

Recusal application in family proceedings—the test for actual or perceived bias revisited (Re C (a child))

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Family analysis: The Court of Appeal allowed an appeal against a judge's refusal to recuse herself after she was overheard making pejorative comments about a party during a break in a Zoom hearing, and brings the perils of a remote hearing into sharp focus. Tahmina Rahman, barrister at 1 GC Family Law, examines the issues.

Re C (a child) [\[2020\] EWCA Civ 987](#), [\[2020\] All ER \(D\) 136 \(Jul\)](#)

What are the practical implications of this case?

The context of the original case is this—a busy judge in a remote hearing, faced a case that was significantly over-running its original time estimate and expressed her frustration at the mother in a private conversation with her associate. The comments were overheard by the parties inadvertently, as the connection to the hearing remained live. The Court of Appeal had to decide if the negative comments were demonstrative of a real possibility of bias and while sympathetic to the pressures faced by the judge, and decided it did.

Much sympathy can be afforded to this judge whose private comments were accidentally overheard during a break. The context of the current worldwide coronavirus (COVID-19) pandemic is important. The Court of Appeal recognised that family judges are currently facing unprecedented challenges in the conduct of remote or hybrid trials, which have been developed to ensure hearings can be conducted safely.

The real practical lesson from this case is that all court users must ensure a connection to a remote hearing is terminated before private conversations are embarked upon. In the context of a private judicial conversation where criticisms of a party are made, the recourse to a recusal application will depend on the content of the conversation and whether the comments are enough to justify actual or perceived bias.

There are also wider implications for practitioners and lay parties, as private conversations are likely to be recorded or overheard if the connection is not properly terminated. The effect on a specific case will vary from case to case, but clearly in this brave new world where the vast majority of family cases are now being heard remotely, it is imperative that proper care and caution is exercised. This must apply across the board in all family proceedings where comments which are overheard or recorded accidentally can have wide-ranging implications. In this case, a lengthy, complicated and costly trial has now had to be abandoned and embarked upon afresh. In Zoom hearings it may have additional implications if 'break-out rooms' are used—these are separate 'rooms' created for specific parties which can also be accessed by hosts. The use of sensitive information in remote hearings (if not known by all parties) is also a potential minefield.

In summary, this case underlines the need for caution in all remote hearings.

What was the background?

Mrs Justice Judd was conducting a fact-finding hearing in care proceedings where the subject child's sibling had died from a catastrophic head injury. The court had to decide whether the sibling died from inflicted injuries and if so, to identify (if possible) who was responsible. The case was a 'hybrid' hearing—the first two weeks were remote with several medical witnesses giving evidence by Zoom and then the time came for the mother to give evidence in person before the judge. Her evidence commenced in person but on the second day she reported feeling unwell, and on the third day she said she had developed a cough. The court, with the agreement of all counsel, sent the mother home, presumably because of the risk she could be developing coronavirus. It was agreed that her evidence should continue on a remote basis and the judge rose for the arrangements to be made.

A court clerk then took the judge's closed laptop to her room, but unknown to the judge, the connection to the hearing remained live. A number of parties remained on the call. The judge's telephone conversation with her clerk was then overheard by the people on the call, who to their credit attempted to alert the clerk and even distort the conversation. This was all to no avail—the judge was heard making 'highly critical' comments including that the mother was pretending to have a cough and was trying 'every trick in the book' in order to avoid answering difficult questions.

Notably, the judge did not express a view about the circumstances of the death of the sibling.

The issue for the Court of Appeal was whether the judge's private remarks demonstrated a real possibility of bias.

What did the court decide?

The appeal against the judge's refusal to recuse herself was allowed and the case was remitted for trial before a fresh judge.

The court considered the test for actual or perceived bias as set out in the case of *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465 at para [102], namely whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the judge was biased. If so, the judge must recuse themselves.

The court also referred to the decision in *Ansar v Lloyds TSB Bank plc* [2006] EWCA Civ 1462, [2006] All ER (D) 88 (Oct), where Waller LJ adopted a list of ten points (originally set out by Burton J in the first appeal in that case), including (para [14]) that:

- the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not, without something more, found a sustainable objection, and
- in any case where there is real ground for doubt, that doubt should be resolved in favour of recusal

The Court of Appeal held that the question for the judge in determining the recusal application was on which side of the line did her negative observations about the mother and her honesty fall. The Court of Appeal had to consider whether the judge was wrong in concluding that those comments did not fall on the wrong side of the line.

Judd J's considerations in coming to her decision are set out (at para [17] of the Court of Appeal's judgment). The Court of Appeal gave her credit for not seeking to dilute the nature or tone of her comments. They also made clear that there was no suggestion of any bias before the overheard

comments or that she undertook the hearing with anything less than scrupulous fairness. The Court of Appeal recognised the tremendous pressure facing judges during the pandemic and they refer to Judd J as ‘hardworking’ and having shown exemplary conduct over the previous weeks of the hearing. Despite their ‘considerable sympathy’ for the judge, the Court of Appeal considered that her comments fell on the wrong side of the line.

The Court of Appeal referred to the objective *Porter v Magill* test and found that a fair-minded observer might consider that the judge had formed an unfair view of the mother on the basis of something that could have been but which was never put to her, namely, that she was inventing a cough in order to avoid having to answer difficult questions. The case could not be more serious, as the mother was facing allegations that she had caused the death of her child or failed to protect the child from a man who caused the child’s death. The Court of Appeal found that the ‘highly critical’ remarks about the mother’s honesty demonstrated a real possibility of bias. Although the Court of Appeal agreed it was a difficult and finely balanced decision, there was, in the words of *Ansar*, ‘real ground for doubt’ which should have been resolved in favour of recusal.

On that basis, the case was remitted to be heard before a fresh judge and the appeal allowed.

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