REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2019-03989**

IN THE MATTER OF AN APPLICATION FOR LEAVE TO MAKE A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56.3 OF THE CIVIL PROCEEDING RULES, 1998 (AS AMENDED) AND PURSUANT TO SECTION 6 OF THE JUDICIAL REVIEW ACT, CHAP 7:08

AND

IN THE MATTER OF THE CONSTITUTION AND THE JUDICIAL REVIEW ACT, CHAP 7:08

AND

IN THE MATTER OF THE DECISION OF THE HONOURABLE PRIME MINISTER OF TRINIDAD AND TOBAGO CONTAINED IN HIS LETTER DATED 22ND JULY 2019 NOT TO REPRESENT TO HER EXCELLENCY THE PRESIDENT THAT THE QUESTION OF REMOVING THE HONOURABLE CHIEF JUSTICE FROM OFFICE OUGHT TO BE INVESTIGATED

BETWEEN

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Claimant

AND

DR. KEITH ROWLEY
THE PRIME MINISTER OF THE REPUBLIC OF TRINIDAD AND TOBAGO

Defendant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Interested Party

THE HONOURABLE CHIEF JUSTICE OF TRINIDAD AND TOBAGO

Second Interested Party

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 19 February 2020

Appearances:

Dr. Lloyd Barnett leads Mr. Rishi Dass, Ms. Elaine Green, Mr. Keil Tacklalsingh and Mr. Kirk Bengochea instructed by Mr. Imran Ali, Attorneys at Law for the Claimant
Mr. Douglas Mark Strachan QC and Mr. Reginald T.A. Armour SC lead Mr. Justin Phelps and Mr. Raphael Ajodha instructed by Ms. Tenille Ramkissoon and Mrs. Kendra Mark-Gordon, Attorneys at Law for the Defendant
Mr. Fyard Hosein SC leads Ms. Sasha Bridgemohansingh instructed by Ms. Michelle Benjamin and Ms. Kristal Madhosingh, Attorneys at Law for the First Interested Party
Mr. John S. Jeremie SC and Mr. Ian Benjamin SC lead Mr. Keith Scotland and Mr. Kerwyn Garcia instructed by Mr. Laurissa Mollenthiel, Attorneys at law for the Second Interested Party

TABLE OF CONTENTS

JUDGMENT

"let me say that there is no such thing under this Constitution as disciplinary proceedings against a Judge. ..If a Judge is so bad that he should not continue as a Judge then you must get rid of him but a Judge must not be under any threat of being disciplined"

-Mr. Ellis Clarke[1]

"I ask you to think of this..to look at it dispassionately…to consider what exactly is the power given to the Prime Minister and what exactly is the protection given to the Judge

-Mr. Ellis Clarke

"if the Prime Minister is going to have any say in the removal of the Judge by initiation or suspension or appointment of a local tribunal before it goes to the Privy Council, the suspicion will be raised in the country that that discretion is being used in a political way…it is necessary to ensure that there is no suspicion of political influence in respect of the Judge."- Mr. G. Furness Smith[2]

Verbatim Notes of Proceedings of Meetings on Draft Constitution held at Queens Hall, Port of Spain 25-27th April, 1962

Introduction

1. The narrow question to be determined in these judicial review proceedings is the legality, rationality and propriety of the Prime Minister's decision not to refer a question of the removal of the Chief Justice under section 137 of the Constitution[3] to Her Excellency the President of the Republic of Trinidad and Tobago. Such a referral is the first in a three stage/tier process for the removal of a Chief Justice under our Constitution often described as "impeachment" proceedings.

2. To this extent, the three extracts quoted above from contributions made in the public

[1] Constitutional Adviser to the Cabinet
[2] Trinidad Incorporated Law Society
[3] The Constitution of the Republic of Trinidad and Tobago

consultations for our Independence Constitution remain pertinent today some sixty (60) years later and provides some markers for this judgment. There is no constitutional provision for the disciplining of judges. The system prescribed by section 137 for the removal of a judge first begins with an Executive Prime Ministerial decision to represent to the President that the question of removal ought to be investigated. The section 137 process is designed to enshrine a fundamental constitutional pillar of an independent Judiciary insulated from the cut and thrust of politics.

3. Effectively at this first tier, the Prime Minister calls upon the President to establish a Tribunal to enquire into the matter of the judge's removal. The Tribunal at the second tier enquires and reports on the facts to the President to recommend whether the question of removal ought to be referred to the Privy Council. If so, the Privy Council conducts the third tier inquiry to advise the President whether or not the judge should be removed.

4. However, the acts of a politician, no less than a Prime Minister, are not unusually accompanied by the controversy of politics. Similarly, the initiation of any such section 137 proceedings for a judge's removal regardless of the merits is usually accompanied by the controversy of the damaged reputation of the judge and wider Judiciary. The subtle interplay of politics, the rule of law, the separation of powers, the independence of the Judiciary and confidence in the administration of the justice inevitably mix in the section 137 constitutional provisions providing for the Prime Minister to exercise a most important and delicate task of judicial accountability which carries the most severe of sanctions- removal.

5. Allegations of impropriety made against the Chief Justice splashed on national headlines, a vote of no confidence adopted by the Law Association of Trinidad and Tobago (LATT), restrained silence from the Chief Justice, strongly worded comments by higher courts on the need to inquire into these allegations, an investigation conducted into the conduct of the Chief Justice by the LATT. These all became the subject of a public exposé over the last three years through which the Judiciary has had to toughen its skin to bear inscrutable criticism with the publics' demands of accountability.

6. As an institution one of the hallmarks of the service we provide of justice is Trust. Trust is an

important aspect of procedural justice as it is fundamental for the rule of law. Although public trust in our institution has historically been conferred upon this important arm of the State, it must be continuously earned as indeed continuously interrogated. Justly so. Equally, the demand for accountability gives no licence for exerting unfair pressure on the Judiciary. To do so will itself sacrifice the very principle of the independence of the Judiciary and the rule of law on the altar of accountability. As in all things there must be equanimity in balance. The right balance in inscrutable accountability on the one hand and restraining from exerting unfair or even toxic pressure on the other is to be struck at every level of the section 137 removal process. In every sense in striving to maintain a pure system of justice through the demands and rigours of a section 137 accountability mechanism, the section 137 process itself must be untainted with any illegality, irrationality or impropriety, let alone politics.

7. The body of Commonwealth law surveyed in this case suggests that section 137 was designed for the most serious cases of misconduct affecting the ability to discharge the judge's duties warranting removal. It is seen as an important element of accountability as well as maintaining the independence of the Judiciary by preventing the harassment and interference of our judges with frivolous or minor infractions of judicial ethics. It is a constitutional provision designed to celebrate the independence of the Judiciary by ensuring its accountability but at the same time the bruising process may not only result in disaster of the sitting Judge or Chief Justice but the bruised image of institution itself.

8. The rule of law depends upon this independent Judiciary insulated from harassment or pressure, to make decisions free of fear or favour to "calmly poise the scales of justice unmoved by armed power undisturbed by the clamour of the multitude". The price for such independence is that our Judiciary is called upon at all times to maintain the highest standards of accountability both individually and institutionally. In the midst of any controversy the Judiciary traditionally remains stoic keeping our heads when all others are demanding it[4].

[4] "If you can keep your head when all about you/Are losing theirs and blaming it on you,/If you can trust yourself when all men doubt you,/But make allowance for their doubting too;/If you can meet with Triumph and Disaster/And treat those two impostors just the same;/If you can bear to hear the truth you've spoken
Twisted by knaves to make a trap for fools. Or watch the things you gave your life to, broken/And stoop and build 'em up with worn-out tools"-***If, Rudyard Kipling***

However, in our society which has, for historical and deep rooted societal reasons, diminishing levels of trust in public institutions, building the trust and confidence of our society remains a premium. There is no gainsaying that increasing demands of accountability by the public on the performance of a Judge serves to remind us of the importance of trust in our independence: That it is not a gift or birth right but a value that is to be earned and maintained.

9. To this extent, while this legal dispute concerns the manner in which the section 137 referral power is to be properly exercised by the Prime Minister, it also throws up for examination deeper societal values of trust and respect for an important institution that maintains the rule of law.

10. While it is not a cloistered virtue, there are times when the silent Judiciary is defended from public criticism by other social groups no less than the LATT. By an unfortunate turn of events, however, it is the LATT that has levelled a complaint of misconduct against the Chief Justice. What began as whispers gathered into a storm of gale force proportions as accusations levelled against the Chief Justice culminated in the LATT's complaint to the Prime Minister that he should consider exercising his section 137 power to refer the question of the removal of the Chief Justice to the President. Of its several complaints the one that remains in issue is the LATT's complaint that the Chief Justice sought favours of the Executive by making recommendations for housing from the Housing Development Corporation (HDC), a State agency, for persons that the Chief Justice thought were "needy and deserving" of housing and possibly actively lobbying the State for them ("the HDC issue").

11. The LATT has underscored the importance of the principle of the independence of the Judiciary in its complaint, essentially criticising the Chief Justice for compromising his independence by making recommendations for persons to State sponsored housing. The sin allegedly committed is to give the appearance that the head of the Judiciary has cowed and is obliged for favours from the State, participated in an illegal scheme of privilege and elitism and is in breach of the sacred tenet of our own Statements of Principle and Guidelines of Judicial Conduct let alone the Bangalore principles.

