TOW *v* TOV
[2016] SGHCF 16

Case Number	: Appeal from the Family Justice Courts No 22 of 2016
Decision Date	: 19 December 2016
Tribunal/Court	: High Court
Coram	: Aedit Abdullah JC
Counsel Name(s)	: Bachoo Mohan Singh and Alwyn Kok (Bachoo Mohan Singh Law Practice) for the appellant; Yap Teong Liang and Tan Hui Qing (T L Yap Law Chambers LLC) for the respondent.
Parties	: TOW — TOV

Courts and Jurisdiction —Judges —Recusal

19 December 2016 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 The question for determination in this appeal is whether a judge or tribunal should recuse when he or she had in earlier proceedings on a separate but factually connected matter made adverse findings and remarks in the course of assessing the evidence of a dissatisfied party. The Appellant seeks the recusal of the district judge (the "District Judge") in the ancillary matters hearing in the divorce proceedings between her and her ex-husband, as the same district judge had earlier made a personal protection order against the Appellant, in the course of which she had found the Appellant to be an untruthful witness. The District Judge declined to recuse herself, leading to the present appeal.

2 After consideration of the arguments and affidavits, I have for the reasons below reached the conclusion that the appeal should be dismissed.

Background

3 The parties, the Appellant ex-wife and the Respondent ex-husband, were married in August 2001, with three children to the marriage of which only one – the eldest daughter who is now a teenager ("the Daughter") – needs to be mentioned specifically in the present proceedings. Divorce proceedings were started by the Respondent in September 2013, with interim judgment granted in December that year. What triggered the present recusal application is the hearing by the District Judge of an application by the Respondent for a Protection Order ("the PPO") against the Appellant for the benefit of the Daughter in 2014.

4 The District Judge granted the PPO after a trial. In reaching her decision to grant the PPO ("the PPO decision"), the District Judge assessed the evidence of the Appellant, found it to be wanting, and preferred the evidence of the Daughter.

5 Subsequently, when the ancillary matters involving the children of the marriage came up for case conference, the case conference judge asked the parties which judge had previously heard matters pertaining to the divorce. The parties' counsel informed that two district judges had

previously adjudicated upon issues involving the children, being the District Judge and another district judge who had heard an earlier custody application. The ancillary matters were eventually fixed before the District Judge. Before the District Judge, the Appellant's counsel informed that the Appellant sought the District Judge's recusal. The Appellant was directed to make a formal application. At the hearing of the recusal application, the District Judge dismissed the application.

The District Judge's Decision

6 In her Grounds of Decision (*TOV v TOW* [2016] SGFC 62) ("the GD"), the District Judge noted the difference in approach between the law on recusal in Singapore as opposed to that in England, at least since the House of Lords' decision in *R v Gough* [1993] AC 646. In particular, in England, the applicable standard is that of whether there is a real danger of bias on the part of the relevant member of the tribunal, and the court answers this question from its own perspective. On the other hand, in Singapore, the appropriate standard, as set down in various cases such as *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791; *Tang Liang Hong v Lee Kuan Yew and another* [1997] 3 SLR(R) 576 ("*Tang Liang Hong*"); *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar Alan*"); and *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 1108, is that of a reasonable suspicion of bias, not from the perspective of the court but from that of a reasonable member of the public with knowledge of the relevant facts. The District Judge also considered Australian authorities.

7 The District Judge then examined cases where apparent bias was alleged because the judge had previously made adverse rulings against a party in an earlier matter. She referred to the increasing use of docketing where all matters pertaining to a protracted case are assigned to the same judge, and stated that such a trend would raise the question of whether (and when) adverse findings made by a docket judge in earlier proceedings against one of the parties should lead to recusal of the same judge such that he or she must discontinue hearing the case or other related matters involving the same parties. English authorities, primarily from the Court of Appeal of England and Wales, were cited for a number of legal principles:

(a) Recusal should generally not occur unless the judge concludes that he or she is unable to give a fair hearing, or a fair-minded and informed observer would conclude that there was a real possibility that the judge would not be able to give a fair hearing (*Otkritie International Investment Management Ltd & Ors v Urumov* (2014) EWCA Civ 1315 ("*Otkritie*"));

(b) A judge is not precluded from hearing a dispute involving a party simply because he had previously criticised the conduct of that party in the course of his judgment on a matter, since if he had met out the criticism fairly and judicially, he was simply exercising his judicial function and there will be no reason for a fair-minded and informed observer to consider that there is any possibility of bias (*Otkritie*; *JSC BTA Bank v Ablyazov* [2013] 1 WLR 1845 ("*JSC BTA Bank*"));

(c) However, if a judge had expressed his views in such outspoken, extreme or unbalanced terms as to cast doubt on his ability to approach the subsequent case with an open judicial mind, then he should recuse himself (*Locabail (UK) Ltd v Bayfield Properties Ltd* (2000) QB 451 ("*Locabail*"); *JSC BTA Bank*; *Otkritie*);

(d) The passing of time would weaken any danger of bias (*Locabail*);

(e) Recusal should not be too readily done, as this would undermine the advantages of having a single judge determine the procedural and substantive parts of a case (*Otkritie*).

