Trinity Term
[2022] UKPC 28
Privy Council Appeal No 0045 of 2018

JUDGMENT

John Henry Smith and another (Appellants) *v* Attorney General of Trinidad and Tobago and others (Respondents) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Sales
Lord Leggatt
Lord Burrows
Lord Malcolm

JUDGMENT GIVEN ON
27 June 2022

Heard on 16 March 2022

Appellants (John Henry Smith and Barbara Gomes)
Edward Fitzgerald QC
Fyard Hosein SC
Joseph Middleton
Annette Mamchan
(Instructed by Simons Muirhead & Burton LLP (London))

Respondents
Thomas Roe QC
(Instructed by Charles Russell Speechlys LLP (London))

Respondents:
(1) His Worship the late Chief Magistrate Sherman McNicolls
(2) Attorney General of Trinidad and Tobago
(3) Director of Public Prosecutions

LORD MALCOLM:

1. These appeals from two related decisions of the Court of Appeal of the Republic of Trinidad and Tobago concern an application for the recusal of a judge presiding over criminal proceedings on the ground of apparent bias. They arise in the context of a long running and extraordinary set of circumstances. The test for such a recusal is whether a fair-minded and informed member of the public who considered the facts would conclude that there was a real possibility that the judge was biased. Sometimes it is asked whether there is a legitimate doubt as to the tribunal's impartiality, a quality seen as indispensable to the fair administration of justice. At the outset it is necessary to record the background circumstances in some detail.

The Piarco preliminary inquiries

2. The appellants were senior officers of insurance companies. Along with others they were charged with various fraud and corruption offences arising out of the development of the Piarco International Airport in Trinidad in the 1990s at a time when the United National Congress ("UNC") was in government. In December 2001 the People's National Movement ("PNM") came to power. In 2002 an Anti-Corruption Investigation Bureau ("ACIB") was established within the Ministry of the Attorney General. Under its auspices various criminal proceedings were brought concerning the awarding of airport contracts and related matters. There were four so-called preliminary inquiries in the nature of committal proceedings known as Piarco 1-4.

3. The appellants were defendants in Piarco 1 presided over by His Worship Chief Magistrate Sherman McNicolls (now deceased). Their co-defendants included the former Minister of Finance, Mr Kuei Tung, and others considered to be financial supporters of the UNC. In January 2008, after some 200 days of prosecution evidence led over several years, the Chief Magistrate refused a motion that he should recuse himself and committed all the defendants to stand trial.

4. Piarco 2 concerns similar allegations against Mr Kuei Tung and another former UNC Minister along with a number of UNC supporters. The Magistrate in charge retired in 2018 and the inquiry is still to be concluded. The same Magistrate presided in Piarco 3, in which Mr Basdeo Panday, the former Prime Minister and then the leader of the opposition, was alleged to have received a corrupt payment. Piarco 3 was also incomplete when the Magistrate retired in 2018 and is still to be concluded." Piarco 4 involves Mr Kuei Tung's partner and is unfinished. No trials relative to these proceedings have taken place.

The Chief Magistrate's land transaction and the Panday trial

5. In July 2005 the Chief Magistrate purchased a plot of land for $3.6m from Home Construction Ltd ("HCL"), one of the Colonial Life Insurance Co (Trinidad) Ltd ("CLICO") group of companies. The purchase and its funding placed significant financial pressures on the Chief Magistrate. Soon afterwards he sought a buyer for the land, but without success.

6. Quite separately from the Piarco inquiries, on 20 March 2006 a summary trial began before the Chief Magistrate in respect of a charge that, when he was the Prime Minister, Mr Panday failed to declare funds received and held in a UK bank account. (The same payment, allegedly made by CLICO to secure airport contracts, formed the subject matter of Piarco 3.) Apart from Mr Panday himself and a spiritual adviser who said that in Hindu households women deal with family finances, the only defence witness was Mr Lawrence Duprey, CLICO's most senior executive.

7. On the morning of 27 March 2006, which was the last day of evidence, Mr Duprey testified that the money was a scholarship to assist Mr Panday's daughter's studies in London. According to the account given the following year by the Chief Magistrate to the Mustill inquiry (discussed below), later that day he phoned Tony Maharaj of CLICO and asked him to send $400,000 as soon as possible. (A few days later the Chief Magistrate told the Attorney General that this was a down payment on the purchase of his land.) The money arrived the following morning in the form of a banker's draft drawn on the account of Caribbean Money Market Brokers Ltd, another CLICO company. The Chief Magistrate deposited it in his bank where it was credited to his account. (In subsequent conversations the draft was sometimes referred to as a cheque.)

8. It soon emerged that there was an apparent difficulty with the draft which had not cleared. However the Chief Magistrate had already used the money to pay off interest on his bank loan and to reduce his overdraft. This required him to take out another loan since in the meantime he had decided to return the money. On 3 April 2006 he told Mr Maharaj that the sale of the land was off.

The Chief Magistrate's meetings with the Chief Justice concerning the Panday trial

9. On the same day as the receipt of the banker's draft, namely 28 March 2006, the Chief Magistrate met with Chief Justice Satnarine Sharma. According to the Chief Magistrate this was their third conversation concerning the Panday trial. He has

claimed that in early March 2006 the Chief Justice informed him that he had told the prosecuting counsel that in Hindu families it is wives who take care of the family finances. On the second day of the trial the Chief Justice told him to pay particular attention to the leading defence counsel who was "very good". As to the meeting on 28 March, the Chief Magistrate's version of events was that the Chief Justice said that he considered it to be a politically motivated trial and that the defendant spoke the truth. The Chief Magistrate was told the points to be noted in his judgment which should be submitted to the Chief Justice before it was issued. His account of these interventions formed the basis of the Chief Magistrate's subsequent strongly contested claim that the Chief Justice put pressure on him to acquit Mr Panday.

The involvement of the Attorney General and the conviction of Mr Panday

10. In or around late March/early April 2006 the Chief Magistrate told the Attorney General, John Jeremie SC, that the Chief Justice had tried to influence his decision in the Panday trial. He also mentioned the $400,000 payment. According to the Attorney General, the Chief Magistrate told him that a land transaction had "inexplicably been activated" by a down payment and an offer to purchase the land made by a CLICO subsidiary. The Chief Magistrate said that he was troubled by this and so he returned the deposit. (This on the face of it exculpatory account was subsequently contradicted by the evidence given by the Chief Magistrate in 2007 to the Mustill inquiry.) In a statement given later the Attorney General said that he told the Chief Magistrate to forget about the matter until after he had freed himself of the Panday trial.