12. This judicial review proceedings calls into question the reasons advanced by the Prime Minister in responding to the complaint by refusing to trigger a section 137 removal of the Chief Justice. The LATT cannot call upon the Chief Justice to account. The most it can do and all that it did was to submit material to the Prime Minister for his consideration under section 137. The nub of this claim is to ensure that the Prime Minister's decision making process in not invoking the removal process was not flawed and comports with the requirements of public law principles.

13. The LATT argues that the Prime Minister's decision not to refer a complaint to the President to trigger the removal process of the Chief Justice is illegal, unfair and procedurally improper.[5]

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[5] The Claimant seeks the following reliefs:

(i) A declaration that the decision of the Honourable Dr. Keith Rowley, the Prime Minister of the Republic of Trinidad and Tobago, contained in his letter to the Law Association of Trinidad and Tobago dated 22nd July, 2019, not to represent to Her Excellency the President that the question of removing the Honourable Chief Justice from office ought to be investigated is illegal and/or unlawful and/or contrary to law and is consequently null void and of no effect;

(ii) A declaration that the decision of the Honourable Dr. Keith Rowley, the Prime Minister of the Republic of Trinidad and Tobago, contained in his letter to the Law Association of Trinidad and Tobago dated 22nd July, 2019, not to represent to Her Excellency the President that the question of removing the Honourable Chief Justice from office ought to be investigated was not made in the performance of his constitutional functions in the public interest and accordingly contravened Section 137 of the Constitution;

(iii) A declaration that the decision of the Honourable Dr. Keith Rowley, the Prime Minister of the Republic of Trinidad and Tobago, contained in his letter to the Law Association of Trinidad and Tobago dated 22nd July, 2019, not to represent to her Excellency the President that the question of removing the Honourable Chief Justice from office ought to be investigated is irrational and/or unjustified and/or unreasonable and/or an improper exercise of discretion;

(iv) A declaration that the decision of the Honourable Dr. Keith Rowley, the Prime Minister of the Republic of Trinidad and Tobago, contained in his letter to the Law Association of Trinidad and Tobago dated 22nd July, 2019, not to represent to her Excellency the President that the question of removing the Honourable Chief Justice from office ought to be investigated was made in bad faith and/or unfairness;

(v) A declaration that the decision of the Honourable Dr. Keith Rowley, the Prime Minister of the Republic of Trinidad and Tobago, contained in his letter to the Law Association of Trinidad and Tobago dated 22nd July, 2019, not to represent to her Excellency the President that the question of removing the Honourable Chief Justice from office ought to be investigated was made taking into account irrelevant considerations;

(vi) A declaration that the decision of the Honourable Dr. Keith Rowley, the Prime Minister of the Republic of Trinidad and Tobago, contained in his letter to the Law Association of Trinidad and Tobago dated 22nd July, 2019, not to represent to her Excellency the President that the question of removing the Honourable Chief Justice from office ought to be investigated was made without taking into account relevant considerations;

(vii) Consequent upon all/any of the declarations above, an order of certiorari to remove into this Honourable Court and quash the said decision;

(viii) Consequent upon the order of certiorari above, an order of mandamus directing the Honourable Prime Minister to reconsider the said decision subject to any directions and or advice that may be given by this Honourable Court with respect to the exercise of his discretion under section 137 of the Constitution;

(ix) Costs; and

(x) Such other orders directions, declarations and writs as the Court considers just in the circumstances.

He failed to understand the significance of the impact of the allegations which has brought the administration of justice in disrepute.

14. To advance further in the section 137 process, the Prime Minister must be satisfied that there is a prima facie case of such serious misconduct warranting the Chief Justice's removal. If so, the question is referred to the President who is obliged to establish a Tribunal to investigate the facts and if justified, refer the question of removal to the Privy Council. The Prime Minister however, must assess the complaint. He is not a conduit. In this case, the Prime Minister thought that the evidence did not sufficiently establish a prima facie case of judicial misconduct and even if it did, it did not warrant removal from office. It can be fairly summarised that the Prime Minister viewed the conduct as a lapse of judgment and does not warrant a call for the Chief Justice's removal. It is in my view, a reasonable value judgment entirely open to Prime Minister to so find on the documents disclosed to him, documents which were quite extensive and thoroughly researched by the LATT, yet also providing conflicting legal opinions on the propriety of the Chief Justice's conduct. It was perfectly open and logical for the Prime Minister to have made the conclusion that this is not the occasion for the severest sanction of a section 137 referral. In the circumstances of this complaint, for the Prime Minister to have conducted his own enquires as urged by the LATT would have seen him dangerously close if not stepping over the boundary of a Tribunal inquiry. For the reasons set out in this judgment I have found that the Prime Minister acted reasonably and took into account relevant considerations.

15. However, while delving into the merits of the Prime Minister's decision is one aspect of the analysis in this judgment, certainly from a purely process perspective, the decision making must be demonstrated to have targeted the relevant considerations of the LATT's section 137 complaint. Unfortunately, there were some ill-advised remarks made by the Prime Minister literally on the eve of disclosing his decision which disclosed the Prime Minister's consideration of the LATT as a tool of his political enemy and their complaint a bold political trap. A section 137 process must from its inception be respected and revered as an important constitutional task. Its foundational principles rest upon the independence of the Judiciary, the separation of powers and the rule of law. There is absolutely no place in this process for

politics or the pretence of political mileage. Without a proper explanation from the Prime Minister, those ill-advised remarks have muddied the waters of what should be a purely objective exercise of determining whether there was a prima facie case of a serious act of misconduct or inability to perform his function warranting the removal of the Chief Justice. For the reason that he took into account this irrelevant consideration as explained in this judgment, I have ruled that the Prime Minister's decision on the HDC issue be remitted for his reconsideration with an open mind[6].

16. This judgment focuses intently on the process at this first stage, its historical, social, constitutional and political contexts. It also begins a conversation on reform of the section 137 process. Firstly, many of the common law authorities, none the least **Rees and others v Crane** (1994) 43 WIR 444, have noted the wide power conferred in section 137 and the absence of any constitutional or statutory prescription on the exercise of the power. Notwithstanding several cases in the Commonwealth on how the discretion is to be exercised, there is still some degree of uncertainty with respect to the exercise of this powerful weapon held over the Judiciary. To this extent, I have in the judgment summarised some principles which can be adopted as protocols for the exercise of this Tier 1 power.

17. Secondly, recognising that the separation of powers reserved powers on the three arms of the State as a means to prevent an abuse of power, a difficulty arises when there are no alternatives to judicial accountability save for a section 137 process. In other words, there remains a yawning gap between a section 137 offence and misconduct which does not deserve the most severe form of sanction. The unfortunate upshot of this is that legitimate complaints of ethical infractions are "force fitted" into the only constitutional process to hold judges accountable. This, as our own history with the debacle of the **Mustill Report**[7] shows, is a most messy and cumbersome affair where the reputation of the entire Judiciary is damaged regardless of the outcome. This may well be a time for the Judiciary to introspect, as they have already done by devising its Statements of Principle and Guidelines for Judicial

[6] The relief is set out in Part F of this judgment

[7] "In the Matter of an Enquiry Under Section 137 of the Constitution of Trinidad and Tobago, Report of the Tribunal": Sir Vincent Floissac, Mr. C Dennis Morrison Q.C, Lord Mustill, 14th December, 2007

Conduct, to determine whether suitable measures can be implemented to hold ourselves accountable to these principles without it escalating into the messy details played out in the public domain which in itself damages our general image and our fragile asset of trust.

18. The judgment is structured into six main Parts: The first examines the brief facts and the nature of this claim. The second a deeper examination of section 137 its process, its context, its constitutional underpinnings and societal subtext. The third examines the standard of review. The fourth an analysis of the facts. Fifth an examination of the separate legal challenges. The sixth the relief and seventh the question of costs. Finally I examine a way forward within the constitutional framework to achieve a less controversial balance between the public demand for accountability and judicial independence. I also offer a way forward for both LATT and the Chief Justice, two entities that are vital pillars in our administration of justice that must find a way to rise above the mire of this controversy.

Part A

Overview of The Claim

"A strong judiciary is reflected in a strong legal profession.." Sir Fenton Ramsahoye QC[8]

Factual Context

19. I will delve deeper into the facts of this claim later in the judgment. At this stage I will highlight the main undisputed facts surrounding the exercise of the Prime Minister's decision.

20. The genesis of this matter began with a newspaper report in November 2017, where certain allegations were published against the Chief Justice. Those allegations mainly were that he had tried to influence Supreme Court Judges to change their personal State provided security in favour of a private company for which his close friend worked. It was also alleged that his friend was among twelve people recommended for HDC Units by the Chief Justice. The Chief Justice briefly answered the allegations on 15th December 2017 through the Court Protocol and Information Unit. The press reports and allegations of improper conduct continued under

[8] "The Modern Judiciary: Challenges, Stress and Strains" by Sir Fred Phillips CVO QC. Epilogue by Sir Fenton Ramsahoye QC, page 264

sensational headlines and reporting.

21. On 20th January 2018, the LATT took up the task to intervene to determine the facts of these allegations with the purpose of defending the Chief Justice if the allegations are untrue or to call for him to account if it was. It wrote to the Chief Justice explaining that it had established a Committee to investigate into the allegations.

