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REASONABLE SUSPICION OR REAL LIKELIHOOD: A QUESTION OF SEMANTICS?

Re Shankar Alan s/o Anant Kulkarni[1]

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The law on apparent bias has been mired in some controversy following the High Court decision of *Re Shankar Alan s/o Anant Kulkarni*, where Sundaresh Menon J.C. seemingly departed from the tentative views of Andrew Phang J.C. (as he then was) in *Tang Kin Hwa v. Traditional Chinese Medicine Practitioners Board*[2] on the issue of whether there were any material differences between the "reasonable suspicion of bias" test and the "real likelihood of bias" test, the two formulations of the test for apparent bias that have been variously adopted by different jurisdictions in the common law world. In *Tang Kin Hwa*, Phang J.C. expressed his tentative view that there are no practical or conceptual differences between the two tests,[3] warning against the dangers of "semantic hairsplitting".[4] Sundaresh Menon J.C., on the other hand, took a different view in *Re Shankar*, holding that "there are indeed some important differences between [the two tests]",[5] and that the "reasonable suspicion of bias" test was the applicable law in Singapore "for good reason".[6]

It is perhaps apposite to mention that Lee Seiu Kin J. recently revisited the question of the appropriate test for apparent bias in *Ng Chee Tiong v. Public Prosecutor*.[7] However, Lee J. merely adopted Menon J.C.'s exposition of the law without delving into an in-depth analysis of the issue[8] because *Ng Chee Tiong* was primarily concerned with a somewhat different aspect of natural justice, namely the prohibition against a trial judge assuming an inquisitorial role.[9] As such, there has been no

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1 [2007] 1 S.L.R. 85 (H.C.) [*Re Shankar*].

2 [2005] 4 S.L.R. 604 (H.C.) [*Tang Kin Hwa*].

3 *Ibid.* at para. 34.

4 *Ibid*. at para. 44.

5 *Re Shankar*, *supra* note 1 at para. 74.

6 *Ibid*. at para. 91.

7 [2008] 1 S.L.R. 900 (H.C.) [*Ng Chee Tiong*].

8 *Ibid*. at paras. 14 and 21.

9 *Ng Chee Tiong* was primarily concerned with the "separate and distinct principle" of natural justice that Menon J.C. termed "the prohibition against assuming an inquisitorial role" (see *Ng Chee Tiong*, *ibid*. at para. 16).

definitive exposition, even in the High Court, on the question of whether the two tests are materially different.

One of the central tenets underpinning the legitimacy of any legal system is that the law must be applied without fear, favour or prejudice. Although perfect objectivity and neutrality are unrealistic goals, the rule against bias operates to prevent a hearing from being a sham, ritual, or a mere exercise in "symbolic reassurance", due to the fact that the decision-maker was not in practice persuadable.[10] As the rule against bias is one of the twin pillars of natural justice that guards against procedural unfairness, it is of some importance to examine the conceptual underpinnings of both formulations of the test for apparent bias. If the two tests are materially different, then the courts should affirmatively adopt one test to the exclusion of the other, and articulate precisely why the adopted test is preferable from the perspective of principle and policy. However, if the differences between the tests are largely a question of semantics, then it may indeed be advisable to heed Phang J.C.'s warning in *Tang Kin Hwa* to focus on articulating with precision the substance of the test for apparent bias, rather than hiding behind specific labels, be they "reasonable suspicion of bias" or "real likelihood of bias".

I. The Singapore Position

By way of background, it should be pointed out that *Tang Kin Hwa* and *Re Shankar* discuss the "real likelihood of bias" test not in its traditional sense, but in the form as modified in *R v. Gough*[11] and *Porter v. Magill*.[12] In *Gough*, the House of Lords held that the correct test was whether, in the circumstances of the case, the court considers that there appeared to be a "real danger of bias" (a test similar to that of the "real likelihood of bias"). Notably, the court made clear that the test was concerned with the *possibility*, not probability, of bias. However, the "real danger of bias" test was criticised by courts in other common law jurisdictions and the House of Lords indicated in *Pinochet (No. 2)*[13] that it might review the test elucidated in *Gough*. Subsequently, in *Porter*, the House of Lords adopted a "modest adjustment" to the *Gough* test, deleting the reference to "real danger" and stating that the test was whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[14] The operational terminology in the present English approach thus appears to be one of "a real possibility of bias". It is in this context that the use of the term "real likelihood of bias" must be seen.

