RATU RAKUITA VAKALALABURE v STATE and Anor (CAV0003 of 2004S)

SUPREME COURT — CRIMINAL JURISDICTION

WEINBERG, MASON and VON DOUSSA JJ

26 April, 1 May 2006

Practice and procedure — applications — application to intervene in pending proceedings — whether or not member of court should not sit on appeal by reason of bias — Constitution of the Republic of Fiji ss 122(5), 128 — Supreme Court Act 1998 ss 2(1), 11, 14 — Penal Code ss 2, 2(a), 50, 54 — Public Order Act ss 5, 5(b) — (NSW) Crimes Act 1900 ss 61E(1), 61E(2), 71, 78.

This was an application by a judge for leave to intervene in an appeal from her own judgment contending that a member of the court should not sit on the appeal by reason of bias.

The Applicant Shameem J presided over the trial of the petitioner Ratu Rakuita Vakalabure on a charge of having taken an unlawful oath. The petitioner was convicted and sentenced to a term of imprisonment. He appealed to the court of Appeal but was unsuccessful. He then petitioned the Supreme Court for special leave to appeal. However, when one member of the court fell ill, the Chief Justice exercising the powers conferred upon him by both s 128 of the Constitution and s 2(1) of the Supreme Court Act, directed that Scott JA should replace French CJ on the Supreme Court panel hearing the petition. Thus, on 17 October 2005, the application for special leave to appeal was argued before the Supreme Court with Scott JA as member of the panel. After the hearing, the Court reserved its decision and invited further submissions from the parties.

On 18 October, the Applicant learned the Scott JA sat on the appeal. She wrote to the Chief Justice and said that she strongly object to Scott JA sitting on an appeal from any of her judgments as Scott JA had "expressed continued hostility" towards her in the past and that "such hostility has not ceased". She made it plain that the basis of her concern was actual and not merely apprehended bias. None the less, Scott JA took no step to recuse himself. The Chief Justice responded to the letter sent the Applicant by explaining the circumstances under which Scott JA had come to sit in the panel. A further exchange of letters occurred between the Applicant and the Chief Justice. Thereafter, the Chief Justice issued a memorandum prompting the Applicant to instruct solicitors to arrange for summons together with a supporting affidavit sworn by her to be filed in the Registrar of the Supreme Court. The registrar acting upon instructions from the Chief Justice referred the summons and affidavit to Handley J pursuant to s 11 of the Supreme Court Act. On 21 October 2005, Handley J gave a Direction to the registrar. The Applicant not satisfied with Handley J's direction filed an application to review that decision.

Held — The court said that an application by a judge for leave to intervene in an appeal from her own judgment raised difficult if not unprecedented questions of principle. The principal issue was whether a judge in her position can have standing before the Supreme Court to contend that a member of the court should not sit on the appeal by reason of bias. The Court ruled that the Applicant does not have standing under the common law to have a right to intervene in the proceeding of the Supreme Court and it was inappropriate for leave to be given to her for that purpose. According to the court, criminal proceedings are prosecuted by the Director of Public Prosecutions (DPP). Neither the DPP nor the petitioner has objected to Scott JA being a member of the panel even though they have been provided with the information that the Applicant wishes to place before the Supreme Court. The court held that it would not be assisted by intervention. Thus, the application for leave to intervene was refused and the summons dismissed.

Application dismissed.

Cases referred to

Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd [1982] AC 617; [1981] 2 All ER 93, approved.

Adams v Adams [1971] P 188; [1970] 3 All ER 572; *Amina Koya v State* [1998] FJSC 2; *Attorney-General v Daniels* (2002) 16 PRNZ 771; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; 28 ALR 257; *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319; [1931] ALR 37; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; 155 ALR 684; 54 ALD 609; [1998] HCA 49; *Boyce v Paddington Borough Council* [1903] 1 Ch 109; *British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201; *Chandrika Prasad v Republic of Fiji & Attorney-General (No 4)* (2000) 2 FLR 89; *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] 2 VR 573; [1999] VSCA 35; *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391; *Croome v State of Tasmania* (1997) 191 CLR 119; 142 ALR 397; *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759; 10 ER 301; *Drew v Attorney-General* [2001] 2 NZLR 428; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; 176 ALR 644; [2000] HCA 63; *New Zealand Engineering Union v Court of Arbitration* [1976] 2 NZLR 283; *R v Social Services State Secretary; Ex parte Child Poverty Action Group* [1990] 2 QB 540; [1989] 1 All ER 1047; *R v Inspectorate of Pollution; Ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329; *Gillespie v Manitoba* 185 DLR (4th) 214; *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] 3 All ER 727; *Re American Ready Mix, Inc* 14 F 3d 1497 (10th Cir, 1994); *Re Beard* 811 F 2d 818 (4th Cir, 1987); *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353; 161 ALR 557; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; 66 ALR 239; *Jones v National Coal Board* [1957] 2 QB 55; [1957] 2 All ER 155; *Kellogg v Martin* 810 SW 2d 302 (1991); *Levy v State of Victoria* (1997) 189 CLR 579; 146 ALR 248; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65; *Manning v Inge* (1982) 169 W Va 430 ; *Minister of Justice of Canada v Borowski* (1981) 130 DLR (3d) 588; *New Zealand Fire Service Commission v Ivamy* (1996) 8 PRNZ 632; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; 36 ALR 425; *People v Griffiths* 155 A D 2d 777 (1989); *Public Util Dist No 1 of Klickitat Cty v Walbrook Ins Co Ltd* (1990) 115 Wash 2d 339 ; *R v J* [2003] 1 WLR 1590; [2003] 1 All ER 518; *R v J* [2005] 1 AC 562; [2005] 1 All ER 1; *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119; [1999] 1 All ER 577; *R v Greater London Council; Ex parte Blackburn* [1976] 1 WLR 550; [1976] 3 All ER 184; *R v Osolin* [1993] 2 SCR 313; *R v Regan* 171 DLR (4th) 555; *R v Foreign & Commonwealth Affairs State Sec; Ex parte World Development Movement* [1995] 1 WLR 386; [1995] 1 All ER 611; *Ratu Ovini Bokini v State & Chief Magistrate, Salesi Temo* (unreported, FCA, AAU0001 and AAU0003/1999, 5 November 1999); *Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278; *Re 'K' a Judicial Officer* [2001] 4 LRC 622; *R (on the application of Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449; *United States v Sciarra* 851 F 2d 621 (3rd Cir, 1988); *Seniloli v State* [2004] FJCA 46; *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552; 129 ALR 191; *Smith v Eighth Judicial District Court* 818 P 2d 849 (1991); *Solberg v Superior Court* 19 Cal 3d 182 (1977); *Sukh Deo Prasad & Ganga Prasad Shankar v Attorney-General* (unreported, Civ App No ABU0029 of 1997, 13 August 1997); *R v GJ* (2005) 16 NTLR 230; [2005] NTCCA 20; *Webb v R* (1994) 181 CLR 41; 122 ALR 41; *Wewaykum Indian Band v Canada* [2003] 2 SCR 259; *Z v Z* [1997] 2 NZLR 257, cited.

Goktas v Government Insurance Office of New South Wales (1993) 31 NSWLR 684; *Gouriet v Union of Post Office Workers* [1978] AC 435; [1977] 3 All ER 70; *Re Tip-Pa-Hans Enterprises, Inc* 27 BR 780 (Bankr WD Va 1983), considered.

A. Naco for the Petitioner

A. Prasad and *K. Bavou* for the Respondent

G. McCoy QC, *P. Joseph* and *C. B. Young* for the Applicant for leave to intervene

N. Nand and *S. Sharma* for the Attorney-General as amicus curiae

[1] Weinberg, Mason and Von Doussa JJ. The Applicant, the Honourable Madam Justice Nazhat Shameem, a judge of the High Court, presided over the trial of the petitioner Ratu Rakuita Vakalalabure on a charge of having taken an unlawful oath. He was convicted of that offence, and sentenced to a term of imprisonment. He appealed, unsuccessfully, to the Court of Appeal. He then petitioned this court for special leave to appeal. His application was heard on 17 October 2005. That application is presently reserved.

[2] The Applicant has sought leave to intervene in the appeal to the Supreme Court. Her application seeks an order that the petition for special leave be heard *de novo* by a reconstituted bench of this court. Originally, she sought an order that the bench, as reconstituted, not comprise any of the members of the bench who originally heard the petition. She has since resiled from that position, and now seeks only an order that one member of the bench, Scott JA, be disqualified from further participating in the appeal.