22. The Chief Justice filed an application for judicial review of the LATT's decision to commence such an investigation into the allegations against him. It was litigated to the Privy Council which ultimately decided that the LATT acted properly in launching its investigation[9]. The Privy Council held that the LATT was entitled to conduct its own investigations into the allegations against the Chief Justice to uphold the administration of justice. The LATT could not, however, hold the Chief Justice accountable as that was the purpose of the process for the removal of a Chief Justice preserved under section 137 of the Constitution[10].

23. The LATT thereafter resumed its investigation and its Committee prepared a report which it submitted to two eminent attorneys Dr. Francis Alexis QC and Mr. Eamon H Courtenay SC on 3rd October 2018 for their opinion on the question whether the information revealed in the investigation establish inability or misconduct warranting removal of the Chief Justice. Mr.

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[9] **The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T v The Law Association of Trinidad and Tobago** CV.2018-00680, Kangaloo J

The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T C.A.CIV.P.075/2018, Mendonca J.A, Jamadar J.A (as he then was), Bereaux J.A

The Honourable Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie O.R.T.T. v The Law Association of Trinidad and Tobago [2018] UKPC 23

[10] **The Honourable Chief Justice of Trinidad and Tobago Mr Justice Ivor Archie O.R.T.T. v The Law Association of Trinidad and Tobago [**2018] UKPC 23:

> "31. The crucial question is whether the allegations are sufficiently serious to have the potential to undermine the administration of justice and the rule of law. If they are, then taking some action to promote, support and maintain the administration of justice and the rule of law clearly falls within section 5(f). There is then power under section 5(g) to do such things as are conducive to achieving that purpose. It is accepted that the LATT, like any other citizen, has power to make a complaint about a judge or the Chief Justice: this is reinforced by rule 36(4) in the Code of Ethics, and the duty to act responsibly when making such complaints is reinforced by the other provisions of rule 36. In the Board's judgment, the LATT was right to consider that it had a dual role in such a situation, although in its letter dated 20 January 2018 this might have been better put. The LATT has no power to "hold the Chief Justice accountable". But it does have the power to make a formal complaint where this is justified and the duty to defend the judiciary against unjustified criticism. Some inquiry to establish whether or not there is a prima facie case for making a complaint is the obvious way to reconcile those two purposes. It is not ultra vires."

Courtenay SC provided his opinion on 19th October 2018 and Dr. Alexis QC provided his opinion on 7th November 2018. They both held diverging views on the merits of the complaint but agreed that the matter should be referred to the Prime Minister for his consideration.

24. On 11th December 2018, at a Special General Meeting of the LATT it was resolved that the Committee's report should be referred to the Prime Minister for his consideration under section 137 of the Constitution. By letter dated 13th December 2018 the LATT provided the Prime Minister with a copy of the Committee's report, the Addendum dated 3rd October 2018, the Procedural Timeline, the Addendum to the Procedural Timeline, the opinions of Dr. Alexis and Mr. Courtenay and the Executive Summary of the Report. It emphasised to the Prime Minister that it had made no finding of misbehaviour against the Chief Justice but only that there is sufficient evidence to support a referral under section 137 for the Prime Minister to determine whether a representation to the President under section 137 is warranted.

25. On 1st April 2019, the Prime Minister attended an interview conducted by Ms. Hema Ramkissoon on the CNC3's Morning Brew in which he made certain comments on the complaint.

26. On 18th July 2019, at a press conference, the Prime Minister announced that he had decided to not make such a representation to Her Excellency, the President. He also made disparaging remarks of the motivation of the LATT in trying to "entrap" him into launching impeachment proceedings. On 22nd July 2019, the LATT was provided with a letter of same date from the Prime Minister of his decision not to make the representation. The letter outlined his reasons. The LATT responded to the Prime Minister's letter indicating their disagreement with his decision and took issue with his decision not to refer the matter to the President.

27. The main flaws in the decision making process of the Prime Minister according to the LATT in this claim are as follows:

    a) The Prime Minister's decision not to represent to the President that the question of removing the Chief Justice from office ought to be investigated is illegal, unlawful and contrary to law.

    b) The Prime Minister's decision was not made in the performance of his constitutional

functions in the public interest and contravened section 137 of the Constitution.

c) The Prime Minister's decision is irrational, unjustified, unreasonable and an improper exercise of discretion.

d) The Prime Minister's decision was made in bad faith or unfairness.

e) The Prime Minister's decision was made taking into account irrelevant considerations.

f) The Prime Minister's decision was made without taking into account relevant considerations.

28. The LATT seeks declaratory relief that the decision is null and void and that it be remitted for reconsideration by the Prime Minister. At these proceedings the claim for bad faith was not pursued and the LATT clarified that only the Prime Minister's decision in relation to the HDC issue was the subject of these proceedings. It also clarified that issues of pre-determination and bias appearing in its grounds are not being pursued.[11] The Defendant elected not to file any affidavit in response to the claim.

Issues

29. I am grateful to Senior Counsel and their respective legal teams for their comprehensive written[12] and oral submissions which were of tremendous assistance. This was a very sensitive matter[13] and I have noted the judgments in **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No.P 075 of 2018 in essence underscoring the important role of the LATT. The parties largely adopted a collaborative approach in the management of this claim[14]. I have also taken note of the LATT's retention of an external lead Counsel Dr. Lloyd Barnett who was of immense value to the sobriety of the proceedings. I am also appreciative of the

[11] See Claimant's submissions in reply

[12] Claimant submissions filed 2nd December, 2019, Defendant submissions filed 6th January 2020, First Interested Party's submissions filed 9th January, 2020, Second Interested Party's submissions filed 9th January 2020, Claimant's submissions in reply filed 22nd January, 2020, 4th February 2020

[13] The parties in fact relied upon an affidavit which they agreed will remain sealed.

[14] See **The Law Association of Trinidad and Tobago v Dr. Keith Rowley The Prime Minister of the Republic of Trinidad and Tobago, The Attorney General of Trinidad and Tobago and The Honourable Chief Justice of Trinidad and Tobago** CV2019-03989 delivered 30th October 2019

contributions of Mr. Strachan QC, Mr. Armour SC, Mr. Benjamin SC, Mr. Jeremie SC and Mr. Hosein SC. At the oral hearing the parties admirably assisted the Court answer some important questions with respect to this matter[15]. The following main issues now fall for determination:

(i) **The Threshold Question:** (a) What is the threshold question for consideration by the Prime Minister under section 137(3) (b) of the Constitution? (b) How far should the Prime Minister's enquiries go in filtering complaints made to him under section 137?

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[15] The following Bench Memo was emailed to the parties on 30th January 2020:

"**A: Subtext to the Exercise of the Section 137 Referral Process**

(i) Having regard to the importance of the principle of the separation of powers/independence of the judiciary, is section 137 a compromise of this principle to accommodate the Executive (the Prime Minister) to initiate the removal process. If so, does it emphasise the level of care to be exercised by the Prime Minister before making a referral.

(ii) Is the Prime Minister entitled to make a value judgment in this filtering exercise to differentiate between errors of judgment and serious misconduct warranting removal having regard to the nature of section 137 being reserved for those serious cases of misconduct warranting removal.

(iii) What useful guidance can be obtained from the Mustill Report with regard to either the threshold test at the referral stage or the exercise of that discretion?

B: Reconsideration

(i) If the Prime Minister took into account the "political motivation" of the Law Association of Trinidad and Tobago's (LATT) complaint, would it not be appropriate for the Prime Minister to be directed to reconsider the narrow HDC complaint with an open mind?

C: Costs

(i) Was there compliance by the LATT with the pre-action protocols prior to the filing of this judicial review claim?

(ii) If not, what are the costs consequence of that failure?

(iii) In any event, having regard to the "public interest" in this dispute should the appropriate order be no order as to costs regardless of the outcome?

D: Mediation

(i) Is there a role for mediation in the section 137 process? If so, at what stage can mediation be utilised?

(ii) In the event of reconsideration by the Prime Minister, would it not also be useful for the Court to direct the Prime Minister to first invite the LATT and the Chief Justice to attempt mediation and to report to him at the conclusion of the mediation if they had so agreed? Should such a process be included at the early stages in any event with parties if they agree, being able to appoint their mediator. The mediator will then submit, with the consent of the parties, terms of settlement or no agreement for the Prime Minister's further consideration.

E: Reform

(i) Are there any recommendations to reform the removal process through which our Judiciary is held accountable?

(ii) With reference to paragraph 27 of the Claimant's reply submissions that "there does not appear to be any constitutional prohibition upon the establishment of *an ad* hoc internal process to be implemented with the concurrence of the Chief Justice", what ad hoc measures can be adopted to deal with complaints before it is referred to the Prime Minister?"

(ii) **Reasonableness and Rationality:** (a) What is the appropriate standard of review of the Prime Minister's decision made under section 137(3)? (b) Whether the decision made by the Prime Minister is logical, rational or reasonable?

(iii) **Relevant and Irrelevant considerations:** (a) Whether the Prime Minister in exercising his discretion took into account all the relevant considerations (b) What presumptions are to be made of the public statements made by the Prime Minister (c) Whether the Prime Minister in exercising his section 137 discretion took into account an irrelevant consideration of the LATT's political motives in making the complaint (d) Whether the Prime Minister attached the appropriate weight to the interest of the public in its confidence in the Judiciary and securing the accountability of the Judiciary to uphold the rule of law.

(iv) **Tameside duty:** Is there a duty on the Prime Minister in the circumstances of this case to conduct further enquiries to discharge his section 137 (3) duty? If so, was he in breach of that duty?

