



Neutral Citation Number: [2024] EWHC 118 (Fam)

Case No: MA22D000013

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2024

Before :

SIR JONATHAN COHEN

Between :

CD

Applicant

- and -

MD

Respondent

Mr TD (instructed as lay advocate) for the (Litigant in Person) Applicant
Ms MD (Litigant in Person) Respondent

Hearing dates: 24 January 2024

Approved Judgment

This judgment was handed down remotely at 2.00pm on 25 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives once anonymised.

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SIR JONATHAN COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

SIR JONATHAN COHEN:

1. I am dealing with an application made by the father in proceedings under the 2007 Hague Maintenance Convention for the recusal of the allocated judge, Mr Justice MacDonald (hereafter referred to as MacDonald J or “the judge”).
2. These are very long running proceedings. They date back to 2019, if not earlier. There are at least 6 orders made by judges prior to the allocation of the case to MacDonald J in mid-2022, and there are 9 orders in the bundle that I have been given which have been made by him between 17 August 2022-18 December 2023.
3. CD tells me through his brother, who has been his advocate in this hearing, that the father had applied for the judge’s recusal on 29 November 2023, although the order only recites that he was ‘considering a recusal application’ and on 18 December 2022 when it is clear that such an application was made and refused. The judge directed that the further application which was issued via a Form N244 should be listed before me today.
4. CD’s brother has been permitted to represent him on a number of occasions. He provided a very detailed 34 page skeleton argument and addressed me at length today. He raised many arguments and I will only deal with those that appear to me to be relevant to this particular application. This judgment has to be produced with expedition as there is a 2 day hearing fixed to commence on Monday, today being Wednesday.
5. The mother who is the respondent to the application appeared and addressed me briefly in opposition to the application. I am grateful for her attendance bearing in mind that the hearing commenced at what were for her the early hours of the morning in America. Both parties appeared remotely.
6. In his skeleton argument, CD says this:

“While actual bias is not alleged, clearly any evidenced actual bias would be encompassed within apparent bias. The prime cause of bias pleaded in this situation relates to several undisclosed ex-parte contacts between the judge and interested third-parties about a significant issue in the case”.
7. The background of the case is that an order in a substantial sum was made for child support in the home State of the mother, Colorado. That order was registered by an order made on 29 April 2021 by the Family Court at Leyland (Lancs) by two justices attended by a legal representative by the name of Mr Dodgshon. The father strongly challenges the correctness of the registration.
8. Since that time CD has been pressing vigorously for disclosure of documents from the registration process which he claims have been withheld from him. As I understand it, some documents have been now disclosed by HMCTS/MEBC (Maintenance Enforcement Business Centre) but CD remains concerned that there are other documents that he has not been provided with.
9. Shortly before the hearing fixed for 29 November 2023 CD says that he was provided with documents by Mr Keenan, an administrative officer within the MEBC. Those

documents revealed to him the existence of communications which, he says, involved MacDonald J without the knowledge of CD, and which he argues give rise to the allegation of apparent bias. In the repeated phrase of his advocate brother, there were “ex-parte interactions” between the judge and third parties which were not reported to CD which makes the judge’s recusal mandatory.

The relevant communications

10. These are:

- i) A letter dated 5 October 2022 from Mr Keenan to CD referring to a communication between the judge and Mr Dodgshon

This letter in its material passage reads as follows:

“I am currently awaiting further details as to how this matter must progress (referring to the request for specific documents) and I have spoken with Simon Dodgshon who has informed me that Justice MacDonald has asked him not to correspond with you any further at this point until a hearing date has been set for your appeal”.

- ii) A copy of CD’s letter to the Chief Executive of HMCTS and the response by Mr Pilch, a HMCTS Customer Investigation Officer to the Clerk of the Rules on 11 November 2022, which made its way to the judge a day or so before a hearing on or about 14 November 2022.