The local position on apparent bias is captured in *Jeyaretnam Benjamin v. Lee Kuan Yew*[15] where the Court of Appeal endorsed the "reasonable suspicion of bias" test, holding that the applicable test was this: would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion

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[10] See Woolf, Jowell & Le Sueur, *De Smith's Judicial Review*, 6th ed. (London: Sweet & Maxwell, 2007) at 499 [*De Smith's Judicial Review*].

[11] [1993] A.C. 646 (H.L.) [*Gough*].

[12] [2002] 2 A.C. 357 (H.L.) [*Porter*].

[13] [2000] 1 A.C. 119 (H.L.) [*Pinochet (No. 2)*].

[14] *Supra* note 12.

[15] [1992] 2 S.L.R. 310 (C.A.) at para. 80 [*Jeyaretnam Benjamin*].

that a fair trial for the litigant concerned is not possible.[16] Although this decision preceded *Gough*, the same court was given the opportunity to reconsider the position in *Tang Liang Hong v. Lee Kuan Yew*.[17] In *Tang Liang Hong*, the Court of Appeal affirmed that the "reasonable suspicion of bias" test was the law in Singapore, but went on to consider *Gough* and the modified "real likelihood of bias" test. The court then held that "[f]or the purposes of this appeal, it is not material which of the two tests we apply in determining this issue [of apparent bias]", adding that "whichever of the tests the court applies, the court must ascertain the relevant facts and circumstances on which the alleged apparent bias is founded".[18] The Court of Appeal thus seemed to have left open the question as to whether the "reasonable suspicion of bias" test ought to be superseded by the "real likelihood of bias" (or "real danger of bias") test.

II. Are There Any Significant Differences Between the Two Tests?

Although the Court of Appeal in *Tang Liang Hong* endorsed the "reasonable suspicion of bias" test, the stance taken did not dispose of the question of whether there were any material differences between this test and the "real likelihood of bias" test. As mentioned above, this question was then taken up by Phang J.C. in *Tang Kin Hwa* where he expressed the view that the two tests were materially similar. Subsequently, in *Re Shankar*, Menon J.C. came to a different conclusion as he considered that there were important differences between the tests. It must be emphasised that the point of divergence in the views of the High Court in *Tang Kin Hwa* and *Re Shankar* was merely on the issue of whether there are perceived and practical differences between the two tests. Both *Tang Kin Hwa* and *Re Shankar* recognise that the "reasonable suspicion of bias" test is, at present, the applicable test in Singapore. Neither does *Tang Kin Hwa* stand for any proposition that the "real likelihood of bias" test (or, for that matter, the "real danger" or "real possibility" of bias test) should be adopted in Singapore.

Broadly speaking, the perceived differences between the two tests as canvassed in case law (both local and foreign) and academic writings fall largely into two categories which relate to: (a) the stringency of the tests; and (b) the perspective of the inquiry the court takes when applying the tests. These categories correspond broadly to the two perceived differences which figure prominently in *Re Shankar*. The first perceived difference is that the "real likelihood of bias" test may be more stringent than the "reasonable suspicion of bias" test. The second perceived difference is that Menon J.C. considered that the "real likelihood of bias" test focused the inquiry from the court's perspective while the "reasonable suspicion of bias" test looked at the matter through the eyes of the reasonable man. Consequently, Menon J.C. was of the view that the "real likelihood of bias" test focused on the finding made by a particular judge while the "reasonable suspicion of bias" test was more concerned with the effect on the public.

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[16] *Ibid*.
[17] [1998] 1 S.L.R. 97 (C.A.) [*Tang Liang Hong*].
[18] *Ibid*. at para. 48.

A. *Is "Reasonable Suspicion of Bias" a Less Stringent Test?*

In relation to the first perceived difference, Menon J.C. in *Re Shankar* considered that the imaginary scales of justice which symbolise the judicial process could connote a quantitative element. He observed that a judge evaluating the evidence in a given case arrives at an impression of the quality of the case and these impressions cover a spectrum. At one end of the spectrum is "doubt", followed by "suspicion" and "reasonable suspicion".[19] Further along would be "likelihood" which points towards a state of being likely or probable or, for that matter, possible. Finally, there would be "proof on a balance of probabilities" which connotes a degree of satisfaction upon the evidence that a particular fact is more likely so than not.[20] Although the term "likelihood" certainly conveys the impression of a higher threshold than "suspicion", as Phang J.C. pointed out in *Tang Kin Hwa*, the concept of "likelihood" entails "possibility", as opposed to the higher standard of proof centering on "probability".[21] Likewise, seen in context, the term "real" in the "real likelihood of bias" test cannot be taken to mean "actual" since the test pertains to apparent as opposed to actual bias. Taking these matters into consideration, the gap between the two tests narrows considerably.