(v) **The Duty to Act Fairly:** Is there a duty to act fairly? Did the Prime Minister fail to comport with the requirements to act fairly in exercising his discretion?

(vi) **Reform and Recommendations:** Is there a role for mediation in the section 137 process? Are there processes that can be implemented to improve upon the mechanisms for holding the Judiciary accountable while respecting its independence and present constitutional arrangements?

30. Before I examine these issues I will deal with some aspects of the proceedings then examine the historical, legal, social and constitutional context of the section 137 referral process which underlie the general obligations imposed on a Prime Minister engaged in that process.

A "Rolled Up" Hearing

31. The parties in these proceedings consented to a "rolled up" hearing. In this hearing therefore the Court must analyse both the questions of the issue of leave and then the substantive

hearing for final relief[16].

32. The test for the grant of leave is that the applicant has an arguable ground for judicial review with a realistic prospect of success. See **The Honourable Satnarine Sharma v. Carla Brown-Antoine & Ors** [2007] 1 WLR 780. Recently in **The Attorney General of Trinidad and Tobago v Ayers-Caeser** [2019] UKPC 44 the Privy Council noted that the threshold is a low one[17] and if the Court is confident that the legal position was entirely clear that the claim cannot succeed it would be appropriate to dispose of the matter at that stage. At a "rolled up" hearing the Court in considering both questions of leave and substantive relief will have at its disposal all the relevant material. In those circumstances it is entitled to take a more demanding view of "arguability" and realistic prospect of success requiring a more intense examination of the evidence rather than an "arguability-light" approach. In such a "rolled up" hearing the two questions of arguability and substantive relief are to be answered based on the same evidence.[18] If leave ought not to be granted the Court should still express its opinion on the merits although in most cases it would be fairly obvious why the substantive claim will also fail.

Pre-Action Conduct and ADR

33. The LATT admitted that it did not comply with the pre-action protocols[19] before filing its application for leave[20] and the parties did not consider this an appropriate case for ADR.

34. The pre-action protocols require, save for exceptional reasons, the Claimant in administrative

[16] See **paragraph 26.130 Judicial Review Principles and Procedure by Jonathan Auburn, Jonathan Moffett, Andrew Sharland**. See also **Joann Bailey Clarke v The Ombudsman of Trinidad and Tobago and The Public Service Commission** CV2016-01809, Bereaux JA in **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No.P 075 of 2018. Before the Court was therefore the Claimants application for leave as well as its Fixed Date Claim.

[17] See Kangaloo J.A in **Steve Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago** Civil Appeal No: 207 of 2010

[18] In such a case the Court engages in as Fordham describes as "enhanced arguability" and a "realistic prospect of success" may well be for practical purposes as stringent as requiring a substantial prospect of success or likely to succeed. See **R (on the application of Federation of Technological Industries) and others v Commissioner of Customs and Excise** [2004] EWHC 254 (Admin) at [8].

[19] Practice Directions, September 2005

[20] The LATT had issued a letter to the Prime Minister dated 28th July 2019 indicating its objection to his decision. Admittedly, this was not its pre-action letter as it then took legal advice, consulted with its members before deciding to initiate legal proceedings.

law proceedings to issue a pre-action protocol letter. The failure to do so without good reason exposes the defaulting party to, among other things, a costs sanction. The LATT failed to set out in a pre-action letter the grounds on which it proposed to challenge the Prime Minister's decision and provide for the mechanisms in the pre-action protocols to take its course.

35. All the parties were unanimous that this was not a suitable case to try an ADR process before the hearing of this claim. As this was a matter in public law it is traditionally viewed as a matter in which mediation has no role to play. I hold a different view.

36. I will deal with these aspects in more detail later in the judgment.

Part B

The Section 137 Removal Process

"Our judicial system can better survive the much discussed but rarely existent senile or inebriate judge than it can withstand the loss of judicial independence that would ensue if removal of judges could be effected by a procedure to facile or a standard too malleable."[21]

-***Chief Judge Irving R Kaufman***

37. The lawful exercise of a power in the section 137 removal process lies at the heart of this claim. To the extent that the LATT claims that the Prime Minister acted unlawfully and unreasonably in exercising this power, it is fitting that I analyse this section, its legislative and constitutional history and the intersection of the principles of the independence of the Judiciary and accountability. Jamadar JA (as he then was) in discussing the nature of section 137 outlined several aids to constitutional interpretation generally not restricted only to fundamental human rights:

> "10. What does such a generous, interpretative approach entail? The cases show that the courts are to take a broad (non-rigid, non-formalistic - 'tabulated legalisms'), purposive approach, looking contextually at the substance and reality of what is at stake, and doing so through the lenses of the human rights provisions, core constitutional values (including

[21] "Chilling Judicial Independence" (1979) Chief Judge Irving R Kaufman, Yale Law Journal 681, 715-16

unwritten constitutional principles), and international treaty values - including unincorporated treaties (where these are relevant), but grounded at all times in the actual language, content and context of the provisions under consideration, especially when these are specific and stated in the most concrete terms.

11. In addition, in Trinidad and Tobago there is a written constitution that proclaims that it is 'the supreme law' and that, in effect, all other laws are to be read and interpreted consistent with its constitutional values (section 2 of the Constitution). The Constitution therefore also functions as an interpretative lens in relation to all other laws. In this context the Preamble to the Constitution is also a legitimate aid to interpretation."[22]

38. Ibrahim's JA interpretative analysis of section 137 of the Constitution in **Crane v Rees** Civil Appeal No.58 of 1991 also commented on the unique constitutional rules required for this analysis.[23] See also **Matthew v The State of Trinidad and Tobago** [2004] 3 WLR 812 paragraph 42.

39. In Trinidad and Tobago the "commencement" and "premature end" of a judge's tenure lies in the hands of the Judicial and Legal Service Commission (JLSC) in the case of judges and the Executive in the case of the Chief Justice. All judges other than the Chief Justice are appointed by the President acting in accordance with the advice of the JLSC[24]. The President appoints the Chief Justice after consultation with the Prime Minister and the Leader of the Opposition.[25] Judicial appointments are permanent until the mandatory retirement age of 65 years "or such other age as may be prescribed"[26] and to enjoy such tenure in accordance with section 136 and 137 of the Constitution. Either the JLSC in the case of judges, or the Prime Minister in the case of the Chief Justice may initiate the process to remove a judge or Chief Justice from office pursuant to section 137.

40. Section 137 of the Constitution outlines the removal process in the following terms:

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[22] **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No.P 075 of 2018, Jamadar JA (as he then was), paragraphs 10 and 11
[23] **Rees v Crane** Civil Appeal No.58 of 1991 paragraph 17
[24] Section 104(1) of the Constitution
[25] Section 102 of the Constitution
[26] Section 136(1) of the Constitution.

"137 (1) A Judge may be removed from office only for **inability to perform the functions of his office** (whether arising from infirmity of mind or body or any other cause) or for **misbehaviour**, and shall not be so removed except in accordance with the provisions of this section.

(2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.

(3) **Where the Prime Minister, in the case of the Chief Justice,** or the Judicial and Legal Service Commission, in the case of a Judge other than the Chief Justice, **represents to the President that the question of removing a Judge under this section ought to be investigated,** then -

(a) the President shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the President acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a Judge, from among persons who hold or have held office as a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeals from any such Court;

(b) **the tribunal shall enquire into the matter and report on the facts** thereof to the President and recommend to the President whether he should refer the question of removal of that Judge from office to the Judicial Committee; and

(c) where the tribunal so recommends, the President shall refer the question accordingly."

41. Section 137(1) of the Constitution provides that a judge may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour. There is no other provision provided in the Constitution or otherwise for the discipline or for the removal of a judge. Indeed, removal

from office is a matter that is much more than disciplining a judge. There are no graduated forms of punishment. Either the judge is fit to continue in office or not. The only two criteria for removal are the inability to perform the functions of office or misbehaviour and only by the President acting on the advice of the Privy Council.

42. The process of removal outlined in section 137 of the Constitution therefore involves three Tiers. The Tier I process is where the Prime Minister in the case of the Chief Justice represents to the President that the question of removal should be investigated. The Prime Minister initiates the removal process by notifying the President that a "question of removal" has arisen. The Constitution is however silent on the considerations which the Prime Minister must take into account in determining whether to represent to the President the question of removing the Chief Justice ought to be investigated. The Constitution is also silent on the processes that are to be engaged in and prior to the exercise of this discretion.

43. The Tier II process is the "inquiry" by the Tribunal. Upon the representation by the Prime Minister, the President appoints a Tribunal[27] of no fewer than three serving or retired judges of any Commonwealth jurisdiction. The Tribunal then enquires into the matter. The matter is not a free ranging wide or loose inquiry nor is it a general Commission of Inquiry. "The matter" which is the subject of its inquiry relates and is referable to "the question of removal" which was referred by the Prime Minister. See **Rees v Crane** and **The Mustill Report.** It must report to the President the facts of the matter and make a recommendation which the President must act upon on whether the question of the removal of the Chief Justice should be referred to the Judicial Committee of the Privy Council.

44. The Tier III process is the investigation by the Privy Council. An example in point is seen in **Madam Justice Levers, Hearing on the Report of (The Cayman Islands)** [2010] UKPC 24 (29 July 2010). The Chief Justice is only removed by the President when the President is advised accordingly by the Judicial Committee of the Privy Council to do so. There appears to be no discretion by the President but to act upon the referral to appoint the Tribunal and remove the judge if so advised by the Privy Council.