[3] This application by a judge for leave to intervene in an appeal from her own judgment obviously raises difficult, if not altogether unprecedented, questions of principle. The primary issue is whether a judge in her position can have standing, before this court, to contend that a member of the court should not sit on the appeal by reason of bias. The matter is additionally complicated by the fact that the bias is said to be actual and not merely apprehended and directed not towards any party, but towards that judge herself.

Factual background

[4] The formal position is that the Applicant seeks "review" of a direction given by Handley J, a judge of the Supreme Court, to the registrar of this court to reject a summons, and affidavit in support, filed on her behalf on 19 October 2005.

[5] It is necessary to say something about the history of this matter. The petitioner had been charged, together with several other accused, with the offence of "taking an engagement in the nature of an oath to commit a capital offence, contrary to s 5(b) of the Public Order Act, Cap 20, read with s 50 of the Penal Code, Cap 17". The prosecution case was that the petitioner, on 20 May 2000, not being a person compelled to do so, took an oath binding him to certain actions which, if performed, would be treason. That was an offence which, at that time, was punishable by death. All of the accused pleaded not guilty and, following their joint trial in August 2004, all but one were convicted.

[6] The petitioner, together with the other accused who had been convicted, appealed to the Court of Appeal: *Seniloli v State* [2004] FJCA 46. On 11 November 2004, that court, constituted by the president, Penlington and Wood JJA dismissed all appeals against conviction and sentence.

[7] The petitioner then filed a petition in this court seeking special leave to appeal from the judgment of the Court of Appeal. It was originally intended that the panel that would hear the petition would consist of the Chief Justice (as president of the court), Handley and French JJ. Regrettably, French J fell ill shortly before the hearing. The Chief Justice, exercising the powers conferred upon him both by s 128 of the Constitution and by s 2(1) of the Supreme Court Act 1998 (the Supreme Court Act), directed that Scott JA, a resident member of the Court of Appeal, should replace French J on the Supreme Court panel hearing the petition.

[8] On 17 October 2005, the application for special leave was argued before the Supreme Court with Scott JA as a member of the panel. At the conclusion of the hearing, the court invited further submissions from the parties regarding a particular issue that had arisen during the course of argument. It otherwise reserved its decision.

[9] On the morning of 18 October 2005, Shameem J learned that Scott JA had sat on the appeal. She wrote at once to the Chief Justice drawing his attention to the fact that she strongly objected to Scott JA sitting on an appeal from any of her judgments. This was because, in her words, Scott JA, had "expressed continued hostility" towards her in the past, and that "such hostility has not ceased". She made it plain that the basis of her concern was actual, and not merely apprehended, bias.

[10] The letter sent by Shameem J to the Chief Justice concluded:

> I bring this to your attention, so that arrangements can be made to hold a hearing de novo before a fresh panel of judges. This will avoid the embarrassment that will accompany a formal application for recusal. I bring this to your attention in the best interests of the judiciary, and am prepared to discuss this with you personally this afternoon
>
> …
>
> The principle to be protected here is the absolute impartiality of the judiciary. Indeed if public confidence in the judiciary is to be maintained, then that absolute impartiality must be protected at all costs.

[11] It is important to note that Shameem J provided copies of this letter to both Handley J and Scott JA. None the less, Scott JA took no step to recuse himself.

[12] The following day, the Chief Justice responded to the letter sent by Shameem J. In a minute addressed to her, he outlined the circumstances under which Scott JA had come to sit as the third member of the panel hearing the petition in the present matter.

[13] The Chief Justice pointed out that two grounds only had been argued in support of the petition. The first concerned an allegation of ostensible bias on the part of one of the assessors at the trial. By not calling upon the Respondent in relation to that ground, the court had made it plain that there was no merit in the point. The second concerned the possible application of the time bar contained in s 54 of the Penal Code to a prosecution under s 5 of the Public Order Act, having regard to the fact that the prosecution in the present case had been commenced more than 2 years after the offence. The Chief Justice noted that it was this second ground that concerned the court and that it was this ground that had led the court to request additional written submissions to be filed.

[14] The Chief Justice said that it was understood that both Shameem J and the Court of Appeal had relied principally upon a decision of the English Court of Appeal in *R v J* [2003] 1 WLR 1590; [2003] 1 All ER 518 in holding that the

prosecution of the petitioner had not been time-barred. He noted that, after the Court of Appeal had upheld the prisoner's conviction, the House of Lords, in *R v J* [2005] 1 AC 562; [2005] 1 All ER 1, had reversed that decision. The Chief Justice said that this meant that the case before the Supreme Court took on a different complexion from the case as presented previously.

[15] The Chief Justice concluded his minute by expressing the hope that his explanation of what had occurred would set Shameem J's mind at rest.

[16] Plainly, it did not. Shameem J replied in writing later that day, restating her concerns. She said:

> Thank you for your prompt reply to my memorandum of 18th October 2005. I accept all the contents of your memorandum in particular that Mr Justice French became suddenly ill and that you did not wish to inconvenience overseas counsel.
>
> However the issue is not one of convenience, with respect. It is of the impartiality of the court. Any judgment this court delivers may be quite correct in law. However when it is delivered by a court which has on it a member who lacks impartiality, it lacks validity. Indeed, the public at large, and not just the litigants, has a right to an impartial court.
>
> I have placed sufficient information before you which in my respectful opinion, would lead any reasonable tribunal to disqualify itself. The papers contain an admission of actual hostility by Scott JA towards me. The effect is to deprive the court of jurisdiction in any matter concerning my decision, whether the points argued were dealt with by me (and the Court of Appeal) or not. The test is one of reasonable apprehension of bias, held by an informed observer at the back of the courtroom.
>
> My position remains unchanged and I am constrained to advise you that unless a new panel is constituted to hear the appeal, I will be making a formal application for recusal.

[17] The Chief Justice replied the same day. His memorandum is important and we set it out in full:

> Hon Justice Shameem
>
> Thank you for your further memorandum of today's date. It is a matter of considerable regret on my part that you are not satisfied with my explanation in yesterday's letter.
>
> As you will be aware Section 2 of the Supreme Court Act 1998 provides that the Court is to be constituted in accordance with my directions. In the situation suddenly created last Friday by Mr Justice French's decision to return to Australia immediately, I re-exercised this power in relation to Ratu Vakalalabure's case and reconstituted the Court with Justice Scott as the third member. The Court as reconstituted sat and heard the oral argument, so that it is now part heard. I have no power of my own motion to direct a re-hearing or to reconstitute the Court for this purpose.
>
> You will also be aware that any application for a Judge to stand aside should be made, in the first instance, to the Judge concerned. I have no power, at this stage, to remove Mr Justice Scott from the case, on the ground of ostensible or actual bias, assuming such a ground could be established.
>
> Needless to say no such application was made or foreshadowed by either of the parties to the petition during the hearing before the Supreme Court on Monday.

[18] This memorandum from the Chief Justice prompted Shameem J to instruct solicitors to arrange for a summons, together with a supporting affidavit sworn by her, to be filed with the registrar of this court. That summons (with formal parts omitted) was in the following terms:

LET all parties concerned attend before the Supreme Court at Suva on the day of 2005 at o'clock in the noon on the hearing of an Application by the Honourable Madam Justice Nazhat Shameem for the following orders:

(1) that the Honourable Madam Justice Nazhat Shameem be given leave to intervene in the matter.

(2) that this Honourable Court not comprising any of the members of the Bench that heard this Petition for leave to appeal on 17 October 2005 be constituted to hear this application.

(3) that the Petition for leave to appeal filed herein be heard de novo by a reconstituted Bench of the Supreme Court not comprising any of the members of the Honourable Judges who heard the said Petition on 17 October 2005

(4) that the pronouncement by this Honourable Court of its judgment to this Petition be deferred pending the hearing and final determination of this application.

This Application is made under the Inherent Jurisdiction of this Honourable Court. Dated this 19th day of October 2005.

[19] The affidavit sworn by Shameem J commenced by noting that she had been the trial judge in the matter of Ratu Rakuita Vakalalabure, then before the Supreme Court. She said that she had only discovered that Scott JA had been a member of the bench hearing the appeal from reading the *Fiji Times* of 18 October 2005. She said that she wished to place evidence before the Supreme Court that would demonstrate actual, and apprehended, bias towards her, on the part of Scott JA. She deposed to a series of statements and other acts on the part of Scott JA that she claimed demonstrated his continuing hostility towards her. Indeed, she alleged that Scott JA was similarly biased against another member of the High Court, Gates J and a former member of that court, Byrne J. It is important to appreciate that she accused Scott JA of "actual malice" towards her.

