26/06/23

IN THE COURT OF APPEAL
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

AC 27 of 2022
(CV 59/2021)

BETWEEN

'ATENISI INSTITUTE INCORPORATED Appellant

AND

TONGA NATIONAL QUALIFICATIONS AND ACCREDITATION BOARD
Respondent

JUDGMENT OF THE COURT

Court: Randerson J
White J
Harrison J

Appearances: Dr M Horowitz as counsel pro se for the Appellant
No appearance for the Respondent

Hearing: 31 March 2023
Judgment: 6 April 2023

[1] The appellant 'Atenisi is a tertiary educational institute in Nuku'alofa. For the past several years, it has been engaged in civil litigation in the Supreme Court and in this Court. In the current litigation in the Supreme Court, 'Atenisi brings judicial review proceedings against the respondent relating to the grant of accreditation for certain of 'Atenisi's educational courses. The litigation has been a long drawn-out saga commencing in 2018.[1]

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1 In CV 13 of 2018, 'Atenisi sought a declaration that it was not subject to the registration and accreditation requirements of the Tonga National Qualifications and Accreditation Board Act and that recruitment bans imposed by the respondent were unlawful. 'Atenisi was held to be subject to the Act but the recruitment bans were unlawful [2019]TOSC 45. The appeal was dismissed by this Court [2020] TOCA 4 . In CV 23 of 2020, 'Atenisi brought a claim for damages arising from the respondent's unlawful recruitment bans. The claim for damages resulted in a nominal award but the dismissal of the substantive part of the damages claim relating to the departure of Dr Gonschor. This Court upheld the dismissal of the substantive claim for damages.

[2] The present appeal relates principally to the Judge allocated to hear 'Atenisi's proceeding. There is a subsidiary issue as to whether a merits determination of the substantive accreditation issue should be made given the lengthy delays to date and failures by the respondent to comply with interlocutory orders. The case has become bogged down in interlocutory issues and the substantive proceeding has not been heard. The present application for special leave to appeal under s 10 (1) (b) of the Court of Appeal Act is against the following interlocutory rulings:

(a) A decision by Whitten LCJ to allocate the case to Cooper J.

(b) A refusal by Cooper J to recuse himself.

(c) A ruling by Whitten LCJ not to make a merits determination on the accreditation issue.

[3] The relief sought is that:

(a) The decisions above be set aside.

(b) The proceeding be remitted for hearing by a Special Judge or by Whitten LCJ or Tupou J.

(c) This Court should make a determination that 'Atenisi's courses qualify for accreditation.

(d) Costs be awarded against the respondent.

Chronology of events

[4] The essential background is best described in the following brief chronology:

25 October 2017	'Atenisi applies for accreditation
25 October 2021	'Atenisi applies for judicial review of its application for accreditation

14 January 2022	Whitten LCJ grants leave to 'Atenisi to apply for judicial review by way of *mandamus*; makes supplementary timetable directions; but declines to declare 'Atenisi entitled to accreditation on the basis of the respondent's "constructive refusal" to do so
28 July 2022	Whitten LCJ directs after discussion with the parties that identified preliminary issues should first be determined rather than proceeding directly to an order by way of mandamus that the Respondent grant accreditation by a specified date
7 September 2022	Whitten LCJ decides on his own motion not to continue to hear the case and remits it to Tupou J for hearing
14 October 2022	After it emerged that Tupou J had previously given legal advice advice to 'Atenisi, Whitten LCJ declines to remit the proceeding to a Special Judge or to Tupou J; and remits the case to Cooper J
15 November 2022	Cooper J declines to recuse himself
8 December 2022	Cooper J declines to reconsider his decision on the recusal application

The ruling by Whitten LCJ on 14 October 2022

[5] The proceeding came before Whitten LCJ for mention on 14 October 2022. The transcript of the hearing that took place that day runs to some 28 pages. The Lord Chief Justice recorded his reasoning for directing the transfer of the matter to Tupou J on 7 September 2022:

> I did so because upon a review of the various proceedings between these parties which I have heard and determined to date, the findings set out therein, including comment in relation to the role played by Dr Horowitz as counsel pro se for the plaintiff but also at times giving evidence from the bar table, numerous interlocutory hearings and numerous exchanges between me and Dr