[27] Acting on advice from the Prime Minister

45. This case examines intently the context and exercise of this Tier 1 section 137(3) power, the representation by the Prime Minister to the President that the question of removing a Chief Justice ought to be investigated. The importance of this power is made even more significant by the consequences of the referral in the final section which deals with the question of the suspension of the judge which may arise immediately when the question of removing the judge is referred to a tribunal[28].

46. To understand and interpret this section 137 power and the definition of "inability" and "misbehaviour" I examine the historical, constitutional and social context of section 137. I end with a summary of the principles that ought to guide a Prime Minister in the exercise of this power in Tier 1.

Section 137-Historical Context

47. It is important to examine the evolution of section 137 and how we have fared as a Caribbean society in the instances where either the section 137 process was invoked or the independence of the Judiciary came under intense public scrutiny.

48. Dr. Barnett submitted that prior to independence, judges were appointed by the Colonial office as servants of the Crown under Orders in Council. They could only be dismissed on the recommendation of the Colonial office which would consult with the Privy Council. Indeed at that time colonial judges were regarded as normally appointed during his Majesty's pleasure. Judges may be removed from office by the Governor in Council of a colony for absence without reasonable cause or neglect or misbehaviour. Either House of the Parliament may entertain questions as to the appointment or conduct of colonial judges. His Majesty may on

[28] "(4) Where the question of removing a Judge from office has been referred to a tribunal under subsection (3), the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge other than the Chief Justice, may suspend the Judge from performing the functions of his office, and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge other than the Chief Justice, and shall in any case cease to have effect -

(a) where the tribunal recommends to the President that he should not refer the question of removal of the Judge from office to the Judicial Committee; or

(b) where the Judicial Committee advises the President that the Judge ought not to be removed from office."

the advice of a Secretary of State remove a judge holding office during his Majesty's pleasure if his conduct has been such that his continuance in office would be prejudicial to the administration of justice or to the public interest. For convenience the judge's actions are examined locally by the Governor in Council who may, if necessary, suspend him when the Secretary of State will normally take the opinion of the Privy Council on the issue. See **Halsbury Laws of England 2nd ed**. Under the colonial system judges were viewed as public servants subject to civil servant regulations. Their conduct could also come under investigation by a system of inquiry under the Commissions of Enquiry Ordinance 1892. These concepts of the initiation of the process by the Executive and the advice of the Privy Council were two ingredients retained in our constitutional arrangements after independence.

49. There are two reported instances in our colonial history of a Commission of Enquiry in the 19th century investigating on one occasion the conduct of the senior puisne judge Mr. John Cook "addicted to habits of intemperance and thereby so impaired his mental faculties as to benefit for his said office and has been guilty of unseemly conduct calculated to bring the administration of justice into contempt"[29]. In that instance his continuation on the bench was found to be incompatible with the office.

50. The Independence and Republican Constitutions sought deliberately to entrench the tenure of judges and to preserve their independence. It also sought to adopt other Commonwealth structures of militating against the Executive's power to "summarily" dismiss a judge. The 1962 Constitution provided for Her Majesty to remove the judge upon a referral from the Governor General and the advice of the Privy Council.[30] However, both Constitutions made the office of the Prime Minister the initiator of the process and referred to an independent mechanism of a Tribunal and the Privy Council[31]. It was seen, even though controversial at

[29]A Commission issued under the Trinidad and Tobago Ordinance, No. 2 of 1892 by His Excellency Sir Frederick Napier Broome, "Report on Inquiry into charges made against Mr. Justice Cook, Senior Puisne Judge":

> "But we have no doubt that he is subject to recurring fits of intemperance and intoxication which render him incompetent to exercise the intelligence or discretion required of a Judge, and that although there have been sober or comparatively sober intervals of a year or more between such fits, during the period over which the inquiry has extended, it is not possible at any given time to count on Mr. Justice Cooke being in that state of perfect and lucid sobriety in which a judge on the bench ought to be."

[30] See 80(4), (5) of the 1962 Constitution.

[31] See 80(5) of the 1962 Constitution.

the time, a vast improvement than pertained in Britain where the question of removal is debated in Parliament, a matter where the arms of the Judiciary and politics of the Executive mixed uncomfortably.

51. The Wooding Commission[32] was of the view that the provisions for the removal of judges and the Chief Justice were elaborate and well set out. Senior Counsel for Attorney General and the Prime Minister in their submissions still maintained this to be so. Wooding CJ explained:

> "The reason for this is to protect judges from political or other extraneous influence by giving them what is called "security of tenure". This means that they cannot be dismissed expect for proved inability to carry out their functions or for proved misbehaviour. They need not therefore be concerned whether any decisions they give may be unpalatable to those in political power or to privileged sections of the community."[33]

52. In the Constitutional debates at Queens Hall there were many contributions on the question of the independence of the Judiciary and the fear of political interference by retaining the power in the Executive to initiate removal proceedings. Interestingly, in the 137 referral process while the Leader of Opposition is consulted on the appointment of the Chief Justice with the Prime Minister, there was no room for the Leader of the Opposition in his removal and the Prime Minister is vested solely with this discretion.

53. The Constitution itself was a negotiated instrument with our former colonisers.[34] To this extent the Constitution, as noted by Senior Counsel for the Attorney General, was drafted by persons steeped in the experience of the Westminster model and imported its customs and conventions. In **Hinds v The Queen** [1976] 1 ALL ER 353, Lord Diplock noted:

> "Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of

[32] "Thinking Things Through" by The Constitution Commission of Trinidad and Tobago, 1972
[33] "Thinking Things Through" by The Constitution Commission of Trinidad and Tobago, 1972, page 53
[34]See "Fundamentals of Caribbean Constitutional Law" Tracy Robinson, Arik Bulkan, Adrian Saunders

political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom…. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.

Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and a judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government…..Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively. To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading…

In the result there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as 'the

Westminster model'."[35]

54. The Prime Minister's constitutional involvement in the section 137 process represents then not only a very delicate compromise of giving the Executive the authority to trigger this high level forum for enforcing the accountability of the Judiciary but to do so in a partisan manner.

55. The IBA Minimum Standards of Judicial Independence do envisage a role for the Executive at the initial stage of proceedings:

> "The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not in the adjudication of such matters."

56. From a survey of Commonwealth jurisdictions, only 8 of 20 jurisdictions involve the Executive in this very sensitive area of making referrals. Other jurisdictions have sensibly opted for a more independent method of beginning this process. While it was debated in Queens Hall that the Prime Minister should be trusted with this power knowing full well that instituting a frivolous complaint would result in, at the least, political damage or at worse political suicide, it still remains a very contentious power susceptible to abuse. This is moreover the case where the Prime Minister is also involved in the appointment of the Tribunal. While the Executive in the form of the Prime Minister takes no part in the assessment of facts and adjudication at the Tribunal stage, it is questionable whether such a process triggered by the Executive is suitable for our modern democracy.

> "3.4.11 Even within these constraints, vesting the power to initiate removal proceedings in in the executive carries a risk of abuse. The repeated use of this power can have the effect of overwhelming the ability of the judiciary to adjudicate on disputed issues in the removal process, to the detriment of the rule of law and judicial independence."[36]

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[35] **Hinds v The Queen** [1976] 1 ALL ER 353 at 359-360

[36] See "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice", Chapter 3 Removal From Office

The power to initiate the removal of proceedings being vested with the executive may carry the risk of abuse. In "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice" it was noted:

57. In our recent history there has been bruising episodes between the Executive and the Judiciary with such encounters attracting the attention of Lord Hope in his dissenting judgment of **The Chief Justice of Gibraltar** [2009] UKPC 43, [2010] 2 LRC 450[37]. Chief Justice Bernard in the late last century found his Judiciary in disarray with the controversial decision to effectively suspend a sitting judge, Justice Crane from office without giving him an opportunity to be heard. This lead to the seminal authority on the use of section 137 in this jurisdiction in **Rees v Crane** (1994) 43 WIR 444. This authority is regarded by all Senior Counsel as setting the standard on how our Courts will approach section 137 and is dealt with separately.

58. Some years later Chief Justice Bernard's successor also came under attack. In the **Georges Report**[38] Mr. Justice Telesford Georges was appointed by the Law Association of Trinidad and Tobago to examine concerns relating to the independence of the Judiciary expressed by the then Honourable Chief Justice The Right Honourable Mr. Justice Michael de la Bastide T.C. in his address at the opening of the law term on 16th September, 1999. Justice Georges noted that while the Judiciary is expected to be accountable, transparent and open, any procedure to secure those ends must ensure its independence and separation from the other arms of government. On the issue of accountability, the report addressed the funding of the judiciary where the then Attorney General had asserted that the Minister of Finance should not release funds for overseas travel of judicial officers unless his (the Attorney General's) approval had been given pursuant to two Cabinet Minutes. Justice George's found that the Attorney General's approval in such matters were an erosion of the principles of separation of powers and the independence of the Judiciary. Notably, he stated that the Judiciary is not "a law unto itself. It is merely protected from interference to ensure that its decisions are not subjects to

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> "3.4.10…. The danger of executive abuse is somewhat reduced by the fact that in all the jurisdictions concerned the executive is required to appoint an ad hoc tribunal which contains a majority of judges.
>
> 3.4.11 Even with these constraints, vesting the power to initiate removal proceedings in the executive carries a risk of abuse. The repeated use of this power can have the effect of overwhelming the ability of the judiciary to adjudicate on disputed issues in the removal process, to the detriment of the rule of law and judicial independence."

