[2014] UKPC 22
**Privy Council Appeal No 0005 of 2013**

# JUDGMENT

# Yiacoub and another (Appellants) *v* The Queen (Respondent)

## From the Appeal Court of the Sovereign Base Areas of Akrotiri and Dhekelia (Cyprus)

**before**

**Lord Neuberger**
**Lord Mance**
**Lord Clarke**
**Lord Hughes**
**Lord Toulson**

## JUDGMENT DELIVERED BY

## Lord Hughes

## ON

## 10 July 2014

**Heard on 9 June 2014**

| *Appellants* | *Respondent* |
| --- | --- |
| Christos Pourgourides | James Guthrie QC<br>Michael Hadjiconstantas<br>(Instructed by MA Law (Solicitors) LLP) |

**LORD HUGHES:**

1. The question in this case is whether the separate court system established by the Courts (Constitution and Jurisdiction) Ordinance 2007 for the Sovereign Base Areas of Cyprus complies in one particular with the common law requirement that justice must not only be done, but clearly be seen to be done.

2. Under the Ordinance, there are, for both civil and criminal cases, the Resident Judge's Court ("RJC") and the Senior Judges' Court ("SJC"). The present case concerns a criminal prosecution. Criminal trial in the Sovereign Base Areas is by judge or judges without jury. For criminal cases, the court of trial is, by section 29, normally the RJC, with appeal to the SJC.

3. Judges of the RCJ must be either judicial office holders in Her Majesty's Dominions or professional lawyers with a minimum of ten years since qualification. The court normally sits constituted by a single judge but there are sensible flexible powers for it to be composed where the occasion warrants it by three judges - see section 16. The usual (and current) practice is for there to be a full time Resident Judge.

4. There are normally only nine judges of the SJC. By section 11(1), all must be full time professional judges from England and Wales, sitting part time and more or less ad hoc in Cyprus. Generally they are Circuit Judges. As such they enjoy security of tenure in England and Wales. They are appointed as Senior Judges by the Administrator of the Sovereign Base Areas on the instructions of the Secretary of State. This follows the recommendation of the Lord Chancellor on the advice of a panel convened under the Chairmanship of the Senior Presiding Judge of England and Wales (a Lord Justice of Appeal). Apart from subsistence allowances, they are unpaid for the additional work in Cyprus.

5. One of the nine Senior Judges acts as Presiding Judge of the SJC. The current holder of that office is an English Circuit Judge of long experience. He is an ordinary member of the court, but in addition has a co-ordinating administrative function of the kind which the senior member of many courts has. Section 4(3) of the Ordinance provides:

> "(3) The disposition and distribution of the duties of the Senior Judges' Court is regulated by the Presiding Judge."

6. This means that one of the functions the Presiding Judge exercises is to supervise listing in the court and thus to oversee the constitution of the panels to hear cases There

is in section 5(3) of the Ordinance an identically worded provision for the Resident Judge to perform the same function for the RJC. Such arrangements are extremely common. In England and Wales such leadership functions are exercised by many judges, not only the Lord Chief Justice and Heads of Division, but also, for example, Resident Judges in a Crown Court, or the Designated Civil or Designated Family Judges in particular geographical areas.

7. The complication which has arisen in the present case derives from flexible arrangements under which judges of the SCJ may from time to time sit when convenient as judges of the RCJ. The Ordinance provides specifically in section 6(3) that this may be done and specifies that in such circumstances the Senior Judge's powers are limited to those of a judge of the RJC. One of the functions of the Presiding Judge of the SCJ is to determine whether a particular case or category of cases justifies a court of three rather than of one in the RCJ: see section 16(3). It is no doubt sensible for Senior Judges sometimes to form the court of trial in a criminal case, and this happened in the present proceedings. The trial court consisted of three Senior Court Judges, including the Presiding Judge, all sitting in their capacity as judges of the RCJ. One defendant pleaded guilty. Three others contested the case; they were acquitted of one charge but convicted of the others.

8. Two of the defendants appealed against their convictions. They sought to challenge the factual findings of the RCJ on the evidence. Appeal is as of right, so it was necessary for a division of the SCJ to be constituted to hear the appeal. Because the trial court had consisted of three judges, a new panel of three Senior Court Judges was convened to hear the appeal. In the ordinary way, the arrangements for this were overseen by the Presiding Judge under section 4(3), who thus nominated another Senior Judge, who had not been a member of the trial court, to chair the panel of three for this purpose. That other judge then made arrangements for two other members of the court to sit with him. The appeal was dismissed by the SCJ.

9. The problem with that procedure was that in this case the Presiding Judge had himself been one of the court of trial. The short point in this further appeal to the Board is based upon the fact that one of the members of the court from which the appeal was being made thus selected the presider of the panel of the court which was to hear the appeal.