[20] The registrar, acting upon instructions from the Chief Justice, referred the summons and affidavit in support to Handley J who was, of course, a member of the panel that was, by then, part heard in this proceeding. This was done pursuant to s 11 of the Supreme Court Act. That section confers upon a single judge of this court the right to exercise any power vested in the court itself not involving the decision of an appeal or reference. Handley J considered the matter and, on 21 October 2005, gave a "Direction" to the registrar in the following terms:

DIRECTION

[1] On 19 October a clerk from G.P. Lala and Associates, the Suva agents for Young and Associates of Lautoka, attempted to file a summons supported by affidavit in the Supreme Court Registry in the matter of *Ratu Rakuita Vakalalabure v State* a petition for special leave heard by the Chief Justice, Scott J, and myself on 17 October.

[2] The summons was sought to be filed on behalf of a Judge of the High Court who considered that the Supreme Court was inappropriately and improperly constituted in that case, because one of the Judges was disqualified from sitting because of his actual or ostensible bias.

[3] The only parties to criminal proceedings are the State and the accused. Since the applicant in the summons was not one of the parties to the proceedings the Registrar properly referred the matter to the Chief Justice who referred the matter to me.

[4] The Supreme Court, like any other superior court, has inherent power to prevent its process being abused, which it can exercise on the application of a party, or on its own motion. Compare *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111; [1944] 1 All ER 469 where the House of Lords took the point that the appeal was incompetent. The abuse in the

present case does not relate to the motivation of the applicant, or to the merits of the application. It relates to the attempt to intervene by a person who is not a party and has no legally recognized interest, other than as a member of the public.

[5] The existence of this inherent power to prevent misuse of its procedures and the fact that the categories of abuse which attract the Court's duty are not fixed or closed, is established by *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536; [1981] 3 All ER 727 at 729.

[6] As I have said there are only 2 parties or groups of parties to criminal proceedings, the State and the accused. The victim, the victim's family, the witnesses, and other concerned or public minded individuals have no standing to intervene, or be heard, or to have counsel or solicitor heard on their behalf.

[7] Furthermore a judicial officer is not a necessary or proper party to an appeal from his or her decision, or to any appeal to a Court of final appeal from an intermediate court of appeal. It is unheard of for a Judge to intervene, or seek leave to intervene in such an appeal, even in a case where his or her judgment is severely criticized, or he or she is said to be disqualified for actual or ostensible bias. See for example *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119; [1999] 1 All ER 577 where Lord Hoffmann's participation in Pinochet (No 1) was challenged for ostensible bias.

[8] Mr Young was heard by me in Chambers this morning in support of the competency of the proceedings. He attempted to distinguish the present case from the general position affecting the standing of judicial officers in appeals from their decisions because of the great public importance of cases being heard by the Supreme Court free from any actual or ostensible bias.

[9] The public interest in question is understood, and it relates to a matter of very great importance, but an individual member of the public has no standing to enforce that right in proceedings in which he or she is not a party. The matter is made clear by the speech of Lord Wilberforce in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477; [1977] 3 All ER 70 at 79.

> i. It [is] a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public … And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.

[10] In a very clear case, such as this, the action can also be stopped by the Court at the threshold. I am therefore completely satisfied that the proposed summons is incompetent to the extent that it would be vexatious and an abuse of the Court's process if it were filed. In the extraordinary and unprecedented circumstances of this case the Court is entitled to reject the documents and to decline to allow them to be filed, and I will direct the Registrar to return them to the solicitors with a copy of this ruling.

[11] Mr Young questioned my power to do this as a single Judge, but s 11 of the Supreme Court Act gives a single Judge power to deal with matters of practice and procedure which this is. He also questioned my power to exercise a function normally exercised by the Registrar. The officers of the Court exercise their powers as delegates of the Judges, under their authority and subject to their supervision. The matter came before me on a reference from the Chief Justice, after the matter had been properly referred to him by the Registrar.

[12] I therefore direct the Registrar to reject the document, refund the filing fee (if any), and return the papers to the solicitors for the applicant.

[Justice Kenneth R Handley]

JUDGE OF THE SUPREME COURT OF FIJI

The application to review

[21] Shameem J, being dissatisfied with Handley J's direction, then filed an application to review that decision. That application was filed on 28 October 2005. It purported to be filed pursuant to ss 11 and 14 of the Supreme Court Act, and the inherent jurisdiction of the court.

[22] The application to review was supported by a further affidavit sworn by Shameem J on 28 October 2005. To that affidavit, she exhibited the correspondence that had passed between the Chief Justice and herself after she discovered that Scott JA had sat on the appeal. She went on to state that on 19 October 2005, she had instructed Chen Bunn Young of Young & Associates, solicitors of Lautoka, to file an application to intervene in these proceedings. She said that she had been informed by Mr Young that the summons and her earlier affidavit had been lodged with the Supreme Court Registry by Mr Young's Suva agents on that same day.

[23] The affidavit then concluded:

> I am further informed by my counsel and verily believe that on Friday 21 October 2005 (at the request of Shiu Sami, Clerk on behalf of the Registrar of the Supreme Court), my counsel thinking that he was attending an informal meeting with the Honourable Chief Justice and Justice Handley found himself in the chambers of Justice Handley alone who thereafter informed counsel that he would deliver a ruling.
>
> On the same day my counsel wrote a letter to Justice Handley and copied to the Chief Justice which letter was exchanged simultaneously with a receipt of ruling titled "Direction" by Justice Handley.

[24] Shameem J annexed to this affidavit a copy of her counsel's letter dated 21 October 2005. That letter purported to record the circumstances of Mr Young's meeting with Handley J in his Lordship's chambers earlier that morning. In substance, Mr Young claimed that he had been told that the meeting would be "informal", and that he need not bring with him any legal materials. He said that he had been taken by surprise when Handley J had referred to "making a ruling". He claimed that he had not regarded the meeting as a "hearing", and that he had only attended as a courtesy, in response to a request from the Chief Justice and Handley J. In effect, the tenor of his letter was to challenge the validity of Handley J's "direction" on the basis that Shameem J had been denied natural justice.

[25] As previously mentioned, the application brought by Shameem J seeking "review" of Handley J's direction to the registrar purported to be brought pursuant to ss 11 and 14 of the Supreme Court Act, and the inherent jurisdiction of the court.

[26] Relevantly, s 11 provides:

> A single judge of the Supreme Court may exercise any power vested in the Supreme Court not involving the decision of an appeal or reference, except that—
>
> (a) in criminal matters, if a single judge refuses or grants an application, a person affected may have the application determined by the Supreme Court constituted by 3 judges, who may include the judge who made or gave the order …

[27] Section 14 provides:

> For the purposes of the Constitution and this Act, the Supreme Court has, in relation to matters that come before it, all the power and authority of the Court of Appeal and

that power and authority may be exercised, with such modifications as are necessary according to the circumstances of the case.

[28] It is tolerably clear that s 11 contemplates a hearing de novo, rather than any form of appellate review. If the review contemplated were in the nature of an appeal, it would hardly be likely that the judge who made or gave the order could sit on an application to have the matter determined by this court. In truth an application under s 11 is only loosely described as a review. It is an application to this court, in its original jurisdiction, to consider the matter which is the subject of the application afresh. This includes any material that was not before the single judge.

[29] The grounds in support of the "application to review" are as follows:

(1) that the learned Judge had no jurisdiction to issue the Direction;
(2) that if the learned judge had jurisdiction (which is not admitted) then he acted in breach of natural justice by denying the Applicant's Counsel an opportunity to be adequately heard in the matter, in that, his Lordship knew or ought to have known;
    (i) that Counsel for the Applicant had been asked by the Registrar, Mr Shiu Sami, to present himself for an informal meeting with the Chief Justice and Justice Handley at 11.00am on Friday 21 October 2005;
    (ii) that Counsel presented himself for an informal meeting with the Chief Justice and Mr Justice Handley but to his surprise the meeting had been rescheduled before Mr Justice Handley alone without prior notification to Counsel;
    (iii) that Counsel appeared before his Lordship without his file and was not in a position to argue the matter;
    (iv) that his Lordship proceeded to conduct a "hearing" and to make a ruling directing the Registrar to not issue the Summons.