The letter says “We have contacted the disclosure team for guidance on what the next steps should be but unfortunately they have not yet replied. We are unable to give any guidance to CD until we hear from the disclosure team but we thought it was important to pass this correspondence on to yourself given Monday’s court date”.

- iii) An email communication dated 6 December 2022 from Mr Dodgshon to Mr Keenan mentioning a conversation between the judge and Mr Dodgshon. In it Mr Dodgshon says to Mr Keenan “I have now finally had the chance to speak with him (MacDonald J) and he tells me he has listed case before him in January ... “.

11. The judge set out in the order that he had no recollection of any of the communications, none of which were addressed to him, or the matters raised within them.

12. The further limb of the recusal application relies on the alleged failure of the judge to notify the parties of these communications and to respond adequately to CD’s enquiries regarding them. The judge replied through his clerk that he had not been able to locate any record of communications between himself and Mr Dodgshon and that the email sent in November 2022 to the Clerk of the Rules office arrived at the time that he had a temporary clerk. I am told that the judge accepted that the likelihood was that the email would have been forwarded to him.

13. This led to yet further questions from CD which might in a different context be described as being interrogatories and unsurprisingly the judge replied through his

clerk that he had already provided a response to the enquiries and would not be engaging in further correspondence.

The test for apparent bias

14. In H (A child: recusal) [2023] EWCA Civ 860 the Court of Appeal summarised the law relating to the test for recusal in these terms per Baker LJ

24. The test for apparent bias involves a well-established two stage process summarised by Leggatt LJ in Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468, [2018] BLR 341 at paragraph 17 in these terms: "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, paragraphs 102-103."

25. It has been stated in several cases since Porter v Magill that apparent bias means a prejudice against one party or its case for reasons unconnected with the merits of the case: Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117, per Scott Baker LJ at paragraph 28; Secretary of State for the Home Department v AF (No2) [2008] EWCA Civ 117, [2008] 1 WLR 2528, per Sir Anthony Clarke MR at paragraph 53; Bubbles and Wine, supra, per Leggatt LJ at paragraph 17. As Lord Wilson observed in Serafin v Malkiewicz [2020] UKSC 23, [2020] 1 WLR 2455 at paragraph 39, this definition of bias is "quite narrow". For that reason, like Lewison LJ, whose judgment I have read, I consider it preferable to consider the matter on the more general level of whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the father would not receive a fair trial.

26. A party may argue that a particular decision during proceedings was unfair. If so, his remedy is to seek to appeal against that decision. Alternatively, he may argue that the judge's treatment of his case was unfair over the course of the proceedings and that he should therefore recuse himself. In those circumstances, however, it is necessary to consider the whole of the proceedings to determine whether the judge's approach to the aggrieved party has been unfair. In Singh v Secretary of State for the Home Department [2016] EWCA Civ 492, [2016] 4 WLR 183, a case about apparent bias, Davis LJ said, at paragraph 36:

"It is necessary to consider the proceedings as a whole in engaging in the objective assessment of whether there was a real possibility that the tribunal was biased." In my judgment, it is also necessary to consider the proceedings as a whole when addressing an allegation that over the course of the proceedings the judge has treated a party unfairly.

15. Lewison LJ added the following:

67. In Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468, [2018] BLR 341 Leggatt LJ defined "bias" at [17] as follows:

"Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case ..."

*68. If “bias” is defined in that narrow way, I find it difficult to see how it can plausibly be said that the judge in this case was biased. But in *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455 at [39] the Supreme Court refrained from endorsing that definition, merely assuming it to be correct. In fact that case was decided, not on the basis of bias, but on the question whether there had been a fair trial. Lord Wilson went on to say in that paragraph:*

“... in so far as the judge evinced prejudice against the claimant, it was the product of his almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources.”

71. But in this case the trial (at least as regards the child’s welfare) has not yet taken place. So I would prefer to characterise the question as: would the fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the father would not receive a fair trial? Those facts include the judge’s procedural decisions during the course of the proceedings, and his interventions and interactions with the parties during oral submissions.