> Horowitz, particularly in recent times, which have been marked by debates about the accuracy of statements attributed to me by him, I considered that there was "a real risk that a fair minded observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the questions required to be decided in this proceeding".[2]

[6] The Lord Chief Justice explained that at the time he had directed that the matter be transferred to Tupou J, she had indicated she was able to hear the matter. However, upon learning that Dr Horowitz had filed an email objection on the basis that Her Honour had previously acted for and provided advice to 'Atenisi in 2018 (apparently in relation to its dispute with the respondent), he decided that the matter would be transferred to Cooper J. The Lord Chief Justice noted that, in the meantime, 'Atenisi had filed an application for Tupou J to recuse herself which had then not been heard or determined. Counsel for the respondent waived any objection to Tupou J hearing the matter. Dr Horowitz stated 'Atenisi would do likewise but wished his application for recusal of Her Honour to remain extant, that is, neither heard nor determined. His Lordship refused that request.

[7] Then the Lord Chief Justice recorded that on 3 October 2022, 'Atenisi had filed an application for Cooper J to recuse himself and for the matter to be remitted back to the Lord Chief Justice or to a Special Judge. That application had not been heard at the time the matter was called before the Lord Chief Justice on 14 October. Accordingly, a direction was given that the file be returned to Cooper J for the recusal application to be determined as soon as practicable.

[8] The transcript of the hearing before the Lord Chief Justice on 14 October 2022 provides some further illumination of the Lord Chief Justice's concerns about apparent bias. With reference to the history of His Lordship's involvement in proceedings involving the present parties over a three year period, the transcript records:

> And standing back and looking at all of that in combination including the often quite terse exchanges between us when it comes to recollections of things that I have said or meant perceived advice given by the Bench to you for your client and the occasions on which I have to say to you I do not agree with the account that have [sic] been given. I have to extend [sic] gone back over my notes as you obviously observed I keep during the running of these various hearings as well as some transcripts. I came to the conclusion that when one

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2 His Lordship noted that the principles on apprehended bias had recently been discussed by the Court of Appeal in *Cox v R* (AC 4 of 2022, 22 May 2022).

> applies the test for not actual but apparent perceived bias through the lens or the view of an informed lay observer … that there is … a very real risk that the lay observer would perceive that I may not be able to continue to hear and determine this case impartially. That view is being informed by numerous times when you effectively disagreed about statements I say which therefore has caused me to refute what has been asserted that casts (inaudible) some doubt over reliability so ultimately it ball [sic] down to me not feeling comfortable about ensuring that 'Atenisi would get a fair trial. It doesn't mean that it wouldn't there's just a risk. That's the reason for the handover.

[9] Later in the transcript, His Lordship said:

> Well unless you can persuade me with the assessment that I have just given you is somehow defective or overly cautious and I must say to you this is the only case in my – disposed over a thousand cases in three years here is the only one I have felt compelled (inaudible) to do. I do simply because of its history not only the actual proceedings but unfortunately some interaction between you and I. And the peculiar position you have of all you have maintained throughout these proceedings where you are both pro se counsel and a witness in and out of the evidential inquiries from time to time. That has made the whole dynamic that much more sensitive if you like, especially and ultimately any Judge being asked to determine issues of credit and reliability about the information that being asked back Doctor and I think I comment to that effect in at least one of it. The Court of Appeal I recall made an observation about the latitude that had been given through the conduct of these cases and it just got to a point and I was reminded of one of our discussions this year when I said to you; do you want to go and talk to your board about an application for me to recuse myself because to put it very simply things were getting out of hand.

[10] The transcript also reveals some further discussion about the suggestion by 'Atenisi that a Special Judge could be appointed. The Lord Chief Justice was clearly not attracted to this proposition stating he was not aware of any previous case where this course had been adopted; expressing the view that it would need to be demonstrated that no sitting Judge was available to hear the case; the cost of bringing a Special Judge from elsewhere would likely be prohibitive; and would likely have to be met by the party seeking the appointment of a Special Judge. Dr Horowitz is recorded as stating that 'Atenisi could not meet an expense of this kind.