[30] The relief sought by the Applicant, as stated in the application, is as follows:

(i) the Summons dated 19 October 2005 be issued by the Registrar; and
(ii) the issued Summons be heard and determined by a reconstituted Supreme Court of Fiji Islands.

The Applicant's submissions to this court

[31] Although the application to review relied, in terms, upon ss 11 and 14 of the Supreme Court Act and the inherent jurisdiction of the court, counsel for the Applicant sought also to invoke s 122(5) of the Constitution as the source of power upon which the application was based. That section provides that the Supreme Court "may review any judgment, pronouncement or order made by it". It was submitted that the direction given by Handley J to the registrar was, relevantly, an "order" within the meaning of that expression in s 122(5).

[32] We consider that reliance upon s 122(5) was misplaced. The section is silent as to the nature of the "review" that is provided for, but it seems to us to contemplate a review of a decision made by the court as such, and not by a single judge exercising interlocutory powers, or administrative functions, of the kind that Handley J performed in this case. Section 11 covers the situation precisely. We doubt that s 122(5) of the Constitution was intended to deal with a matter of procedural detail concerning the method by which an applicant can have his or her application determined by the Supreme Court constituted by three judges, rather than one.

[33] It follows that the application to this court seeks to have the application for leave to intervene, which was summarily rejected by Handley J, dealt with *de novo*. It is not an appeal from Handley J's decision.

[34] On behalf of the Applicant, it was submitted that Scott JA was automatically disqualified from sitting on the appeal from Shameem J because of his "past and ongoing implacable hostility and animosity" towards her. That submission was supported by reference to one matter, in particular, that emerged from the affidavit sworn by Shameem J on 19 October 2005. It concerned a letter dated 29 January 2003 written by Scott JA to the Chief Justice in which he advised that he would not be attending a judges' retreat scheduled for February 2003. He explained that the events of May 2000 and subsequent months, had resulted in a very serious split in the judiciary. He said that in his opinion three judges, Byrne, Shameem and Gates JJ "were guilty of grave misconduct" which resulted in the judiciary in general and himself in particular, having been brought into disrepute. He said that as a result he had had no social dealings for the past 2 years with the three judges. He canvassed various options. One of these options was to commence legal proceedings seeking declaratory relief and damages. He said that given his position as a judge of the High Court, he did not think it would be appropriate to initiate legal proceedings at that stage. He added that he would not find himself so constrained if he were to exercise his option to retire in April 2004.

[35] Scott JA did not spell out in his letter precisely the cause of action that he might rely upon if he initiated any legal proceedings. It may reasonably be inferred that he had in mind a claim for defamation. The fact remains, however, that Scott JA did not retire in April 2004, and has not instituted any legal proceedings against Shameem J or either of the other two-named judges.

[36] Counsel for the Applicant submitted that it was of fundamental importance to the rule of law that public confidence in the independence and impartiality of the courts be maintained. It was essential to that end that members of the judiciary act, at all times, without bias, for or against any party. Not only must they be impartial, they must be seen to be impartial. It was submitted that it was impossible for Scott JA, having threatened to sue Shameem J and having never withdrawn that threat, to be regarded as unbiased in relation to any appeal from one of her judgments.

[37] Counsel submitted that Handley J had erred in summarily directing that her application for leave to intervene be rejected on the basis that she lacked standing in this matter. They submitted that, in applying the test for standing laid down by the House of Lords in *Gouriet v Union of Post Office Workers* [1978] AC 435; [1977] 3 All ER 70 (*Gouriet*), Handley J took an unduly stringent view of what an applicant for leave to intervene had to show in order to be granted intervener status. They submitted that *Gouriet* no longer represented the law in England, and was not the law in Fiji.

[38] We should interpolate at this stage that although the grounds in support of the application for review were limited to challenging Handley J's jurisdiction to give the direction that he did, and a claim that he denied the Applicant natural justice, neither point was seriously pursued in the oral submissions to this court. It was effectively conceded that s 11 conferred power to give the direction, and it was acknowledged that there was no evidence, in admissible form, as to what had taken place between Mr Young and Handley J in chambers on the morning of 21 October 2005. In effect, the natural justice ground was not pressed.

[39] Acknowledging the difficulty that counsel faced given the narrow terms of the grounds as formulated, they sought leave to amend those grounds so as to encompass the broader issues raised in their written submissions. The amendment would allow consideration to be given to the real issue in this case, namely whether Shameem J should be granted leave to intervene in this appeal for the purpose of pressing a formal application to the Supreme Court that it reconstitute itself in a part-heard proceeding. That was put on the basis that the court was improperly constituted with Scott JA as a member of the panel. Neither the petitioner, nor the Respondent, objected to leave to amend being granted. There being no prejudice to any party, the court granted such leave.

[40] Counsel submitted that in Fiji the rules governing standing were broader, and more flexible, than Handley J had appreciated. They submitted that Shameem J had standing, in this matter, under an orthodox application of those rules, by reason of several important factors.

[41] The first of these factors was the unique position in which Shameem J found herself. She alone (apart from Scott JA) was in a position to appreciate the full extent of his hostility towards her. Others may have had an inkling of the difficulties between them, but not the full extent of the problem. In addition, she alone had access to the correspondence addressed to her and other material necessary to establish the malice that she claimed he bore towards her.

[42] The second factor was the specific duty that she had, by virtue of her judicial oath, to uphold the Constitution. It was noted that judicial officers alone, among those whose oaths are prescribed in the Constitution, are required, in terms, to swear or affirm to uphold the Constitution. In other words, she had a duty, under the Constitution, to bring to the attention of this court any matter that would undermine public confidence in the judiciary if it were not properly addressed.

[43] The third factor was the lack of any alternative means by which Scott JA's unwillingness to recuse himself could be formally addressed by the court. It was plain, from the fact that Shameem J's initial letter to the Chief Justice had not resulted in Scott JA disqualifying himself, that he had no intention of doing so. Although the matter might have been dealt with in other ways, such as by being drawn to the attention of the Attorney-General, and by providing him with whatever evidence there was to support the claim of actual bias, it was submitted that the course adopted by Shameem J, of seeking leave to intervene in this proceeding, had been entirely appropriate.

[44] Counsel relied upon a number of authorities in support of their contention that Shameem J ought to be given leave to intervene. They submitted that when an allegation of bias on the part of a judge was made, more liberal rules of standing should apply. They noted that it had been suggested that an allegation of that nature could not be the subject of waiver by the parties to the proceeding. If that proposition were correct, self-evidently a broader concept of standing would be applicable. They referred, in that regard, to *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, where Kirby P, as his Honour then was, said at NSWLR 687:

> My own view is that it is not ordinarily open to a litigant unilaterally to waive an appearance of bias on the part of a judge. This is because the existence and appearance of impartiality on the part of the judiciary belongs not to the litigant alone but to the public at large and to the legal system of which the judge is a member.

[45] Counsel submitted that there were several other matters that needed to be taken into account when considering whether leave should be granted to Shameem J to intervene in the present case. They noted that Shameem J sought only to be heard on the limited question of whether Scott JA should be disqualified. She did not seek to be heard on the merits of the appeal. They also noted that Shameem J did not seek leave to intervene because she apprehended any damage to her reputation if her judgment in this matter were overturned. Indeed, she did not seek to vindicate any legal interest on her part. She was acting selflessly, as a matter of principle, fulfilling what she regarded as her duty as a judge, under the Constitution.

[46] Counsel relied, in particular, upon a passage from the judgment of Rose LJ, sitting as a member of the divisional court in *R v Foreign & Commonwealth Affairs State Sec; Ex parte World Development Movement* [1995] 1 WLR 386 at 395; [1995] 1 All ER 611 at 620 where his Lordship summarised the increasingly liberal approach to standing that had been taken in England during the preceding decade. After noting that the House of Lords had determined that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case, his Lordship continued:

> Furthermore, the merits of the challenge are an important, if not dominant, factor when considering standing. In Professor Wade's words in Administrative Law, 7th ed (1994), p 712: "the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved".
>
> Leaving merits aside for a moment, there seem to me to be a number of factors of significance in the present case: the importance of vindicating the rule of law, as Lord Diplock emphasised [1982] AC 617; [1981] 2 All ER 93; the importance of the issue raised, as in *R v Social Services State Secretary; Ex parte Child Poverty Action Group* [1990] 2 QB 540; [1989] 1 All ER 1047; the likely absence of any other responsible challenger, as in *R v Inspectorate of Pollution; Ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329 the nature of the breach of duty against which relief is sought …

[47] It was submitted on behalf of the Applicant that this passage was squarely in point. The question of standing, so far as Shameem J was concerned, should not be determined by whether her personal rights or interests were involved. The real question was whether she could show some substantial default or abuse. In favour of standing were the importance of the issue raised, which Handley J himself had acknowledged, the importance of vindicating the rule of law, and the likely absence of any other responsible challenger.