The District Judge noted that some of the above principles, particularly that in sub-paragraph (c) above and the related observations by the English court in *Otkritie*, have been adopted by the Singapore High Court: see *Ong Wui Teck v Ong Wui Soon* [2016] 2 SLR 1067 at [25].

8 Responding to the Appellant's arguments below that Australian cases should be followed in preference to those of England, the District Judge found that those cases, namely *Vakauta v Kelly* (1989) 167 CLR 569, *Hearst & Hearst and Ors* [2011] FamCA 470 and *Murray & Tomas and anor* [2011] FamCACF 81 ("*Murray*") were actually not inconsistent with the authorities in England. The District Judge further cited another Australian case, *Jarrah & Fadel (Disqualification)* [2015] FamCAFC 163, as an illustration for the principle that unless there are clear and substantiated grounds for recusal, the fears of a litigant that a judge might not be impartial are not sufficient.

9 The District Judge then found that the allegations made by the Appellant below were not such as to give rise to a reasonable suspicion of bias from the viewpoint of a reasonable observer sitting in court with knowledge of the relevant facts. The District Judge noted that when she made adverse findings of fact against the Appellant in the PPO decision, she was simply exercising her judicial function in dealing with the matters in controversy raised in the PPO application. She had made those findings on the balance of probabilities, based on evidence presented after a two-day trial. Neither were the findings and views she expressed of such an outspoken, extreme or unbalanced nature as to raise in a reasonable observer doubt in her ability to deal with the subsequent ancillary matter issues fairly. She had provided in her written grounds for the PPO decision (*TCV (On behalf of Child, A) v TCU* [2015] SGFC 3 ("the PPO GD")) her objective reasons for preferring the evidence of the Daughter to that of the Appellant. Furthermore, the issues dealt with in the PPO decision were relevant to the determination of the ancillary matters which involve the children of the marriage, and would form part of the universe of materials that the judge hearing the ancillary matters would have to consider. Hence, even if another judge were to hear the ancillary matters, he would have to refer to the District Judge's PPO GD, and consequently, he would not be in any position different from that of the District Judge.

10 As for the Appellant's allegations below that the District Judge's findings in her PPO decision had caused her relationship with the Daughter to deteriorate such that she had not seen the Daughter for two years, the District Judge noted that that was unfortunate. However, the underlying reasons for the problems between the Appellant and the Daughter had to be resolved at the hearing of the ancillary matters, and as far as the recusal application was concerned, the Appellant's allegations about the impact of the District Judge's PPO decision was based mainly on her personal fears and thoughts unconnected to whether the District Judge can act with fairness or impartiality at the hearing of the ancillary matters.

11 The adverse feelings that the Appellant harboured towards the District Judge was also not sufficient ground for recusal. A judge should not recuse simply to avoid the discomfort of hearing a case involving his critic: *Triodos Bank v Dobbs* [2005] EWCA Civ 468 at [7].

12 As for complaints by the Appellant about the management of the proceedings for the PPO application, such as the absence of mandatory counselling and the scheduling of the hearing one day before the Daughter's examinations, the District Judge found these to be irrelevant to the question of apparent bias on her part and they were, in any event, not matters that were dealt with by her.

The Appellant's Case

13 The Appellant raised various circumstances in support of her case that the District Judge ought to have recused herself. The District Judge failed to advise the parties to go for counselling before

allowing the PPO application to go to trial. She had made adverse findings against the Appellant in the PPO decision; she had found the Appellant an incredible witness, and her evidence unreliable and untruthful. The District Judge also found that the Appellant had caned the Daughter not for the purpose of discipline. All in all, the PPO decision labelled the Appellant as an abusive mother and liar, and the findings by the District Judge discredited the Appellant as a person and made her appear unworthy as a mother in the eyes of the Daughter. As a result, the Appellant has not seen her daughter for over two years, and the Appellant now views the District Judge as the person who has taken the Daughter away from her.

14 At the trial for the PPO application, the District Judge allowed the admission of the Respondent's evidence alleging that the Appellant had abused drugs even though the Respondent's allegations were but bare assertions unsupported by objective evidence. The District Judge appeared to have been influenced by the Respondent's evidence and this created a reasonable suspicion that the District Judge would have preconceived ideas about the Appellant's parental fitness.

15 The Appellant argued that a reasonable or fair-minded and informed member of the public would have a reasonable suspicion that the District Judge would have a pre-conceived notion of the Appellant's character, having found against the Appellant in the hearing of the PPO application. Such a member of the public would also have a reasonable suspicion that the District Judge would be unconsciously affected by bias if she were to now hear the ancillary matters, having previously made adverse findings about the Appellant including that she was a liar unworthy of credit. The ancillary matters would cover the same issues as those covered in the PPO application. The District Judge, having found that a PPO was necessary, had found that the Daughter's safety and welfare required intervention by the courts. This would colour her determination of the ancillary matters. In these circumstances, there would be a reasonable suspicion of bias if the District Judge continues hearing the ancillary matters and eventually makes a decision that is adverse to the Appellant.