Cooper J's recusal ruling of 15 November 2022

[11] Cooper J noted first that the respondent had not lodged any submissions and remained neutral to the application by 'Atenisi that the Judge should recuse himself. It had

been argued on 'Atenisi's behalf that the Judge would be biased because of a finding he made in relation to the evidence of a Dr Eke during a criminal trial.[3] In his verdicts finding the defendants guilty in that trial, Cooper J had found that Dr Eke "had not been desirous of telling the truth". It was argued that Dr Eke's credibility would be damaged as a result. It was said that Dr Eke would be "reluctant to testify [before Cooper J] and/or would be "anxious and/or overly cautious ...".

[12] The Judge reviewed relevant authorities describing the test for bias including *Muir v Commissioner of Inland Revenue*,[4] *Webb v R*[5] and *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No. 1)*.[6] In the latter, Tipping J described the test in the following terms:

> The crucial question ... is whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased.

[13] Dr Horowitz did not take any issue with the Judge's statement of the relevant principles.

[14] Cooper J noted that, in summary, the preliminary issues to be dealt with in the application for judicial review raised complaints about the membership and qualifications of the membership of the respondent's review panel; issues about findings made and recorded in the respondent's Approval Record Book and whether the period of the review of 'Atenisi's organisation should include only the years 2014 to 2017.

[15] Addressing an affidavit filed by Dr Eke in support of the application for recusal, Cooper J noted that although Dr Eke stated he would be giving evidence at the trial of preliminary issues, he did not state the areas his evidence would cover or allude in any way to how any evidence he might give would be relevant to 'Atenisi's claims. The Judge recorded that Dr Horowitz had been unable to provide any further detail apart from stating in an unspecified way that Dr Eke would give "anecdotal accounts" about Parliament's intention in relation to the enactment of relevant legislation and debates.

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3 *R v Lavulavu and Lavulavu* (CR 173 & 174/2018).

4 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334.

5 *Webb v R* [1994] 181 CLR 41 (HCA).

6 *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No. 1)* [2010] 1 NZLR 35, 37 (SC).

[16] In dismissing the application for recusal, the Judge reasoned that there was not a single instance of his being biased in the proceedings or at all; there was nothing specific about how Dr Eke's evidence might be relevant or even what it would be or how it might assist the Court; the application was entirely speculative and did not demonstrate any bias against Dr Eke in these proceedings or at all.

[17] As noted above, Dr Horowitz invited the Judge to reconsider his ruling of 27 October but this was rejected on 8 December 2022. The Judge observed that Dr Horowitz had received ample time to make his submissions on the previous hearing of the application and had indicated he had nothing more to add. In those circumstances, the proper course was for Dr Horowitz to appeal.

Decision of Whitten LCJ on 14 January 2022 declining to declare 'Atenisi entitled to accreditation

[18] The Lord Chief Justice's ruling of 14 January 2022 was largely concerned with 'Atenisi's application for leave to bring the judicial review proceedings as required by the rules of court. In his ruling, His Lordship details the extensive background of prior litigation involving 'Atenisi and the respondent. The ruling also cites statements made in previous Court decisions drawing attention to the extensive delays on the part of the Board against a background in which the relevant regulations required all applications for accreditation to be processed within six weeks of receipt.[7]

[19] Amongst the relief 'Atenisi was then seeking was an order that the respondent decide 'Atenisi's application within 15 days and make additional orders if deemed appropriate including, if warranted, an order compelling the respondent to accredit 'Atenisi and/or compensate it for damages incurred by the respondent's negligence.

[20] Although there had been lengthy delays on the part of 'Atenisi in filing the application for leave the Lord Chief Justice considered there was good reason to extend the time and to grant leave accordingly.

[21] Addressing the other relief sought by 'Atenisi, His Lordship said:

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7 The Tonga National Qualifications and Accreditation Board Regulations 2010.

