IN THE UPPER TRIBUNAL **Appeal No. GIA/26/2020**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Applicant:	Mr Terry Crossland
Respondent:	The Information Commissioner
Tribunal:	First-tier Tribunal (Information Rights)
Tribunal Case No:	EA/2019/0252
Tribunal Venue:	in chambers
Decision Date:	4 November 2019

NOTICE OF DETERMINATION OF RECUSAL APPLICATION

I refuse the application by the Applicant that I should recuse myself from dealing with this application for permission to appeal (and any further applications or appeals involving the Applicant).

REASONS

1. On 2 December 2019 Mr Crossland made an application to the Upper Tribunal for permission to appeal against an interlocutory decision or decisions made by the First-tier Tribunal (General Regulatory Chamber) (Information Rights) ["the FTT"]. The application and appendices ran to a total of 163 pages.

2. On 9 December 2019 an Upper Tribunal Registrar wrote to Mr Crossland seeking clarity as to which specific decision by the FTT he was seeking to appeal (p.164).

3. On 16 December 2019 Mr Crossland replied (pp.165-166).

4. On 9 January 2020 I signed off Directions indicating that I proposed to strike out the application dated 2 December 2019 on the basis that either the Upper Tribunal had no jurisdiction to deal with the application and/or the application had no reasonable prospects of success (pp.167-171). Those Directions were issued by the Upper Tribunal office on 4 February 2020.

5. On 9 February 2020 Mr Crossland wrote making an application that he be provided with electronic copies of all documents in the proceedings in addition to the hard copies as provided for by the Tribunal Procedure (Upper Tribunal) Rules 2008.

6. On 14 February 2020 I dismissed Mr Crossland's application to receive electronic copies of all documents in the proceedings (pp.175-177). This ruling was issued by post by the Upper Tribunal office on the same date.

7. On 24 February 2020 Mr Crossland made a further application to the same effect.

8. On 26 February 2020 the Upper Tribunal Registrar wrote to Mr Crossland again, indicating that I had nothing to add to my earlier rulings.

9. On 5 March 2020 Mr Crossland applied to the Upper Tribunal for permission to appeal to the Court of Appeal against my ruling of 14 February 2020. That application has been dealt with in a separate ruling. He also apparently sought to make a complaint of judicial misconduct on my part. That, obviously, cannot be a matter for me. Finally, he applied that I recuse myself on the basis that "re his conduct, including apparent bias, lack of independence and lack of intellectual honesty such that any further involvement in any case of the LIP Appellant could not satisfy the necessary standards". Mr Crossland applied that I both recuse myself from dealing with (a) the present matter and (b) "withdraw… from any future involvement in any case involving the Appellant."

10. This ruling deals with this last application for recusal. I will take the points in reverse order.

11. As to (b), there are, of course, many decided cases about the circumstances in which a Judge should recuse herself or himself from hearing a specific case. I refer to several of the leading authorities from the case law below. Although the principles are of general significance, their application will turn on the specific facts of any given case. However, I am not aware of any authority in which a Judge has been required to recuse herself or himself from hearing any *future* case involving a particular party. Indeed, I am struggling to see how the relevant principles could be applied to a purely hypothetical future case, given that the recusal test must be applied in a fact-sensitive way. On this basis I reject limb (b) of the recusal application as wholly misconceived.

12. As to (a), the legal test for recusal of a judge is clear. I considered the authorities in my earlier decision in *Kirkham v Information Commissioner (recusal and costs)* [2018] UKUT 65 (AAC), as follows:

> '**The principles governing recusal by a judge**
> 14. The law governing apparent bias is well known. The test 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": see Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357 at [103]. The "fair-minded and informed observer", according to Lord Steyn in *Lawal v Northern Spirit* [2003] UKHL 35, "is neither complacent nor unduly sensitive or suspicious" (at [14]). See also *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781 (also reported as *R(DLA) 5/06*), where Lord Hope added that the "fair-minded and informed observer" must be taken to be to be able distinguish between what is relevant and what is irrelevant and decide what weight should be given to facts that are relevant.
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> 15. Thus, as Underhill LJ recently observed in *Shaw v Kovac* [2017] EWCA Civ 1028 at [86], "An impartial observer will generally have no difficulty in accepting that a professional judge will decide the case before him or her on its own merits and will be unaffected by how they may have decided different issues involving the same party or parties". Moreover, as Burnett LJ (as he then was) added in the same case at [88], "The party who seeks to bounce a judge from a case may be fair-minded and informed but may very well lack objectivity."
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> 16. The rule against bias was considered in more detail by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [1999] EWCA Civ 3004; [2000] QB 451, where it was stressed that the "mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or

witness to be unreliable, would not without more found a sustainable objection". So, for example, where a member of a tribunal makes it clear (e.g. through comments or body language) that he or she is unimpressed by evidence that is being given, that may be a rational reaction to the evidence even though it may be discourteous or even intemperate. In such circumstances, it does not show that the tribunal member had a closed mind or was biased, with the result that the tribunal's decision is not vitiated (*Ross v Micro Focus Ltd* UKEAT/304/09).