However, Menon J.C. defined "suspicion" as a belief that something "might be possible without yet being able to prove it" while the addition of the adjective "reasonable" suggests that the belief cannot be "fanciful".[22] In contrast, the connotation of "real possibility" suggests that while there is no need to prove bias or even the likelihood of bias, it must be shown that it was *possible* that there was bias. Since "reasonable suspicion" does not require the proving of the possibility of bias but merely requires that the belief not be fanciful, this is a somewhat less stringent standard than "real likelihood" which requires that the possibility of bias be proved.[23] Nevertheless, this difference is hardly material because the gap between the two tests appears to be considerably narrow and practically speaking, the two tests are unlikely to lead to different results in the vast majority of cases.

B. *A Contrast Between Perspectives?*

The next perceived difference centres on whether the two tests present a "contrast between perspectives". In applying the "reasonable suspicion of bias" test, the court looks at the matter through the eyes of the reasonable man. On the other hand, the "real likelihood of bias" test focuses the inquiry from the court's perspective. In *Gough*, Lord Goff explained that the test in *Gough* did not require the court to look

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[19] *Re Shankar*, *supra* note 1 at para. 48.

[20] *Ibid*. at paras. 50 and 51.

[21] *Tang Kin Hwa*, *supra* note 2 at para. 39.

[22] *Re Shankar*, *supra* note 1 at para. 49.

[23] This view is shared by the learned authors of *De Smith's Judicial Review, supra* note 10 at 506 who place "reasonable suspicion that bias might have infected decision" at the lowest end of the spectrum while "possibility of bias" appears further upstream.

at the matter through the eyes of the "reasonable man" because the court personifies the "reasonable man":

> Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[24] [emphasis added]

In *Tang Kin Hwa*, Phang J.C. agreed with this reasoning:

> In particular, I think that one ought not to draw a sharp distinction between the court's perspective on the one hand and that of the public on the other. Both are two sides of the same coin. Or, to put it more accurately, both are integral parts of a holistic process.[25] [emphasis added]

Menon J.C. disagreed with Phang J.C.'s analysis on this point, considering that an adoption of the "real likelihood of bias" test over the "reasonable suspicion of bias" test would shift the inquiry from one directed at how it might appear to a reasonable man to whether the judge thinks there is in fact a sufficient possibility of bias.[26] Menon J.C. considered such a shift to be "a very significant point of departure".[27] In his view, there is a vital public interest in subjecting the decisions of those engaged in any aspect of judicial or quasi-judicial work to the most exacting scrutiny in order to ensure that their decisions are not only beyond reproach in fact and indeed from the perspective of a lawyer or a judge but also beyond reproach from the perspective of a reasonable member of the public.[28] In the words of the High Court of Australia in *Webb v. The Queen*[29]:

> Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. *The test of "reasonable likelihood" or "real danger" of bias tends to emphasize the court's view of the facts*. In that context, the trial judge's acceptance of explanations becomes of primary importance. Those two tests tend to place *inadequate emphasis on the public perception* of the irregular incident.[30]

While the intention of protecting public confidence by looking at the matter through the eyes of the reasonable man is laudable, one is left to wonder how accurately the "reasonable suspicion of bias" test reflects the public view in the first place. The test as formulated in *Jeyaretnam Benjamin* requires that the reasonable man be sitting in court and apprised of *all the relevant facts*.[31] However, the majority of the public are neither sitting in court nor apprised of all the relevant facts. For the

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[24] *Gough*, *supra* note 11 at 670.
[25] *Tang Kin Hwa*, *supra* note 2 at para. 40.
[26] *Re Shankar*, *supra* note 1 at para. 62.
[27] *Ibid*.
[28] *Ibid*. at para. 64.
[29] (1993-1994) 181 C.L.R. 41 (H.C.A.) [*Webb*].
[30] *Ibid.* at 50-51 [emphasis added].
[31] *Jeyaretnam Benjamin*, *supra* note 15 at para. 80.

most part, members of the public obtain their information in bits and pieces, through the mass media (from sources like the newspapers or the internet where reporting can be selective) or by word of mouth. Neither source can be expected to arm the public with all the relevant facts, and it is doubtful whether the public would in any case be interested even if they did. Indeed, public attention is usually captured by the sensational while uninteresting details are conveniently glossed over. As such, even if a particular case passes the scrutiny of the "reasonable suspicion of bias" test, it does not follow that the public will necessarily be satisfied that there was no possibility of bias. In any given case, the combination of selective reporting and the tendency for word-of-mouth discussions to sensationalise events may lead members of the public to consider that there was a *possibility* of bias even though a reasonable member of the public who had sat through the proceedings and was apprised of *all the relevant facts* would not think so.