> 14. Given the history between the parties and the nature of the present application, I called the matter for mention on 20 October 2021. During the course of that mention, at which Dr Horowitz appeared again as counsel pro se for the plaintiff, I explained the nature of the prerogative writ of mandamus as referred to in Order 39 rule 1. I also explained to Dr Horowitz that only the first order sought can, if warranted, be logically necessary for if the defendant issues a decision approving the plaintiff's application for accreditation then (and subject to any conditions which might be attached to that approval), that would be the end of the matter (save for any claim for damages or compensation resulting from the delay). The other alternative would be to treat the defendant's alleged delay as a constructive denial of the application, in which case, the usual administrative law review considerations would be applied, but which do not involve the Court usurping the statutory role of the Board.[8] However, at this stage, and until the defendant has explained, or been given the opportunity to explain, its delay, I regard that course as premature. Otherwise, the balance of the orders sought are predicated and derivative upon an assumed decision, adverse to the plaintiff, when in fact no decision has as yet been made.

[22] It should be recalled that the focus in the proceeding later moved to the determination of the preliminary issues and this remained the position at the time of the recusal rulings.

Application for leave to adduce further evidence on appeal

[23] 'Atenisi seeks leave to adduce on appeal an affidavit sworn on 14 December 2022 by a Member of Parliament, Paula Piveni Piukala. The deponent deposes to two events which the deponent states suggest the Judicial Appointments and Discipline Panel has either unduly influenced – or sought to unduly influence – the Court below over the past year.". We are satisfied that none of the material contained in this affidavit has even remote bearing on the issues on this appeal. Accordingly, the application for leave to adduce further evidence on appeal is dismissed.[9]

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8 Citing *'Atenisi Institute Inc v Tonga National Qualifications and Accreditation Board* [2020] TOCA 4 at [20].

9 Dr Horowitz also placed before the Court a medical report relating to his short-term memory concerns, but we are not persuaded there is any material issue in that respect.

Submissions on appeal

[24] In his written submissions on behalf of 'Atenisi, Dr Horowitz described the recusal issues as the main point and the denial of some form of declaration on the merits as a secondary point.

[25] Addressing first the decision by Whitten LCJ declining to continue to hear the case, Dr Horowitz submitted that this was irregular for the following reasons:

- The timing was suspicious.

- Neither party had complained of prejudice nor sought His Lordship's recusal and there was no evidence of prejudice.

- Whitten LCJ was uniquely acquainted with the issues and evidence by reason of his previous involvement in litigation between the parties; there would be an onerous burden based on another judge and His Lordship had "ostensibly failed to diligently vet Tupou J" before transferring the matter to her and had failed to appreciate the public acrimony between Dr Eke and Cooper J.

- The integrity of the Court was jeopardised. We need address this point no further since the submission was based on the evidence of Mr Piukala whose affidavit we have declined to consider.

[26] Addressing the refusal by Cooper J to recuse himself, Dr Horowitz focussed principally on Cooper J's finding in the *Lavulavu* fraud trial in which Dr Eke gave evidence. Cooper J found that Dr Eke was "not desirous of telling the truth". It was submitted that Dr Eke was to be a key witness in the judicial review proceedings currently at issue and that Cooper J ought to have recused himself in view of the adverse view he had formed of his credibility and integrity in the earlier criminal trial.

[27] Dr Horowitz described Dr Eke as a prominent member of the Legislative Assembly and leader of the Opposition. He was a former Minister of Finance. a former Chair of Tonga Power Ltd and had recently been appointed as 'Atenisi's President. Dr Eke had testified at

the *Lavulavu* criminal trial that it was legitimate to treat gifts in kind for school fees as a receipt for the purpose of obtaining Government grants. In giving his verdicts in the *Lavulavu* trial Cooper J addressed a defence submission that:

> ... Dr Eke had given evidence that non-Government schools were allowed to set their own fee system and that it was acceptable to write a cash receipt because of the value of the bartered item tendered.[10]

[28] Cooper J found:

> Dr Eke provided no proof as to the former claim and when he made the latter, all his credibility was gone, it then being so obvious he was not desirous of telling the truth.[11]

[29] This Court set aside the guilty verdicts in the *Lavulavu* trial[12] noting that, cumulatively, the irregularities in the trial had resulted in it going "badly awry".[13] Dr Horowitz also drew our attention to the observations of this Court about Cooper J's view on the issue of receipts. This Court stated:[14]