16. The thrust of the argument of CD is that it is not simply the existence of communications as set out above but their non-disclosure to the father which make recusal necessary.
17. I was referred to the case of *Brisset v Brisset* [2009] EWCA Civ 314. In that case there had been multiple communications between a circuit judge and a district judge about the appeal of the district judge’s order which was being heard by the circuit judge. The whole set of communications was directly about the substance of the appeal. The Court of Appeal said that notwithstanding that the court centre in which the proceedings took place might be small, it was essential to keep a Chinese wall. I did not find this case to be a helpful analogy as there has been no suggestion that any of the communications involving MacDonald J went to the substance of the matter before him, which was the appropriateness of the registration.
18. I asked whether there was any authority that supported the proposition that the failure to disclose communications, however harmless they might be, would in itself lead to the need for the judge’s recusal. TD, who had done prodigious research on the matter as his skeleton argument shows, was unable to direct me to any English authority but referred me to State of Illinois Judicial Enquiry Board Code of Judicial Conduct. This is plainly of no binding authority upon me. I accept that it provides that to avoid the need for recusal the judge should make provision promptly to notify the parties of the substance of any ex-parte communication and give the parties an opportunity to respond. This applies even to communications for scheduling or administrative purposes and which does not address substantive matters.
19. In my judgment there is no scope for a blanket rule in England and Wales that a judge is obliged promptly to notify parties of any communication which he or she might have for administrative or case management purposes. Judges are referred a huge amount of (normally) email traffic relating to the management and listing of cases. These may or may not be referred to the parties. Each communication has to be judged on its merits.

20. I return to each of the communications. It is difficult to analyse them in the absence of any memory by the judge, although that is not surprising, it being over a year ago. The communication of 5 October 2022 would in itself be unsurprising coming from a junior judicial officer to his Family Division Liaison Judge (now Presider). There can be no objection to the judge having told the Legal Advisor not to correspond with a party until the appeal had been determined (I suspect a more likely piece of advice than that recorded in the letter, namely not to respond until the case had been listed, particularly in the light of the next paragraph which refers to the notification of the outcome).
21. CD says that the purported instruction not to respond related to his request for the disclosure of documentation. Assuming this to be the case, although the letter does not show that this is obviously so, CD of course had the ability to apply formally either to the Family Court at Leyland or to the judge. I do not read the communication as being obstructive of CD's application or ability to apply.
22. I fail to see that there is anything even potentially prejudicial in the email of November 2022 in reply to CD's letter of 10 October. It seems to me perfectly proper for HMCTS to inform the court that they have not yet responded fully to CD's letter as they are waiting a reply from the disclosure team. The attachment of supporting correspondence to that effect adds nothing to the harmlessness of the communication.
23. I likewise can see nothing objectionable in the judge, if he did, telling Mr Dodgshon that the appeal was listed before him in January. Judges frequently are asked by lower court judges whether or not an appeal has been heard, and, if not, when it will be heard, and the provision of such information is entirely proper for the smooth running of the wheels of justice. In any event, the parties had themselves already received notice of the hearing date.
24. I did not understand TD to take any serious issue with my analysis of the communications. His point was that any communication should have been referred promptly to the parties and the absence of such referral provides the basis for a finding that there was a real possibility that the tribunal was biased.
25. I am not prepared to accept this submission. Unless there is evidence of any apparent prejudicial material within the communication, and there is not in this case, no fair minded and informed observer could properly conclude that there was a real possibility that the judge was biased.
26. I do not consider that CD is assisted by his reliance on FPR 29.12 to show that he was entitled to the documents that he was seeking but not receiving. I have not seen the detail of his requests but the rule makes clear that permission to have access to documents retained in court may be sought, and the mother told me that the applicant has made successful requests to the judge. But, this does not go to the issue which the court has to determine, namely whether the registration of the Colorado order was or was not justified.
27. I therefore dismiss the application that the judge shall be recused from the case.