

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

*Judgment Book*

IN FULL COURT

SUIT NO. M106 OF 1998

IN THE MATTER of the Jamaica (Constitution)  
Order In Council 1962; AND IN THE MATTER  
of Section 20 Sub-section (1) AND Section 25  
Sub-sections (1) and (2) of the Constitution of  
Jamaica.

IN THE MATTER of Indictment No. of 1998  
In the Resident Magistrate's Court Regina v.  
Norma Von Cork and Others

BETWEEN        NORMA VON CORK                                - Applicant  
AND                DIRECTOR OF PUBLIC PROSECUTIONS    - 1st Respondent  
AND                THE ATTORNEY GENERAL                - 2nd Respondent

CORAM:    THE HONOURABLE MR. JUSTICE WOLFE - CHIEF JUSTICE  
                  THE HONOURABLE MR. JUSTICE COOKE  
                  THE HONOURABLE MR. JUSTICE KARL HARRISON

R.N.A. Henriques, Q.C., Miss Norma Linton, Q.C., Delano Harrison and  
Patrick Bailey for the Applicant  
Brian Sykes, Deputy Director of Public Prosecutions for the Director of  
Public Prosecutions  
Lennox Campbell, Senior Assistant Attorney General for the Attorney General

Heard:        November 30 and December 1, 1998.

WOLFE CJ

On December 1, we handed down our decision dismissing the motion  
herein and promised to put our reasons in writing. The promise is now being  
fulfilled.

The applicant, Mrs. Norma Von Cork was at the time of the commission of the offence, with which she is charged, an Acting Resident Magistrate assigned to the parish of Manchester.

The indictment upon which she is charged is for conspiracy to pervert the course of public justice. The particulars of offence are as set out hereunder.

"Norma Von Cork, Christopher Moore, Morris Thompson, Radcliffe Orr and Clive Ellis on divers days between the 1st day of September, 1997 and the 31st day of October, 1997, in the parish of Manchester conspired together and with Ron McLean and other persons to pervert the course of public justice by causing the said Radcliffe Orr to enter a false plea of guilty to the charges of Possession of Ganja, Dealing in Ganja, Attempting to Export Ganja and Conspiracy to Export in order to cast doubt on the validity of the convictions of Brian Bernal and the said Christopher Moore intending thereby to pervert the course of public justice."

The matter is scheduled to be tried in the Corporate Area Resident Magistrate's Court, Criminal Division, holden at Half Way Tree. When the accused persons appeared before the Court for the first time the applicant was granted bail in the sum of Two Million Dollars. Her co-accused were granted bail in the sum of One Million Five Hundred Dollars each.

The motion herein is an "Application under Chapter 3 of the Jamaica (Constitution) Order in Council 1962 (hereinafter called "the Constitution") that section 20 subsection (1) thereof has been and is being, contravened in relation to her".

The applicant prays the Court to grant her the undermentioned reliefs.

A. A DECLARATION

That the right of the Applicant to a fair hearing has been, and is being contravened by reason of the institution of criminal proceedings against the Applicant in the Resident Magistrate's Court, before a Judge of that Court, of equal Jurisdiction to that enjoyed by the Applicant, who was herself a Resident Magistrate at all material times.

B. AN ORDER

- (1) That the aforesaid Indictment against the Applicant be withdrawn.
- (2) That the Applicant be unconditionally discharged.

ALTERNATIVELY

- (3) That all further proceedings upon the said Indictment be stayed until the said Indictment can be transferred from the Resident Magistrates Court and heard and determined before a Court of Higher Jurisdiction, i.e. a Circuit Court presided over by a Supreme Court Judge enjoying security of tenure, security of constitutionally entrenched remuneration and institutional independence sitting with a jury, thus to ensure that the applicant will enjoy her full constitutional and legal right to a fair hearing.

C. AN ORDER

That the Respondents do pay the costs of this Application or such other Order as the Honourable Court may think fit.