16 The Appellant, her mother and friends, who are fair-minded and informed members of the public, have all questioned the fairness of the ancillary matters being heard by the same judge who had heard the PPO application. The recusal application should be allowed as public confidence was of paramount importance, and any person before the court should not have any apprehension that the judge may be subject to unconscious bias. Anything which has the slightest effect on public confidence and trust has to be addressed, and there has to be absolutely no suspicion of bias. Justice has to be seen to be done, and it would help ensure public confidence if the ancillary matters are not heard by the District Judge.

17 Further, the Appellant submitted that the District Judge had applied the wrong test, by relying on *Otkritie* which referred to the need for substantial evidence of actual or imputed bias before a judge would need to recuse himself: this was consistent with the real danger of bias test rather than the reasonable suspicion test that is applicable in Singapore. The District Judge cited UK authorities, but these were inapplicable in Singapore. The reference by the District Judge to *Ong Wui Teck* was also misplaced, as that was a case concerned with actual bias. The reference in *Ong Wui Teck* to *Otkritie* was only a reference to an observation of the English Court, and the UK principles have neither been approved nor adopted in Singapore. The District Judge was also wrong to invoke the docketing system as a justification for her decision as the PPO application was not part of the divorce proceedings, and was a quasi-criminal matter. The adverse findings made by the District Judge in the PPO decision were akin to a finding of guilt under s 321 of the Penal Code (Cap 224, 2008 Rev Ed) for voluntarily causing hurt. Further, the present case was a simple divorce case as opposed to a long or complex one and so the District Judge reliance on *Otkritie* was misplaced.

18 It was emphasised that had the District Judge applied the reasonable suspicion test, she would

have concluded that the Appellant had shown that given the facts of the case, a reasonable member of the public could harbour a suspicion of bias on her part, and recused herself. Other judges are available to hear the ancillary matters.

The Respondent's case

19 The Respondent argues that the District Judge had used the correct test in determining the recusal application. She had referred to the relevant authorities, including *Re Shankar Alan*, which applied the reasonable suspicion of bias test. The District Judge was aware of and alive to the differences between the law in Singapore and that in the UK, as well as that in Australia. *Ong Wui Teck* was cited and referred to in respect of the proposition that the mere fact that a judge had previously heard a related matter and made an adverse ruling or comment against a litigant is not a basis for recusal of the judge in a subsequent matter involving that litigant. English authorities were considered by the High Court in *Ong Wui Teck* in respect of this holding. That *Ong Wui Teck* was concerned with an allegation of actual bias is irrelevant and has no bearing on the fact that the case is still authority, which is binding on the District Judge, in respect of the proposition put forth on recusal following adverse comments made by a judge in a prior related matter.

20 The question is not whether adverse findings against the Appellant were ever made but whether the test for apparent bias has been fulfilled. Otherwise, no judge could hear matters if they had made adverse findings against a litigant in an earlier matter, and this would undermine the docket system and the early assignment of judges to cases.

21 The Appellant has not referred the court to any outspoken, extreme or unbalanced views that were expressed by the District Judge in the PPO GD. The mere fact that the District Judge had made findings against the Appellant and had granted the PPO are not sufficient to meet the test for apparent bias. The District Judge's findings were based on the evidence, and they were objective, fair and considered, backed by detailed reasons for why she preferred the evidence of the Daughter against the Appellant, who she found to be untruthful and unreliable because of inconsistencies in evidence. The District Judge was merely just exercising her judicial functions and duties. Furthermore, the adverse findings she made were upheld on appeal to the High Court.

22 The Australian cases such as *Murray* are consistent with the District Judge's ruling. There was a finding of false evidence that took the facts of that case to a different level.

23 Contrary to the arguments of the Appellant, PPO proceedings are not quasi-criminal in nature: *Tan Hock Chuan v Tan Tiong Hwa* [2002] 2 SLR(R) 90 ("*Tan Hock Chuan*"). A finding or conviction of a criminal offence does not arise from the granting of a PPO order.

24 Nor can there be any reasonable suspicion that the District Judge had formed preconceived ideas of the Appellant's fitness as a parent because she had admitted and heard evidence of allegations of drug use by the Appellant. Such evidence was admitted in the PPO proceedings; if any complaint were to be made against such evidence, it should have been made in that set of proceedings. In any case, the District Judge did not actually make any finding of fact on whether the Appellant had indeed abused drugs; she had referred to the Appellant's alleged drug abuse in the PPO GD only as background in setting out each party's version of the facts. In any event, the District Judge was not influenced by the allegations of drug abuse in reaching her decision.

25 The District Judge would not be unconsciously affected by her pervious findings against the Appellant. No evidence has been given to substantiate the assertions that the District Judge would be so affected. The court needs to approach the question of whether there would be reasonable

suspicion of bias not from the Appellant's view, but from the view of a reasonable fair-minded observer. The Court of Appeal in *Tang Liang Hong* had also cautioned against judges being too ready to recuse themselves upon allegations of apparent bias that are not substantiated.

26 The findings made in the PPO decision would be one of the various matters that would be considered by the court hearing the ancillary matters. The District Judge, contrary to the arguments of the Appellant, took note that matters examined in the PPO decision would be relevant to the ancillary matters proceedings, but that the weight and consideration to be given to those matters would be a separate matter to be determined during the ancillary matters hearing. Even if the PPO application had been heard by a different judge, the decision for that would still be relevant in the ancillary matters hearing.