[37] **The Chief Justice of Gibraltar** [2009] UKPC 43, [2010] 2 LRC 450, pages 518-520

[38] Report of the RT. Honourable Mr. Justice P.T Georges "Independence of the Judiciary" 16th February, 2000.

any influences but guided solely by the law." He recommended that the Prime Minister should serve as the channel of communication between the Chief Justice and the Cabinet and the Legislature rather than the Attorney General. Importantly, he sounded a reminder to the LATT that should the independence of the Judiciary be eroded, they will be amongst the most affected.

59. **The Mackay Report**[39] was the product of a Commission appointed on 29th February 2000 by the President comprising Lord Mackay of Clashfern, Justice Austin Amissah and Dr. L.M Singhvi to enquire into the administration of justice in Trinidad and Tobago. While the Georges Report was borne out of a desire to mediate the conflict between the Judiciary and the Executive, the establishing of a Commission of Inquiry is but an instance of the Executive exerting pressure on a Judiciary and an informal disciplinary measure.[40] In the Mackay Report their terms of reference included but were not limited to the qualification which may be prescribed in the appointment and promotion of judicial officers and the manner of dealing with complaints by the legal profession and the public against judicial officers and allegations that the Executive was attempting to undermine the independence of the Judiciary. The Commission advised that the Judicial and Legal Service Commission should set up a system for receiving complaints against judicial officers by nominating a particular person/s to receive complaints to be considered either by the Chief Justice in respect of the Judiciary or the Chief Magistrate in respect of the Magistracy. If a complaint is made against the Chief Justice then that complaint should be referred directly to the JLSC and the Chief Justice would not take part in the process as a member of the JLSC. Unlike in the Georges' report, the Commission in Mackay was of the view that the Attorney General should act as a channel of communication between with the Judiciary, Executive and Parliament. They noted that the

[39] "Report of the Commission Appointed to Enquire into and Report and make Recommendations on the Machinery for the Administration of Justice in the Republic of Trinidad and Tobago": Lord Mackay of Clashfern, Justice Austin Amissah and Dr. L.M Singhvi

[40] See "Judges on Trial" Shimon Shetreet pages 264-265:

> "The Executive may exercise an indirect disciplinary measure over the judiciary or the senior judges by appointment of a Royal Commission without consultation with the judges or against their will, and with terms of reference to cover an inquiry into deficiencies in the administration of justice, including failures of justice due to judicial conduct. Lord Hewart C.J was deeply hurt when a Royal Commission to inquire into the business of the courts was appointed without his being consulted. He regarded it not only as a personal insult, but as an affront to the high office he held."

Attorney General made it clear to them that the Executive supported the independence of the Judiciary.[41]

60. Chief Justice de la Bastide's successor Chief Justice Sharma was not spared the "anxious scrutiny" of the publics in the attempt to impeach him which resulted in a report of a Tribunal[42] eventually acquitting him. However, at that stage the damage had already been done as he quietly retired after the conclusion of the hearing.[43]

61. The Mustill report provides a useful anecdote on the damaging ramifications of making a referral to a Tribunal even where the charges are found to be unsubstantiated. It was an inquiry into allegations of misbehaviour against the then Chief Justice Satnarine Sharma. It was alleged that he had sought to influence the Chief Magistrate in his decision in criminal proceedings conducted in the Chief Magistrate's Court involving Mr. Basdeo Panday. The question before the tribunal was "whether the allegations against the Chief Justice are proved so as to make the Tribunal sure beyond reasonable doubt that there are well founded." The Tribunal found that the allegations were not proved and recommended that the matter should not proceed to the Privy Council.

62. The very tenacious nature of the evidence before the Prime Minister drew the remark for the

[41] Lord Hope remarked of both reports in **Gibraltar:**

> "[242] I refer to these examples—and others could no doubt be cited (see, for example, the matters referred to in para5of Lord Mustill's report of the tribunal in the question of removing Chief Justice Sharma from office as Chief Justice of Trinidad and Tobago)—in order to emphasise the latitude that must be given to senior judges when they engage with the executive on matters which may be thought to affect the independence of the judiciary. Upholding that principle is one of their most important responsibilities. The rule of law depends upon it. Of course, they must be careful, as Sir Telford Georges remarked, not to descend into the arena when they are provoked. To do so risks bringing their office into disrepute. But sometimes a venture in that direction is unavoidable in order to make the point that there is a boundary beyond which the executive may not go in its dealings with the judiciary. From time to time mistakes will be made, as tends to happen in the heat of battle. But they should not be characterised as instances of misbehaviour or indicative of inability. That would only be appropriate in the most extreme case. Ideally, it would only be after a warning has been given by a higher judicial authority that conduct of a kind which has given offence out of all proportion to the circumstances must not be repeated. In the case of this Chief Justice no such warning was given. It is unclear who, if anyone, was in a position to do this. He was, in effect, on his own. All the more reason for according him a measure of latitude, so long as his actions were not malicious or in bad faith."

[42] The Mustill Report

[43] "The Modern Judiciary: Challenges, Stresses and Strains" Sir Fred Phillips CVO, QC, page 83

Tribunal that[44]:

> "The picture presented to the Tribunal almost defies belief. We find contradictory accounts given by the Chief Justice and the Chief Magistrate (Mr. Sherman McNicolls) on oath, of meetings between them where the discrepancies cannot be explained away by misunderstandings or poor recollection. We see the Chief Justice publicly arrested, and later ushered three times into the dock in a criminal court to undergo a summary trial on charges based on allegations by the Chief Magistrate, and then on the last occasion ushered out again in consequence of the refusal by the Chief Magistrate to give evidence against him. During the oral hearings before us we have heard Counsel for the Chief Justice publicly accusing the Chief Magistrate of having been bribed to mis-try criminal proceedings against the leader of the opposition party, a former Prime Minister. We can study the battle of press released between the Chief Justice, the Chief Magistrate and the Attorney General (Mr. John Jeremie), putting their accusations directly before the public. We see formal complaints made by the protagonists to disciplinary and police authorities within days of the controversy coming to a head. We have heard allegations against the Attorney General, who could have given oral evidence to rebut them, but did not. The air was full of rumour, innuendo and gossip, around and across deep political (and, we are forced to say, ethnic) divide. Atleast within this narrow field of view, the concept of the separation of powers seems to have been ignored. We need not go on. The picture is "troubling" indeed, both for the Tribunal and for the peoples of Trinidad and Tobago."

63. The Mustill Report underscored the role of the Tribunal, the standard of conduct and the nature of the evidence required for it to make serious findings of misconduct warranting removal. It raised questions of politicisation of the process. It also acknowledged both the fact that the Tribunal's role is not to conduct a general inquisition into a judge's conduct but to determine the fact of the matter referred to it. It also demonstrated the gap between misconduct warranting removal and misconduct in office which does not.

64. It is unsurprising that in various constitutional Committees' recommendations since then, the

[44] The Mustill Report, paragraph 5

reform of the section 137 process to insulate the Judiciary entirely from the Executive have been proposed. In the Draft Constitution "A Constitution for the Republic of Trinidad and Tobago"[45] on the provisions for removal of a judge or Chief Justice from office, it was recommended in section 158 that complaints of misbehaviour be referred to an independent Judicial and Legal Service Disciplinary Committee with powers to impose varying degrees of disciplinary measures.[46]

65. What is clear of the **Georges Report** and the **MacKay Report** was that over time there were apparent stressors in our constitutional arrangements between the Judiciary and the Executive which still left the Judiciary vulnerable and exposed to Executive pressure under the guise of demands for accountability which are a threat to its independence. On the other end of the spectrum, the **Mustill Report** and **Rees v Crane** demonstrated blind spots in our genuine mechanisms for accountability, in the removal mechanisms with its yawning gap between misbehaviour in office on the one end that warrants immediate corrective action

[45] The Constitution was prepared by a Sub-Committee comprising: Tajmool Hosein, TC, QC Hamid Ghany, PhD assisted by Rajiv Persad Attorney-at-Law

[46] "**Removal from office of Chief Justice or Judge**

(2) The procedure for the removal of judges, including the Chief Justice, is as follows–

(a) a complaint of judicial misbehaviour, or inability to perform the functions of his office under subsection (1), shall be made in writing directly to the Judicial and Legal Service Disciplinary Committee;

(b) the Judicial and Legal Service Disciplinary Committee shall expeditiously enquire into any such complaint, and submit a report to the Caribbean Court of Justice on the facts of the complaint and recommend–

(i) the dismissal of the complaint;

(ii) the dismissal of the judge, or the Chief Justice as the case may be; or

(iii) the imposition of a lesser penalty.

(c) The Caribbean Court of Justice shall then consider the report and determine whether–

(i) the complaint should be dismissed; or

(ii) the judge or the Chief Justice, as the case may be, should be removed from office; or

(iii) any lesser penalty should be imposed in the circumstances of the case, and make an Order accordingly.

(d) The Order of the Caribbean Court of Justice must then be transmitted to the President who may make an Order for the removal of the judge, or the Chief Justice, as the case may be, from office, or the imposition of such other lesser penalty as has been prescribed.

(e) Where the President makes an order for the removal of the judge or the Chief Justice as the case may be, his office shall become vacant;

(f) the Chief Justice, or the Judge, against whom the complaint is made shall be afforded the opportunity to be heard in his defence at such enquiry as aforesaid and before the Caribbean Court of Justice before its order is made.

