IN THE CORONERS COURT
AT CHRISTCHURCH
(IN-CHAMBERS)

CSU-2019-CCH-000165 to
CSU-2019-CCH 000214;
CSU-2019-CCH-000326

I TE KŌTI KAITIROTIRO MATEWHAWHATI
KI TE ŌTAUTAHI
[I TE TARI]

UNDER **THE CORONERS ACT 2006**

AND

IN THE MATTER OF **Inquiries into the deaths of 51 people in relation to the 15 March 2019 Christchurch Masjid Attacks**

Date of Minute: 10 March 2022

REASONS OF CORONER B WINDLEY
AS TO APPLCATIONS FOR RECUSAL AS CORONER

Introduction

[1] On the morning of 21 February 2022 two Interested Parties filed applications pursuant to section 133A(3) of the Coroner's Act 2006, seeking that I recuse myself and that a replacement coroner be appointed. The hearing as to the scope of the issues for determination in the coronial inquiry was due to commence, and did commence, the following day.

[2] On receipt of the initial two recusal applications, which contained accompanying written submissions, I issued a Minute that same day inviting further applications and submissions to be received by 8:00am on 22 February 2022 and setting down a hearing for 9:00am on Tuesday, 22 February 2022 for interested parties to be heard on the applications. An additional four applications were subsequently received.

[3] The six applications for recusal (**Applications**) were brought by Interested Parties represented by Mr Hampton QC and Ms Dalziel, Ms Toohey, Mr Rasheed,[1] Mr Bastani, the Federation of Islamic Associations of New Zealand, and the Islamic Women's Council of New Zealand (**Recusal Applicants**). Both St John's Ambulance and the Canterbury District Health Board filed memoranda recording that they were neutral on the Applications.

[4] The purpose of the hearing at 9:00am on 22 February 2022 was for oral submissions to be made by those Recusal Applicants who wished to do so, as to the legal test and its application in this coronial inquiry. I heard oral submissions from Mr Hampton QC, Ms Joychild QC, and Ms Toohey as well as from counsel assisting me, Ms McClintock.

[5] Following the oral submissions, I declined the Applications with full reasons to follow. In my oral decision, I said:

> Thank you all for your submissions and it is certainly the case that I have reflected carefully on the applications and on the submissions that have been made today.
>
> I am going to decline the applications and my full reasons will be given in due course but so that interested parties have the essence of what my reasoning is, I want to say three things:
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> i. The submission is that some families have a deep sense of mistrust of state institutions, and I want to acknowledge that. I also want to acknowledge that it provides certainly important context to how these families approach an issue like this.
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> ii. But, an inherent suspicion does not lower or alter the test that I must apply in this case. The submissions I have heard today have not demonstrated in my mind that there is a logical connection between my prior roles and ***a reasonable apprehension*** that I might not bring an impartial mind to the issues I need to determine.
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> iii. So again while I acknowledge certainly the suspicion that families feel, and I have the utmost respect for the families, that suspicion does not in my view attach to any of my actions that have either been taken in prior inquiries or in fact, in this inquiry. There is no connection that I have, or step that I have taken or propose to take, that bears out so that I cannot do my job or discharge my duty in anything other than in an impartial way.

[6] My full reasons for declining the Applications follow.

The Applications

[7] The Applications are each brought on the same basis. Namely, that my having held two particular roles for state agencies whilst in legal practice might lead to a

[1] Mr Rasheed was not clear as to how many of the 39 Interested Parties he currently represents supported the Applications. Paragraph 9 of his written submissions reads: "While there is so far, not a unanimous view of support for the application for recusal, there is overwhelming consensus about the need for clarification of these issues and for concerns about fairness and the need for strong and apparent impartiality, to be urgent and fundamentally addressed."

reasonable apprehension that I will have an inherent leaning toward the position of those agencies. The prior roles at issue are:

(a) As a legal advisor to the police;

(b) As a Senior Investigator for the Inspector-General for Security and Intelligence Services (**IGIS**).