D. AN ORDER

For such further and other relief as the Court may seem fit.

The Grounds of the Application are:-

1. That by virtue of section 112 of the Constitution of Jamaica, it is submitted, Resident Magistrates are members of the lower judiciary and, as such, enjoy a lesser degree of security of tenure than members of the higher judiciary, to wit, judges of the Supreme Court and Court of Appeal. Thus, "there is nothing in the Constitution to protect the lower judiciary against Parliament passing ordinary laws -
  - (a) abolishing their office
  - (b) reducing their salaries while they are in office, or
  - (c) providing that their appointments to judicial office shall be only for a short fixed term of years. As "judges of inferior courts" their independence from all local pressure by Parliament or by the Executive is not as "firmly guaranteed" as that of the judges of the higher judiciary.
2. That, it is submitted, whatever the personal integrity of the individual Resident Magistrate, the concept of judicial independence falls to be determined on the basis not of subjective impartiality but of such objective considerations as security of tenure and security of remuneration.

3. That on December 12, 1997, having been charged with others with conspiracy to pervert the course of justice, the Applicant appeared in the St. Andrew Resident Magistrate's Court, accused before a Resident Magistrate having equal jurisdiction to that which the Applicant enjoyed at all material times. The Resident Magistrate ultimately offered the Applicant bail in the sum of Two Million Dollars (\$2,000,000.00) whilst offering each of the Applicant's co-accused bail in the sum of One and a half Million dollars (\$1,500,000.00)
4. That the offer of bail granted the Applicant in such a high sum was entirely without precedent in the Applicant's experience both at the Bar and on the Bench, and, this leads the Applicant to apprehend that the Resident Magistrate's exercise of discretion in that respect was not wholly independent of the fact of the Applicant being herself a Resident Magistrate of equal standing, then accused before her.
5. That, further, as respects the higher sum in which bail was offered in comparison to that relating to the Applicant's co-accused, charged with the self-same offence, the Applicant is constrained to infer therefrom an absence of equal treatment under the law, to which, it is submitted, the Applicant is entitled before the Courts.

6. That the plain inference from the manner in which the Resident Magistrate exercised her discretion as respects the grant of bail to the Applicant, as averred above is that -
- (a) Because of the Applicants status as an accused Resident Magistrate, the Applicant was being treated differently from the average person accused of the same or like offence; and
  - (b) Because of the said status, the Applicant was being treated differently, in fact from the applicant's very co-accused; and
  - (c) Accordingly, even at that preliminary stage of the Applicant's trial, the Applicant was not accorded that judicial impartiality to which the Applicant is constitutionally entitled.
7. That it is submitted that it would be ipso facto unfair to require a Resident Magistrate to determine guilt or innocence of one merely recently a colleague, in that there is every likelihood, it is submitted, that, in the effort to avoid public perception of a favourable bias, he/she may be liable, even subliminally, to unfavourable bias.
8. That, in all the premises, having regard to the Applicant's status as an accused Resident Magistrate, charged with an offence against the criminal justice system itself, the proposed trial of the Applicant's case by any Resident Magistrate, sitting alone whose

security of tenure and security of remuneration are not absolutely rooted in the Constitution, would constitute a contravention of the Applicant's right to a fair trial under section 20 of the Constitution.

Section 25 (1) of the Constitution states:

"Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of section 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Section 25 (2) states:

"The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The complaint of the Applicant is that the fundamental right guaranteed under section 20 (1) of the Constitution has been or is being contravened.

Section 20(1) stipulates:

"whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."  
(emphasis mine)

Mr. Henriques, Q.C., submitted that the right guaranteed under section 20(1) must be looked at and the scope determined. In this regard he cited the dictum of Lord Wilberforce in *Minister of Home Affairs and Another v. Collins McDonald Fisher and Another* 2 WLR 889 at 894.

"These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism, suitable to give individuals the full measure of the fundamental rights and freedoms referred to."

In essence Lord Wilberforce advocates a liberal approach in the interpretation of a constitutional instrument.