[48] The principles identified by Rose LJ were accepted by Gates J in *Chandrika Prasad v Republic of Fiji (No 4)* (2000) 2 FLR 89 where his Lordship observed that the question of standing always involves matters of discretion. Gates J applied precisely the factors referred to in the passage from the judgment of Rose LJ, set out above, in holding that the applicant was not a "mere busybody," but claimed to have lost rights by the purported abrogation of the Constitution. Accordingly, the applicant was granted standing.

[49] Counsel submitted that there could be no doubt as to the importance of the principle that a judge who is not impartial, in relation to a particular matter, is automatically disqualified from hearing that matter. They submitted that the same principle applied when the bias in question did not arise towards any of the parties, but rather towards the judge who heard the case at first instance.

[50] Counsel referred to a number of cases that set out the principles governing the circumstances in which a judge would be disqualified on grounds of bias, actual or apprehended. They referred also to the importance of the principle that a judge who was not seen as impartial should not sit. The authorities are well-known and need only be cited. They include *Webb v R* (1994) 181 CLR 41 at 74; 122 ALR 41 at 64–5; *Amina Koya v State* [1998] FJSC 2 and *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132–3; [1999] 1 All ER 577 at 586–7 (*Pinochet No 2*).

[51] Not surprisingly, there appear to be very few reported cases dealing with allegations of actual bias on the part of judges. Counsel for the Applicant referred to the decision of the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65 (*Locabail*) a case in which a solicitor sitting as a deputy judge of the High Court was alleged to have had a direct interest in the outcome of the proceeding before him.

[52] A notably strong Court of Appeal (Lord Bingham of Cornhill CJ; Lord Woolf MR and Sir Richard Scott VC), held that where a judge had a direct personal interest in the outcome of a proceeding which was other than *de minimis* he was presumed to be biased and automatically disqualified from hearing or continuing to hear the case.

[53] The Court of Appeal in *Locabail* referred, with approval, to extracts from three Australian cases, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; 66 ALR 239 at 246; 10 ALN N184; 10 Fam LR 917 per Mason J; *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353 at 366; 161 ALR 557 at 568; [1999] FCA 110 (*Ebner*) and *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd* [1999] 2 VR 573; [1999] VSCA 35 (*Clenae*). Both *Ebner* and *Clenae* subsequently went on appeal to the High Court of Australia; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; 176 ALR 644; 63 ALD 577; 63 ALD 577; [2000] HCA 63. That court held that in neither case was a judge who had a theoretical, and in *Ebner*, indirect, pecuniary interest in the outcome of the proceeding automatically disqualified from hearing the matter.

[54] Neither *Ebner* nor *Clenae* involved allegations of actual bias, but it is fair to say that the High Court's decision represents a departure from the traditional view taken in England that any pecuniary interest, however small, that a judge may have in the outcome of a case over which the judge is presiding leads to automatic disqualification: *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759; 10 ER 301.

[55] In *Locabail*, their Lordships took a somewhat more relaxed view of the effect of an insignificant pecuniary interest upon a judge presiding over a trial than would traditionally have been the case. Importantly, as counsel for the Applicant submitted, they distinguished the position of a judge in such a situation from that of a judge displaying actual bias in relation to a matter over which he or she was presiding. They stated (at [2000] QB 480) that a judge should automatically be disqualified "if there were personal friendship or animosity between the judge *and any member of the public involved in the case*" (emphasis added). Importantly, they went on to say that a judge was bound to disqualify himself 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". (emphasis added)

[56] After dealing at considerable length with the authorities on the subject of judicial recusal, the written submissions filed on the behalf of the Applicant sought to justify the grant, by this court, as presently constituted, of a series of remedies some of which are plainly not available. For example, it is difficult to see how this court, could order the panel that heard the petition for leave on 17 October 2005 to cease its deliberations regarding that matter. It is equally difficult to see how this court could order that the petition be heard afresh by a new panel not comprising any of the original members of the bench. If Scott JA, ought to have recused himself, that would have nothing whatever to do with whether the Chief Justice or Handley J should continue to hear the matter.

[57] Sensibly, counsel for the Applicant abandoned these claims for relief during the course of oral submissions. They submitted instead that this court should simply grant leave to intervene, and hold that Scott JA was disqualified from continuing to hear this appeal. Whatever happened thereafter would be a matter for the Chief Justice to determine.

The petitioner's position

[58] It is important to note that the petitioner, who has been served with the material upon which Shameem J relies in support of her application for leave to intervene in this appeal, does not support that application. Indeed, he strongly opposes the grant of such leave. He simply wants his appeal determined as quickly as possible. He is concerned that judgment in the matter seems to have been deferred pending the outcome of this application. He has been in prison for some 12 months now and does not want any further delay. He has no concerns regarding Scott JA continuing to sit on his appeal.

The Respondent's position

[59] The Respondent does not support the application for leave to intervene. Though the Director of Public Prosecutions was served in February 2006 with the material upon which Shameem J relies in support of her contention that Scott JA is automatically disqualified, he has not sought to take the matter further. He is content simply to abide the decision of this court.

Submissions of the Solicitor-General

[60] The Solicitor-General provided the court with helpful references to the authorities dealing with the question of standing. He neither supported nor opposed the application for leave to intervene. However, the general thrust of his submissions was to caution against leave being granted too readily, particularly in the context of criminal proceedings.

The rights of an intervener

[61] It should be noted at this stage that the first order sought in the summons rejected by Handley J is that Shameem J be given leave to intervene in this matter. A person who seeks to intervene in a proceeding, once given leave to intervene, becomes a party to the proceeding. In general, the intervener can tender evidence, make submissions on questions of fact and law and appeal any adverse orders: *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 (*Corporate Affairs Commission*).

[62] The position of the Attorney-General is quite special. He or she can intervene, as of right, in civil proceedings that may affect the prerogatives of the Crown: *Adams v Adams* [1971] P 188; [1970] 3 All ER 572. Likewise, the Attorney-General can intervene as of right in cases involving the interpretation of the Constitution.

[63] It was once thought that intervention by a private party or stranger may only be permitted under statute, or rules of court dealing with joinder of parties. There was authority for the proposition that a court had no inherent power to allow a stranger to intervene in proceedings: *Re Great Eastern Cleaning Services Pty Ltd* [1978] 2 NSWLR 278; and *Corporate Affairs Commission*. The better view today seems to be that such inherent power does exist.

[64] There is a helpful statement of the principles on which leave to intervene will be granted in constitutional matters in *Levy v State of Victoria* (1997) 189 CLR 579 at 600–4; 146 ALR 248 at 256–9 per Brennan CJ. His Honour noted that various media organisations and industrial organisations representing journalists and the Australian Press Council had applied for leave to make submissions as interveners, or as *amici curiae* in a case involving the implied freedom of communication under the Australian Constitution.

[65] Brennan CJ observed that although the jurisdiction to allow non-party intervention in the proceeding had not been challenged, it was necessary to ensure that "mere convenience or utility" did not lead to a wrongful assumption of jurisdiction to allow a non-party to intervene in a matter before the court. His Honour stated that leave to intervene should not be granted unless the legal interests of the person seeking such leave were likely to be affected, directly or indirectly, by a decision in the proceeding. He said, at CLR 602; ALR 258, that nothing short of such an affection of legal interest would suffice, citing the views of Dixon J in *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331; [1931] ALR 37 in support of that proposition.

[66] Brennan CJ went on to say, at CLR 603; ALR 258, that where a person "having the necessary legal interest to apply for leave to intervene" can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, the court may exercise its jurisdiction by granting leave to intervene.

[67] His Honour dealt separately with *amici curiae*. He said, at CLR 603; ALR 259, that the hearing of an amicus was entirely in the court's discretion, and that the discretion, would be exercised on a different basis from that which governed leave to intervene. The footing on which an amicus would be heard is that the person was willing to offer the court a submission on law or relevant fact which would assist the court in a way in which the court would not otherwise have been assisted.