(g) The Judicial and Legal Service Disciplinary Committee shall, in the exercise of its jurisdiction in relation to the officers mentioned in paragraphs (a) to (f) of section 156(1) afford all persons against whom complaints are made the opportunity to be heard in their defence at any enquiry that may be conducted."

and misbehaviour that warranted removal from office on the other.

Section 137- Rees v Crane

66. In **Rees v Crane** the respondent was a senior puisne judge of the High Court who was not informed of the Chief Justice's decision that he would not be listed in the roster of judges for the law term from October 1990 to December 1990. When he returned from a visit abroad before the law term started, he realized his name was not on the roaster for the new law term. He raised the matter with the Chief Justice who informed him that a letter was sent to him in August, which he subsequently discovered with other unopened mail at his home. In that letter, the JLSC informed him that it had considered complaints about his performance in court and doubts about his health and they agreed with the Chief Justice he should not preside in court until further notice. The JLSC considered the respondent's fitness to perform the functions of his office and sought more detailed evidence about his unfitness. The Chief Justice did not sit in the JLSC for these meetings and took no part in the discussions of the JLSC. The JLSC resolved that under section 137(3) of the Constitution, it should represent to the President that the question of removing the respondent from office should be investigated.

67. The respondent was not consulted before this decision was made. Instead, in November, he learnt from a television broadcast that the President had appointed a tribunal to investigate him. The following day he was given a formal document suspending him from office by a police officer in a public street. The respondent thereafter commenced judicial review proceedings of the decision to suspend him. He was later informed by the President that the investigation into his removal was on the grounds of inability to perform the functions of office and/or misbehaviour. Davis JA and Ibrahim JA in the Court of Appeal found that the suspension had been unlawful and a breach of the rules of natural justice.

68. The Privy Council dismissed the appeal and held that the Chief Justice had no powers to impose a period of indefinite suspension on a judge of the High Court. Importantly it established that before the JLSC represented to the President that the question of removing a judge should be investigated under section 137(3) of the Constitution, it must be satisfied

that the complaint had prima facie sufficient basis in fact and was sufficiently serious to warrant such representation. In both such respects, the JLSC must act fairly.

69. The judgments of the Court of Appeal are also quite illuminating and deserve mention.

70. Ibrahim J.A emphasises that the first tier in the process on the referral is the "most important link in the chain"[47] of events. After that, a chain of events is put in motion which has disastrous consequences for the judge the first being his suspension: "Great care has to be taken by the commission to ensure that no injustice is caused to the judge"[48]. He emphasises that suspension for an officer in the service will constitute a slur but "How much greater the blemish on character here in respect of a judge in a small country with a relatively small population that thrives greatly on rumour: it being that "where there is smoke there is fire".[49] Importantly, Ibrahim JA described the sifting process that the JLSC must be engaged as one establishing the bona fides of the complaint by in limine subjecting it to a strict analysis such as rejecting hearsay and examining rules of evidence:

> "Thirdly the commission has to come to a conclusion on the facts before it. It has to make a decision or express an opinion. It has to do so after going through the sifting process as Mr. Daly submitted by eliminating all hearsay material (and that itself is one of the most difficult branches of the law with which to grapple), then analysing the quality of the evidence left to determine if it is sufficient to establish the charges made (after of course, it has determined what are the prerequisites to establish such a charge), then consider the source of the information and finally taking everything into account it exercises its own judgment as to whether the material would constitute inability or misbehaviour to the degree that would warrant investigation. This Mr. Daly submitted is done in limine by assuming all the facts before it to be true or as it is generally said to determine whether there is sufficient evidence of a prima facie standard or prima facie evidence to warrant an inquiry or investigation by a tribunal that could lead to removal."[50]

[47] **Crane v Rees and others** Civ App No.58 of 1991, Ibrahim J.A, page 13
[48] **Crane v Rees and others** Civ App No.58 of 1991, Ibrahim J.A page 13
[49] **Crane v Rees and others** Civ App No.58 of 1991, Ibrahim J.A page 14
[50] **Crane v Rees and others** Civ App No.58 of 1991, Ibrahim J.A page 15

71. Davis JA describes the process in these terms: "It is an unique procedure designed to ensure that the security of a judge in his office cannot be lightly or casually disturbed and **it is in its essence throughout a judicial process"**.[51] It is a power not to be whimsically or arbitrarily exercised. The JLSC is not required to act on every complaint but must rationally exercise its powers in relation to it. Indeed having regard to the Prime Minister's powers to effectively appoint the Tribunal the acrimony generated in the referral the "contamination has in fact spilled over into his "sterile holding bay"[52] of the Tribunal.

72. Davis JA makes an illuminating point on the role of the Commission in the way in which the section is structured to conclude that its role encompasses formulating the actual charges and complaints for the Tribunal. Indeed to do so it must go beyond merely sifting, it must ensure there is a case to be made for the tribunal to investigate.[53]

73. The Commission must therefore deliberate on the complaint, and assess the plausibility and credibility of the allegations. This exercise by the Commission of assessing the quality of the evidence was authoritatively settled by the Privy Council:[54]

> "It is also in their lordships' view clear that the commission is not intended simply to be a conduit pipe by which complaints are passed on by way of representation. The

[51] **Crane v Rees and others** Civ App No.58 of 1991, Davis J.A pages 13-14. At pages 41 and 42 Davis JA states:

> "It seems to me that subsection 3 of section 137 from start to finish lays down procedures which fall much more comfortably to be classified as judicial; the Commission has to consider whether the facts of any given complaint can constitute misbehaviour or can amount to infirmity of body or mind within the legal contemplation of the section, these being the only two grounds on which it could lawfully make a representation. It seems to me, therefore, that in deciding whether or not to make a representation, the Commission has to direct its mind to the question, whether the facts before it are capable in law of constituting misbehaviour, or of amounting to infirmity of body or mind. It is also inconceivable, to my mind, that that Commission, acting responsibly, could avoid giving consideration to the plausibility at least, if not the credibility, of the allegations of fact which are made against the judge, before it would permit itself to reach so important a decision as to make a representation to the President.
>
> In considering the evidence in this way, the Commission would unarguably be performing a judicial function. For the section to be considered otherwise, it would mean that every complaint which reaches it, however irrelevant, such complaint may be to the grounds of infirmity or misbehaviour, and whatever allegations are made, however, implausible or incredible, the Commission would be required to send these forward to the President, who would in turn be required duly to appoint a tribunal to consider, only then, the relevance or value of the complaint."

[52] **Crane v Rees and others** Civ App No.58 of 1991, Davis. J.A page 18

[53] **Crane v Rees and others** Civ App No.58 of 1991, see pages 19-20

[54] **Rees and others v Crane** (1994) 43 WIR 444 at 458

commission may receive isolated complaints of a purely administrative nature which it considers can be dealt with adequately through administrative action by the Chief Justice. Then it would no doubt not make a representation that the question of removal be considered. Indeed, it may well in the public interest be desirable that such matters be dealt with quickly by the Chief Justice rather than that the full panoply of representation, tribunal and the Judicial Committee be set in motion. The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively and equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the commission must act fairly."[55]

74. Section 137 is a critical component of our constitutional machinery in the establishment and protection of the Judiciary. The Prime Minister holds an important discretion that must be exercised judicially. To understand the power of referral and removal is also to understand the interplay of the several constitutional principles that underlie the exercise of this power.

Section 137-A Balance of Constitutional Principles

75. This section 137 removal mechanism sits precariously to balance complementary principles of separation of powers, independence of the judiciary, accountability and the rule of law.

Separation of Powers

76. The preamble of the Constitution recognises the respect for principles of social justice, our belief in a democratic society, due respect for lawfully constituted authority, respect for

[55] **Rees v Crane** [1994] 43 WIR 444, page 459:

> "Nor is it right to say that the Commission's action is analogous to the decision of a police officer to charge a defendant in a criminal process. The composition of the commission and the nature of the process made what happened here more akin to a *quasi*-judicial decision.
> The nature of the broad categories of complaint made in the present case is also a relevant factor in deciding what fairness demanded
> ……
> The fact that a representation was made, a tribunal appointed and the respondent suspended on the basis of bodily infirmity and misbehaviour were bound to raise suspicion or conviction that the commission and even the President were satisfied that the charges were made out, in a way which subsequent revocation of the suspension would not necessarily dissipate.

moral and spiritual values and the rule of law. A vital element in our functioning democracy is the doctrine of the separation of powers. To the extent that the doctrine suggests that each arm of the State, the Executive, Legislature and Judiciary must act independently of one another underrates the practical interdependence each has on the other in the operationalisation of civil society. To a certain degree the co-operation of these arms of State are equally vital in forging our new Republic. Separation of powers should not then be viewed as distinct, airtight, compartmentalisation of powers but merely a system of checks and balances in the distribution of power to protect the citizens from autocracy. See **Myers v United States**, 272 U.S. 52, 293 (1926) at paragraph 55, **Hinds v Queen** [1977] A.C. 195, **Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago** [2012] UKPC 4[56]. Sir Isaac Hyatali was more in point to describe the separation or "partnership" of powers as a feature of modern governance. In distributing power in such a manner to prevent its abuse and to create checks and balance the three arms co-operate and play joint partners in the business of governance:

> "The effective maintenance of peace and order in society is not only an indispensable plank in the platform of economic and other policies of executive government but also the primary function of the courts. Whatever then may be said of the separation of powers as a central constitutional principle and the independence of the judiciary in its capacity as an arm of State power, it is here that Executive and State power meet, blend and assume the role of joint partners by each independent nevertheless, in the important business of Government."[57]

77. In **Matthews v The State of Trinidad and Tobago** [2004] 3 WLR 812 the Privy Council noted that "the principle of the separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real constitution are divided" More

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[56] "The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle."