This approach found favour with Lord Diplock in *Attorney General of the Gambia v. Jobe* [1985] LRC (const) 556 at p. 565 where he opined -

"that a constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given a generous and purposive construction."

This Court is invited in its interpretation of what is meant by an "Independent and Impartial Court" to consider that there are two units:

- (a) the structural
- (b) impartial.

No complaint is being made about the structure of the Court in which the applicant is to have her trial. Neither is any attack being made on the office of the magistracy. To illustrate the interpretation which must be given to independence and impartiality, the case of *Valente v. The Queen* 24 D.L.R.

(4TH) P 161 was cited, in which the Supreme Court of Canada held:

"Judicial independence involves both individual and institution relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the Court or tribunal over which he presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of Government. Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence for the purposes of section 11(d) of the charter is whether the tribunal may reasonably be perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. It is important that a tribunal should be perceived as independent and that the test for independence should include that perception. The perception must, however, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. The standard of judicial independence under section 11(d) must necessarily be a standard that

reflects what is common to, or at the heart of the various approaches to the essential conditions of judicial independence in Canada and need not be the standard of uniform provisions such as the standard embodied in ss 99 and 100 of the Constitution Act 1867 for judges of the Superior Courts."

Mr. Henriques contends that because the office of the Resident Magistrate is not enshrined in the Constitution there is no security of tenure and that security is the first essential condition of judicial independence. This lack of security of tenure he contends is likely to put a Resident Magistrate who is called upon to adjudicate in a matter involving another Resident Magistrate under great pressure with the resultant effect of bias.

This pressure he says may arise from the perception of the public in circumstances where one colleague is trying another colleague that justice will not be done. This perception could result in the colleague magistrate bending over backward to dispel the perception to the detriment of the applicant.

Mr. Campbell sought to argue that the matter was not properly before the Court in that the allegations tend to show that the applicant was contending that the right guaranteed under section 20(1) was likely to be contravened and should therefore have been commenced by writ in keeping with the provisions of the Judicature (Constitutional Redress) Rules 1963.

This submission does not find favour with me. The applicant's allegation is that the guaranteed right has been or is being contravened. The process is continuous. The applicant is contending that for as long as the matter remains

in the Resident Magistrates Court the guaranteed right is being contravened. There is no allegation of "likely to be contravened".

Mr. Campbell submitted that:

1. The applicant has failed to produce any evidence to substantiate an allegation of danger of bias in respect of any hearing held or likely to be held.
2. The disparity between the quantum of bail offered to the applicant and her co-accused is explainable by the factors which the Resident Magistrate is obliged to consider when considering the whole question of bail.
3. In considering the question of perception the Court should view the matter through the eye of the reasonable man.

Mr. Sykes adopted the submissions of Mr. Campbell and further submitted that in considering the question of independence and impartiality it was important to consider whether the institutional protection afforded the tribunal was commensurate with the particular offence with which the person is charged.

In considering the whole question of independence and impartiality, I would adopt the words of *Fawcett in the Application of European Convention on Human Rights (1969) p.156.*

"The often fine distinction between independence and impartiality turns mainly, it

seems on that between the status of the tribunal determinable largely by objective tests and the subjective attitude of its members, lay or legal. Independence is primarily freedom from control by or subordination to the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or some form of prejudice. (emphasis mine)

I agree with Mr. Campbell for the first respondent that not one iota of evidence has been adduced to support any finding that the magistracy in Jamaica does not enjoy freedom from control by or subordination to the executive power in the state or that the magistracy has any personal interest in the issues or entertains any bias or prejudice against the applicant.

It is fallacious to suggest that because the magistracy does not enjoy security of tenure as the Judges of Appeal and Supreme Courts that it is any less independent.

Whilst the Constitution does not give security of tenure to a magistrate, section 112(3) of the Constitution stipulates who is vested with disciplinary power over Resident Magistrates and how that power was to be exercised. So it is not as easy to remove a Resident Magistrate from office as the applicant has submitted.