The general principles governing standing

[68] A person has standing to sue (or locus standi) where the court recognises that person's connection with the dispute before it and regards it as sufficient to allow that person to institute and maintain the proceeding.

[69] Issues of standing normally arise only within the realm of public law. In a sense, this case, which involves a question of standing in relation to a criminal appeal, is very much an exception to what normally occurs.

[70] The traditional test of standing in matters of public law was that formulated by Buckley J in *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114 where his Lordship said that a person unable to invoke a private right or equity had to be able to show "special damage peculiar to himself from the interference with the [asserted] public right".

[71] The "special damage" test prevailed for the better part of the 20th century throughout most of the Commonwealth. However, in Australia it was abandoned in *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493;

28 ALR 257 (*ACF*) because it implied that standing in public law cases was restricted to those who could demonstrate that they were at risk of pecuniary damage. The High Court of Australia laid down a new test for parties seeking declaratory or injunctive relief in such cases. Such a party had to show a "special interest" in the subject matter of the action.

[72] In a passage which has been repeatedly cited by Australian courts, Gibbs J said, at CLR 530–1; ALR 270:

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

[73] Stephen J, at CLR 541; ALR 278, considered that the question of standing should be resolved:

> … by the direct route of search for enforceable rights conferred by statute, rather than … the circuitous course of seeking, in accordance with Boyce's Case, for the existence of special damage.

[74] Mason J said, at CLR 547; ALR 284:

> … apart from cases of constitutional validity which I shall mention later, a person, whether a private citizen or a corporation, who has no special interest in the subject matter of the action over and above that enjoyed by the public generally, has no locus standi to seek a declaration or injunction to prevent the violation of a public right or to enforce the performance of a public duty.
>
> Depending on the nature of the relief which he seeks, a plaintiff will in general have a locus standi when he can show actual or apprehended injury or damage to his property or proprietary rights, to his business or economic interest … and perhaps to his social or political interests.

[75] His Honour went on to say, at CLR 548; ALR 284:

> … that a mere belief or concern, however genuine, does not in itself constitute a sufficient locus standi …

[76] The High Court of Australia reaffirmed these principles in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35–6; 36 ALR 425 at 430–1 per Gibbs CJ, at CLR 41–2; ALR 435–6 per Stephen J and at CLR 74; ALR 462 per Brennan J. It applied these principles again in *Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552; 129 ALR 191 and also in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; 155 ALR 684; 54 ALD 609; [1998] HCA 49 (*Bateman's Bay*).

[77] It is interesting to note that in *Bateman's Bay*, although standing was recognised on the basis of the existing "special interest" test, as originally formulated by Gibbs J in *ACF*, in a joint judgment, three members of the High Court, Gaudron, Gummow and Kirby JJ, indicated that they were prepared to see that test widened still further, if necessary. Their Honours considered that it gave

insufficient attention to the basis upon which equity intervenes in public law matters, particularly to restrain apprehended ultra vires activities of statutory authorities involving recourse to public monies. They also noted that the characteristics of the office of Attorney-General in Australia differed from those associated with that office in England, in particular with respect to the grant of the fiat.

[78] Their Honours observed, at [50] of the joint judgment:

> Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The answer, required by the persistence in modified form of the Boyce principle, is that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter. Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive, procedural stipulation.

[79] Their Honours went on to observe that it would be odd if the requirements for standing in a public law case, not involving constitutional issues, were more stringent than the requirements for standing in constitutional matters. They noted that prejudice to a sufficient material interest, such as that in the practice of a profession or occupation, was sufficient to give standing in constitutional cases: *British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201 at 257; and *Croome v State of Tasmania* (1997) 191 CLR 119 at 126–7 and 137–8; 142 ALR 397 at 401 and 409–11. They considered that the same test ought to be applicable in public law cases generally.

[80] As counsel for the Applicant correctly submitted, the rules regarding standing have been considerably broadened in England over recent years.

[81] The major impetus for reform in this area has come through statutory developments in the area of judicial review. It is now widely recognised that where a person has been the object of administrative action, that person should have a right to dispute its legality. Other persons are not regarded as necessarily having such rights. None the less, public authorities exercise powers that affect the public generally rather than particular individuals. To take but one example, if a local council grants planning permission without complying with all necessary legal requirements, it does harm to the public interest, though not necessarily wrong to any particular individual. If no one has standing to call that local council to account, it can disregard the law with impunity. A rational and just system of public law must find a solution to this problem or else the rule of law will itself be diminished.

[82] In HWR Wade and CK Forsyth, *Administrative Law*, 9th ed, 2004, (Wade), the learned authors observe at 680:

> Judges have in the past had an instinctive reluctance to relax the rules about standing. They fear that they may 'open the floodgates' so that the courts will be swamped with litigation. They fear also that cases will not be best argued by parties whose personal rights are not in issue. But recently these instincts have been giving way before the feeling that the law must somehow find a place for the disinterested, or less directly interested, citizen in order to prevent illegalities in government which otherwise no one would be competent to challenge.

[83] It is fair to say that, although *Gouriet* has never been expressly overruled by the House of Lords, the principles set out therein are no longer generally followed in England. It is no longer necessary for a person who initiates

proceedings for judicial review to satisfy the stringent tests that formerly applied in relation to the prerogative writs. Nor is it necessary for a non-party who seeks leave to intervene in a private action or a matter involving questions of public law, to show that he or she will suffer "special damage" if the decision goes a particular way. The Attorney-General is no longer regarded as the sole protector of the public interest in such matters. There has been a tendency on the part of the courts to grant standing on the strength of any broadly conceived "special interest" and a recognition that each case must be considered in the light of its own particular facts.

[84] Wade goes so far as to suggest that the requirement that there be standing in relation to judicial review has been virtually eliminated. He cites, as an early example of the modern tendency, *R v Greater London Council; Ex parte Blackburn* [1976] 1 WLR 550; [1976] 3 All ER 184 where the Court of Appeal held that prohibition could issue at the instance of a private citizen, applying primarily from motives of public interest, to prevent the Greater London Council from licensing indecent films by applying an unduly indulgent test of obscenity. In that case the applicant's wife, who was a co-applicant, was a ratepayer. In addition, they had children who, it was argued, might have been harmed by being subjected to indecent films. However, these latter interests were not regarded as decisive.

[85] We are conscious, however, that the present case has nothing whatever to do with prerogative remedies. The question before this court is simply whether Shameem J should be given leave to intervene in this appeal. The first issue to be resolved is whether she has any standing in this matter. In the event that the court finds in her favour on that point, there is still the question whether, in the exercise of its discretion, leave to intervene should be granted.

[86] It should not be assumed that the principles that govern standing and the related issue of leave to intervene, are in all respects the same as those developed by the courts in relation to standing to bring applications for judicial review. It may be that a broader test for standing is appropriate in cases which involve challenges to the legality of administrative actions than would be appropriate where non-parties seek to involve themselves in other persons' private proceedings, or a criminal prosecution.

[87] We accept that in Fiji the test for standing in applications for judicial review is essentially that stated by the House of Lords in *Inland Revenue Commissioners v National Federation of Self-Employed & Small Businesses Ltd* [1982] AC 617; [1981] 2 All ER 93. In that case, an association of taxpayers sought judicial review of a decision by the Inland Revenue to waive large arrears of income tax due from 6,000 workers in the newspaper printing industry who had, for some years, collected pay under false names, and defrauded the revenue.

[88] The House of Lords considered that it had been wrong for the divisional court to treat standing as a preliminary issue to be determined independently of the merits of the complaint. Their Lordships observed that the question of "sufficient interest" could not, in such cases, be considered in the abstract, or as an isolated point. On the facts, the Applicant had failed to show any breach of duty by the Inland Revenue, and specifically had not established that the commissioners had failed in their duty to administer the tax laws fairly as between different classes of taxpayer. It is interesting to note, however, that their Lordships stated that if it had been shown, on the facts, that the Inland Revenue

had been unduly influenced by the threat that the printing workers might cause serious disruption by striking if their cooperation could not be obtained, the Applicants might have succeeded.

[89] Lord Roskill referred, at AC 656; All ER 116, to the "change in legal policy" which had greatly relaxed the rules about standing in recent years. Lord Diplock described the virtual abandonment of the former restrictive rules as to standing in relation to prerogative remedies as the "greatest achievement" of the English courts that he had witnessed in his lifetime, in the context of progress towards a comprehensive system of administrative law.

