IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

NO.09/2009

BETWEEN: CHIEF REGISTRAR

APPLICANT

AND: IQBAL KHAN

RESPONDENT

APPLICANT IN PERSON

RESPONDENT IN PERSON

DATE OF HEARING: **11TH OF December 2009**
DATE OF RULING: **3RD OF FEBUARY 2010**

RULING ON APPLICATION TO DISQUAILFY FOR BIAS

1. The Respondent makes an oral application that I disqualify myself from hearing this matter on the bases of alleged biased towards him

2. The allegation of bias is that the Respondent commenced an action in 2005 in the High Court against me and subsequently in separate proceedings against my wife.

3. Both sets of proceeding were subsequently discontinued by the Respondent and he apologized for having commenced them. This was acknowledged by the Respondent in the course of his submissions

4. The Respondent seeks further support for his application from the fact that a decision of mine whilst a judge of High Court of Fiji was overturned by the Fiji Court of Appeal. This decision being in part the substance of the proceedings commenced against me by the Respondent.

5. The Respondent in his submission acknowledges that it is not uncommon for decisions of a judge at first instance to be overturned on appeal

6. The respondent made a similar application in *State v Manoj Kumar and Nilesh Prakash – HAC 007 OF 2004L* in which a ruling was delivered on the 23rd of January 2006. The Respondent acknowledged in his submissions that the law as to bias has not changed since that ruling.

7. In *Citizens Constitutional Forum v President HBC 091 OF 2001S* Fatiaki J. referred to *Rajski v Wood [1989] 18 NSWLR 512* where Kirby P. said at page 519:

"If parties could pick and choose judges according to their perception of the way in which their choice could advantage them, or disadvantage their opponents and then render judges answerable for sitting arrangements, great damage would be done to the integrity of the judicial process and to the community confidence in the neutrality and impartiality of the judiciary."

8. The High Court of Australia *in Ebner v The Official Trustee in Bankruptcy- 205 CLR 337* in a majority judgment at p 348 said:

"Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong.
They do not select the cases they will hear, and they are not at liberty to decline to hear cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, than that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.
This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

9. The test for bias in Fiji is as expressed by the Supreme Court of Fiji in *Amina Koya v the State- Criminal Appeal No. CAV 0002 of 1997* where at page 12 the Court said :

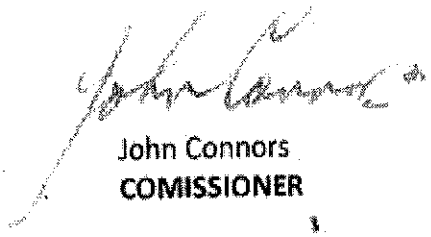
"There is some controversy about the formulation of the principle to be applied in cases in which it is alleged that a judge is or might be actuated by bias. In Australia, the test is whether a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case...In England however, the house of Lords, in R V Gough (1993) A.C. 646, decided that the test to be applied in all cases of apparent bias involving justices, tribunal members, arbitrators or jurors is whether in all the circumstances of the case there is a real danger or real likelihood, in the sense of possibility, of bias. In a later case, Webb v The Queen (1994) 181 CLR 41, which concerned a juror, the High Court Of Australia, despite Gough, decided that it would continue to apply the reasonable apprehension or suspicion of bias test, and held that in the circumstances of case a fair-minded but informed observer would not have apprehended that the juror or the jury would not have discharged their task impartiality."

10. Subsequently, the New Zealand Court of Appeal, in *Auckland Casino Limited v Casino Control Authority (1995) 1 NZLR 142*, held that it would apply the *Gough* test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias.

11. When I apply that test to the facts as submitted by the Respondent I am unable to conclude that a reasonable and informed observer would consider there was a real danger of bias of alternatively apprehend or suspect bias. In forming this conclusion it is necessary to consider the circumstances in which the proceedings were previously commenced against me by Mr. Khan and the fact that those proceedings were discontinued by him and that he apologized for having commenced them.

ORDER

The application is dismissed



John Connors
COMISSIONER

Dated: 3 February, 2010