> [74] On the other hand, a judge must take care when articulating a view on the evidence, particularly a decided view, on a critical issue, as he did in relation to receipts. At an early stage of the trial the Judge was, in effect, saying that, in his view, a critical aspect of the Crown case was proven fact and the trial should proceed on that basis. Even if the state of the evidence justified his view, he should have kept it to himself. Judges habitually remind jurors of the need to keep an open mind and not to come to a decided view until they have heard all the evidence. That precept applies equally to a judge sitting alone. To ignore it is perilous. Not only does it potentially infect the integrity of the decision making process but, as occurred here, it immediately raises questions as to the impartiality of the judge.

[30] Soon after this Court's decision in the *Lavulavu* criminal appeals was delivered on 10 October 2022, 'Atenisi lodged its application for Cooper J to recuse himself. The hearing of that application took place on 3 November 2022. In an affidavit supporting the application, Dr Eke expressed his concern about the possibility that the Judge might migrate prejudice against him from the criminal proceedings to the matter before the Court. After

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10 Verdicts at para 1199.
11 Verdicts at para 1200.
12 AC 17 of 2021 and AC 19 of 2021, 10 October 2022.
13 Para [82].
14 At para [74].

Cooper J's ruling on 15 November 2022, Dr Eke filed a further affidavit sworn on 18 November 2022 stating:

> ... I now hold unfair adjudication by the Cooper Court is probable and that a Special Judge remains the plaintiffs' venue for justice.

[31] Dr Eke added:

> 5. In my testimony before the Cooper Court in CR 173/2018, I sought to testify truthfully. Yet in finding at paragraph 1200 in Judgment, Your Honour recklessly deployed judicial immunity to defame me.
>
> 6. I remain unpersuaded the Cooper Court would not again unjustifiably defame me via finding in judgment of the instant action.
>
> 7. Consequently, I am advised I retain no other prudent course but to decline to voluntarily depose and testify for the plaintiff should Your Honour continue to preside over the instant action. In the event I am subpoenaed, I shall testify sparely in the presence of personal, as well as, of course, corporate counsel pro se.

[32] Dr Horowitz also referred to adverse media publicity in June 2021, some 16 months prior to 'Atenisi's application for Cooper J to recuse himself. We do not attach any weight to the media publicity at that time.

[33] Dr Horowitz relied on a United Kingdom Guideline to Judicial Conduct stating that personal animosity towards a party is also a compelling reason for disqualification[15] and High Court Recusal Guidelines in New Zealand stating that recusal may be required if a Judge is to assess a witness of disputed facts about whom he or she has formed a view.[16]

[34] As to the topics Dr Eke might address should he be called to give evidence in the Court below, Dr Horowitz submitted that:

- 'Atenisi could not be expected to reveal an outline of testimony until the respondent's opposition case is disclosed.

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15 Guide to Judicial Conduct (March 2020), Courts and Tribunals Judiciary, UK at 18

16 High Court Recusal Guidelines (June 2017), Courts of New Zealand at para 2.3.2.

- As an MP, Dr Eke is capable of testifying regarding the collective intent of the Legislative Assembly when the relevant regulations were promulgated.

- As the Chair of another tertiary institution in Tonga, Dr Eke was capable of reporting the respondent's incompetence or favouritism regarding another local candidate for tertiary accreditation.

- The respondent might summon Dr Eke as 'Atenisi's President to give evidence at trial to confirm an argument of counsel pro se.

Relief sought on recusal issues

[35] As we understand Dr Horowitz's submission, his first preference is that the decision by Cooper J not to recuse himself should be set aside and this Court should direct that a Special Judge should deal with the proceedings in the Court below at its cost. Alternatively, 'Atenisi is confident in the ability of the Lord Chief Justice to remain objective and that his decision to recuse himself should be set aside. His Lordship should hear the matter or, if not, Tupou J.