11. On 24 April 2006 the Chief Magistrate convicted Mr Panday and imposed the maximum prison sentence. While there is some dispute as to the exact chronology, according to the Attorney General it was after the conviction when he met with Mr Andre Monteil, an old friend and a senior CLICO executive. He told him that he had reason to believe that CLICO had attempted to bribe the Chief Magistrate and that they should "clean up their mess". If, however, the transaction had been in good faith the Chief Magistrate should not suffer through being overly cautious in returning the cheque.

12. On 28 April 2006 Mr Monteil asked Mr Michael Fifi, HCL's chief executive officer, to buy the land back from the Chief Magistrate. He was reluctant to do so, an earlier inquiry from the Chief Magistrate having been refused as it was against company policy. The Attorney General joined the call and asked Mr Fifi whether he could finalise the repurchase reasonably quickly. Mr Fifi then gave instructions for the land to be bought by a subsidiary of HCL for $3.9m, this being the price paid by the Chief Magistrate plus the stamp duty.

Events in May 2006

13. A lot happened in May 2006. On the first of the month the Chief Justice and the Chief Magistrate met and discussed both the Panday trial and the land issue. Later they gave conflicting accounts as to what was said. On 5 May the Chief Magistrate signed an agreement for the repurchase of the land and received a deposit of $390,000. The transaction completed a week later, well short of the normal 90 day period for such matters. The Attorney General later indicated that it was this which caused him to breathe "a sigh of relief" and close an investigation into the circumstances of the payment to the Chief Magistrate. Also on 5 May the Chief Magistrate made a written statement to the Prime Minister alleging that the Chief Justice attempted to influence his decision in the Panday trial. On 8 May the Chief Justice provided a statement to the Judicial and Legal Services Commission ("JLSC") about the Chief Magistrate's land transaction.

14. On 10 May the Chief Justice issued a press release questioning the propriety of the Chief Magistrate's land transaction and the Attorney General's involvement in it. The next day a press statement from the Attorney General was published. He denied putting pressure on HCL to buy the land and criticised the Chief Justice for his smears against the Chief Magistrate. In addition the Chief Magistrate made further statements to the Prime Minister and to the police regarding his allegations against the Chief Justice.

15. On 12 May the Chief Justice complained to the police about the Chief Magistrate's land transaction. He also sought judicial review (ultimately unsuccessfully) of the Prime Minister's decision to institute an inquiry under section 137 of the Constitution into his conduct, and in particular as to whether he should be removed from office. (In due course the inquiry was held under the chairmanship of Lord Mustill.) In July 2006 the police charged the Chief Justice with attempting to pervert the course of justice. Subsequently he was prosecuted with the Chief Magistrate being prospectively the main witness in the case.

Closure of the prosecution case at Piarco 1

16. Throughout all of the above the Chief Magistrate was continuing to conduct the Piarco 1 inquiry. On 19 September 2006 the prosecution closed its case and the proceedings were adjourned for written submissions addressing a motion of no case to answer. On 11 October the prosecution filed a notice of proposed amended and additional charges. The defence objected to this being done at such a late stage. At a hearing on 27 November 2006 the Chief Magistrate ruled that such changes to the

charges could not arise after the prosecution had closed its case and that the application would not be entertained. The defence was told to confine its submissions to the original 21 charges. Mr Jenkins QC confirmed that the prosecution would proceed on the basis of those charges. In February and March 2007 the Chief Magistrate heard submissions on the no case to answer application in respect of the existing charges. He reserved judgment until a later date.

The prosecution of the Chief Justice

17. On 13 February 2007 the Chief Magistrate wrote to the Director of Public Prosecutions ("DPP") inviting him to stay the prosecution of the Chief Justice pending the anticipated section 137 proceedings. The next day he gave a sworn statement for use in the committal proceedings against the Chief Justice. In addition to reiterating his allegations, he stated that at their 1 May 2006 meeting the Chief Justice indicated that everything about the land would come out. The Chief Magistrate said that when he received the $400,000 he thought that it was designed to implicate him in a suspicious or illegal transaction.

18. Not having received a reply to his letter to the DPP the Chief Magistrate informed the Deputy DPP that he never intended the Chief Justice to be prosecuted, only that there be an investigation under the Constitution, and that he was unwilling to give evidence in the criminal proceedings. The Chief Magistrate told the Attorney General of the lack of any response to his letter to the DPP. The Attorney General set up a meeting to take place on 23 February 2007 between himself, the Deputy DPP and the Chief Magistrate "to thrash out the issues". The Chief Magistrate did not attend but the Attorney General communicated his concerns about oppression and the possible need to disengage one set of the proceedings against the Chief Justice.

19. The criminal proceedings against the Chief Justice were required to be adjourned on two occasions because of the failure of the Chief Magistrate to attend. However on 5 March 2007 he was due to give evidence and be cross-examined. That morning he told prosecuting counsel that he was not willing to testify. When the Chief Magistrate entered the witness box counsel informed the judge that having regard to the position of the witness the prosecution was being withdrawn. The Chief Justice was discharged. The Deputy DPP issued a press release explaining how and why this had happened. She wrote to the Chief Magistrate telling him that his position was untenable. The next day a press release from the Chief Magistrate stated that he would give evidence in the proper forum, namely the inquiry set up under section 137. Later that month Ventour J informed the Chief Magistrate that he had been appointed by the JLSC to investigate a charge that, in refusing to testify, he had acted in a manner prejudicial to the administration of justice.

Mr Panday's successful appeal against conviction

20. On 4 April 2007 the Court of Appeal quashed Mr Panday's conviction because of the appearance of bias on the part of the Chief Magistrate - *Panday v Virgil* (Mag App No 75 of 2006). At paras 60-61 of his judgment Archie JA (as he then was) explained that whatever the truth of the conflicting assertions or the motivations for the actions taken, the inescapable conclusion was that a fair-minded and well-informed observer would conclude that "there was a real possibility that when the Chief Magistrate decided the appellant's case, his mind was affected by unconscious bias". He had received what he suspected was a bribe connected to the evidence of Mr Duprey. Also the Chief Magistrate had said that he was the subject of improper pressure from the Chief Justice, his administrative superior and the chairman of the JLSC which exercised disciplinary control over him. An informed observer would be aware of the political sensitivity of the matter and the attempt to initiate section 137 proceedings against the Chief Justice. The Chief Magistrate's complaint and his linkage of it with the land transaction raised a question as to whether he would be pre-occupied about his own image or credibility. "The fair-minded and informed observer might conclude that there would be at least a subconscious desire to do what he perceived might please the current political directorate." That impression would be reinforced by the Attorney General's willingness to become personally involved in both matters.

21. In her judgment (para 52) Warner JA referred to Wills J's observations in *R v Huggins* [1895] 1 QB 563 that it would be "impossible to overstate the importance of keeping the administration of justice by magistrates clear from all suspicion of unfairness". The Chief Magistrate had a duty to inform the parties of all that was troubling him. She referred to the sensitivity of the case; that the Chief Magistrate's doubts about the cheque were sufficiently grave to cause him to report the matter to the Attorney General; and that Mr Panday and the Attorney General were on opposite sides of the political divide. In para 105 she noted that an observer would appreciate that Mr Panday was convicted before the Attorney General decided to take no further action against the Chief Magistrate. In her view the weight of authority spoke to unconscious bias. The Chief Magistrate's vacillation on testifying against the Chief Justice threw further light on his earlier conversation with the Attorney General (para 110).

22. The Court of Appeal's decision in the *Panday* case preceded the revelations at the Mustill inquiry, which included details as to the Chief Magistrate's direct involvement in the payment of the money, its purpose, and his use of it. Before then the Chief Magistrate's position was essentially that a cheque came out of the blue and was returned because he was suspicious that he was being set up. Had the Court of Appeal known the full picture it is likely that its criticisms would have been more

severe, albeit it was said that "extraordinary" hardly did justice when describing the sequence of events unfolding in the first half of 2006.

23. It can also be noted that the Panday conviction occurred on 24 April 2006 in advance of the bulk of the Attorney General's efforts on the Chief Magistrate's behalf, and certainly before they came to fruition with the repurchase of the land by a CLICO company and the shutting down of an investigation into his conduct. No doubt the Court of Appeal had in mind the benefit for the Chief Magistrate of keeping the Attorney General on his side; and by the time of its decision to quash the conviction it was clear that any such hopes had been fulfilled.

Piarco 1 ruling on the no case to answer submissions

24. On 9 July 2007 the Chief Magistrate addressed the no case to answer submissions made in Piarco 1 earlier that year. He discharged the defendants on all the original charges. However he committed them to stand trial on the amended and additional charges which previously he had refused to entertain. A judicial review raised by two of the appellants' corporate co-defendants challenging the Chief Magistrate's power to do this was dismissed by the Court of Appeal in October 2007. (This played a part in the reasoning of the courts below in the current proceedings and is mentioned later in that context.)

The JLSC charges

25. In August 2007, having considered a report by Ventour J, the JLSC confirmed that it was preferring charges against the Chief Magistrate of bringing the administration of justice and the judiciary into disrepute by refusing to give evidence in the criminal trial. While the JLSC indicated an intention to suspend the Chief Magistrate, earlier in June it had decided that it would defer that matter until after his completion of the Piarco 1 inquiry.

26. The Chief Magistrate applied for leave to raise a judicial review of these decisions and also the Commission's failure to keep its deliberations confidential which he considered had facilitated extensive media criticism and damaged his professional reputation. That challenge eventually reached the Judicial Committee of the Privy Council (*McNicholls v Judicial and Legal Service Commission* [2010] UKPC 6) where the two by then remaining charges were allowed to proceed. The Chief Magistrate retired later in 2010 after which the disciplinary proceedings were taken no further.

The Chief Magistrate's evidence to the Mustill inquiry

27. In the latter half of 2007 the Mustill inquiry set up under section 137 of the Constitution began to hear evidence concerning the allegations against the Chief Justice. In his written statement for the inquiry the Chief Magistrate said that in the week of 20 March 2006, which was when the Panday trial began, he received a telephone call from someone saying he was Tony Maharaj of CLICO who offered to buy the land he was trying to sell. The Chief Magistrate gave details of how he called Mr Maharaj on 27 March 2006, being the last day of the trial when Mr Duprey of CLICO gave evidence in Mr Panday's defence, and arranged to receive a deposit of $400,000. However, because of his suspicions he subsequently changed his mind about the transaction.

28. In September 2007 the Chief Magistrate gave evidence to the inquiry under oath and was subjected to cross-examination on the circumstances of his receipt and repayment of the money. In summary he gave the following explanation. He knew that the evidence given by Mr Duprey, that CLICO paid a scholarship rather than a bribe, was vital to the defence. That day he called Mr Maharaj to confirm that he wanted to accept his offer to purchase the land for $4m. The land had been on the market for six months and this was the only expression of interest. He was heavily in debt in respect of a $3.8m loan facility and was incurring bank charges. He asked for the deposit to be paid as quickly as possible. Before he received it he sent Mr Maharaj a certified copy of a deed for the land which he had been given in September 2005. Mr Maharaj had claimed that the same document was sent to him in March 2006 after he called the Chief Magistrate to discuss the purchase of the land. However when shown the relevant exhibit the Chief Magistrate confirmed that in fact the deed had been certified in June 2006. He was unable to say where he and Mr Maharaj had obtained the document.

29. The Chief Magistrate testified that the draft for $400,000 was brought to the court building the next day. There was no written agreement regarding the sale of the land and he did not provide a receipt. He denied the suggestion that it was a bribe and had nothing to do with the land. He did understand that Mr Duprey was a director of the company which provided the bank draft. On its receipt it did not occur to him that it was a dubious transaction. The money was a deposit for the sale of his land. That day he deposited the draft with his bank. On 31 March he was told there was a problem with the payment, but by then he had used the funds to reduce his overdraft and make interest payments.

30. On 3 April 2006 the Chief Magistrate told his bank manager that he was "in a bind". He wanted to pay the money back even though his account was overdrawn. The

bank provided a cheque for $400,000 made out to Tony Maharaj which the Chief Magistrate sent to Mr Maharaj along with a covering letter saying that he no longer wanted to proceed with the land transaction. This was because, having reflected on the matter, it might have been a trap set for him.

31. When telling the inquiry about the advice given to him by the Chief Justice regarding the Panday trial the Chief Magistrate added: "… I recall distinctly on a previous occasion in the Kuei Tung matter when Mr Jenkins came in as QC for the state, he told me; his exact words were: 'Pay particular attention to Mr Jenkins, because he was there to guide me'". The "Kuei Tung matter" was a reference to Piarco 1, where Mr Jenkins was the leading prosecution counsel. Referring to the Chief Justice's remarks about foreign counsel the Chief Magistrate said: "I know the Chief Justice very well, sir. When he says something, I know the signal he is giving".

The Mustill inquiry's report

32. The Mustill inquiry's report was presented to the President of the Republic on 20 December 2007 and published in the press the following day. It stated that the picture presented to the tribunal "almost defies belief". There had been a "battle of press releases" and the air was full of rumour, innuendo and gossip "around and across deep political (and, we are forced to say, ethnic) divides." The separation of powers seemed to have been ignored.

33. According to the report the accounts of the meetings between the Chief Magistrate and the Chief Justice, which emerged by fits and starts as the days went by, did not ring true. There were no suspicious circumstances surrounding the evidence of the Chief Justice comparable to those "overshadowing" the accounts given by the Chief Magistrate whose conduct was "shrouded in mystery" (para 97). There had been no satisfactory explanation for the long delay in him putting his complaint against the Chief Justice into writing, nor for the failure, which the Court of Appeal had regarded as culpable, to convey his misgivings to counsel involved at the Panday trial. These considerations, and that the story seeped out by degrees, reinforced a "sense of unease". And there was the "remarkable story" of the Chief Justice's trial. No explanation of the Chief Magistrate's last minute change of heart in refusing to testify could leave his credibility untouched, and indeed none had been offered. The report continued: "… whatever the true state of affairs this episode seriously shakes the confidence which we can place in the Chief Magistrate's testimony" (para 100). The tribunal "would hesitate long before concluding, on the basis of the way in which he gave evidence, that the necessary standard of proof [for proving the allegations against the Chief Justice] has been achieved".

34. The recommendation to the President was that the question of the Chief Justice's conduct and his possible removal from office should not be referred to the Judicial Committee of the Privy Council. No such referral was made. Thus the Chief Justice emerged relatively unscathed with his position, including that of chairman of the JLSC, secure. On the other hand the report must have made extremely uncomfortable reading for his accuser, not least since it was in the public domain.

Refusal of the application that the Chief Magistrate should recuse himself from Piarco 1

35. On 10 December 2007, some ten days before the Mustill report was presented and published, counsel for the appellants and their co-defendants invited the Chief Magistrate to recuse himself from Piarco 1, failing which to refer the matter to the High Court under section 14(4) of the Constitution. Among other things it was contended that he was beholden to the Attorney General in that he had been the beneficiary of substantial financial advantages at the behest of the Attorney General who had a serious and declared interest in the prosecution of the Piarco 1 charges and related matters, all of which he was happy to describe as fraud in relation to the airport project. The proceedings were adjourned to allow for written submissions which were lodged on 21 December.

36. In brief summary the appellants' written submissions drew attention to the payment of $400,000 and its surrounding circumstances; the Attorney General's involvement in the sale of the land; his support for the Chief Magistrate and his publicly declared interest in securing convictions of the Piarco 1 defendants. Reference was made to the evidence at the Mustill inquiry to the effect that the Chief Magistrate was told by the Chief Justice to pay particular attention to the lead prosecuting counsel. Reliance was also placed on the Court of Appeal's finding of apparent bias in the Panday trial; the disciplinary proceedings instituted by the JLSC; and the critical comments in the Mustill report.

37. On 7 January 2008 the Chief Magistrate delivered an oral judgment in remarkably peremptory terms simply refusing the defendants' recusal applications as being without merit. No reasons were given. Under section 14(4) of the Constitution he was required to grant an application to refer the matter to the High Court unless the applications were frivolous and vexatious. When this was pointed out he added that they were frivolous and vexatious. At the conclusion of the hearing the Chief Magistrate committed all the defendants to stand trial on the new charges. To date no indictment has been filed and the trial has not taken place.

The claim of apparent bias and the proceedings in the courts below

38. The appellants and other defendants challenged the ruling on recusal and other aspects of the Chief Magistrate's conduct by way of applications for leave to file for judicial review. Separately the appellants sought constitutional relief for breach of their right to due process and a fair hearing under respectively sections 4 and 5 of the Constitution. The Chief Magistrate lodged an affidavit in which he denied receiving financial advantages or favours from the Attorney General. There had been no attempt by the Chief Justice to influence him in Piarco 1 and he had treated Mr Jenkins QC in the same way as any other counsel appearing before him. He was challenging the JLSC proposed charges in a judicial review. He considered that many of the allegations were "scandalous and an attempt to discredit the administration of justice".

The High Court judgments

39. On 12 January 2009 Bereaux J refused the applications for leave to file for judicial review because of both delay in raising the proceedings and non-disclosure of an earlier judicial review decision; also ruling that in any event none of the grounds of challenge were arguable. In respect of the appearance of bias case, it was "far-fetched at best". The specific complaints were described as speculative and fanciful.

40. The appellants' claim for constitutional relief was dismissed by the same judge on 14 January 2009. The reasons for this were given in a judgment delivered on 30 June 2010. It was noted that the alleged breach of the right to a fair hearing and due process was based on the same claim of apparent bias relied upon in the unsuccessful judicial review proceedings.

41. It had been contended that apparent bias resulted from the significant financial and other advantages in favour of the Chief Magistrate at the behest of the Attorney General who had an interest in the airport prosecutions, was actively seeking convictions, and was also pursuing litigation abroad in connection with the same allegations. The Chief Magistrate was said to be beholden to the Attorney General for a number of reasons, including bringing about the repurchase of the land and thereby resolving his severe financial problems; for supporting the Chief Magistrate when the Chief Justice raised concerns about impropriety and misconduct regarding the receipt of $400,000; and for siding with him in his allegations against the Chief Justice. The Attorney General also helped to ensure that the Chief Magistrate did not have to testify in the criminal trial. It was submitted that all of this suggested that the Chief Magistrate may have had a disposition to adjudicate in a manner which would find favour with the Attorney General. Reference was also made to concerns arising from

the looming JLSC disciplinary charges and his proposed suspension which had been deferred pending the completion of Piarco 1. In addition the Chief Magistrate had told the Mustill inquiry that the Chief Justice, who was also chairman of the JLSC, advised him to be guided by the Piarco 1 lead prosecuting counsel.

42. Bereaux J dismissed the constitutional claim for two reasons. First there was an alternative remedy of judicial review and as a result the claim was an abuse of process. Secondly there was no breach of the constitutional right to due process and a fair hearing because no apparent bias was established. He accepted the denials of bias set out in the Chief Magistrate's affidavit. A direction from the Chief Justice did not mean that the Chief Magistrate favoured the prosecution nor that he did other than come to his own view. In any event the advice from the Chief Justice was innocuous. The Chief Magistrate was not the first adjudicator simply to accept prosecuting counsel's proposals. This could have been explained by a desire to bring a long running matter to an end.

43. Bereaux J held that there was no connection between the advantages allegedly received by the Chief Magistrate and the offences charged in Piarco 1. The parties in *Panday v Virgil* (where the Court of Appeal quashed the Panday conviction because of apparent bias) were different. There were no commercial relations between the current claimants and the finance company whose employees played a role in the Panday case. *Panday v Virgil* was distinguishable. In any event there had been no proof of financial advantage to the benefit of the Chief Magistrate, this being a necessary precondition for the claimants to succeed.

44. As to the disciplinary charges, the view was that the Chief Magistrate enjoyed the presumption of innocence. This was sufficient to maintain his credibility in the public domain, especially since he was determining only whether there was a case to answer, not guilt or innocence. The original charges were brought by the DPP, and as a constitutionally independent officer the Attorney General could have no interest in them. (As noted earlier, the Piarco 1 charges were in fact brought by an officer of the ACIB which had been set up by the incoming PNM government to address corruption in the public sector and was located in the Ministry of the Attorney General.) Bereaux J's overall conclusion was that the complaint of apparent bias was speculative and totally without merit.

The Court of Appeal judgment

45. On 23 January 2009 these appellants filed notices of appeal in respect of their claims for constitutional relief and judicial review. They were conjoined with an appeal

by three other Piarco 1 defendants. While these proceedings were pending, in 2012 the Chief Magistrate passed away. A hearing took place before the Court of Appeal in December 2016. Judgment dismissing the appeals was delivered on 28 June 2017. The reasons were given in the judgment of Rajkumar JA with which the other members of the court, namely Smith and Pemberton JJA, agreed.

46. The Court of Appeal upheld a number of the challenges to the decisions below, for example Bereaux J had erred in dismissing the judicial review applications brought by the current appellants because of delay and non-disclosure. Also the constitutional claim was not an abuse of process. It was noted that both the constitutional claim and the judicial review raised substantially the same issue as to apparent bias. The court below was wrong to regard this matter as unarguable and it required to be addressed on its merits in both processes. However on a fuller consideration of the allegations on their merits, the application for judicial review and that for constitutional relief were both unsustainable thus the appeals were dismissed.

47. The submissions in support of apparent bias were much the same as those in the court below though with perhaps greater reliance on the judgments in *Panday v Virgil* and the publicity given to the Mustill report. Rajkumar JA referred to the same test for apparent bias as that adopted by Warner JA in *Panday* which in turn had been taken from Lord Hope of Craighead's speech in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at para 103, namely "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

48. Rajkumar JA noted that the observer is not a lawyer; is informed as to at least the most basic considerations relevant to a conclusion founded on a fair understanding of all the relevant circumstances; and is deemed to be "neither complacent nor … unduly sensitive or suspicious when he examines the facts" (Kirby J in *Johnson v Johnson* [2000] HCA 48; 201 CLR 488). It was recognised that a risk of unconscious bias may suffice. There need not be a finding of judicial misconduct or breach of the judicial oath. Bias can operate in such an insidious manner that the person alleged to be biased may be unconscious of the effect. If there is a reasonable apprehension of bias, credibility issues no longer arise; the whole proceeding is infected and cannot be saved. It is clear that the Court of Appeal adopted the correct test, hence, and whatever the Board's own view might be, the respondents' submission is that it should decline to interfere.

49. Under the heading "Linkage", Rajkumar JA adopted a three-stage test taken from *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 involving first, identification of what it is that might divert the judge from an impartial judgment on

the merits of the case; secondly, the articulation of a logical connection between it and the feared deviation from the proper path; and thirdly an assessment as to whether the fair-minded and informed observer would conclude that there was a real possibility that the case would not be decided impartially. While no doubt there can be utility in this analysis, it is not a necessary approach to the assessment of a claim of apparent bias. It might carry a risk of persuading the court to look for a direct causal connection between the matter of concern and the outcome of the case; and this notwithstanding that it is well-established that an appearance of bias is sufficient. When the proposition is apparent bias it is not necessary to demonstrate that the tribunal was in fact biased, nor that absent the perceived problem the decision would have been different. These are matters which will often be difficult to prove.

50. Rajkumar JA's judgment on the bias challenge began with a detailed analysis of the judgments in *Panday v Virgil*, which were noted to relate to events occurring in the specific context of the matter pending against the former Prime Minister. The issue of out of court conversations and the failure to disclose them had been causes of concern but did not arise here. The Chief Magistrate being beholden to the Attorney General was discussed in paras 82-86. It was clear that the Attorney General had assisted in the sale of the land, had exonerated the Chief Magistrate after a cursory examination, and had intervened in respect of the failure to testify at the trial. All of this was apparent from the Court of Appeal judgments delivered on 4 April 2007. However in the present case "the informed observer would not be able to discern a similar obvious link between the instant appellants and the then [Attorney General]". Nonetheless it had to be considered whether the matters discussed in *Panday v Virgil* "were sufficient either by themselves or in combination with other matters to justify the instant allegations of apparent bias, and the link between them, (if any), and the instant matter". It was clear that since April 2007 the reasonable and informed observer could have perceived that the Chief Magistrate may have been beholden to the then Attorney General.

51. The judgment continued to the effect that the linkage between a subconscious desire on the part of the Chief Magistrate to please the current political directorate and the outcome of the trial was demonstrated in the circumstances of *Panday v Virgil*. However no such link had been demonstrated between any such desire to please and the outcome of Piarco 1 (paras 87-88).

52. Rajkumar JA then observed (paras 89-90) that judicial review proceedings brought by other defendants in relation to the Chief Magistrate's ruling of 9 July 2007 to substitute the new charges (*McNicolls v Fidelity Finance and Leasing Co Ltd* Civ App No 127 of 2007) did not raise the issue of bias in the Court of Appeal, even though the decision quashing the Panday conviction had been issued in April of that year. The

"most favourable analysis" was that the findings in *Panday v Virgil* were insufficient to justify an allegation of bias in Piarco 1, but a different picture might emerge when coupled with matters subsequently revealed. It was therefore necessary to ask whether the revelations at the Mustill inquiry that the cheque had not been returned, but rather was deposited in the Chief Magistrate's bank, and that the deed relied on was dated two months after the transaction was cancelled, established 'a real possibility of bias … **in relation to these appellants**' (emphasis in the text). The answer was that they added nothing to matters which were on the public record after the *Panday v Virgil* decision, namely that the Chief Magistrate could be perceived to be beholden to the then Attorney General and that the Panday conviction was vitiated by apparent bias (paras 94-95).

53. Elaborating on the no-linkage view, Rajkumar JA noted that while, as with Mr Panday, some of the appellants' co-defendants were on the other side of the political divide, they had not raised an allegation of bias in their 2007 judicial review. Even on the assumption that the Attorney General had a non-neutral interest in the outcome of Piarco 1, given the passage of time since the sale of the Chief Magistrate's land and his exoneration "it would not follow that the reasonable observer would conclude that the [Chief Magistrate] … would be so generally beholden and indebted to the then [Attorney General] in January 2008 as to commit the instant appellants to trial, whatever the merits of the case against them" (para 96). As will be elaborated upon later, this and other passages can be cited as examples of the linkage approach causing the judge to reject a case based on a real possibility of bias because actual bias had not been established.

54. The Board is also concerned as to the importance placed on the absence of a bias challenge in the earlier proceedings raised by other defendants in respect of the decision on the new Piarco 1 charges and the readiness to proceed on the basis that this disproves any ground for concern at that time. Rather than take that as a baseline which invalidates the challenge unless something new and persuasive demonstrates otherwise, the *Porter v Magill* test simply requires an objective consideration of how all the relevant facts as at the date of the impugned decision would be perceived by the fair-minded and informed observer.

55. As for the direction by the Chief Justice that attention should be paid to the prosecuting counsel, this was addressed at paras 134-139. It is plain that Rajkumar JA doubted that it had in fact been made. In any event, if it had been said the observer would conclude that the Chief Magistrate dismissed it from his mind. In May 2006 the Chief Magistrate had complained about the Chief Justice trying to influence him in the Panday trial and he was the main witness in impeachment proceedings. It would be "absurd" to think that he would be influenced by the Chief Justice regarding Piarco 1.

56. None of the other specific complaints, which included the Chief Magistrate's volte-face on the new charges, the disciplinary proceedings and the Mustill report criticisms, either individually or as part of an accumulation of concerns, vouched apparent bias.

57. Before the Court of Appeal the constitutional claim, which previously ran in tandem with the apparent bias complaint, was broadened to a submission that even if the concerns as to apparent bias were not established, in the whole circumstances the Chief Magistrate was unfit to hold judicial office, thus the constitutional guarantees of due process and a fair hearing were breached. It was held that there was no room for a separate yet to be identified category of free-ranging unfitness which had not been determined objectively by the specified and independent body, namely the JLSC. The court could not uphold a challenge if it did not fall within existing categories of law such as bias, unreasonableness, or illegality (para 127).

58. The ultimate conclusion was expressed as follows at para 149(viii): "… on a fuller consideration of the allegations of apparent bias **on their merits**, whether on the Judicial Review application or on the Constitutional motion, the trial judge was entitled to find as he did that the allegations of bias and/or constitutional breaches of the right to a fair hearing and to due process, and to the protection of the law, were ultimately unsustainable" (emphasis in the text). Despite the wording here, it is apparent that the Court of Appeal considered the issue anew and proceeded on its own assessment of the merits of the claims.

The issues

59. The present appellants, but not the other appellants in the Court of Appeal, sought leave to appeal to the Judicial Committee. Final leave was granted in February 2018. (Subsequently the first appellant passed away and an application to substitute a representative in these proceedings is pending.)

60. In the judicial review appeal the issue is whether the Court of Appeal was entitled to conclude that there was no appearance of bias, and that any concerns about the Chief Magistrate's independence and impartiality were not so serious as to deprive the appellants of their right to due process and a fair hearing.

61. The constitutional issues are (i) the proper scope of section 4(a) of the Constitution which protects the right to due process, and (ii) the nature of the

protection conferred by section 5(2)(f)(ii) regarding the right to a fair and public hearing before an independent and impartial tribunal.

The case for the appellants

62. The appellants contend that the Court of Appeal erred in concluding that the factors which tainted the Panday conviction have no connection with or relevance to Piarco 1. For example, the significance of the Chief Magistrate's indebtedness to and subconscious desire to please the Attorney General and the then current political directorate would be apparent to an observer of both politically charged events. The context is that the appellants' co-defendants included the former Minister of Finance and other supporters of the UNC which was in office under Mr Panday's leadership when the airport was constructed. After gaining power the PNM established the ACIB under the jurisdiction of the Attorney General, a political appointee, to investigate concerns regarding airport contracts and related matters. His cabinet responsibilities included corruption matters.

63. The Piarco 1 charges were made and the preliminary inquiries instituted not by the usual authorities but by the ACIB. The complainant in Piarco 1 was the ACIB's senior officer. The Attorney General had invested much in a successful outcome. He had made plain his views on the guilt of the Piarco defendants in public pronouncements which had been judicially described as "overzealous" (Warner JA in *Ferguson v Attorney General of Trinidad and Tobago* Civ App No 60 of 2007 at para 58, a case arising out of extradition requests made by the USA). The Panday trial and the Piarco inquiries were both rooted in the airport corruption allegations. In *Panday v Virgil* Warner JA noted that the observer would be presumed to know that the Attorney General and Mr Panday "were on different sides of the political divide" (para 104(v)). The same would apply in respect of the Piarco defendants. Furthermore, the pressure to please was even greater by January 2008 given the public furore surrounding the Chief Magistrate.

64. The Court of Appeal erred in concluding that the evidence at the Mustill inquiry as to the circumstances of the receipt of the $400,000 and the land transaction added little to what was already in the public domain. On the contrary these were important revelations which would have exacerbated any assessment of how compromised the Chief Magistrate was and the extent to which he was beholden to the Attorney General.

65. It is submitted that the Court of Appeal considerably underplayed the importance of the Chief Magistrate's evidence about the Chief Justice telling him to

pay particular attention to the prosecuting counsel because he was there to guide him. The observer would see this as an instruction to a subordinate from a superior attempting to influence the proceedings. On the contentious issue of the new Piarco 1 charges, which had been prompted and supported by Mr Jenkins, the observer would notice that, having initially rejected them, the Chief Magistrate made an about turn, adopted them verbatim, and then ordered each of the defendants to face all of them at trial. Unlike in the Panday trial the Chief Justice's intervention pointed in the same direction as the Attorney General's preferred outcome.

66. By January 2008 the Chief Magistrate was "beleaguered" and "hopelessly compromised", all adding to a concern that he would not want to do anything which might jeopardise the support he had been receiving from the Attorney General and the government. His conviction of the former Prime Minister had been quashed because of an appearance of bias on his part. The public was aware that the JLSC had preferred disciplinary charges and had decided to defer the question of his suspension until after completion of Piarco 1. The Mustill report gave weight to the JLSC's allegation that by refusing to testify in the trial of the Chief Justice he had brought the administration of justice into disrepute. The pressures on him were increased by the other critical comments in the report which was published in the lead up to his decision on recusal and committal. His professionalism, credibility and integrity had been impugned. It was clear that he had given misleading accounts as to the circumstances of the receipt of the money on the last day of the Panday trial and what was done with it. They had caused the Attorney General to accuse the Chief Justice of spreading smears against the Chief Magistrate.

67. The appellants contend that by January 2008 the circumstances transcended notions of bias and robbed the Chief Magistrate of the moral authority necessary for any judicial officer to preside in a manner consistent with due process and the fair administration of justice. It followed that the appeals in both the claim for constitutional relief and the judicial review should be allowed.

The case for the respondents

68. The respondents rely on the reasoning in the courts below. The judgments should be afforded a considerable degree of deference given the judges' awareness of the local issues, attitudes and customs which would be attributed to the fair-minded and informed observer. An analogy can be drawn with observations of the Board in another appeal from Trinidad and Tobago, namely *Dass v Marchand* [2021] UKPC 2; [2021] 1 WLR 1788. The correct legal test was applied. In the absence of a serious error in law or principle, the Board is faced with no more than a disagreement with the

outcome. In short there is no proper basis for interfering with the carefully reasoned decision of the Court of Appeal.

69. In any event the Court of Appeal correctly held that to find a link between the outcome of Piarco 1 and the wishes of the Attorney General would require "an extraordinary degree of speculation". The factors which were determinative in *Panday v Virgil* have no application to Piarco 1. For example, the appellants were not politicians. The Chief Magistrate discussed the Panday case with the Attorney General while his judgment in the Panday trial was pending. After it was issued the Attorney General intervened regarding the sale of the land and resolution of the Chief Magistrate's financial problems. It is not a surprise that the observer would perceive a real possibility of bias in that case, but to do so in respect of the Piarco 1 decision taken many months later would require the exercise of undue suspicion.

70. As to the injunction regarding prosecuting counsel, if it was made, it was equivocal. Judges should pay attention to counsel. In any event the Chief Magistrate and the Chief Justice being openly at odds, no fair-minded observer would think it could have any effect on the decision.

71. The observer would be hard-pressed to identify any connection between the decision to be made in Piarco 1 and the Chief Magistrate's evidence to the Mustill inquiry and the criticisms in its report; and similarly regarding the JLSC charges. In so far as the Chief Magistrate was subject to an accumulation of pressures, they did not all point in the same direction. For example, surely the JLSC charges would impress on him the importance of strict compliance with the judicial oath.

72. If and in so far as the complaint of an alleged lack of moral authority is presented as a free-standing challenge not dependent on success on bias, it is incompatible with judicial independence and the Constitution of the Republic. It is only the JLSC which can remove a judge from office and only on the grounds specified in section 137(1). Matters never reached that stage. Along with others the Chief Magistrate acted unwisely, but it would be going too far to hold that this disqualified him from all cases. The constitutional claim adds nothing to the judicial review based on apparent bias and is an abuse of process.

The Board's views on the issues

73. The Board is not persuaded that there should be any particular deference shown to the decisions of the courts below on the application of the *Porter v Magill*

test. No doubt there may be cases where circumstances peculiar to the particular country from which the case comes, perhaps local customs, attitudes or conditions, are of direct significance and are matters which the local courts are better placed to assess than the Board. However no such factors are in play in the present case. Indeed counsel's submission on this matter never progressed beyond a high level of abstract generality.

74. Similarly the fact that the Court of Appeal applied the correct legal test to what are essentially undisputed facts is not in itself a reason for the Board to exercise restraint. To decide whether on these facts the observer would identify a real possibility that the judge was biased is not the exercise of a discretion. No doubt it involves evaluation and judgment, but the Board is well placed to carry out the task, and certainly is in no worse position than the local courts.

75. Writing extra-judicially Lord Sales JSC has said that in some situations "it would be an abdication of responsibility" for an appellate court to refrain from providing its own authoritative judgment applicable across a range of cases ("Proportionality Review in Appellate Courts" (2021) Judicial Review 40). Though expressed in a different context, the sentiment is apposite, not least given the constitutional importance of an independent and impartial tribunal to the fair administration of justice and preservation of the rule of law. As Lord Sales said in the same article: "It is appellate courts which have authority to determine matters of justice and legality."

76. The respondents did not cite any judgment in which an appellate court has shown deference to a lower court's conclusion on bias. There are numerous decided cases where appellate courts have shown no hesitation in addressing challenges in this area of the law on their merits. That was how the matter was approached in *Porter v Magill*, see Lord Hope at para 105. (Other examples include *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2003] ICR 856 and *R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13; [2005] 1 WLR 688 in the speech of Lord Brown of Eaton-under-Heywood at para 39.) This is unsurprising in respect of an objective test involving universal values and which, once the facts are known, admits of only a yes or no answer. However if one were to insist on the identification of a serious error or a plainly wrong decision before the judgment of the Court of Appeal can be reversed, for the reasons given later (paras 82 and 84) such a requirement is met in this case.

77. Given the lengthy recital of the background circumstances it will be apparent by now that there were numerous potential causes for concern. Concentrating for the moment on just one of them, namely the Chief Magistrate being beholden to the Attorney General, by January 2008, and in particular after the Mustill inquiry revelations, it was clear that no benign construction was available in respect of his

receipt and banking of the $400,000. By then the full extent of his indebtedness to the Attorney General could be appreciated. It is not difficult to imagine his gratitude. He had the Attorney General to thank for resolving his serious financial problems and for shutting down an investigation into his reprehensible conduct.

78. While the Panday conviction was tainted by apparent bias arising from the desirability of the Chief Magistrate keeping the Attorney General on his side, it is noteworthy that it occurred on 24 April 2006, a date which was relatively early in the course of the main events. Most, if not all, of the Attorney General's support and efforts on the Chief Magistrate's behalf occurred subsequently; and come decision time in Piarco 1 matters relating to the $400,000 and the repurchase of his land looked even worse for the Chief Magistrate than they did in April 2007 when the Panday conviction was quashed.