27 The Appellant's personal feelings about the District Judge hearing the ancillary matters do not feature in the test for recusal.

28 The Respondent also pointed out that the Appellant had on 19 February 2016 filed an application for the appointment of a child issue expert to prepare a report for the purpose of assisting the court in dealing with the ancillary matters. The Appellant has made no objection to the District Judge hearing that application. The Respondent submitted that the Appellant should not be allowed to pick and choose when to allege apparent bias.

The Decision

29 I found that the Appellant has not successfully made out her case that the judge should be recused. A fair-minded reasonable member of the public with knowledge of the relevant facts would not have the suspicion or apprehension that the District Judge would be biased.

Analysis

Basis of application

30 Counsel for the Applicant made it clear that there is no allegation of actual bias. Actual bias requires strong proof. For the record, it should be made clear that there is nothing in the PPO GD to show any actual lack of impartiality by the District Judge. The very fact that the PPO decision was upheld on appeal makes it much harder for any actual bias to be made out. Only apparent bias will be considered in this judgment.

The Law on Apparent Bias

31 The law on recusal for apparent bias in Singapore was laid down in *Re Shankar Alan*. The test is whether the circumstances complained of would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the judge is biased. The assessment is made on an objective basis, but with the actual knowledge of the relevant facts. The fact that the yardstick is the perception of a fair-minded and reasonable person excludes any particularly sensitivity or brittleness as to how the judge's actions or statements should be judged.

32 As a number of Australian and English authorities were considered in the decision below, it would be appropriate for me to mention briefly the tests as they now stand in these jurisdictions. In England, the test applies a different standard of probability, namely that of a real danger of bias. As noted in *Re Shankar Alan* (at [66]), the basis of the English test is that it looks to the real possibility or danger or risk of the tribunal or judge being biased. In comparison, the reasonable suspicion test,

which is the test under Singapore law, takes an objective assessment of the appearance of bias, and bases the doctrine on the need to ensure public confidence: see *Re Shankar Alan* at [75]. The reasons for not following the English position have been well considered in *Re Shankar Alan* and do not need to be revisited here.

33 The Australian courts apply a test broadly similar to that in Singapore, looking at reasonable suspicion or apprehension of bias, but split the analysis into two steps (see, *eg*, *Murray* at [27]):

(a) Step 1: Whether a reasonable observer would form the perception of an absence of impartiality on the part of the judge, if he is to hear further proceedings between the parties; and

(b) Step 2: Whether a nexus exists between the lack of impartiality and the issues requiring determination in the future.

The second step of the Australian formulation requiring a nexus focuses on a link between the possible bias and the issues that the judge would be required to determine in the future if he does not recuse himself. This approach has not been adopted in Singapore thus far. I do not think that is appropriate to do so given that the reasonable suspicion test is aimed at considering the perception of bias measured through a hypothetical observer. Since the issue is one of reasonable perception, whether or not a nexus exists would seem immaterial. The real issue is what would be a reasonable suspicion.

34 As the test in Singapore adopts the standard of the fair-minded person's reasonable suspicion of bias, this brings in an objective viewpoint. The vantage point is one founded on reasonableness and fair-mindedness, with knowledge of the facts of the case. This means that the normal work of and discharge of functions by a judge would not be, unless the specific facts of a case are exceptional, matters that would give rise to a reasonable suspicion or apprehension of bias. A judge in our adversarial system would be expected to sift through the evidence, choose one side's version of the facts to the other's, and normally, in the absence of objective evidence, reach conclusions on credit and credibility. If the judge considers that witnesses have been mistaken, deficient, or untruthful, the judge should make the necessary findings. The judge is not expected to be gingerly or tactful to the point of obscuring necessary findings. The courtroom is certainly not an arena for trial by combat, or for the flagellation of witnesses, but there is no safe zone against adverse findings in the courtroom: the court is concerned with the proof of a case, and will need to evaluate the credit and credibility of the witnesses who testify.

35 That I believe underlies the approach of the English Court of Appeal in *Otkritie* that a judge is not barred from hearing a matter simply because he may have criticised a party's conduct in an earlier judgment. A similar observation was made in *Locabail*.

36 The growth and multiplying of procedures and the increasing number of types of applications that may be made on the one hand, and the drive to make efficient use of judicial resources on the other, mean that often a specific judge may need to hear multiple parts of what is essentially a single case. The odds are also increased that the same parties may be involved in different applications arising out of the same or related facts. An important consideration has been the need to ensure that litigants should not pick their own judges or disrupt proceedings: *In re JRL* (1986) 161 CLR 342 at 352, as cited in *Locabail* at [22]. Against that backdrop, the primary concern of the apparent bias rule is to root out any untoward behaviour that goes beyond the pale.