Consideration

Recusal Principles

[36] This Court recently discussed the principles applicable to disqualification for bias in *Cox v Attorney-General*:[17]

> [16] The application falls to be considered under rule 4(1) order 6 of the Tongan Judicial Code of Conduct Rules 2010 which provides:
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> > A Judge is disqualified from sitting if the circumstances are such that they would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the Judge would be biased.

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17 *Cox v Attorney-General* AC 4 of 2022, 23 May 2022.

[17] Rule 4(1) captures the conventional common law test for apparent bias, helpfully elaborated by the then Lord Chief Justice Paulsen in *Fa-oliu v Public Service Commission.*[18] As he said:[19]

> Whether or not a decision maker is biased does not depend upon that decision maker's personal opinion but is to be assessed objectively. I adopt as the test that a judge/decision maker is disqualified if the circumstances are such that a fair-minded lay observer might reasonably apprehend that the judge/decision maker might not bring an impartial mind to the resolution of the question that the judge or decision maker has to decide (*Ebner v Official Trustee in Bankruptcy* [2000) HCA63; *Porter v Magill* [2001] UKHL, 67, *0 'Neill No. 2 v Her Majesty's Advocate* [2013] UKSC 36, *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72 and *Joseph* (supra) at 25.5(2)). It is the possibility not the probability of bias that is important. But the existence of bias is not to be lightly inferred. The functions of a decision maker cannot depend upon the suspicions of the ultra-sensitive, paranoid or cynical person (*S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 35374). For this reason the examination of an allegation of bias must be rigorous.

[37] We accept that a Judge should not accede too readily to suggestions of bias and should be mindful of the burden that passes to other Judges if the Judge recuses him or herself unnecessarily. The need for a rigorous examination of an allegation of bias is emphasised by the Recusal Guidelines for the High Court of New Zealand which state:

> 1.3 The standard for recusal is one of real and not remote possibility, rather than probability.
>
> 1.4 The test is a two-stage one. The judge must consider:
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> 1.4.1 first, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and
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> 1.4.2 second, whether there is a logical and sufficient connection between those circumstances and that apprehension.

Ruling by Lord Chief Justice Whitten

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18 *Fa-oliu v Public Service Commission* [2017] TOSC 32, at [44]–[47].

19 At [46].

[38] We can dispose of this issue briefly. First, the Lord Chief Justice has the administrative responsibility to allocate the work of the Supreme Court to be determined by the members of that Court. In deciding that the case should no longer be dealt with by him but should instead be allocated to Cooper J, the Lord Chief Justice was exercising that administrative responsibility. A decision of this kind is not amenable to judicial review and any challenge to it is not therefore justiciable.

[39] Even if the decision were justiciable we are satisfied there are no valid grounds to set it aside. It is highly unusual, if not unique, for a litigant to challenge a decision by a Judge to stand aside. In our collective experience, challenges are invariably to a ruling by a Judge dismissing an application to disqualify himself or herself. Here, the Lord Chief Justice had been dealing with 'Atenisi and Dr Horowitz over a lengthy period with multiple appearances and rulings. His Lordship had plainly done his utmost to accommodate and guide Dr Horowitz as a non-lawyer but had reached the point for justified reasons where he was no longer confident he could fairly adjudicate on the matter. There is nothing to suggest that this was anything other than a genuine conclusion reached after careful consideration. Far from any criticism of this decision, the Lord Chief Justice is to be commended for acknowledging the conclusion he had reached. It is certainly not one with which we would be prepared to interfere.

Ruling by Cooper J

[40] The examination of an allegation of bias must be objective and requires a rigorous approach. A Judge should not accede too readily to an application that he or she should disqualify him or herself to avoid casting an unnecessary burden on colleagues and to discourage litigants from suggestions of forum shopping. Where there is a limited pool of Judges able to sit, the need for rigour is particularly important.

[41] On the other hand, if the circumstances are such that they would lead a reasonable, fair-minded and well informed observer to conclude that there is a real possibility that the Judge would be biased, then the Judge has no alternative but to stand aside.

[42] The argument advanced here is that Cooper J should disqualify himself because he had formed a negative view of Dr Eke's credibility in another case and Dr Eke would or

might be called to give evidence in the present matter. It cannot be doubted that the Judge expressed himself in strong terms in the Lavulavu case, but the question is whether, assessed objectively, there is a real possibility that the Judge would be biased against 'Atenisi in the present case.

