

# **Submission to the Australian Law Reform Commission**

## **Review on Judicial Impartiality**

Submitted by

Philip Marcus, Judge (retired), Jerusalem Family Court,  
Israel

June 2021

The undersigned, who served as a Judge of the Jerusalem Magistrates' Court from 1995 and in the Family Court from its opening in 1997 (including five years as Deputy President for Family Affairs) until taking early retirement in 2012, is privileged to make this submission. It is based on the Israeli law and procedure rules relating to disqualification and recusal of judges, and on the ways in which a litigant may file a complaint about the actions of a judge.

The Israeli system, which is based firmly on the principles of the Common Law regarding judicial independence and integrity, and the importance of due process and equitable treatment of all litigants, has the virtue of simplicity. It is comprehensible to all who come before the court, and enables swift disposition of claims that the judicial officer is not impartial and therefore should be disqualified.

As amended, the law gives a general ground for disqualification, and also specific circumstances in which a judge should decline to handle a specific case, or should recuse himself when it appears that one of the specified grounds for recusal becomes apparent.

In addition, once an application is made for a judge to recuse himself, the application must be dealt with immediately by that judge. Any party, the party who made the application and also any other party, may appeal the decision, so that a decision by a judge to recuse himself or not to do so may be appealed by a party other than the one who made the application. A judge who refuses an application to disqualify will usually continue hearing the case.

The appeal must be filed immediately with the Supreme Court, even if the case is being handled in the Magistrates' Court (from which all other appeals are to the District Court); the President of the Supreme Court (who is the highest judicial officer, and as such has power to issue practice directions and to direct the handling of court business, aided by the Presidents of the courts at each level and in each district) usually handles such appeals, and decisions are handed down within a few days of the final pleadings being filed with the Supreme Court. Such decisions are almost always published.

As a result, the disruption of proceedings by a spurious application to disqualify is kept to a minimum, and the process is open to the public; even cases in the Family Court, which are held *in camera*, and publication of any information which may identify the parties is forbidden, are reported using initial letters.

Except in the very rare cases when the grounds for disqualification become known from the judgment itself, an appeal of the judgment given at the end of proceedings may not include submissions of bias, since the issue of

disqualification must be raised immediately a party becomes aware of the facts underlying the grounds for disqualification.

The Israeli judicial system is unitary; all judges at all instances are governed by the Courts Law (Combined Version) 1984.

The issue of recusal (disqualification) of judges is dealt with in Section 77A of the Courts Law, which was added in 2004. (Section 6 of the Interpretation Law 1981 provides that expressions in the masculine import the feminine and *vice versa*).

These are the relevant provisions:

77A (a) A judge shall not sit in a case if he finds, at his own initiative or on the application of a party, that there are circumstances in which there arises a substantial concern of bias in the conduct of the case.

(a1) Without derogating from the generality of the provisions of subsection (a), a judge shall not sit knowing that one of the following applies:

- (1) A party in the case, a lawyer or a central witness in the case is related to the judge or there is some other substantial connection;
- (2) The judge has a substantial personal financial or other interest in the case or its outcome, in a party to the case, his lawyer or a central witness, or a first degree relative of the judge has a substantial personal financial or other interest in the case or its

outcome, in a party to the case, his lawyer or a central witness.

- (3) Prior to his appointment as a judge, the judge was involved in the matter being dealt with by him, as a lawyer, arbitrator, mediator, witness, professional consultant, expert or in any other similar way;

In this subsection –

"relative" – spouse, parent, parent of a spouse, child, sibling, grandparent, grandchild, and also the child or spouse of one of these, and including a person who was the guardian of or the foster parent of the judge, or the judge was his guardian or foster parent;

"first degree relative" - spouse, parent, parent of a spouse, child, sibling, or the child or spouse of one of these, and including a person who was the guardian of or the foster parent of the judge, or the judge was his guardian or foster parent;

"central witness" – a witness the determination of whose reliability is required for the determination of the outcome of the case.

(a2) Notwithstanding the provisions of subsections (a) and (a1), a judge may sit in the case if, because of the urgency of the matter, it is not possible to conduct the hearing before a different judge and serious harm or a miscarriage of justice would arise if he does not hear the case.