[8] The Recusal Applicants stressed in both their written and oral submissions that the issue was one of perceived bias resulting from the fact of having held the above roles, rather than any issue of actual or demonstrated bias. In particular, counsel for the Recusal Applicants emphasised the deep sense of mistrust that their clients hold toward state institutions as a result of the events of March 15 2019 and its aftermath.[2]

[9] Prior to hearing the Applications, I provided all Interested Parties with additional context around the relevant roles. This was set out in my Minute as to Recusal Applications dated 21 February 2022, a copy of which is **attached** (**21 February Minute**). In summary, I explained that:

(a) My last substantive work with the New Zealand Police as a legal adviser was in 2014 in Wellington; and

(b) I was subsequently seconded for a fixed term to IGIS as a Senior Investigator which is the role I was undertaking in 2015 when I was appointed as a Coroner.

[10] At the hearing of the Applications, I also outlined that my non-sworn role of legal adviser to the New Zealand Police commenced in 2007, that my role was to provide legal advice to local Police Districts and at no point did I work in Police National Headquarters. This was my only period of employment with New Zealand Police, and was continuous from 2007 until my appointment as Coroner in 2015 other than short-term secondments to Crown Law and to the IGIS.

[11] As to the IGIS role, in the 21 February Minute I set out that the role of IGIS is that of a watchdog over New Zealand security services, in that it: "Provides independent oversight of the NZSIS and the intelligence and security agencies."[3] I explained this because I apprehended that there may be some misunderstanding of the role of IGIS. Indeed, the written submissions of some of the Recusal Applicants confirmed that they had misunderstood that I had worked for the New Zealand Security Intelligence Service, which is not the case.[4]

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[2] See for example the Memorandum of Mr Hampton QC and Ms Dalziel on the Applications, at paragraph 10.

[3] Inspector-General of Intelligence and Security <www.igis.govt.nz>

[4] See for example the written letter in support of the Applications from FIANZ which included that the considerations of FIANZ in supporting the application were based on "the fact that a substantive part of our submission relates to the role and responsibilities of the NZ Police and the NZSIS and

[12] After it was emphasised at the hearing that it was IGIS that I worked for, and the watchdog nature of the IGIS role was explained, the Recusal Applicants that chose to make oral submissions did not pursue the IGIS role with any vigour as a ground for recusal. The oral argument instead focussed on my previous role advising the New Zealand Police.

[13] The 21 February Minute also set out the essence of the legal test that applies to the Applications, the core aspects of which are summarised below.

The legal test for recusal as a coroner

[14] The Chief Coroner, in consultation with the Attorney-General, has developed guidelines pursuant to s 107A of the Coroners Act 2006, to assist coroners to decide if they should recuse themselves from an inquiry (**the Coroner's Recusal Guidelines**).

[15] The Coroner's Recusal Guidelines are designed to assist coroners to makes their own choices, informed by a checklist of general principles, which underpin the legitimacy of judicial function.

[16] The guiding principle within the Coroner's Recusal Guidelines is that I should recuse myself if "a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the question the judge is required to decide".[5]

[17] The Coroner's Recusal Guidelines set out the two-step process that must be applied:

(a) The identification of what is said might lead a Judicial Officer to decide a case other than on its legal and factual merits; and

(b) An articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits.[6]

[18] There was no dispute in either the written or the oral submission as to the applicable legal principles, which are summarised in the High Court Recusal Guidelines, 12 June 2017 (**High Court Recusal Guidelines**): [7]

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these are the very agencies with which the Coroner has had previous association". Similarly, Mr Rasheed's written submissions said, at paragraph 5, "Chief amongst these grievances is how the dynamics and shortcoming within the Security Intelligence Service (and the various committees and boards it governed) have not been effectively and robustly traversed, along with related issues of its relationship with the New Zealand Police and the latter's separate such failures. Unfortunately, these two chief and overlapping concerns fit squarely against the similarly overlapping involvement of Coroner Windley in these two agencies".

[5] Chief Coroner's Recusal Guidelines, Guiding Principle.

[6] *Saxmere Company Ltd & Others v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, at [4].

[7] Citing *Saxmere* (above, n 5); and *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495.

(a) A judge has an obligation to sit on any case allocated to them unless grounds for recusal exist;

(b) A judge should recuse themselves if [the guiding principle set out at paragraph 16 above is met];

(c) The standard for recusal is one of "real and not remote possibility", rather than probability.