[43] We are not persuaded there are any valid grounds to challenge Cooper J's refusal to recuse himself. First, there is no objective basis for an independent observer to conclude that by reason of his critical view of Dr Eke's credibility in another unrelated case, the Judge would be biased against 'Atenisi in the present case. Neither 'Atenisi nor Dr Eke was a party to the Lavulavu criminal fraud trial; the subject matter of the previous case was completely different from the present; Cooper J's view of Dr Eke's credibility related to his opinion given in evidence about whether gifts in kind for school fees qualified for Government grants; 'Atenisi's present case is concerned with the unrelated issue of its wish to obtain accreditation of its tertiary courses by the respondent authority.

[44] Secondly, there is no evidence on which a logical connection could be made between the previous credibility finding and any apprehension of bias against 'Atenisi or Dr Eke. It is incumbent on 'Atenisi to show that connection, yet Dr Horowitz submits that it should not be required to say what evidence Dr Eke would give at the substantive hearing. The suggestions of what evidence he could give (recounted at [34] above) are either inadmissible or not shown to have any relevance to any issue likely to arise. Importantly we have nothing before us to determine whether any issue is likely to arise which would require an assessment of Dr Eke's credibility. In these circumstances, Cooper J was right to conclude that any allegation of bias was mere speculation.

Decision of Lord Chief Justice Whitten declining to declare 'Atenisi entitled to accreditation

[45] Dr Horowitz submitted that the lengthy delays in granting accreditation of its relevant courses of education combined with the respondent's repeated failures to comply with timetable orders were such that the Court below or this Court on appeal should have been willing to make at least a *prima facie* determination that 'Atenisi's courses qualified for accreditation. After a delay of over four and a half years, it was not until July 2022 that the respondent finally indicated which of its three Approval Record Books would serve as the basis for its assessment of 'Atenisi's application for accreditation. The relevant

regulations require that an outside review panel be appointed to confer accreditation. The respondent appointed four academics to a panel on 20 April 2022 but 'Atenisi had objected to them. 'Atenisi also disputed the extension by four years of the respondent's ambit of evaluation contending that the period should be confined to November 2017 to November 2021.

[46] It should be recalled that although the Lord Chief Justice had earlier granted leave in January 2022 for 'Atenisi to apply for judicial review by way of *mandamus*, he had declined at that time to declare 'Atenisi entitled to accreditation on the basis of the respondent's "constructive refusal" to do so. By July 2022, following the disputes that had arisen between the parties over the appointment of the panel and the extension of the ambit of evaluation, His Lordship had identified relevant preliminary issues to be first determined rather than proceeding directly to an order by way of *mandamus* that the respondent grant accreditation by a specified date.

[47] Dr Horowitz submitted that after nearly five years of prosecution and four attempts by three of its advocates to settle the matter, 'Atenisi's enrolment and solvency was in jeopardy. He pointed out that the Court below had admonished the respondent for repeatedly defaulting or filing proceedings out of time and submitted that this Court retained a discretion to impose a remedy based on a review of the *prima facie* record. He maintained that 'Atenisi merited accreditation in December 2017 based on its compliance with the relevant legislation and *prima facie* evidence of its academic performance over the period February 2014 to October 2017. Issues of costs and damages were also canvassed.

[48] We understand 'Atenisi's frustration with the progress of this litigation. There has undoubtedly been delay attributable to the respondent but 'Atenisi must accept that there can be no substantive resolution while its challenge to the membership of the accreditation panel and its scope remain outstanding. The determination of those preliminary issues was correctly identified and directed by the Lord Chief Justice on 28 July 2022 yet matters continue to be delayed by issues such as the challenges raised in this appeal.

[49] This matter requires firm management by the trial Judge and a willingness by both sides to grapple with the real issues.

Result

[50] We have concluded there is no merit in any of the issues raised by the appellant and the application for special leave to appeal is dismissed accordingly.

[51] The respondent has not participated in this application and there will be no order for costs.

Randerson J

White J

Harrison J

COURT OF APPEAL TONGA