(a3) Notwithstanding the provisions of subsections (a) and (a1), a judge may sit in the case if transferring the case to any other judge would not change the grounds for disqualification.

(b) When an application for disqualification is made against a judge, he shall decide on the application forthwith, and before giving any other decision.

(b1) .....

(c) The decision of the judge under this section shall include reasoning, and a party may appeal the decision to the Supreme Court; the appeal shall be heard before the President of the Supreme Court or a bench of Justices of the Supreme Court or a single Justice, as the President shall decide.

The procedure for handling matters of disqualification is set out in Chapter XX part B of the Civil Procedure Rules, 2018:

## Part B

### Applications for disqualification

173 (a) An application for disqualification under section 77A of the (Courts) Law shall be filed in writing, or, if it is made in the course of a hearing, shall be made orally, immediately after the party becomes aware of the grounds for disqualification, and before any other submission.

(b) Where the judge decides to dismiss the application for disqualification, the hearing shall continue, unless the judge instructs otherwise.

## Appeal of decision regarding disqualification of a judge

174 (a) An appeal of a decision regarding disqualification of a judge shall be filed in the Supreme Court within fourteen days of service of the decision; the appeal shall specify the essential grounds of the application to overturn the decision, and shall be accompanied by an affidavit attesting to the facts which form the basis of the appeal, a copy of the application for disqualification, the record of the hearing of the application, and the decision being appealed.

(b) A copy of the appeal shall be served on all the other parties on the day of filing.

(c) The other parties may respond to the appeal.

(d)...

(e) The President of the Supreme Court may request that the judge, against whose decision the appeal is filed, to comment.

(f) Where it is decided on appeal that the hearing of the matter shall be transferred to another judge, that judge shall continue from the point at which the previous judge had reached, or from any other stage as shall be appropriate and just in the circumstances.

There is ample case law dealing with the issues of disqualification and recusal. The undersigned will give references if the Commission should see fit to request them; however, most of the recent decisions of the President of the Supreme Court have dismissed appeals of parties calling for disqualification. Some of the grounds for dismissal:

- Commenting on the strength or weakness of a party's case, or suggesting a settlement at the pre-trial stage, or making a decision in favour or against a party in an interlocutory application, are within the judge's powers, and do not indicate bias, unless it appears from the record of the hearing that the judge is "locked in" on a specific result
- The fact that the judge has previously adjudicated a case between the same parties is not of itself a ground for disqualification. (In the Family Court, the rule is One Family – One Judge, so that the same judge will often deal with several issues between the same parties; the fact that a judge has found a defendant guilty and sentenced him in a criminal case will not of itself be grounds for disqualification of that judge in a new case against that defendant).
- An allegation of bias is not a weapon to be introduced at the appeal stage, and must be raised immediately the party becomes aware of the grounds.
- The fact that a judge prior to appointment acted as a lawyer for a corporate client is not of itself grounds for recusal, unless the judge has a financial or other interest in the client (other than shares in a public company held by a pension fund or similar entity) or in the law firm in which he worked or was a partner prior to appointment; however, it is proper for a judge to ask that cases involving the former client or law firm not be allocated to him, at least for a substantial period after appointment. This will not apply when the judge previously appeared on behalf of the attorney-general, the district attorney or as a police prosecutor, unless the judge was involved in the specific case prior to appointment.

In the interests of completeness, a person may file a complaint as to judicial conduct under the Commissioner for Complaints against Judges Law, 2002. The relevant part of Section 14 of that laws reads as follows:

14 (a) The following persons may file a complaint with the Commissioner:

- (1) Any person who sees himself injured by the conduct of a judge in the course of fulfilment of his judicial role, including in relation to his management of the case or that of any person appointed by him;

.....

However, Section 17(5) of that law states that the Commissioner shall not deal with a complaint which consists of a request that a judge should recuse himself on the grounds of bias; thus, issues of bias may only be dealt with under Section 77A of the Courts Law.

The undersigned will be happy to appear before the commission or to answer any questions on the topice dealt with herein.

Philip Marcus

Judge (retired) Jerusalem Family Court

[REDACTED]

[REDACTED]

[REDACTED]