10. There is not the slightest suggestion that the Presiding Judge actually exercised any influence over the members of the SCJ who heard the appeal, any more than there is any suggestion that the members of the appellate court were actually less than independent. But the question which arises is whether his administrative function under section 4(3) of regulating the disposition and distribution of the duties of the various judges of the SCJ conflicted in this particular case with the fact that he had been a member of the court of trial. It is of the highest importance that courts should not only

be actually independent and impartial but that they should also be free of any appearance of the absence of those qualities.

11. The relevant test has not been in dispute. It was set out by Lord Hope, with whom the remainder of the court agreed, in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at paragraph 102-103. It is entirely consistent with the approach of the European Court of Human Rights to the requirement that a court be impartial, not only in fact, but from an objective viewpoint: see *Findlay v UK* (1997) 24 EHRR 221 at paragraph 73. Lord Hope expressed the test in these terms:

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

12. That and similar formulations use the word 'biased', which in other contexts has far more pejorative connotations, to mean an absence of demonstrated independence or impartiality. Lord Hope had made this clear in the contemporary case of *Millar v Dickson* [2002] 1 WLR 1615 at paragraph 63:

> "….the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality."

13. Mr Guthrie QC, for the prosecution in the present case, submitted that the objective observer would fear no absence of independence or impartiality. He would know that the SCJ hearing the appeal would be composed of full-time professional judges enjoying the status and security of tenure of English Circuit Judges. That would suffice to allay any incipient misgivings. Mr Guthrie helpfully took the Board to a number of cases involving the exercise by ministers or others of either statutory or ad hoc powers to appoint tribunals of enquiry or similar, in which this proposition had prevailed. An example is the decision of the Board in *Belize Bank v Attorney General of Belize* [2011] UKPC 36. There the Finance Minister had power to appoint the two non-judicial members of an Appeal Board to hear an appeal against the Central Bank's directive to the Belize Bank to restore to the country a large sum of money which had been transferred outside it. The Minister had previously voiced strongly worded concern about the transfer. The Board held that the objective test of want of impartiality was not satisfied: the objective observer would know that the Appeal Board would be

chaired by the Chief Justice or another judge nominated by him and that its other members would take the judicial oath. It was also the fact that they had been selected from a comparatively small pool of suitably qualified people by a career civil servant and not by the minister.

14. There is no occasion in the present case to review the many situations in which ministers or others may appoint boards of enquiry or similar review under statutory or common law powers but the Board sees no reason to doubt the reasoning in that and similar cases. It is no doubt very common for such enquiries to be set up where there is public concern about a particular event or transaction and it will not be uncommon for ministers to have adverted to such concern. The appointment of suitably qualified and independent judges to the task will no doubt ordinarily meet the requirements for independence and impartiality as seen by any objective observer.

15. The difference in the present case is that the Presiding Judge found himself not simply appointing a judge to deal with a matter of general concern, but nominating a judge to hear an appeal from himself. The Board is satisfied that that carries an appearance of lack of independence and impartiality in relation to the process, viewed as a whole, which would impact on an objective informed observer. It is not difficult to imagine circumstances, under other regimes, in which such a process could be open to abuse of the kind not suggested here to have occurred in fact. The objective observer would, as it seems to the Board, say of such a process "That surely cannot be right".

16. Whether there could ever be a situation in which such a problem was incapable of avoidance the Board cannot say. But it could readily be avoided in the present circumstances. Although the number of Senior Court Judges who could form the appellate court is strictly limited, especially where three of the nine have already sat at first instance, there is no obstacle to the Presiding Judge, faced with the situation which arose here, directing that the constitution of the appellate court must be the responsibility of the next most senior judge by appointment after himself who was not part of the court of trial. Because the next most senior judge by appointment is objectively ascertainable, such a practice removes all input from the Presiding Judge. If a court cannot be constituted without unacceptable delay, there is power under section 9 of the Ordinance to appoint one or more acting judges.

17. For these reasons, the Board is satisfied that in this instance the appearance of justice was not sufficiently done. The appellants' primary submission was that in that event the safety of their convictions was affected, but this is clearly not so. The only part of the process which fails to satisfy the common law requirement of objective fairness is the appeal. The decision of the appellate court must therefore be quashed. The appeal must be re-heard before a court which does not contain any judge who sat upon either the trial or the first appeal. It may well be that the best way of constituting that court will be to do so under the administrative responsibility of the judge next in

seniority of appointment to the Presiding Judge who was not involved either in the trial or the first appeal. If necessary, one or more ad hoc acting judges may need to be appointed. The Board will humbly advise Her Majesty accordingly.