[90] Later decisions of the House of Lords, as well as those of other English courts, have continued to reflect the more liberal character of this ruling. The cases are usefully discussed in Wade at 695–7.

[91] There are, however, limits to the extent to which the current law allows non-parties to be heard. A pertinent example, so far as this case is concerned, is *R (on the application of Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449, where a divisional court held that the father of a murdered child lacked general standing to challenge the tariff period set for that child's murderer. His standing was limited to the impact of the decision on him personally.

[92] Developments in Canada and in New Zealand appear to mirror those in England.

[93] In *Minister of Justice of Canada v Borowski* (1981) 130 DLR (3d) 588, the Supreme Court of Canada held that a citizen could complain that statutory provisions regulating abortion were in conflict with the right to life in the Canadian Bill of Rights.

[94] In *Wewaykum Indian Band v Canada* [2003] 2 SCR 259, the Supreme Court dismissed a motion to vacate one of its own judgments in circumstances where, it was discovered, after judgment had been given, that a member of the court, Binnie J, had many years before, advised one of the parties to the case on the very issues that had later been determined by the court. It was held that in the particular circumstances, no reasonable apprehension of bias had been established. The court referred to there being "a strong presumption of judicial impartiality". It added that even if the involvement of a single judge had given rise to an apprehension of bias, no reasonable person informed of the decision-making process of the court and viewing it realistically, could conclude that the eight other judges who heard the appeal were biased or tainted. Though there was little, if any, discussion regarding standing, the tenor of the judgment supports a somewhat broader view of that threshold issue in cases involving allegations of bias than cases of a different nature.

[95] In New Zealand, the tendency has been to retreat from the traditional view that the courts are seen simply as a means of resolving disputes between private parties. There has been a greater willingness to allow affected non-parties to make submissions as public interest interveners. A variety of interest groups have been allowed to intervene to offer submissions on a range of factual and legal issues.

[96] Several examples will suffice. In *New Zealand Fire Service Commission v Ivamy* (1996) 8 PRNZ 632 which concerned rights to representation in contract negotiations under the Employment Contracts Act (1991) both the Council of Trade Unions, and the New Zealand Employers' Federation were granted leave to intervene. In *Drew v Attorney-General*

[2001] 2 NZLR 428 the New Zealand Council of Civil Liberties was granted leave to intervene in an appeal that centred on the rights of prisoners to be represented in disciplinary hearings. In *Attorney-General v Daniels* (2002) 16 PRNZ 771, the New Zealand Human Rights Commission was granted leave to intervene in cases dealing with children with disabilities.

The special position of a judge

[97] None of the authorities dealing with the general principles of standing to which we have referred come close to the particular facts of this case. Nor do they deal with the related question of who, apart from the parties themselves, has standing to bring an application to have a judge disqualified upon the ground of bias, actual or apprehended. This latter issue has, however, received some attention in the United States.

[98] In RE Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* (1996) at 510 and following, it is suggested that it is uncertain whether a person who is not, strictly speaking, an interested party may move to disqualify a judge. On the one hand, there are cases where questions of judicial bias or interest are regarded as being of concern only to the parties to the action in which such bias or interest might have an impact. Professor Flamm cites as an example of this approach: *Public Util Dist No 1 of Klickitat Cty v Walbrook Ins Co Ltd* (1990) 115 Wash 2d 339 . Professor Flamm notes, however, that the relevant code applicable in that case expressly required that the person seeking relief under the statute had to be a party to the action in question.

[99] Professor Flamm observes that those courts that have adopted a restrictive approach to standing have, generally, concluded that a person who is neither a participant, nor directly interested in a proceeding (including witnesses, victims of crime, and former parties who had been dismissed from the action), should not be heard to complain about an assigned judge's alleged bias or interest. Professor Flamm cites as examples *Manning v Inge* (1982) 169 W Va 430, *People v Griffiths* (1989) 155 A D 2d 777 and *Re Beard* 811 F 2d 818 (4th Cir, 1987) at 829.

[100] On the other hand, Professor Flamm identifies cases that suggest that since disqualification requests call into question a judge's ability to adjudicate fairly, they raise issues in which not only the participants in the proceeding itself, but the public as a whole, have a legitimate interest. For example, in *Re Tip-Pa-Hans Enterprises, Inc* 27 BR 780 (Bankr WD Va 1983), it was stated that:

> [s]uch prohibitions are plainly intended not merely for the general parties to a suit, but for the general interests of justice, by preserving the purity and impartiality of the courts, and the respect and confidence of the people for their decisions.

[101] On this latter approach, allegations of judicial bias are regarded as cloaking the entire judicature with suspicion and distrust. If judicial disqualification is intended to benefit the public as a whole and if a judge is bound to evaluate questions about that judge's impartiality even when such questions are not raised by any party, it must follow, so it is said, that judges can evaluate such questions when raised by non-parties.

[102] In a passage that seems to be particularly relevant to this proceeding, Professor Flamm observes:

> Indeed, in a number of cases persons who were not named as parties, such as witnesses, interveners, creditors, and real parties in interest, have been found to have standing to raise such questions.

[103] Professor Flamm cites various authorities in support of the principle that underlies a broad view of standing in such cases. They include *United States v Sciarra* 851 F 2d 621 (3rd Cir, 1988) in relation to witnesses, *Smith v Eighth Judicial District Court* 818 P 2d 849 (1991) in relation to interveners, *Re American Ready Mix, Inc* 14 F 3d 1497 (10th Cir, 1994) in relation to creditors and *Solberg v Superior Court* 19 Cal 3d 182 (1977) in relation to what are described as "real parties in interest".

[104] Professor Flamm also refers to *Kellogg v Martin* 810 SW 2d 302 (1991), where grandparents who had had custody of a child for more than 6 months were held to have standing to object to the assignment of a judge, even though they were not parties to the underlying proceedings.

[105] There are only two cases, of which we are aware, that deal with the question whether a judge has standing before an appellate court by reason only of the fact that the judge presided over the trial. These cases were drawn to our attention by the Attorney-General, who appeared as *amicus curiae*, at the request of this court, to assist in considering the issues raised by this application.

[106] In *Ratu Ovini Bokini v State & Chief Magistrate, Salesi Temo* (unreported, FCA, AAU0001 and AAU0003/1999, 5 November 1999), the Chief Magistrate in Fiji sought to intervene as an interested party before the Court of Appeal. The Court of Appeal stated as follows:

> No case was cited to us where an appellate Court has granted the Court appealed from leave to appear as a party to the appeal. The normal parties to any appeal are the litigants in a civil case or the prosecution and the accused in a criminal case. That is not to say that an appellate Court will not in unusual circumstances appoint an amicus or allow public interest parties to be heard. For example, see *Z v Z* [1997] 2 NZLR 257 where the New Zealand Court of Appeal appointed amici curiae and allowed special interest groups to be heard on an appeal in a matrimonial property dispute where the issues involved transcended in public importance the mere personal interests of the litigants.
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> In judicial review proceedings, as distinct from an appeal, the judicial officer or tribunal whose decision is being attacked is usually joined as a defendant. Usually, that defendant has an obligation to provide any record to the reviewing Court, but is not expected to enter the fray on the merits, especially where there are parties who can be expected to provide the reviewing Court with opposing arguments. See *New Zealand Engineering Union v Court of Arbitration* [1976] 2 NZLR 283.
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> A judicial officer has to accept that not all his or her decisions will be accepted meekly by litigants; it is part of the legal system that there will be inevitable appeals. Sometimes appellate Courts will criticise the lower Court Judges quite severely. The English Court of Appeal decision in *Jones v National Coal Board* [1957] 2 QB 55; [1957] 2 All ER 155 is a well-known example, Often a lower Court judge, criticised by a higher court, may feel indignation at what he or she sees as unjustified criticism of a course of conduct adopted or a decision made in the course of a difficult judicial proceeding. But, usually, the lower Court Judge has to put up with the appellate decision with such fortitude as he or she can command. Being successfully appealed against is one of the less attractive aspects of the judicial vocation, but it "goes with the territory".

[107] The second case to which we were referred was *Gillespie v Manitoba* 185 DLR (4th) 214, a decision of the Manitoba Court of Appeal. In that case, the Chief Justice of Queen's Bench, a provincial superior court, sought to intervene in an appeal from a judgment given *ex parte* in which he ordered the sheriff to continue to operate a perimeter security program that had been instituted at the law courts. Leave was refused, but it was held appropriate to allow counsel for the Chief Justice to appear as amicus curiae on the appeal. However, the case contains little discussion of principle regarding the issue of standing.