37 Contrary to the arguments of the Appellant, I find that the District judge applied the appropriate test, and was alive to the distinction between the reasonable suspicion test that is the

law in Singapore, and the test applied in England. The District Judge did cite *Ong Wui Teck*, an actual bias case, as well as the authorities considered in that decision, such as *Otkritie* and *Locabail*, but this was for guidance in respect of analogous factual situations, namely the type of previous adverse finding of fact or credibility that would call for the recusal of a judge. The observations and considerations made in *Ong Wui Teck* in respect of such factual situations would still be useful in an apparent bias case as they can show how a recusal application based on previous adverse findings by a judge should be treated, whether actual or apparent bias was alleged. Even if different tests were applied, that would not necessarily give rise to different results in different factual situations. It is noteworthy that the Appellant has not shown how differently the factual situations in this case would have been dealt with on applying a reasonable suspicion test, even assuming that she is right in her allegation that the District Judge had erred in not applying the reasonable suspicion test in the first place. The simple point is that they would not have been treated any differently. There may indeed be differences in outcome in some factual situations depending on the test applied, but not here. The English cases were considered in *Ong Wui Teck* for the factual matrices involved, and not for the test for bias applied there. They could therefore be legitimately referred to by the District Judge.

38 The Appellant also seems to argue that the District Judge wrongly took the observations in the English decisions cited in *Ong Wui Teck* as principles of law when they were merely *obiter*. It suffices to note that observations, statements, and pronouncements, however styled, may be persuasive even if they were not part of the ratio of a particular case: indeed, most important principles of law are culled not from the actual holding of cases, but from the exposition of reasoning.

39 In the course of oral arguments, counsel for the Appellant referred to the remarks of then judicial commissioner Sundaresh Menon in the opening of the judgment of *Re Shankar Alan* and argued that that encapsulated the approach that should be adopted in the present case. Menon JC said (at [1]):

> The applicant reaches out to that hallowed principle: justice must not only be done but it must manifestly be seen to be done. He contends that this principle has been violated in his case. What do these words really mean? Are they simply a nice sounding tagline expressing a pious aspiration? Or do these words in fact express an uncompromising standard which serves to guarantee that those having business before judicial and quasi-judicial bodies in this country will not go away harbouring any reasonably held apprehensions that they have not been fairly dealt with?

40 I do not see those remarks as introducing a legal test. The whole point of the above comments in *Re Shankar Alan* was to reiterate the appropriate test for apparent bias that should be applied in Singapore. Those remarks reflect the underlying objectives, but are not criteria to be applied in determining whether apparent bias is made out. Furthermore, it is clear that the measure is that of a reasonably held apprehension: the primary gauge is an objective one.

The specific allegations

41 I find that no apparent bias has arisen here. The remarks made by the District Judge were made in the course of her assessment of the evidence before her in the PPO proceedings: these remarks may have been robust, but do not evince any hostility towards the Appellant or are of such a nature that they should be regarded as being untoward. Neither is the fact that the District Judge had previously heard the PPO application and found against the Appellant sufficient ground to require her to recuse from hearing the ancillary matters. There would not have been a reasonable suspicion on the part of a reasonable member of the public that the District Judge is biased against the Appellant.

Remarks made by the District Judge

Remarks made by the District Judge

42 It is clear that in determining a recusal application premised upon adverse findings or remarks made by a judge against a litigant in prior proceedings, the focus of the Court's concern is whether those remarks that were made would reasonably and fairly trigger a concern that the judge would bring in extraneous matters to the determination of the present case. The mere fact that the judge had previously made adverse comments or findings against a litigant is, on its own, not sufficient for a recusal application to succeed. In *Locabail*, after considering the factors which would not generally give rise to a real danger of bias (applying the English test), the English Court of Appeal stated at [25]:

> … By contrast, a real danger of bias might well be thought to arise if … in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. 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. In most cases, we think, the answer, one way or the other, will be obvious.

43 In the present case, the remarks made by the District Judge in the PPO proceedings were in the normal course of assessing the evidence. It is part and parcel of the judicial process for evidence to be weighed, and accepted or rejected. The mere rejection of a party's evidence is not by itself an indication of actual bias, or pertinently for the present case, a matter which would create a reasonable suspicion of bias.

44 The remarks complained of were expanded by the Appellant in oral arguments, and related to the District Judge's findings on the evidence. The District Judge did state the following in the PPO GD:

(a) The Appellant gave inconsistent accounts (at [31] and [36] of the PPO GD) (the Appellant here was referred to as "the Respondent" in the PPO GD);

(b) At trial, the Appellant did an about turn from her affidavit. She failed to explain why she drastically changed her evidence (at [34] of the PPO GD);

(c) The Appellant's testimony was riddled with inconsistencies and her evidence was unreliable (at [35] of the PPO GD);

(d) The Appellant was "unable to untangle herself from her web of lies" (at [37] of the PPO GD);

(e) The Appellant had changed her evidence after receiving the complainant's affidavits, upon realising that what she had initially admitted to would weaken her defence. She had also said untruthful things in her affidavit (at [38] of the PPO GD);

(f) The Appellant was uncertain about her evidence, and was unable to give credible explanations for the innumerable inconsistencies in her evidence (at [42] of the PPO GD); and

(g) The Appellant had no qualms about shifting her evidence (at [43] of the PPO GD).