It must be emphasised that this is not to say that the appropriate test should be one that takes the public's views fully into account. Indeed, in ascertaining whether there is apparent bias, the court (whatever the perspective it adopts) must consider all the relevant facts. To attempt to pick and choose which facts the public would take cognisance of or to attempt an approximation of the public's views would necessarily be an arbitrary, speculative and unprincipled exercise. Nevertheless, the point remains that the case that the "reasonable suspicion of bias" test protects the public interest by reflecting the public's perspective is overstated.

One might argue, then, that despite not being a perfect solution, the "reasonable suspicion of bias" test remains the test most consistent with the policy justifying disqualification for apparent bias: that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[32] While it may be true that the label "reasonable suspicion of bias" comports better with the policy underlying disqualification for apparent bias than the label "real likelihood of bias" (a test that appears to be directed more at the sheer difficulty of proving actual bias), the application of the two tests in practice reveals that the contrast in perspectives is more often than not a distinction without a difference. It must be remembered that both tests are premised on an *objective* basis.[33] Further, *Tang Kin Hwa* clearly states that:

> It is undoubtedly the case that *the court will in fact have to ascertain what the perspective of the public is and, to that extent, "personifies" the reasonable man*. This is a practical reality that cannot be ignored, even though it might not be perceived to be ideal.[34]

As such, it appears to us that Phang J.C. was not suggesting that the court replace the reasonable man. Rather, the practical reality is that when the reasonable man is imbued with all the relevant facts, he would essentially be in the same position as the court. One is reminded of what Sedley J. said in *R v. Secretary of State for the Environment*: "in imputing to him [the reasonable man] all that is eventually known to the court and asking him for his impression, the court is looking into a mirror."[35]

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[32] *The King v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256 at 259.
[33] *Tang Kin Hwa*, *supra* note 2 at para. 36.
[34] *Ibid*. at para. 40 [emphasis added].
[35] [1996] 3 All E.R. 304 at 316.

A related criticism of the "real likelihood of bias" test can be gleaned from *Webb* where Deane J. expressed the view that the overall tendency of the "real danger of bias" test was to collapse the distinction between real and apparent bias partly because it seems to introduce "a new standard of proof".[36] A similar concern was expressed by Menon J.C. in *Re Shankar*:

> [T]here is an inherent difficulty with the real likelihood test in that it is *utterly imprecise. The court is not looking for proof of bias on a balance of probabilities. What then is the court looking for?* A sufficient degree of possibility or bias is how Lord Goff put it in *Gough*. But that becomes inherently, indeed impossibly, subjective. The "reasonable suspicion" test in my view avoids this because it directs the mind not towards the degree of possibility of bias which the court thinks there may be; but toward the suspicions or apprehensions the court thinks a fair-minded member of the public could reasonably entertain on the facts presented.[37]

However, in *Tang Kin Hwa*, Phang J.C. (quoting the English High Court decision of *Cook International v. BV Handelmaatschappij Jean Delvaux*)[38] noted that:

> [W]hilst contrasting the "reasonable suspicion of bias" test with the "real likelihood of bias" test was appropriate based on a plain reading of those two respective tests, nevertheless "as [he] read the authorities, the contrast is between reasonable suspicion of bias on the one hand, and the *appearance* of a real likelihood of bias on the other".[39]

The point raised by Menon J.C. is that in ascertaining whether there is a *possibility* of bias, the court is not applying the normal civil standard of proof on a balance of probabilities. As such, Menon J.C. considers the "real likelihood of bias" to be "utterly imprecise". However, as observed in the passage quoted above, despite its awkward phraseology, the "real likelihood of bias" test is not concerned with the degree of possibility of bias but the *appearance* of a real possibility of bias. Therefore, the normal civil standard of proof applies, but what must be established on a balance of probabilities is the *appearance* of a real possibility of bias. In substance, this is not very different from establishing, on a balance of probabilities, that a fair-minded member of the public could have a reasonable suspicion that a fair trial for the litigant concerned was not possible.

