind of a fair-minded observer, the strong impression that he would not listen with an open mind to the full arguments afresh from the petitioners' counsel and had predetermined the matter. In that context, the argument that the issues before the judge were all issues of construction and law and that there was no dispute of fact, would not avail the respondents.

[28] In indicating that if the motion to strike were made at the beginning of the hearing of the motion, it is bound to succeed, the learned judge explained that:

> "This indication may be of some assistance to the parties in deciding the way forward and saving costs, time and national uncertainty …"

Mr. Astaphan, SC contended that the applications arose within the context of election petitions. The learned judge was therefore right and acted in the public interest when he said:

> "However, having had the benefit of full arguments I am of the view that

> such an application, if made at the beginning of the hearing of the petition, is bound to succeed. This indication may be of some assistance to the parties in deciding the way forward and saving costs, time and national uncertainty. I thank all counsel involved for the industry they have displayed and the assistance they have provided to the court."

[29] While recusal may entail the negatives referred to by the learned judge, they cannot palliate apparent bias or predetermination. As Mummery LJ explained in **Morrison v AWG Group Ltd** at paragraph 6:

> "Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is a *the* fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights. If, on an assessment of all relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case."

In the circumstances, the prudent decision would have been for the learned judge to have recused himself from hearing the substantive matter in open court. Such recusal would have saved costs, time and national uncertainty without impairing the impartiality of the system.

[30] Likewise in **Locabail (UK) Ltd v Bayfield Properties Ltd**,[17] the Court stated that any judge who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to a fair hearing and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is shown, the litigant has irresistible grounds for objecting to the trial of the case by the judge (if the objection is made before the hearing) or for applying to set aside any judgment given.

[31] I now address the critical issue of waiver. Mr. Scotland's proposition that the sui generis nature of an election petition renders waiver inapplicable, seems to be overbroad. It appears to be that much would depend on the nature of the right

[17] 2000 QB 451 at pp. 471- 472.

alleged to be waived. In most litigious situations the expression "waiver" is used to describe a voluntary, informed and unequivocal (clear and unqualified) election by a party not to claim a right or raise an objection which is open to that party to claim or raise. In the context of a right to a fair hearing by an independent and impartial tribunal, such is the meaning to be given to the expression.[18] In order to be effective, a waiver must be made without compulsion and 'must be made in an unequivocal manner and must not run counter to any important public interest.'[19]

[32] Section 8 (8) of the Constitution provides that :

> "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be… independent and impartial; and where proceedings for such a determination are instituted … before such a court or other authority, the case shall be given a fair hearing..."

This is a fundamental right and is kindred to article 6 of the European Convention on Human Rights. As stated in **Locabail (UK) Ltd v Bayfield Properties Ltd** at paragraph 16:

> "The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all relevant circumstances the court concludes that there was a real danger … of bias."

[33] As indicated earlier, Mr. Scotland advanced the proposition that in the peculiar circumstances of an election petition, there can be no waiver of apparent bias. Mr. Scotland contended that it is not an individual right that can be waived like in a commercial case. What is at stake is the preservation of democracy itself. The election petition touched and concerned the body politic and requires the utmost confidence in the system.

[34] It cannot be doubted that in some commercial matters, involving the litigation of private rights, the parties may voluntarily agree to limit their right of access to

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[18] Per Lord Bingham in Millar v Dickson (Procurator Fiscal, Elgin) and other appeals (Scotland) [2002] 3 All ER 1041 at para. 31.

[19] See: Hakansson v Sweden (1991)13 EHRR 1 para. 66 cited in Di Placito v Slater and Ors [2003] EWCA Civ 1863 at para.51.

court. In that regard, it is not uncommon to find an arbitration clause whereby the parties voluntarily agree to submit their dispute to arbitration. The considerations of justice arise simply as between the disputants; no additional public interest falls for consideration.

[35] An election petition undoubtedly falls in a different category. An election petition is not a matter involving litigation of a private right in which considerations of justice arise simply as between the disputants, with no additional public interest element falling to be considered. An election petition, by its very nature, is often a matter of great public interest and importance. The right to the hearing and disposal of an election petition by an impartial tribunal is a matter of tremendous public interest. It is also a right which engages section 8 (8) of the Constitution. The right to a fair trial by an impartial tribunal holds a prominent place in a democratic society and is pivotal for public confidence in the administration of justice. There is, accordingly, an important public interest in ensuring that the administration of justice is preserved from any suspicion that a judge hearing an election petition is not impartial or has predetermined a matter. As Lord Hope stated in **Millar v Dickson (Procurator Fiscal, Elgin) and other appeals (Scotland)**[20] at paragraph 65:

> "The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand."

[36] In my judgment, lack of impartiality on the part of the learned judge of the nature demonstrated by the appellants in this appeal could not be a permissible waiver. Such waiver would certainly run counter to that very important public interest of having an election petition determined without apparent bias or predetermination. There is absolutely no advantage to the administration of justice in the waiver contended for by the respondents.

[20] [2002] 3 All ER 1041.

[37] In summary, in light of the statement made by the learned judge, he ought to have recused himself from hearing the motion to strike the petitions even in the absence of an application for recusal. There was apparent bias and predetermination on his part. Having regard to the nature of the matter before the learned judge and the nature of the objection taken on appeal to lack of impartiality as presented by the appellants, and paying regard to section 8(8) of the Constitution, the appellants could not have waived their right to rely on apparent bias and predetermination.

Mario Michel
Justice of Appeal

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar