Appeal No: SC/98/2010
Hearing Date: 24 February 2014
Date of Judgment: 28 February 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN

"J1"

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT ON APPLICATION FOR RECUSAL

MR T OTTY QC, MS S HARRISON QC and MR E GRIEVES (instructed by Birnberg Peirce & Partners) appeared on behalf of the Appellant

MR R TAM QC and MS K GRANGE (instructed by The Treasury Solicitor) appeared on behalf of the Secretary of State

MR A McCULLOUGH QC and MS C McGAHEY (instructed by the Special Advocates' Support Office) appeared as Special Advocates

Mr Justice Irwin :

1. I here set out my reasons for acceding to the application of all parties that Mr Haydon Warren-Gash should recuse himself from the hearing of this appeal.

2. Mr Warren-Gash is a distinguished member of the panel of lay members of SIAC. He had a long career in the Foreign Service, serving *inter alia* as HM Ambassador to the Kingdom of Morocco. He was asked well in advance to sit in this appeal and agreed to do so. He attended at the commission on Friday, 21 February 2014 to commence his reading of the papers. In the period between Mr Warren-Gash being engaged to sit on the Tribunal and Friday, 21 February, it was decided that Mr Anthony Layden, formerly the UK Special Representative for Deportation with Assurances, would be a witness in the hearing. Once Mr Warren-Gash learned this he alerted me to the fact that, in so far as he could recall, in November 2013 he had met Mr Layden at a reception and had a brief conversation, which touched on the fact that Mr Layden had ceased to act as the UK Special Representative. Mr Layden explained that he had become uncomfortable with that role. Mr Warren-Gash made it clear there had been no discussion of any individual case. The discussion was brief and the conversation moved on to other topics.

3. In an interlocutory hearing on the afternoon of Friday 21 February, those facts were communicated to the parties. Rather later on the same afternoon, following further discussion with Mr Warren-Gash, the Commission wrote to the parties confirming that Mr Layden and Mr Warren-Gash were near-contemporaries in the FCO and knew each other as colleagues. Mr Warren-Gash's account was that they had been "conventionally friendly but not personal friends". Mr Warren-Gash succeeded Mr Layden as HM Ambassador to Morocco and had stayed with Mr Layden for one weekend before succeeding. Otherwise there had been only occasional contact between them and the hand-over from one to the other was conducted on paper. The meeting in November had been at a reception hosted by the Moroccan Ambassador. At that stage the two gentlemen had not seen each other for quite some time.

4. All parties took time over the weekend to consider their position. Monday, 24th February was allocated as the principal reading day for the hearing, with the evidence due to commence on the morning of Tuesday 25th. By an e-mail of 13.26 on Monday 24th February, the Secretary of State indicated that she intended to apply for a recusal. The basis of the application was expressed as follows:

> "The Secretary of State would like to stress that this is not because of any doubt about Mr Warren-Gash's good faith, nor does the Secretary of State question in any way his intention to hear and determine the appeal impartially. However, the specific personal connections between Mr Warren-Gash and Mr Layden are close enough to give rise to questions about whether Mr Warren-Gash's consideration of the case might be affected about views he has formed about Mr Layden personally over the years…."

5. In oral submissions Mr Robin Tam QC, for the Secretary of State, emphasised that there was not the slightest suggestion of bad faith in respect of Mr Warren-Gash. The

problem arose on the specific facts of the relationship between the two gentlemen, because of the rather unusual position of Mr Layden. Mr Layden had been, as Mr Tam described it, a "corporate witness" presenting the coordinated views of various officials in respect of the efficacy of Memoranda of Understanding as a means of ensuring safe return to a country of origin. His subsequent position doubting the efficacy of the mechanism involved the presentation of a personal viewpoint, and there might require to be explanation of his "personal credibility and motivations". Mr Warren-Gash was bound, because of their mutual history, to have formed views about Mr Layden and this might possibly be the basis of an unconscious bias in relation to his evidence one way or the other, and would be the basis of a credible appearance of bias. Would the reasonable observer consider it at least possible that Mr Warren-Gash's assessment of Mr Layden and his response to his evidence could be affected by pre-existing views? The answer was yes. Mr Tam emphasised that this was a wholly specific matter to the facts of this case and no question of the simple "institutional" fact that both men had been senior Foreign Office officials would be sufficient for a successful application for recusal.

6. The application was supported by Mr Timothy Otty QC for the Appellant. Mr Otty made six points. First, the fair-minded observer might consider there was a possibility of subconscious bias. Second, this was not an application based on the nature of the Tribunal and its membership: it was fact specific, arising from the unusual facts in this case. Third, the presence of actual or apparent bias in relation to a significant witness was as important a basis for recusal as in relation to a party. Fourth, if there was any doubt as to the proper answer to such an application, the doubt should be resolved in favour of recusal: a precautionary approach was the correct one. Fifth, where proceedings were complex or long, that factor militated in favour of recusal, since the complexity meant it was at least to some extent more difficult to predict where actual bias or the appearance of bias might arise in the end. Lastly, Mr Otty submitted that convenience or the efficiency of justice was irrelevant: such an application had to be decided on the merits.

7. The essential test in such applications is that set out by Lord Hope in *Porter v McGill* [2002] 2 AC 357 at paragraph 103:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

8. The legal principles governing such applications were analysed by the Competition Appeal Tribunal in *BAA Ltd v Competition Commission, supported by Ryanair Ltd* [2009] CAT 35 at paragraphs 107-115. It is not necessary for me to recite those paragraphs. It is appropriate to emphasise that in paragraph 108, the Tribunal set out clearly the need to distinguish actual from apparent bias. A decision may be affected by apparent bias, without the decision-maker being actually biased and:

> "In relation to apparent bias, not only are outward appearances and public perceptions important, but it is also to be borne in mind that a person who in good faith believes that he or she is impartial or is capable of acting impartially, may nevertheless be subconsciously affected by bias… The test to be applied is an objective one: whether the fair-minded and informed

> observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased."

9. Mr Otty, in particular, relied on the judgment of the Court of Appeal in *AWG Group Limited v Morrison* [2006] 1 WLR 1163 at paragraph 9 where the Court said:

> "Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the Court has to predict what might happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry."

10. It is of great importance to the successful operation and integrity of SIAC that applications to recuse properly qualified members of the Tribunal are made only when necessary and appropriate. The application of the test of the apparent bias to SIAC was addressed by my predecessor as Chairman, Mitting J, in *Ekaterina Zatuliveter v SSHD* (2011) TRS/300/2011. That case concerned an application that Sir Stephen Lander, former Director General of the Security Service, should recuse himself.

11. In the course of his judgment, Mitting J identified some of the specific features of SIAC to be borne in mind when considering such an application. In paragraph 4 he said:

> "First, [SIAC] is not simply a passive referee of evidence, material and arguments submitted to it by the parties. Rule 4(3) of its Procedural Rules requires it to satisfy itself that it has sufficient information to decide a case justly. It therefore has, to a limited extent, an inquisitorial role. Secondly, the panel is required to be constituted of three members: a High Court Judge, or someone who has held high judicial office, a Senior Immigration Judge and a lay person. There is no statutory requirement that the lay person should have any particular expertise, but SIAC was set up to succeed a system… in which there was both legal and intelligence or diplomatic expertise. Accordingly, it has been generally recognised that the third lay member of the panel is expected to have a background in, a familiarity with and to have made use at a high level of, secret intelligence. Most panel members have been drawn from what can broadly be termed the "intelligence services", a portmanteau phrase which includes SIS, the Security Service and GCHQ, and the Foreign and Commonwealth Office…. The well-informed and fair-minded observer would, accordingly, recognise that the panel would include amongst its members someone who is likely to have an expert understanding of the issues to be decided."

12. Mitting J observed that the informed and fair-minded observer would expect the participation of someone with such knowledge and experience. In relation to the evidence to be given in that case by Anthony Layden, then still acting as the UK Government's Special Representative, Mitting J observed, in paragraph 7, that:

> "… Anthony Layden … expresses his own individual view, and also expresses the collective view of the Foreign Office or the section of the Foreign Office which deals with that country. It is far from uncommon that those who sit on a SIAC panel know Anthony Layden and, in the case of one of the Foreign and Commonwealth Office's former officers, served at the same time as him. If we are required to exclude such individuals from cases in which safety on return arises, then we would have only two possible means of proceeding: one would be to try the case in two halves, so that national security was dealt with by a diplomat and safety on return by a former intelligence officer, or we could call upon the one member of the SIAC panel of lay members who fits into neither category. This would be deeply unsatisfactory and it cannot have been what Parliament intended when it established the constitution of SIAC."

13. Mitting J went on to conclude that neither the role filled by Sir Stephen Lander, as a former Director General, nor any of his public pronouncements on intelligence questions, including some general remarks about Russian intelligence activity, could be a proper basis for recusal.

14. I am in full agreement with all of the observations made by Mitting J in *Zatuliveter*. In the context of SIAC, it would be a wholly inadequate basis for a recusal application that a member of SIAC with a former career as an ambassador, who overlapped in the Foreign Service with a former ambassador witness, should be precluded from sitting on the basis of their contemporaneous former service. Ordinary professional acquaintance would be an equally insufficient basis. Those observations would apply equally to a witness and Tribunal member who formerly served in the Intelligence Services. What is required is some specific factor which might reasonably lead the fair-minded observer to conclude that the Tribunal member must previously have formed, or was likely to have formed, views as to the capacity or judgment of the witness to be called and that, therefore, the conclusions of the Tribunal might be influenced or affected by those views formed earlier in time, rather than by the evidence in the case. Such a pre-existing relationship would be likely to be immaterial in a case where the witness was advancing factual matters only, save perhaps in the exceptional circumstances where a witness was to be accused of dishonesty.

15. The critical factors in this case really derive from the unusual position of Mr Layden in the instant case. Having been a "corporate witness" for HMG, he is now formally to be called by the Commission and cross-examined by all parties, in the light of his recently expressed doubts as to the efficacy of the system of Memoranda of Understanding and the conditions under which HMG has sought to invoke the Memorandum of Understanding with Ethiopia. Those unusual factors have led me, following considerable hesitation, to conclude that recusal is appropriate.

16. I must, in fairness, record the great courtesy shown by Mr Warren-Gash whilst awaiting the outcome of this very late application, and my own, clearly formed, view that there is not the slightest basis for any concern as to actual bias in this case.