79. Would all of this be a matter of concern to the fair-minded and informed observer? The observer is assumed to know that the Attorney General was in charge of the body investigating alleged corruption concerning airport contracts and whose senior officer was the complainant in Piarco 1. Warner JA had described the Attorney General's pronouncements on airport corruption as "overzealous". There could be no doubt as to his and the government's preferred outcome. It would be appreciated that the Court of Appeal had concluded that the Chief Magistrate could have a subconscious desire to do that which he would see as pleasing to the current political directorate in respect of the Panday trial. It would be understood that the Piarco 1 defendants included persons who were aligned with the same party as Mr Panday and thus who, like him, were on the other side of the political divide. The close connection in terms of subject matter, namely corruption regarding procurement of airport contracts, would be noted. On the face of it this all points to the observer having a legitimate concern about a real risk of at least subconscious bias in respect of the Chief Magistrate's role in Piarco 1.

80. The Court of Appeal held (para 101) that it cannot be assumed that the Chief Magistrate's decisions in Piarco 1 were based on a desire to please the Attorney General. However no such assumption is required for a case based on apparent bias. In para 102 the court drew a distinction between a real possibility of bias and a mere possibility of bias in that the former requires more than speculation on the part of the observer. It can be accepted that more than speculation is required; however the Board is satisfied that even if focussing only on the Chief Magistrate's indebtedness to the Attorney General, the observer would conclude that the potential impact of this was not confined to the Panday trial but was also a source of real concern in respect of Piarco 1. If the Chief Magistrate might have at least a subconscious desire to please the Attorney General and others by convicting Mr Panday, the same would apply, and

perhaps more so, at decision time in respect of the Piarco 1 defendants. It is the beholdenness itself, not the precise circumstances in which it arose, plus the Attorney General's direct interest in Piarco 1, which create a legitimate doubt as to the Chief Magistrate's ability to act as a wholly independent and impartial judge.

81. No doubt it would be different if the Chief Magistrate was dealing with something entirely separate and distinct such as a private civil suit in which the Attorney General had no interest. The necessary logical connection between the matter of concern and a potential impact on the mind of the decision-maker would be absent. But here, for all the reasons given on behalf of the appellants, the connection is plain and obvious. It follows that the Board does not accept the Court of Appeal's view (para 97) that the appellants' case on apparent bias involves "an extraordinary degree of speculation".

82. It is possible to offer an explanation as to how and why the Court of Appeal reached the wrong decision in each of the appeals. As suggested earlier when discussing the judgment delivered by Rajkumar JA, the court erred by rejecting the case of apparent bias on the basis that actual bias had not been established. It would seem that this was caused by the court misinterpreting the three-stage test narrated at para 72 and derived from *Ebner v Official Trustee in Bankruptcy*. In particular it is apparent from numerous passages in the judgment that, under the rubric "linkage", the need for a "logical connection" between the matter of concern and the feared deviation from impartiality was recast as a requirement to demonstrate that the decision was indeed influenced; in other words that the feared deviation was a reality. This occurred despite it being recognised earlier in the judgment that a real risk or reasonable apprehension of bias would be sufficient to invalidate the proceedings (para 67).

83. By way of examples, para 97 speaks of a "missing link between the outcome in this case and the wishes of the then [Attorney General]", and at para 98 it is said that "the translation of that indebtedness into an **outcome** adverse to **these appellants** has not been made out" (emphasis in the text). Para 101 begins: "However these are matters that cannot by themselves require attribution to the then [Chief Magistrate] or the then [Attorney General] of an interest in procuring an outcome by means other than that recognised by law"; and later one reads that "the actions of the [Chief Magistrate] cannot be **assumed** to be based on a desire to please the then [Attorney General]". Similarly in para 104 it is suggested that the appellants failed to demonstrate that the observer would conclude that the Chief Magistrate was predisposed to determine matters against the appellants or their co-accused. In recognition that actual bias is usually difficult to prove, no such demonstration is necessary, merely that there is a real possibility that the judge lacks impartiality.

84. Again as touched on earlier, the Board also has concerns as to the importance attached to the absence of a bias claim in the previous judicial review brought by others in respect of the July 2007 decision to substitute the new charges. It is quite a leap to conclude that, given that *Panday v Virgil* was issued earlier that year, this means that there was no basis for a bias challenge at that time regarding Piarco 1. However, while the matter is not entirely clear, the Court of Appeal does appear to have proceeded on that view, see paras 89-91. Subsequent events, namely the Chief Magistrate's evidence to the Mustill inquiry and the issue of the certified deed, were considered in order to decide whether they added anything which, when taken with what was known from *Panday v Virgil*, justified a bias challenge. The conclusion that "these details" added nothing to the public record as it was at 4 April 2007 (para 94) is itself surprising; but in any event the underlying exercise of assuming a baseline of no concern as at the date of the decision in *Panday v Virgil* is questionable. At best it overcomplicates the task of applying the *Porter v Magill* test to the relevant facts as at the time of the committal decision in Piarco 1. Perhaps more importantly it unjustifiably downgrades the importance of what was known in mid-2007 simply because, for whatever reason, other defendants did not raise a bias challenge to a different decision, and it places an artificially high bar on the significance required of subsequent events.

85. The above is sufficient for allowing both appeals. The constitutional claim succeeds because a tribunal which is seen to be impartial is part and parcel of both due process under section 4 and a fair hearing in terms of section 5. However, as will be apparent, if there were any doubt on the matter the observer would have a number of other important issues to assess. They would include the absence of any reasoning for the Chief Magistrate's dismissal of the recusal application and the transparent attempt to avoid scrutiny by labelling it as frivolous and vexatious, see para 37 above.

86. When all the various sources of concern are considered together the observer would be likely to agree with the appellants' submission that by January 2008 the Chief Magistrate was hopelessly compromised. Given that everything was happening in the full glare of publicity his mind must have been in turmoil. Nonetheless the Board accepts the submission for the respondents that if the bias challenge were to fail there would be no scope for success in the claim for constitutional relief. The concerns as to due process and a fair hearing are dependent on the same factors which underpin the judicial review. To countenance an inherently vague and novel challenge based on the alleged lack of moral authority of a judge who is otherwise entitled to preside would be something of a slippery slope and difficult to reconcile with established safeguards of judicial independence.

87. For these reasons the Board allows both appeals and quashes the decisions of the Court of Appeal. In each case it erred by failing to hold that the test for apparent bias was satisfied and that recusal should have followed. Both the application for judicial review and the claim for constitutional relief are granted with the consequence that the Piarco 1 committal decision of 7 January 2008 falls to be quashed. Any other consequential matters are remitted to the High Court.