[19] The additional relevant sections of the Coroner's Recusal Guidelines to the Applications are:

(a) *Conflict of interest:* which describes a coroner's duty to disclose known circumstances that may give rise of a conflict of interest. The Coroner's Recusal Guidelines give examples of when a conflict of interest arises. Whilst non-exhaustive, the examples demonstrate that the bias must be more than theoretical and will most likely arise when there is a close connection to the inquiry. For example, in relation to having acted as a legal advisor, the Coroner's Recusal Guidelines say a conflict of interest includes where "The coroner has served as a legal advisor *in respect of a matter in issue* when in practice." This supports the conclusion that any direct connection to the matters giving rise to this coronial inquiry would give rise to a conflict of interest that should be disclosed. The close connection required mirrors that required by the High Court Recusal Guidelines in relation to both recusal arising from legal practise and recusal where a personal or professional relationship exists.[8]

(b) *Apparent Bias:* The suggestion here is one of apparent bias through my prior professional relationship with the agencies above as opposed to presumptive bias.

(c) *Pragmatic stance:* The Coroner's Recusal Guidelines emphasise that a pragmatic stance must be adopted. There must be good reason to transfer a case, as opposed to doing so out of an abundance of caution when the test is not in fact met. In other words, I am obliged to continue with the Inquiry unless there are proper grounds for recusal.

(d) *Application for recusal:* Where a party applies for recusal, the Guidelines set out the process to be followed, which is the process I followed as set out at paragraphs [2] and [4] above.

[20] I address below the application of the two-stage test I must apply in determining whether the overarching test is met.

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[8] High Court Recusal Guidelines, 12 June 2017, at paragraphs [2] and [3].

Step One: apparent bias alleged

[21] As noted above, the essence of the Applications is that there is a perception issue for the Recusal Applicants, who are concerned that I may approach the inquiry from a biased perspective in favour of the Police and the security and intelligence agencies due to the identified roles I have held.

[22] Each of the Recusal Applicants submitted that I should have disclosed the roles to them and that the recent discovery of my having held these roles has come as a shock to them. Mr Hampton QC submitted that the roles were recent.

[23] As noted above, it was clear that there was some misunderstanding as to the IGIS role, and with the clarifications I have outlined this role was not a focus of the submissions that were made at the hearing.

[24] Ms McClintock submitted the roles were not overly recent, and importantly the time since my appointment as a Coroner in 2015 had given an opportunity to test whether there was any bias in favour Police or other state agencies that might support what the Recusal Applicants fear. She submitted that no such examples had been given. She also highlighted the watchdog nature of the IGIS role and submitted that the role, when properly understood, had the potential to bring helpful insight to the issues of concern to the Recusal Applicants regarding the conduct or omissions of security and intelligences agencies.

[25] As to disclosure, Ms McClintock submitted that a simple online search reveals the roles that I have had, including in general terms on the Ministry of Justice Masjid Inquiry website,[9] and in more specific terms in a law society press release announcing my appointment as a coroner.[10]

Step Two: the logical connection between the alleged bias and the feared deviation from deciding the case on its merits

Submissions made

[26] As I have said, the Recusal Applications fairly acknowledged that their concerns went no further than concerns of perception. But this in turn demonstrated a difficulty in the making out the second step of the test.

[27] My Hampton QC submitted that the connection was that there are live issues in the inquiry involving the conduct of the Police and that of the security and intelligence agencies.[11] He stressed the mistrust that this clients have of state

[9] https:// www.coronial service.justice.govt.nz/masjid-attacks-coronial-process/people-supporting-the-coronial-process/
[10] https://www.lawsociety.org.nz/news/people-in-the-law/recent-movements/brigitte-windley-appointed-dunedin-coroner/
[11] Memorandum of Counsel on Behalf of a Number of the Families of the Shaheed in Respect of Recusal, at paragraph [9].

institutions, although he conceded that that alone could not be determinative.[12] He also raised the information disclosure process used in the inquiry so far as illustrative of an issue that is "causing disquiet" in that it leads the Recusal Applicants to feel information is being hidden from them.[13] At the same time, he submitted he was not raising the information disclosure issue as a ground for recusal, but rather as a way of highlighting the exceptional nature of the inquiry and the particular need for every step taken in it to bear "the scrutiny of judicial independence."[14]

[28] Ms Joychild QC made similar submissions to Mr Hampton. She also submitted that the fair-minded lay observer in these circumstances should be considered to be the families of those who have lost their lives.