17. As already noted, the "fair-minded and informed observer" will recognise that judges are assumed to be trustworthy and to understand that they should approach every case with an open mind. As Mr Commissioner Bano (as he then was) pointed out in *CIS/1599/2007* at paragraph 12:

> "In *R (on the application of Holmes) v General Medical Council* [2002] 2 All ER 524 the Court of Appeal held, applying the Porter test, that the fact that a Lord Justice of Appeal had refused leave to appeal was not a ground for requiring the lord justice to recuse himself from hearing the full appeal, and in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* [2005] 1 All ER 723 the Court of Appeal held that the same principles apply even where an adjudicator has already decided an issue on the merits against one of the parties."

18. Referring to the passage in *Locabail*, and cited above, Dyson LJ held as follows in *AMEC Capital Projects Limited v Whitefriars City Estates Limited* (at paragraph 21):

> "…As was said in *Locabail*, the mere fact that the tribunal had previously commented adversely on a party or found his evidence unreliable would not found a sustainable objection. On the other hand, if the tribunal had made an extremely hostile remark about a party, the position might well be different. Thus, in *Ealing London Borough Council v Jan* [2002] EWCA Civ 329, this court decided that the judge should not hear the retrial of proceedings where he had twice said of the respondent in preliminary proceedings that he could not trust him 'further than he could throw him'."

19. Thus in *Otkritie International Investment Management Limited v Urumov* [2014] EWCA Civ 1315 the Court of Appeal held that the fact a trial judge had made adverse findings against a party did not preclude him or her sitting in subsequent proceedings. As Davis LJ further noted in *Shaw v Kovac* (at [19]), "It is striking that in that case the trial judge was held by the Court of Appeal to have been positively wrong to recuse himself on the application of the defendant in circumstances where, in the same complex commercial proceedings, the judge previously had made findings of actual fraud on the part of the defendant."

20. Whilst each case necessarily turns on its own facts, these authorities demonstrate clearly that judges must be robust and are not expected to jump to recuse themselves. The rationale was explained clearly by Chadwick LJ in *Triodos Bank N.V. v Dobbs* [2005] EWCA Civ 468, in which the defendant had invited Chadwick LJ to recuse himself as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ observed as follows:

> "7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more

> comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard."'

13. Having reviewed the authorities again, I consider that summary is entirely consistent with the principles established by the case law. This can be illustrated, for example, by the following passage from the judgment of Rix LJ on the question of apparent bias in the commercial case of *JSC BTA Bank v Ablyazov (Recusal)* [2012] EWCA Civ 1551 (omitting a footnote which is superfluous for present purposes):

> '65. The authorities suggest the following conclusions. First, although the principles of apparent bias are now well established and have not been in dispute in this case, the application of them is wholly fact sensitive. Secondly, a finding of prejudgment has been rare. *Livesey* and *Timmins v. Gormley* (one of the *Locabail* cases) are examples, but their circumstances bear no relationship to the circumstances of this case. Thirdly, although discussion of pre-judgment issues are not uncommon in Strasbourg jurisprudence, they tend to fall within the criminal sphere where special problems arise in civil law countries through the use of examining magistrates at earlier stages of the criminal process, and the use of judges to decide guilt at both trial and appeal levels (the appeal is a complete rehearing of guilt and innocence). Mr Béar has told us that he has as yet found no Strasbourg authority in which a doctrine of pre-judgment has been used to disqualify a judge in civil proceedings. Fourthly, although no doubt matters of mere convenience cannot palliate the appearance of bias, and the application of the doctrine of apparent bias is not a matter of discretion (as distinct from assessment on all the facts of the case), it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge. Fifthly, no example of a designated judge being required to recuse himself or herself has been found. In *Arab Monetary Fund v. Hashim* Bingham MR said that the replacement of Hoffmann J by a different judge for trial was an "indulgence to Dr Hashim", where he had shown "no grounds whatsoever for a change of judge". Sixthly, a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms. That, however, has not been alleged in this case.'

14. There is also a very detailed and extremely helpful analysis of the principles to be derived from the case law by Fraser J in his recent judgment in *Bates v Post Office Ltd (No 4)* [2019] EWHC 871 (QB) (at paragraphs [27]-[77]). I take that discussion into account.

15. I also note the judgment of the Court of Appeal in *Otkritie v International Investment Management Limited v Urumov* [2014] EWCA Civ 1315, where Longmore LJ observed as follows (at paragraph [13], emphasis added):

> "The general rule is that [the judge] should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so … *there must be substantial evidence of actual or imputed bias before the general rule*

can be overcome. All of the cases, moreover, emphasise that the issue of recusal is extremely fact-sensitive."

16. The case law shows that the mere fact that I may have refused Mr Crossland permission to appeal on the papers in an earlier case (GIA/1338/2018) does not begin to lay the evidential basis for an arguable recusal application. In the same way, my rulings in the instant proceedings do not get close to laying the foundations for such an application. Following the guidance of Chadwick LJ in *Triodos*, I resist the temptation to recuse myself from deciding the strike out issue relating to Mr Crossland's application for permission to appeal. I am not persuaded by anything he has said that the test for apparent or actual bias is made out. Moreover, there is an important reason for me not to recuse myself merely because the Applicant has subjected me to criticism, as to do so would allow him, in effect, to choose his judge.

17. I therefore refuse this recusal application.

(Signed on the original)

Nicholas Wikeley
Judge of the Upper Tribunal

(Dated) **4 May 2020**