In addition, the District Judge noted (at [45] of the PPO GD) that the behaviour of the Appellant (and the Appellant's mother) was inappropriate at certain times during the hearing of the PPO application, even when she was not giving evidence, including after the oral decision was given. It should be noted that no complaints were made by the Appellant about the conduct of the District Judge in the course of the PPO proceedings.

45 In my view, there is nothing in the findings or statements of the District Judge in the PPO GD that displayed such intemperate language that a reasonable perception of bias would be engendered. The rule against apparent bias is not meant to be a check on language used – assessment of evidence and conclusions on credibility need to be weighed against what was adduced. In the present case, the use of phrases such as "web of lies", and "shifting of evidence" was based on the assessment of evidence. The use of such phrases is, on the face of it, part of an assessment of the inconsistencies that the District Judge was concerned about and which played a role in her determination of the PPO application. The assessment of evidence was carefully done. While the District Judge concluded that the Appellant lied and was inconsistent in giving her evidence, she did not express any conclusion that the Appellant was totally incapable of belief. It is clear looking at the language and reasoning of the District Judge that her conclusions were specific to the case and what was adduced before her in the PPO proceedings. In view of that, it could not be said that a reasonable and fair- minded member of the public would have the suspicion that there was such a closing of the mind as to the credit or credibility of the Appellant that the District Judge would not be able to discharge her duties fairly in the subsequent ancillary matters proceedings, or that the District Judge had taken such a view that she would reasonably be thought of as being bias.

46 Importantly, as raised by the Respondent, the District Judge's findings in the PPO decision were upheld on appeal. There has thus been scrutiny of the District Judge's decision, and the fact that such scrutiny did not lead to a reversal of her decision underlines that her assessment of the evidence was properly done. But even had the PPO decision been reversed, this does not mean that a reasonable suspicion of bias would necessarily have been engendered. An error in law or fact does not mean that bias was present or an appearance of bias created: see *Tang Liang Hong* at [60], reproduced below:

> … the thrust of Mr Gray's criticism is not about the correctness of the orders, but that these orders gave rise to an appearance of bias. With respect, this criticism is untenable. It is one thing to say that an order made by a judge is extraordinary and unusual or it is wrong; it is quite another to say that there was an appearance of bias on the part of the judge in making the order because it is so extraordinary and unusual. Even if the learned judge had erred in law or on the facts in making the orders or any of them, such error cannot be translated into an appearance of bias on the part of the learned judge.

47 I do take note of the Australian authorities cited in arguments. In *Murray*, the Full Court of the Family Court of Australia at Sydney ("the Full Court"), in a judgment delivered by Coleman J, considered arguments in an appeal against the refusal of the first instance judge to recuse. The complaint was that the first instance judge lacked impartiality because of certain remarks that he had made regarding the reliability of the evidence of one of the parties. Those remarks were made at a preliminary hearing pending the final full hearing. The first instance judge had, among other things, stated his views that the complainant had exaggerated or prevaricated in relation to her evidence, had given "unreliable" evidence, and basically that some of her evidence was untrue. The Full Court found that there was nothing in the reasons provided by the first instance judge which suggested that he retained, or could be expected to retain, an open mind at the subsequent final hearing, and

that the same issues would be canvassed there in the subsequent proceeding. In the circumstances, the Full Court was of the view that the first step of the analysis for finding a reasonable suspicion or apprehension of bias (see [33] above) was satisfied. That decision could perhaps be distinguished from the present case, as the earlier proceedings referred to in *Murray* was intricately linked to the later proceedings. In fact, as the District Judge noted at [45] of the GD, the subject of the complaint in *Murray* were findings made at interim interlocutory proceedings which foreshadowed the final hearing, and the issues upon which the first instance judge had to determine at the interim proceedings would be the very same issues that fall to be determined at the final hearing. After reviewing the remarks made by the first instance judge at the earlier proceedings, the Full Court was of the view that the first instance judge had already formed views on the issues at the earlier proceedings, and could not be expected to retain an open mind with respect to the same issues if he were to preside over the final hearing. This is not the case here, given my findings at [45] above.

48 Similarly, in *Stephens v Stephens (Disqualification)* [2010] FamCAFC 206 ("*Stephens*"), the Full Court of the Family Court of Australia at Melbourne came to the conclusion that adverse findings and remarks made by a judge against a litigant's credibility could give rise to a reasonable apprehension of bias of the same judge against that litigant in subsequent proceedings. In that case, the first instance judge, Strickland J, had concluded in the earlier proceedings that the complainant had, *inter alia*, an "egocentric personality" and had concocted stories or falsely suggested facts. The Full Court said at [41]:

> We are not persuaded that the cumulative effect of the findings, observations or statements previously made by Strickland J established a reasonable apprehension of bias. There is a material distinction between findings of fact, observations and statements made by a trial judge in the course of reasons for judgment following the trial of contested proceedings, and things said by a trial judge at earlier times in the proceedings. In many cases, the proper exercise of judicial power calls for robust findings with respect to credibility... Strickland J formed an adverse view of the husband's credibility. It may well be said that Strickland J could not be seen as bringing an impartial mind to the determination of any further proceedings in which the husband's credibility was an issue.