[108] A somewhat different case in which an appellate court permitted a subordinate judge to be heard, is *Re 'K' a Judicial Officer* [2001] 4 LRC 622. There, a magistrate was permitted by the Supreme Court of India to be heard on an application seeking to have certain criticisms that had been levelled at her by the High Court expunged from the judgment of that court. The Supreme Court observed that the High Court had an inherent power to expunge objectionable remarks from a court record, and the Supreme Court could exercise a similar jurisdiction under various provisions of the Constitution. The case did not really turn upon standing.

[109] It seems clear, from this brief survey of the authorities, that the circumstances under which non-parties will be given leave to intervene in cases that do not directly concern their legal rights are more circumscribed than those which will apply in applications for judicial review. Moreover, the constraints upon such intervention are likely to be greater, for sound public policy reasons, in criminal cases than they are in civil cases.

[110] The position in Fiji regarding civil appeals is best exemplified by the decision of the Fiji Court of Appeal in *Sukh Deo Prasad & Ganga Prasad Shankar v Attorney-General* (unreported, Civ App No ABU0029 of 1997, 13 August 1997) where it was said that in order for a non-party to obtain leave to intervene in an appeal the person must be "interested in or aggrieved or prejudicially affected by the judgment or order".

[111] The courts have taken an even more cautious approach in allowing applications for leave to intervene in criminal proceedings. This includes criminal appeals. See generally *R v Osolin* [1993] 2 SCR 313; and *R v Regan* 171 DLR (4th) 555. The reasons for this are plain. There is a need to avoid persons who are not parties to criminal proceedings, but have strong emotional interests in their outcome, such as the victims of crimes, or their relatives, pressing for the right to participate directly in the trial process. The interests of such persons are represented by the Director of Public Prosecutions, who brings criminal charges in the name of the State.

[112] No one doubts that Shameem J believes strongly in the need to have this matter raised before the court. None the less, it remains the case that before a non-party can be granted leave to intervene in litigation, that party must demonstrate some form of legal interest in the outcome of the proceeding. It was frankly acknowledged by counsel for Shameem J that she had no such legal interest, but it was submitted that, in the unusual circumstances of this case, this was not required. We are unable to accept that submission, at least without considerable qualification. There may be cases, of which this is not one, where the need for a judge to be added as an intervener is so overwhelming as to persuade the court that leave to intervene should be granted. No such need has been demonstrated in this case. Any concerns that Shameem J had regarding Scott JA's refusal to recuse himself could have been raised with the Attorney-General, but were not. He would have been the appropriate person to take up those concerns with the court, if satisfied that it was proper to do so.

[113] In the final analysis, there is always the residual power, as exercised by the House of Lords in *Pinochet No 2*, to overturn a decision of a court that included a judge who sat in a matter, when he ought not to have done so. Section 122(5) of the Constitution seems to allow for just such eventuality, if the available evidence warrants the adoption of that course. That would be a very exceptional case. As will shortly be seen, we have considered for ourselves the

material that would be relied upon in any such application. We have concluded that it falls well short of triggering the exercise of any such power. Despite counsel's earnest submission to the contrary, there will be no lacuna in the law of Fiji if this court refuses Shameem J leave to intervene in this criminal appeal.

[114] We have previously noted that neither the petitioner nor the Director of Public Prosecutions, who are the parties to this appeal, have shown any desire to have Scott JA recuse himself. The petitioner has filed an affidavit in the proceeding, which makes it clear that his sole concern is to have the Supreme Court, as originally constituted for the hearing of his appeal, determine that appeal as soon as possible. He does not seek a hearing *de novo* before a differently constituted court. His position is entirely understandable.

[115] The Director of Public Prosecutions, who represents the State, is the other party to this appeal. He is aware of the rift between Scott JA and Shameem J. He knows that Shameem J believes that Scott JA is biased against her, and he knows why she holds that belief. None the less, he does not seek to have this matter heard afresh by a differently constituted court. Nor does the Attorney-General who, by these proceedings, has been informed of the rift between the two judges. When it comes to the exercise of this court's discretion to grant leave to intervene, the positions taken by the Director of Public Prosecutions and the Attorney-General are entitled to considerable weight.

[116] The hostility that exists between Scott JA, and Shameem J, and appears to be reciprocal, is now a matter of public record. It is known that their difficulties go back at least as far as the tumultuous events of May 2000. Their differences are obviously both real and personal. It is a matter of regret that there appears to be little that can be done to persuade them to reconcile.

[117] It may be accepted, as Shameem J, contends, that she is better placed than either the petitioner or the Director of Public Prosecutions, to appreciate the level of hostility that she regards Scott JA as manifesting towards her. It may also be accepted that she is in a better position to place evidence before the court that might support her claim of actual bias on his part. Neither of these facts, if true, gives her "a special interest" in the proceeding of a kind that would warrant granting leave to intervene. Nor does her position as a judge of the High Court. She is no more bound, by virtue of that position, to uphold the Constitution, than is any other citizen of this country, irrespective of whether that person has taken an oath to do so.

[118] The very fact Shameem J has herself expressed hostility towards Scott JA means that a cloud hovers over her own objectivity in this unfortunate matter. Courts of final appeal that permit intervention generally look to satisfy themselves that the prospective intervener can contribute information or submissions beyond the ken of the parties. In the present case information has been drawn fully to the attention of the Supreme Court, as presently constituted. Suffice it to say, it does not present an overwhelming case. The material emanating from Scott JA is hardly current, and it requires a leap to proceed from a finding that Scott JA does not get on with Shameem J (whether with, or without, good cause) to a finding that his Lordship would be false to his judicial oath. We recognise that these remarks tentatively enter into the merits, but it would be wrong to exclude them entirely in determining whether to grant the present application.

[119] The special importance of not involving non-parties in criminal proceedings was made plain in *R v GJ* (2005) 16 NTLR 230; [2005] NTCCA 20, a judgment of the Northern Territory Court of Criminal Appeal. Mildren J, with whom the other members of the court agreed, rejected an application by the Human Rights and Equal Opportunity Commission (HREOC) for leave to intervene, or to appear as amicus curiae, during the hearing of a criminal appeal. HREOC sought leave to intervene because it believed that the resolution of the issues raised by the appeal would be assisted by a consideration of international human rights law, principles and jurisprudence. Mildren J observed at [54]:

> There are significant reasons why this Court, in the absence of statutory authority, has no jurisdiction or power to permit an intervention in criminal proceedings. It is well established that if the Court grants leave to a non-party to intervene, the non-party then becomes a party to the proceedings with all of the benefits and burdens of that status: see *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534; 83 ALR 79 at 94; 16 ALD 266; *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452 at 456; 182 ALR 617 at 624. But there are no issues joined nor could there be any issues joined between the intervener, the Crown and the accused. When an accused is put on his trial in accordance with the time-honoured formula repeated in every criminal trial in the presence of a jury the issues are joined between the sovereign and the accused. It is the sovereign which represents all of the interests of the community including the individual interests of the victims of crime and no one else. As was said in Sir William Blackstone's *Commentaries on the Laws of England*, vol 1, Book 1 p 269, Claitor's Publishing Division, 1915 ed, republished 1976:
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> > All offences (sic) are either in the king's peace or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason and a very few others) to be offences against the kingdom than the king; yet, as the public, which is an indivisible body, has delegated all its power and rights, with regard the execution the laws, to one visible magistrate, all affronts to that power and breaches of those rights are immediately offences against him to who they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eyes of the law.

[120] In our view, irrespective of whether Handley J applied too narrow a test of standing when he directed the registrar to reject Shameem J's application, as we think he did, Shameem J does not have standing, under the common law, as we understand it to be, to intervene in this appeal. If we were wrong about that, we would none the less refuse leave to intervene as a matter of discretion.

[121] The application for review was, on 26 April 2006, dismissed for the reasons set out above. On that day, we made the following orders.

1. The direction given to the registrar of the Supreme Court by Handley J on 21 October 2005 be set aside.
2. In lieu thereof, it be ordered that the Applicant's summons dated 19 October 2005 be made returnable forthwith before this court, as constituted this day.
3. The application for leave to intervene be refused and the summons otherwise dismissed.
4. There be no order as to costs, save for the order earlier made this day that the Attorney-General pay the petitioner's reasonable costs incurred in this application.

Application dismissed.