The disparity in the bail offered to the accused persons to my mind does not indicate bias. Bail is in the discretion of the Magistrate. That decision on the part of the Magistrate can only be challenged on the basis of improper exercise of the discretion. There is no complaint that the discretion was wrongly

**Cooke, J.:**

I have had the benefit of reading the draft judgment of the Honourable Chief Justice. I respectfully agree with the views expressed therein. However, I would like to offer my thoughts on the submission that:

It would be *ipso facto* unfair to require a Resident Magistrate to determine guilt or innocence of one merely recently a colleague, in that there is every likelihood, it is submitted, that, in the effort to avoid public perception of favourable bias he/she may be liable, even subliminally to unfavourable bias.

The applicant has posited a "public perception" which she fears will be inimical to her receiving a fair trial. She apprehends that the Resident Magistrate who conducts the trial will be burdened by the "public perception" that such Magistrate will be sympathetic to his/her erstwhile colleague. Consequently, the inevitable approach of the trial Magistrate would be to dispel this "public perception". In dispelling this "public perception" the applicant seeks to arrive at the conclusion that the objectivity of the trial Magistrate will be so adversely affected as to preclude a fair trial. To buttress this submission, it was pointed out that members of the lower judiciary do not have the same security of tenure as those of the higher judiciary. Hence, it was argued, in respect of the trial of the applicant, it was better to have the matter heard in a Circuit Court presided over by a Supreme Court Judge.

There is no suggestion, nor could there be, that the magistracy has not performed, and is not performing, its duties with independence and impartiality. The want of security of tenure available to the higher judiciary does not seem to have in any way influenced, affected or detracted from

magistracy gives confidence that the independence and impartiality have always been maintained. There is nothing to suggest that in this case it will not be maintained. It is expected that Magistrates as trained judicial officers will be servants of the law. The "public perception" posited by the applicant is entirely contrived.

It is right, that all persons who are jointly charged should, as far as possible, be tried together before the same tribunal. From a practical point of view, this is preferable because it cuts down on expense and makes better use of judicial time. But of even greater importance, all persons jointly charged should receive equal treatment.

The motion is without merit and should be dismissed.

HARRISON J.

I have read the reasons for judgment of the Honourable Chief Justice and my brother Cooke and I am in total agreement with their reasons. I wish to say a few words however.

Submissions for and against removal to the Supreme Court

No issue was taken by the Applicant as regards the Magistracy's jurisdiction over the trial of the offence for which she is charged. The gist of Mr. Henriques arguments for a removal into the Supreme Court, as I understand him is firstly, that Resident Magistrates would not be free from local pressure having regard to their lack of security of tenure and remuneration. Secondly, it was also argued that there would be an onerous responsibility on the part of a Magistrate to determine guilt or innocence of a colleague who now occupies a seat in the dock.

Mr. Henriques argued that the mischief in the case was to avoid the public's perception of the trial not being fair and further that the Magistrate trying the case might well apply a standard that was not fair. He asked the Court to look at the notoriety of the case out of which the instant case arose. The pressure he says may arise from the public's perception that justice will not be done since one colleague is trying another colleague.

The respondents contended on the other hand, that the applicant had failed to produce evidence to substantiate the danger of bias in respect of any hearing. Mr. Campbell argued that the disparity between bail was explainable by factors which the Resident Magistrate is obliged to consider in order to properly exercise his/her discretion in granting bail. He asked the Court to look at bias through the eyes of the reasonable man. The test he said, to ascertain whether there could be bias is whether there was a real danger of bias of the Magistracy.

Mr. Campbell further submitted that having regard to the training of Resident Magistrates they could properly adjudicate in the matter with an impartial mind. He argued that if the Court were to accede to the Applicant's request then, there would be unfairness if the applicant were to be singled out for

special treatment. In addition, Mr. Sykes submitted that since there was concession that the Magistrate's Court had proper jurisdiction over the trial, there was no real basis that there would not be a fair trial.

