Judicial recusal

By Masood Ahmed14 October 2013

The doctrine of judicial recusal dictates that a judge may recuse himself from proceedings if he decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there appears to be bias or 'apparent bias'.

Judicial recusal is not then a matter of discretion. The test for determining apparent bias is this: if a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased, the judge must recuse himself (see *Porter v Magill* [2002] 2 AC 357 at [102]). That test is to be applied having regard to all the circumstances of the case.

The doctrine is underpinned by important public policy reasons. The judiciary must ensure that it remains independent and that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially.

As Arden LJ put it in the recent case of *Mulugeta Guadie Mengiste and Other v Endowment Fund for the Rehabilitation of Tigray and Others* [2013] EWCA Civ 1003, 'to maintain society's trust and confidence, justice must not only be done but be seen to be done'. This note is only concerned with the Court of Appeal's consideration of the doctrine of judicial recusal in *Mulugeta*.

The claimants commenced proceedings against the defendants for claims in respect of an investment in Ethiopia. The defendants contended that the appropriate forum was Ethiopia and made an application to stay the English proceedings. The main question in the application was whether the claimants would receive a fair hearing in Ethiopia. The claimants' expert was an Ethiopian law expert who provided evidence at the hearing of the application. However, during cross-examination by the defendants' counsel and questioning by the judge, it was clear that the expert had failed to understand his duty as an expert.

Further, the evidence did not comply with Civil Procedure Rule 35. It was not surprising, therefore, that the judge severely criticised both the evidence which the claimants' expert provided at the hearing and the apparent failure of the claimants' solicitors to properly prepare the expert for trial. The judge also noted that it was clear that the expert did not understand that a wasted costs order could be made against him. The judge ordered a stay.

Following the hearing, the defendants' solicitors informed the claimants' solicitors that they would be making a wasted costs order against them. The claimants' solicitors then wrote to the judge informing him that the claimants intended to make an application that the judge recuse himself. The claimants' solicitors failed to provide an explanation to the judge as to why they did not inform him earlier of their intention to make the application. The judge refused to recuse himself.

In his judgment the judge expressed concern about the late notice of the recusal application and repeated grounds for criticising the claimants' solicitors' conduct in relation to the expert evidence. Considering the authorities, the judge noted that there was an inevitable collision between the principle of a wasted costs order and an application for recusal because a wasted costs application could not be made unless there was some criticism of the party or his representatives. He held that the criticism would have to be in 'extreme and unbalanced terms' (*per* Lord Bingham in *Locabail (United Kingdom) Ltd v Bayfield Properties Ltd* [2000] QB 451), which was not a proper criticism of his conduct.

The judge also argued that the expert had not been properly prepared because of the claimants' solicitors' failure to advise him properly and, accordingly, the judge made a wasted costs order against the claimants' solicitors.

Arden LJ, giving the leading judgment, commented that in almost every case, the judge who heard the substantive application will be the right judge to deal with consequential issues as to costs, even if he made findings adverse to a party during the proceedings. However, there were exceptions to this practice (see *Re Freudiana Holdings Ltd* 28 November 1995, Court of Appeal, unreported).

The fact that it might be difficult or even impossible for another judge to hear an application for costs does not mean that the principles for recusal should be in any way tailored. The same test applies. On this basis, Arden LJ rejected the judge's analysis that there is some conflict between the principles applying on a recusal application and an application for a wasted costs order based on criticisms made in a judgment.

Arden LJ held that this was an exceptional case and that here existed apparent bias from the facts and that the judge should have recused himself from hearing the wasted costs application. Arden LJ gave the following reasons for her conclusions.

- The judge's criticism was not necessary to enable the judge to evaluate the expert's evidence. The only issue to be decided was whether the expert's evidence should be accepted, evidence which the judge concluded was unreliable and inconsistent. The questions of why the expert's evidence was poor were relevant when it came to the issue of costs. Arden LJ was of the opinion that the judge's criticism was designed to ward off an application for a wasted costs order against the expert, when no such application was in fact made.
- The judge's failure to leave the door open for the possibility of some explanation when he had not heard evidence or submissions from the claimants' solicitors gave rise to an impression of bias because it suggested that no explanation will be considered. The impression of bias was further confirmed by the making of findings of this nature when it can be foreseen that an application for a costs order, with serious consequences for the solicitors, may result.
- Arden LJ stated that she had 'the gravest difficulty' in following the judge's repeat and further criticism of the claimants' solicitors, who were not obliged to make the application any earlier than they did. While the judge drew the inference that this failure was tactical, it was difficult to see why it was not equally open to the explanation that they were waiting to see if an application was actually made and then needed time to consider how they should react.

Agreeing with the claimants' solicitors, Arden LJ held: 'The judge expressed a concern that there was no advocate to assist him but this obscured the real issue that he was also a judge in his own cause so far as the recusal application was concerned. In that very privileged position, the applicant for recusal must be given the benefit of the doubt. Because of the implications of this point I am inclined to agree with Mr McPherson, that if a party has grounds for appealing against a stage 1 order on the grounds of apparent bias this would form one of the exceptional cases in which such an appeal should lie (see *Crabtree v Ng* [2011] EWCA Civ 1455).'

Applying the test in *Porter v Magill*, the judge should have recused himself from hearing the wasted costs application and the judge's ruling on the wasted costs application was set aside.

An application for judicial recusal will be exceptional and will require the applicant to demonstrate the existence of exceptional circumstances as in *Mulugeta*. On the extraordinary facts of *Mulugeta*, Arden LJ's judgment correctly upholds the public policy of maintaining the integrity of the judiciary and, at the same time, achieving fairness to the parties concerned.