C. *The Crux: Exclusion of Extraneous Considerations*

In the final analysis, what is of importance is not the label "real likelihood of bias" or "reasonable suspicion of bias", but that the law emphasise that certain extraneous considerations must be excluded when a court, personifying the reasonable man, examines matters relating to apparent bias. Indeed, it is axiomatic that a judge must not bring his personal views, prejudices and preferences into the equation. It would be unfathomable for any court of law, even if it was applying the "real likelihood

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[36] *Webb*, *supra* note 29 at 70-71.
[37] *Re Shankar*, *supra* note 1 at para. 84 [emphasis added].
[38] [1985] 2 Lloyd's Rep. 225 at 231 (H.C.).
[39] *Tang Kin Hwa*, *supra* note 2 at para. 37 [emphasis in original].

of bias" test, to decide on matters relating to apparent bias based on the individual judge's personal views, prejudices or preferences. That would be plainly wrong. Some other extraneous considerations that a court should guard against are laid out by Sir Richard Scott V-C in *Locabail (UK) Ltd v. Bayfield Properties*:

> In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, *without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary reasonably well informed member of the public*, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.[40]

Essentially, the court in *Locabail* identified two specific matters that judges should be careful to exclude from their consideration. The first is special knowledge which the individual judge possesses. As observed in *Livesey v. New South Wales Bar Association*,[41] the reasonable observer is not presumed to have any personal knowledge of the character or ability of the members of the relevant court. The second matter is legal knowledge and sophistication which Sir Richard Scott V-C termed "the minutiae of court procedure". As noted by the learned authors of *Judicial Review of Administrative Action*,[42] the reasonable person should neither be credited with knowledge of the professionally acquired skill which solicitors, barristers and judges have in putting impermissible information or preconceptions to one side[43] nor should they be credited with much knowledge of the law or of administrative processes.[44] If a court is conscious to exclude these extraneous considerations, regardless of which of the two tests it applies, it should come to the same answer and this answer would sufficiently account for the reaction of an ordinary member of the public.

Conversely, a court that is not mindful of excluding extraneous considerations may arrive at a conclusion that takes inadequate account of public perception even if it applies the "reasonable suspicion of bias" test. In this respect, the learned authors of *Judicial Review of Administrative Action* note that, in Australia (a jurisdiction where the operative test is whether there is a "reasonable suspicion or apprehension of bias"), the hypothetical observer is often imbued with extraordinary knowledge.[45] An illustrative example is the case of *S&M Motor Repairs Pty. Ltd. v. Caltex Oil (Australia) Pty Ltd*,[46] where the majority thought that a bystander would not be reasonable unless he or she first inquired as to the general way in which barristers work. Having done that, they would have appreciated that whilst the challenged judge

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[40] [2000] Q.B. 451 at para. 17 [emphasis added] [*Locabail*]. This case was discussed in *Tang Kin Hwa*, *supra* note 2 at para. 40.

[41] (1983) 151 C.L.R. 288 at 299.

[42] Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action*, 2nd ed. (Sydney: LBC Information Services, 2000) at 488 [*Judicial Review of Administrative Action*].

[43] *Vakauta v. Kelly* (1989) 167 C.L.R. 568 at 584 to 585.

[44] *Webb*, *supra* note 29 at 52; *Minister for Immigration, Local Government and Ethnic Affairs v. Mok* (1994) 127 A.L.R. 223 at 244.

[45] *Judicial Review of Administrative Action*, *supra* note 42 at 488.

[46] (1988) 12 N.S.W.L.R. 358 at 379 to 381.

in the instant case had often appeared for Caltex, he had never been on a general or special retainer, and they would have understood the significance of that.[47]

III. Concluding Remarks

To conclude, we are of the view that, all things considered, the "reasonable suspicion of bias" test and the "real likelihood of bias" test, though not identical, operate, in substance, in very much the same manner. The differences between the tests are largely semantical. However, the question of labels is not completely irrelevant. For the sake of clarity and certainty, it may well be important for the Court of Appeal to state affirmatively, when the opportunity arises, which of the two labels should be used to describe the test in Singapore. On this question of labels, we are of the view that the "reasonable suspicion of bias" is more appropriate as it comports better with the policy surrounding disqualification for apparent bias: that justice should not only be done but should manifestly be seen to be done. Nevertheless, perhaps the preoccupation with labels should give way to a focus on the actual approach to be taken in cases of apparent bias. In essence, our suggested approach is that the court, personifying the reasonable man, should simply take into account all the relevant circumstances and determine if there is the suspicion or possibility of the appearance of bias (as far as possible taking into account the public's views on the matter) whilst always being mindful to exclude considerations stemming from the individual judge's personal preferences, special knowledge and legal sophistication.

[47] *Judicial Review of Administrative Action*, *supra* note 42 at 488.