#### Reasons for judgment

The researches of Counsel and indeed of myself could not unearth any case within our Jurisdiction where a Resident Magistrate was on trial for the offence charged in the indictment and has made an application before the Court in terms of the motion filed. It was said by Mr. Henriques that it was the first time in the history of the judiciary in Jamaica that a case of this nature has arisen for consideration. This Court therefore, has the onerous task of making a decision on the issues raised.

#### Trial by jury

As in England, in most parts of the West Indies including Jamaica, jurisdiction at first instance may be exercised summarily or by trial on indictment. By law, trial in the Resident Magistrate's Court is by the Magistrate alone without a jury whereas a jury is indispensable in the circuit court system. Although many indictable matters can be heard by either tribunal, the law is quite clear however, that there is no power in the accused to elect jury trial. See *R v Gregory* Stephens Report 573 (Jamaica).

#### Issues of impartiality and bias

Let me now turn my attention to the issues of impartiality and bias. It is sufficient that there should arise from all the circumstances of the case a reasonable suspicion that strict impartiality could not or will not be shown in adjudicating the questions before the Resident Magistrate. Lord Justice Vaughan Williams has stated in a well known passage in his judgment in the case of *Rex v The Justices of London* (1908, 24 T. L. R 274), the following words: -

"No one suggested that in these bias cases it was necessary to "prove bias in fact, or that a finding that there was a sufficient "bias to disqualify a magistrate involved any consideration of the "personal qualities or personal action of the magistrate said to be "disqualified. Every one agreed that the whole basis of the decisions as to

pecuniary interest and bias was the question as to "the effect likely to be produced in the minds of the public or a "class of the public as to the fairness of the administration of "justice if the magistrate objected to were allowed to sit and "take part in adjudicating upon the particular case. This "question was one of fact, and it was a question which was "difficult to decide because it was really a question of degree. "And it was a question which had to be considered and decided "separately in each case."

The authorities show that it is not necessary that bias should in fact be established: it is sufficient that circumstances should exist which might cause a fair-minded and reasonable man to doubt whether justice will be disinterestedly and impartially done in the matter. The Supreme Court must be guided, in exercising this jurisdiction, by the maxim that it is not sufficient to say that justice will in fact be done in the matter; it must be shown that it is apparent to all reasonable men that justice will be seen to be done.

For the purpose of applying the above principles to the circumstances of the case before this Court the facts outlined in the grounds in support of the Motion and the affidavit of the applicant were examined and considered.

On the face of it, the only allegation which speaks of bias or likely impartiality and bias is that which concerns the exercise of the Magistrate's discretion on the matter of bail. I did not accept the averment that the difference in the sums offered for bail amounted to an absence of equal treatment under the law. I bear in mind the principle that bail must not be excessive (**Exp. Thomas [1956] Crim. L. R 119**) as well as the principle that the means of the accused would have to be considered when fixing the amount. I do believe, that these are factors a Resident Magistrate did take into consideration on the issue of bail. The following dicta I find quite apt in the circumstances:

"The measures to provide an opportunity for bail to be granted to an arrested person pending his trial are merely procedural, and although they impose a public duty on

the police, do not affect the question of the guilt or innocence of the accused person”.

Per Cools-Lartigue in **R v Wilfred Wright** (1953) 6 J. L. R 265 (CA)

I concluded therefore, that no evidence has been adduced to show the danger of bias now or likely bias and/or impartiality in the future. See **R v Gough** [1993] A.C 646.

**Appointment and tenure of Resident Magistrates**

In Jamaica the power to make appointments to the office of a Resident Magistrate is set out in section 112 of the Constitution. The section states inter alia:

“112 (1) - Power to make appointments to the offices to which this section applies and subject to the provisions of subsections (3) and (4) of this section, to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor General acting on the advice of the Judicial Service Commission...”