The Court however found (at [42]) that even if the cumulative effect of the findings, observations and statements of Strickland J established a reasonable apprehension of bias, it was not established that there was any connection between any such bias and the issues to be determined at the subsequent proceedings, which was for a costs application (*ie* the second step of the analysis for finding a reasonable suspicion or apprehension of bias (see [33] above) was not satisfied).

49 There are some parallels that could be drawn between the remarks made by the District Judge in the present case and that made by the first instance judge in *Murray*, in terms of the language used, though what was expressed in *Murray* was a little stronger. That authority is not binding upon me, and in any event, as has been noted in various cases, recusal is a fact-sensitive exercise. The facts of Murray are distinguishable from the present case (see [47] above). As for *Stephens*, the court there ultimately rejected the applications because of the lack of connection between the apparent bias and the determination to be made by the judge in the subsequent proceedings. As noted above (at [33]), I do not think it is necessary to adopt the Australian two-step test: the approach in *Re Shankar Alan* provides sufficient and adequate guidance. But as far as the first stage of the Australian test is concerned, I am of the view that the finding in those two Australian decisions that the first stage of the test was met, *ie* that the remarks gave rise to reasonable suspicion or apprehension of bias, should not be followed here. In the final analysis, the facts in the present case are sufficiently different from those in *Murray* and *Stephens*, and the comments made by the District Judge were of a different scale as those made in the two Australian cases.

Adverse findings

50 Even if the District Judge had found grounds to grant a PPO against the Appellant that does not mean that a reasonable suspicion of bias would necessarily be established if she hears the subsequent ancillary matters pertaining to the children of the marriage. A fair-minded reasonable observer or member of the public would accept that a judge would carry out judicial duties conscientiously, and would not readily or easily slip in thinking, by letting previous adverse findings against the Appellant close his or her mind in subsequent ancillary matters proceedings.

51 In *Otkritie*, the English Court of Appeal, after reviewing a number of cases, summarised the position as such at [22]:

> There is thus a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences".

52 In *JSC BTA Bank*, the court considered the scenario of prejudging where committal proceedings are undertaken in the midst of complex civil litigation: would a judge who has dealt with the committal of a party earlier in the process be precluded from hearing the civil matter subsequently? Rix LJ , delivering the judgment of the court, noted as follows:

> **[68]** Special considerations may arise in such cases. Where a judge has had to form and express a view as to the credibility of a party or an important witness as a result of such cross-examination, should that require the recusal of that judge from further involvement in the litigation, even where he does so, as in this case, in moderate terms? Committal applications have to be judged on the criminal standard of proof, so that, where such an application has resulted in a finding of contempt of court, the judge has applied a standard of proof higher than that of a civil trial.
>
> **[69]** On the other hand, in any event the findings of the judge are part of the *res gestae* of the proceedings. They are, as it were, writings on the wall, and would need to be considered (subject to appeal of course), for any relevance, in any subsequent proceedings and at trial, by the same judge or by any other judge. They may not even be appealed, or, as in this case, they may be appealed and upheld, so that in either event it is not possible to say that the judge was in error. In this connection, certain findings might give rise to issue estoppels, which would not only have to be taken into consideration by any judge at trial but would be binding on him, as Mr Béar accepts. What then is the difference between the judge who bears in mind his own findings and observations, and another judge who reads what the first judge has written, as he must be entitled to do? Mr Béar submits that in the case of the first judge who has heard and written, the impact of what he has learned is the more direct, immediate and powerful, and that that is a critical distinction. However, it seems to me that, unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge - other than that he is more experienced in the litigation.

Thus, a fair-minded member of the public would not come to the conclusion, in the absence of some other trigger, that the judge who had heard the first matter would be cloaked with bias in the subsequent proceeding. Rix LJ then highlighted that what the judge undertakes in a case is the performance of his judicial function, and that the consideration of the earlier matters would

legitimately be part and parcel of the relevant matters that would have to be scrutinised in coming to a determination:

> **[70]** In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *ex parte Lewin*, approved in *Livesey)*. He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case" (*AF (No 2)* at para 53). I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments

Hence, if there is no indication of any unfairness on the part of the judge, there would not be a reasonable suspicion of bias under the test.

53 It was noted at [71] of *JSC BTA Bank* that different problems may be presented if at a pre-trial hearing of a criminal case a judge decides what is in effect an ultimate issue of guilt or innocence and is subsequently asked to determine what is essentially the same issue at trial. That difficulty does not, however, arise in the present case, as PPO proceedings are civil in nature: see *Tan Hock Chuan* and [60] – [61] below.

54 In the present case, the finding made by the District Judge in the PPO proceedings would be material for any judge hearing the ancillary matters which relate to the children of the marriage. Relevant prior findings would almost always be material in subsequent proceedings. Furthermore, the findings made in the PPO proceedings do not necessarily compel an adverse conclusion against the Appellant in the ancillary matters. As noted by the Respondent, the consideration of the ancillary matters brings into play a whole host of factors, over and beyond those considered in a PPO application.

