

P -v- The General Council of the Bar; Re P (A Barrister); 24-Jan-2005

(Visitors to the Inns of Court) The visitors were asked whether Ms Nathan could participate as a member of the tribunal when she was a member, albeit only as a lay representative, of the Professional Conduct and Complaints Committee (PCCC) of the Bar Council, which was the body responsible under the Bar Council code of conduct for deciding whether to prosecute a member of the Bar against whom a complaint had been made. The complaint was that: 'Ms Nathan would be a judge in her own cause. This would also be a situation of apparent bias for, although it was accepted that she had taken no part in the particular decision of the PCCC to prosecute the Appellant and that there was no actual bias on her part, there was nevertheless a real apprehension or danger or possibility or suspicion of bias by reason of her membership of the PCCC.'

Held: The objection succeeded. The decision was rendered under the doctrine that no one must be a judge in his own cause, rendering it unnecessary to consider whether the doctrine of apparent bias was also an impediment to Ms Nathan's participation. However, the judgment expressed the firm view that the doctrine of apparent bias did also require Ms Nathan's recusal. 'The decision by the PCCC to institute proceedings against a barrister thus imposes upon the PCCC as agent for the Bar Council a duty to prosecute that person and, consistently with the applicable procedure, to present the case against the barrister in a manner designed to procure conviction. Whereas it is undoubtedly true that the proceedings in which the charges are prosecuted must be fairly and justly conducted, those representing the Bar Council have a duty as its agents to procure conviction or in the case of appeals before Visitors to defeat an appeal. They do not have the function of a neutral amicus. Their interest is conviction or dismissal of appeals.'

In considering whether a lay representative on a Visitors Panel shares the interest of the PCCC, of which that person is a member, in the appeal being dismissed, an analysis of the quality of that particular member's ability to maintain objectivity is nothing to the point. Nobody called in question Lord Hoffmann's personal ability to be objective and impartial. Nor, in our judgment, does the fact that the purpose of including lay representatives on the PCCC and as members of the Visitors panel, have the effect of insulating such persons from having the appearance of sharing the interest of the PCCC as a prosecutor. Lord Hoffmann's judicial oath could provide no such insulation. Nor do we find that a lay representative's non-participation in meetings relating to the prosecution in question cuts off that person from the responsibility which, as a member of the PCCC that lay representative bears together with its other members for taking forward and facilitating the prosecution. Lord Hoffmann was not a decision-taker at either Amnesty International or AICL with regard to participation in the proceedings.

Accordingly, the perception of impartiality is to be based on that which is open to view and not on facts which would be hidden from an outside fair-minded observer.

If therefore one assumes that the scope of the hypothetical fair-minded observer's knowledge is confined to the Code of Conduct of the Bar, the Disciplinary Tribunal Regulations, the Complaints Rules and the Hearings before the Visitors Rules and does not extend to the methods of selection of the members of the PCCC or, except in so far as they should not have attended the relevant meeting of the PCCC, the Visitors panels or to the attendance records of lay representatives at meetings of the PCCC, we consider that even taking account of the high calibre of lay representatives generally and of their function in representing the public interest, there would be a perception to the fair-minded observer of a real possibility of subconscious lack of impartiality by reason of exposure to influence by such prosecuting policies as might exist amongst PCCC members generally.'

Date: 24-Jan-2005

Judges: Colman J, Clark, Nathan

References: [2005] 1 WLR 3019,

Cases Cited:

- *Dimes -v- Proprietors of Grand Junction Canal and others*, HL, Cited, ((1852) 3 HL Cas 759, [1852] EngR 789, Commonlii, (1852) 3 HLC 759, (1852) 10 ER 301)

Cited By:

- *Kaur, Regina (on The Application of) -v- Institute of Legal Executives Appeal Tribunal and Another*, CA, Cited, (Bailii, [2011] EWCA Civ 1168)