Section 100 (1) speaks of the tenure of office of Judges of the Supreme Court. The section reads inter alia:

“100 (1) - Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Supreme Court shall hold office until he attains the age of sixty - five years:

Provided that :-

- (a) he may at any time resign his office; and
- (b) The Governor General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, may permit a Judge who attains the age of sixty-five years to continue in office until he has attained such later age, not exceeding sixty-seven years, as may (before the Judge has attained the age of sixty-

five years) have been agreed between them.”

(N.B The age of retirement is now seventy years. )

The decision in **Valente v The Queen** 24 D.L.R (4<sup>th</sup>) 161 speaks of a perception as to whether or not the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act. It is my considered view, that although there is no express provision in the Constitution guaranteeing the security of tenure of appointment and remuneration of Resident Magistrates, they are not necessarily susceptible to pressure and/or removal at the “whims and fancies” of the public or political directorate. The Constitution safeguards against this and puts in place certain measures before any action can be taken against the Resident Magistrate for failure to carry out his/her judicial functions. I am further of the view that a Resident Magistrate need not “look over his shoulder” so to speak, when he or she is called upon to carry out his judicial functions.

Finally, I ask myself this question: Do we not have one Resident Magistrate in this Country who could display the qualities of impartiality and lack of bias? It would be a sad indictment upon our Magistracy if there was none. Why should this Court separate the persons accused and allow the public to believe that there is partiality and inequality before the law? I do believe and so hold that the matter ought to remain in the Resident Magistrate’s Court.

For the above reasons, I was in total agreement that the Motion should be dismissed.

exercised. The complaint is that the disparity may give rise to the perception of bias against the applicant.

I find the argument specious. The instances are numerous where persons charged jointly are offered bail in different sums depending on the nature of the parties involvement in the alleged crime or the ease with which a party may be able to abscond and forfeit a small sum.

A matter which ought to be given consideration is the fact that the applicant is jointly charged with others who have not joined in the complaint and are willing to submit themselves to the jurisdiction of the Resident Magistrate's Court. Do we remove the case into the Supreme Court to facilitate the apprehension of the applicant that a fair trial will be denied her?

In closing let me state that I am of the view that the perception of which Mr. Henriques speaks is more imagined than real. It must be borne in mind that magistrates are legally trained persons conscious of the principle of law which states that all accused persons are presumed innocent until proved guilty.

I am not satisfied that the provisions of section 20(1) have been or are being contravened.

For these reasons I concurred with my Learned Brothers in ordering that the Motion be dismissed.

Resident Magistrates carrying out their tasks in a judicial manner. Certainly, there is no public perception that a Magistrate will be removed because of any particular decision. In any event, a Magistrate cannot be lightly removed. See section 112 of the *Jamaica (Constitution) Order in Council*. Further, although this case is unique in that it is a former Magistrate who is on trial, Magistrates have tried a number of cases involving very prominent persons in our society. There has never been any public perception that in the trial of these prominent persons there was any lack of independence and impartiality.

One of the fundamental ideals of our administration of justice is equality under the law. Were the court to find favour with the applicant's motion, there would be a situation whereby the applicant would be tried in the Circuit Court and her three co-accused tried in the Resident Magistrate's Court. The public would want to know, and is entitled to know, why the applicant is being treated differently from her three co-accused. Very good cause must be shown. Has this been demonstrated in this motion? The only evidence put forward is that "The Resident Magistrate ultimately offered the applicant bail in the sum of two million dollars (\$2,000,000.00) whilst offering each of the applicant's co-accused bail in the sum of one and a half million dollars (\$1,500,000.00)." This, it is said, did not accord with judicial impartiality. Perhaps everyday in respect of bail different conditions are attached as between co-accused persons, according to the circumstances which prevail before the tribunal. It cannot be said that the difference in the sums is any indication that the applicant will not have a fair trial. This lack of evidence means that the applicant can only rely on a theoretical apprehension. The theoretical apprehension is unfounded. The history of the performance of the