[29] Ms Toohey submitted that my prior role advising police gave rise to the risk that I had professional relationships with Police officers who may be involved in the inquiry or that I may have given advice on matters that will arise in the inquiry. Ms Toohey conceded that many members of the judiciary will have had a role with the Police of some description. She acknowledged the strong institutional safeguards within the system, and that an informed observer would not lightly accept that the judge had or will put aside their professional oath. But, relying on *R v Sullivan (No 5)*, she urged me to take a precautionary approach and recuse myself given the hearing had not yet begun.[15]

[30] While the remaining Recusal Applicants did not make oral submissions, their grounds for recusal were encapsulated within their written submissions and largely mirrored the submissions made by Mr Hampton QC, Ms Joychild QC and Ms Toohey.

[31] Ms McClintock submitted that none of the Interested Parties had articulated a connection in any way or to any witness who may yet give evidence in a substantive inquiry – bearing in mind the scope hearing was an interlocutory step. Nor was there any suggestion that my prior inquiry decisions demonstrate a risk of bias toward Police, security agencies or any other state actor. On the contrary, Ms McClintock submitted that an online search reveals several decisions, including recent decisions, where my findings have been adverse to Police (including Canterbury District Police) and other state agencies.[16]

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[12] Memorandum of Counsel on Behalf of a Number of the Families of the Shaheed in Respect of Recusal, at paragraph [10]
[13] Memorandum of Counsel on Behalf of a Number of the Families of the Shaheed in Respect of Recusal, at paragraph [11].
[14] Memorandum of Counsel on Behalf of a Number of the Families of the Shaheed in Respect of Recusal, at paragraph [16].
[15] *R v Sullivan (no 5)* [2014] NZHC519 at [30].
[16] The recent decision specifically referenced was the decision in relation to *Jayet Cole* [2021] NZCoRC19 (9 February 2021). Another recent example is *Bua Ngoen Thongsi* 2015-CCH-91 (26 February 2021).

[32] Ms McClintock further submitted that counsel for the Recusal Applicants were inviting me to lower the legal test for recusal to account for the mistrust their clients hold toward state agencies. She submitted that such an approach cannot meet the test because an inherent mistrust does not equate to a demonstration of apparent bias.

Analysis

[33] For the avoidance of doubt, I confirm that I am not aware of any witness who would likely give evidence in the inquiry with whom I hold a relationship that falls within the Coroner's Recusal Guidelines as a relationship requiring disclosure. Nor do I hold any information from the roles that would influence my ability to bring an impartial mind to the issues to the be determined.[17]

[34] The submission from the Recusal Applicants is, in essence, the fact that I will need to examine the conduct of the Police, together with the Recusal Applicants' inherent mistrust of state agencies and therefore those associated in any way with them, means I should recuse myself. I deal with each of those points in turn, before turning to consider whether I should recuse myself in line with taking a precautionary approach as urged by Ms Toohey.

The fact of a prior connection to the Police and IGIS

[35] I do not accept that the fact of prior connection to the Police or IGIS is enough to make out a claim that I should recuse myself. The roles at issue were last held around seven years ago, albeit for at least all of 2015 I was undertaking only my IGIS role. Since my appointment as a coroner there has been ample opportunity to test any concern arising from those roles. No examples of concern have been raised.

[36] If the mere fact of such a role were enough to meet the test, that would mean that I cannot sit on a large number of inquiries that come before me because they involve examining the actions or omissions of the Police. As Ms Toohey acknowledged, the type of connection that I have had to the Police will be the case for many members of the judiciary, and an informed observer would not lightly accept in the circumstances that exist here that I will put aside my judicial oath in dealing with the issues. Further, the IGIS role, given its independent nature, does not amount to me having a direct connection to a state agency involved in this inquiry.

[17] I confirmed during the hearing that the officers as best I have seen them features in the evidence, are not people who are known to me personally from my work with Police. It is conceivable that I had provided general legal advice to officers within the Canterbury District on a broad range of matters while a member of the South Island Legal Service team before moving to the Lower North Legal Service team in January 2009. I do not recall having had any involvement in advising Police in District or PNHQ on any counter-terrorism issues, and do not believe I have provided advice related to any matters that are directly or indirectly potentially in issue in this inquiry.

The Recusal Applicants' mistrust of state agencies

[37] I acknowledge that the mistrust of state agencies held by the Recusal Applicants is strong, and nothing in this decision should be taken as in any way dismissive of the force of that mistrust. On the contrary, it provides important context as to how the Recusal Applicant families who lost loved ones approach an allegation of bias. But, to the extent that counsel for the Recusal Applicants are inviting me to use that mistrust to lower the test for recusal in this inquiry, I do not accept that I can do so.