55 The power of the Court in divorce proceedings to make orders in respect of the custody, care and control of the children born to a marriage is conferred by s 124 of the Women's Charter (Cap 353, 2009 Rev Ed). Section 125(2) makes it clear that the welfare of the child is paramount. In comparison, protection orders are governed by s 65 of the Women's Charter, under which the Court has the power to, if it is being satisfied on the balance of probabilities that family violence has been or is likely to be committed, make a protection order. This is not the appropriate place to go into the respective case law concerning these two areas, but it is apparent that while one may be relevant to the other, the considerations are distinct. The fact that a PPO adverse to one party has been made does not axiomatically lead to a specific determination in subsequent ancillary matters proceedings pertaining to the custody of the subject of the PPO.

56 Thus, in the circumstances of the present case, a reasonable suspicion of bias would not arise in a fair-minded observer. Such a person would be aware that the determination of a PPO application for the protection of a child would not, by itself, determine the outcome of the ancillary proceedings, even if the ancillary matters are as to the award of custody, care or control of the same child. The former is focused on protection against family violence while the latter entails consideration of a spectrum of factors, including most importantly the welfare of the child.

57 A fair-minded member of the public would also accept that judges would aim to fulfil their duties conscientiously and would not readily conclude that a judge could not separate in his or her mind the findings made in one set of proceedings from that in another. Such a fair-minded person would also not readily think that a judge could not bring a fresh understanding and perspective to subsequent proceedings, despite an earlier finding adverse to one side; certainly, if there were evidence of intemperate or exaggerated language accompanying the finding, the-fair minded member of the public may have a reasonable suspicion of bias. But in the absence of such language or particular facts, there would not be such suspicion. Any discomfort, dislike or concern that the Appellant or those allied with her feel against the District Judge do not show grounds for recusal.

Miscellaneous issues

58 A number of miscellaneous issues may be dealt with relatively briefly.

Alleged drug abuse by the Appellant

59 I accept that the District Judge did not, in the course of the PPO proceedings, actually find that the Appellant had abused drugs. As argued by the Respondent's counsel here (see [24] above), the consideration of the allegations of drug abuse in the PPO GD was but part of the District Judge's exposition of the background facts. It did not play a role in her findings. But even if the District Judge had made a finding against the Appellant on the alleged drug abuse, such a finding would not, on its own, have precluded the District Judge from hearing the subsequent ancillary matters. As noted above, ancillary matters of custody, care and control of a child are determined by a range of considerations, particularly the child's welfare.

Nature of PPO proceedings

60 This is not really essential to my decision in this case. But what I understand the District Judge to be saying in the GD is that because of the docket system, it would not be unusual for judges to find themselves in similar situations where they hear different matters involving the same parties. It is in that context that the District Judge considered that the PPO proceedings were part of the divorce proceedings. I understand the Appellant to disagree with that, arguing that PPO matters could not be part of divorce proceedings as they are criminal in nature. That the factual grounds for a PPO may give rise to possible offences does not cloak the PPO with a criminal nature. This has been made clear in *Tan Hock Chuan*. PPO proceedings are civil in nature. Breach of a PPO may give rise to a criminal offence under s 65(8) of the Women's Charter, but that is a separate matter involving separate proceedings.

61 I do note that the Family Justice Act 2014 (Act 27 of 2014) refers to "quasi-criminal proceedings". While the term is undefined, it would seem that it is intended to cover various proceedings which are not clearly civil in nature. There is nothing in the Family Justice Act 2014, and I see no reason, to conclude that that term is intended to characterise PPO proceedings in a way that would be relevant for present purposes.

Application for appointment of child welfare expert

62 A point taken by the Respondent was that the Appellant had not raised any objection with the District Judge hearing an application made by the Appellant for the appointment of a child issue expert (see [28] above). Before me, there was some dispute between the parties about the exact circumstances: the Appellant said that there was a consent order for the appointment of the child issue expert, while the Respondent said that there was no consent. Be that as it may, even if the

order was not consensual, I would not have taken a decision by the Appellant to not raise any objection with the District Judge hearing that application as indicating a lack of *bona fides* on the part of the Appellant in the present recusal application. The former application on the appointment of the child issue expert is a relatively limited application.

Practicalities

63 The present case has not actually raised issues concerning the operation and management of docketed cases, which would generally entail determination by the same judge of interlocutory matters pertaining to a main case. But given that docketing is increasingly adopted in view of its advantages, some remarks are appropriate. The docket judge will often need to choose between competing factual allegations. In doing so, he will weigh, accept or reject the veracity, credit and credibility of witnesses. Unless the judge has made remarks that are so untoward or unsupported by the evidence, prior findings and prior pronouncements made by him against a litigant would not debar him from deciding other interlocutory matters or the main case on the basis of apparent bias. Such assessment of the credibility of witnesses is simply part and parcel of the normal discharge of judicial duties and functions, which a judge would be expected to carry out professionally in a disinterested manner. Without some evidence of remark or conduct by the judge of an out-of-the-ordinary nature, there would be nothing to excite reasonable suspicion of apparent bias.

Conclusion

64 The Appellant's application was thus not made out, and the District Judge correctly declined to recuse herself. The appeal is dismissed. Directions for cost submissions and other matters will be given separately.