[38] An inherent mistrust in a state institution does not demonstrate that an apparent bias exists and nor does it equate with a fair-minded and fully informed approach to the issue. I have immense respect for the Recusal Applicants, and the grief and suffering that they have endured and are continuing to endure. But, I cannot accept that the reasonable and fair-minded observer is someone in the position of the families who have lost loved ones as submitted by Ms Joychild QC. That is not what the word *observer* means. Further, it is directly contradictory to the Supreme Court's decision in *Saxmere*, which held that:[18]

> [5] the fair-minded lay observer is presumed … to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the Judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system as well as about the nature of the issues in the case and the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.

[39] There are good reasons that those most deeply affected are not held to represent the objective observer standard.[19] As such while I do not doubt the nature or strength of the mistrust that exists for the Recusal Applicants, it does not lower or alter the test I must apply.

[40] The reasonable and fair-minded observer would, in my view, look at the time that has passed since I have held the roles, the decisions that I have made as a Coroner since being appointed, the decisions I have made to date in this coronial inquiry and the judicial oath I have sworn to uphold. In my view having done so, that objective observer would conclude that there is no proper basis to fear that I will do anything other than decide the issues as they arise on their merits. It might in fact be the case that the reasonable and fair-minded observer would consider my previous roles to provide me with a level of awareness that will be useful in enhancing the rigour of the inquiry rather than undermining it.

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[18] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72 at [5] per Blanchard J. See also [10] where the Supreme Court noted that the matter is not to be tested by reference to the party making the allegation of bias.

[19] In the same way, the families of homicide victims may not represent that test in expressing their views on justice outcomes, for the very good reason that they are so closely connected and deeply affected by the events, they cannot be expected to approach the issue with the objectivity that the test requires.

The precautionary principle

[41] Ms Toohey effectively invited me to recuse myself out of an abundance of caution in reliance on what is known as the precautionary principle.[20] In *R v Sullivan*, the court noted in the passage cited by Ms Toohey the scope for a proactive recusal out of prudence where a hearing has not yet commenced. But, the question arises as to exactly when the precautionary principle should be invoked. The full passage of the decision reveals that greater context applies to the invoking of the precautionary principle than a judicial officer simply doing so wherever objection has been taken and a hearing has not commenced. Rather, Heath J stated that:[21]

> [30] My view is that the "precautionary principle" to which Mummery LJ refers should be seen as applicable in a finely balanced case. I have formed the view from the context in which the passage appears, immediately following reference to another decision of the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd*. In *Locabail*, the Court (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC) had said:[22]
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> > … By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case … or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him … In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.

[42] If my recusal were a finely balanced issue, then I accept that the precautionary principle means that I should recuse myself at this juncture. But, for the reasons set out above, I do not consider the need to recuse myself to be finely balanced. There is not in this case a sufficiently clear and logical connection between the issues raised and a risk that I will not bring an impartial mind to this inquiry. In other words, in the situation that exists in this inquiry, the precautionary principle takes the matter no further.

The information disclosure example

[43] Given Mr Hampton's concession that the information disclosure issue he raised was not relied upon as a ground for recusal, I do not consider it necessary to traverse that issue here, other than to note that there has been no determination to withhold information from families that could lead a reasonable and fair-minded observer to conclude that information is being hidden from the Recusal Applicants. The scope hearing was an interlocutory hearing and much of the

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[20] Memorandum of Counsel for Zuhair Darwish and Aya Al-Umari, dated 21 February 2022, at paragraph [6].
[21] *Sullivan*, above n 15.
[22] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA).

information that is sought by Interested Parties was not necessary for the purposes of the hearing and was instead to be made available in the substantive inquiry phase that followed the hearing.

[44] I have, however, addressed the information disclosure process by separate Minute[23] because I accept that despite the good intention behind the information disclosure process, it is nonetheless causing distress and I wish to address that as a matter of urgency. That issue is, however, quite separate to the issues that were raised for the purposes of this application.

Decision

[45] For the reasons set out above, I decline to recuse myself from this coronial inquiry because I do not accept the test for doing has been made out.

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CORONER B WINDLEY

[23] Minute as to General Information Disclosure No. 1, 8 March 2022.