[57] "Concerns on the Administration of Justice" by the Hon. Sir Isaac Hyatali, TC

recently in **Steve Ferguson v The Attorney General of Trinidad and Tobago et al** [2016] UKPC 2 the separation of powers principles was noted to be described as a characteristic feature of democracies. It is an aspect of the rule of law. It was also noted to be "qualified separation": "qualified because the "Westminster model" has never required an absolute institutional separation between the three branches of the State. But the relations between them are subject to restrictions on the use of its constitutional powers by one branch in a manner which interferes with the exercise of their own powers by the others". The separation between the exercise of judicial and legislative or executive powers has been described as a "characteristic feature of democracies": **R (Anderson) v Secretary of State for the Home Department** [2003] 1 AC 837 at para 50 (Lord Steyn); **Director of Public Prosecutions of Jamaica v Mollison** [2003] 2 AC 411 at para 13 (Lord Bingham of Cornhill).

78. In **Seepersad v Attorney General of Trinidad and Tobago** [2013] 1 AC 659, Lord Hope of Craighead applied these principles to the Constitution of Trinidad and Tobago.[58]

Independence of the Judiciary

79. The separation of powers doctrine recognises the independence of the Judiciary. This principle of an independent Judiciary is a vital element in any modern democratic Constitution and it is crucial in maintaining the rule of law. In **The Honourable Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T. v The Law Association of Trinidad and Tobago** [2018] UKPC 23, Lady Hale observed:

> "18… the judges must be free to interpret and apply the law, in accordance with their judicial oaths, not only in disputes between private persons but also in disputes between private persons and the state. The state, in the shape of the executive, is as much subject to the rule of law as are private persons. An important part of the judicial task in a

[58] Lord Hope observed at para 10:

> "The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle."

constitutional democracy is not only to ensure that public authorities act within their powers but also to enforce the fundamental rights of individuals against the state. Judicial independence is secured in a number of ways, but principally by providing for security of tenure: in particular this requires that a judge may only be removed from office, or otherwise penalised, for inability or misbehaviour and not because the government does not like the decisions which he or she makes. It is also required that removal from office should be in accordance with a procedure which guarantees fairness and the independence of the decision-makers from government."

80. In **The Separation of Powers in the Contemporary Constitution**[59] Roger Masterman noted:

> "The aim of each of these mechanisms is the same: to uphold the legitimacy of the judicial process by insulating courts from the controversies and party political pressures of the elected arms of government. The Magna Carta of 1215 endorses the independence of a trial process from the influence of prosecuting authority. More saliently, the Act of Settlement 1701 provides that judges should hold office quamdiu se bene gesserint, that their salaries should be established by statute and immune from executive interference and that they might only be removed 'upon the address of both houses of Parliament."

81. Internationally accepted principles on judicial independence set out in **The Commonwealth (Latimer House) Principles on the Three Branches of Government** to which this jurisdiction ascribes emphasizes that an independent Judiciary is integral to upholding the rule of law, engendering public confidence and dispensing with justice. See Principle IV.[60] Among other

[59] (2011) Cambridge University Press at page 209

[60] "**Principle IV: Independence of the Judiciary:**

> "An independent, impartial, honest and competent Judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the Judiciary is to interpret and apply national Constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country. To secure these aims:
>
> (a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:
>
> • Equality of opportunity for all who are eligible for judicial office;
>
> • Appointment on merit; and

things to secure the aim of an independent, impartial, honest and competent Judiciary:

"(d) Interaction, if any, between the Executive and the Judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties."

82. In **Basic Principles on the Independence of the Judiciary**[61] it is noted:

" 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."

Judicial Accountability

83. The other side to the coin of judicial independence is judicial accountability. Judicial independence can only be strengthened whether there is good governance and accountability. The Latimer House Principles require each of the three arms of government to maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Judicial Accountability is set out in Principle VII (b):

"(b) Judicial Accountability

Judges are accountable to the Constitution and to the law, which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of

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• That appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints, which may hamper the independence sought.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the Judiciary."

[61] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

the Judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the Judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings that might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions."

84. See also Sir Isaac Hyatali in his article **"Protection of Judicial Independence"**[62] and the important role played by the judicial officer to maintain the public confidence in the judicial office.[63]

85. Jamadar JA (as he then was) in **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** noted the importance of judicial accountability in paragraphs 69 and 121:

"69. The more recent Nuremberg Declaration on Peace and Justice makes the point that justice includes accountability. Indeed, the Bangalore Principles of Judicial Conduct arose out of the United Nations Judiciary Integrity Group initiative (2002-2008) to bolster public trust and confidence in judicial systems globally; and recognised that accountability that is measurable according to specified values is essential for realising this goal. In 2007, the Preface to the United Nations Human Rights Commission publication on the Bangalore Principles stated: "A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law." The Trinidad and Tobago SPGJC was developed, agreed to by Judges, and published in furtherance of these internationally recognised and acclaimed objectives. It is an endorsement of the idea that in Trinidad and Tobago judicial officers will be held accountable according to these

[62] Pages 81-82

[63] "Role of the Judiciary in the New Commonwealth Countries" presented at the Sixth Commonwealth Magistrate's Conference

internationally recognised standards, adapted as they have been for local conditions. Therefore, far from threatening or undermining judicial independence, the administration of justice, or the rule of law, legitimate pre-complaint investigations into alleged judicial misconduct serve to strengthen them all, because potentially, they further the goals of accountability, integrity, and public trust and confidence.

……..

121. Accountability by public officers, including judges, is of paramount value in a democracy. Discourse in the public sphere is both necessary and needed in order to sustain the democratic values of freedom and the rule of law - values which the Constitution expressly affirms and aligns, "... men and institutions remain free only when freedom is founded upon respect ... for the rule of law." Freedom and the rule of law depend significantly on accountability for their survival. This is because true freedom is grounded in responsibility. Freedom to think and freedom to express one's views, in so far as they "facilitate the exposure of errors in the governance and administration of justice" are thus "the lifeblood of democracy." The legitimate exposure and criticism of judicial misconduct is therefore undoubtedly in the public interest."

86. The judgments of the Court of Appeal in **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** wonderfully thread together these complementary strands of the separation of powers/partnership, the independence of the Judiciary, accountability and the rule of law in the tapestry of section 137. To that end Jamadar JA (as he then was) noted:

"30. In my opinion, courts and judges in Trinidad and Tobago ensure the rule of law by conforming to all of the standards and values set out in the SPGJC. Dicey's second principle of the rule of law is that "no man is above the law". This fundamental idea that every person is subject to the law and responsible for their actions under the law, is often used in the context of accountability, and rightly so. A Chief Justice and a Judge are no exception. Embedded in this principle of accountability however, is the assumption of responsibility. That is to say, it is only because a person is responsible, that they can be

accountable. Therefore, it is because a Chief Justice or a Judge is assumed to be responsible for conducting themselves according to certain minimum standards and upholding certain non-negotiable values, that they can be held accountable if they fall short to such a degree that it is inimical to the due administration of justice.

…….

61. Section 137 exists in the Constitution as an integral aspect of the separation of powers, securing the independence of the Judges from undue influence and/or control by the Executive or Legislature. To reinforce this, sections 136 and 137 are entrenched pursuant to section 54(2) (a) of the Constitution. Sections 136 and 137 protect the independence of Judges (and therefore of the Judiciary) by providing security of tenure and prescribing the only bases and procedures for their suspension and/or removal.

62. The primary aim of the entrenchment of section 137 is therefore to be considered in the context of the constitutional principle of the separation of powers. Section 137 is not intended to place Judges outside of the rule of law, or to exempt them from accountability, or to immunize them from being disciplined. On the contrary, the Constitution by way of section 137 recognises that Judges, even though they may hold a 'Special Office', are to be held accountable for and disciplined ('removed from office') for 'inability to perform the functions of office' or 'for misbehaviour'. However, Judges "shall not be so removed except in accordance with the provisions of" section 137."

87. Mendonca JA noted:

"64. The principle of the separation of powers is therefore designed to achieve the separation of powers between the three branches of the state and to protect against one branch of the state exercising the powers of the others. In so doing the principle protects the independence of the judiciary. It also protects the citizen from the potential abuse of the power of the state if it were to reside in one arm. I, however, cannot see the relevance of that to the conduct of an enquiry or investigation by the Law Association to determine whether to make a complaint to the Prime Minister in respect of the conduct of the Chief justice which every citizen may do or to support the Chief Justice. In my judgment it is not

relevant."

88. Bereaux JA also noted:

> "[31] Section 137 is intended to protect the Chief Justice and judges from unwarranted attempts to remove them from office by the Executive. It is recognised that in the course of his duties, a judge's decision may offend the Executive. It may also offend private citizens adversely affected by his decisions who may seek to impugn his conduct. But section 137 was not meant to immunise him from public scrutiny. It is for this reason that judicial officers are expected to conduct themselves, publicly and privately, in a manner befitting of their office. They must be prepared to accept and ignore what may be unjust and unwarranted criticism from persons who simply may not know better and from even those who do."

89. Section 137 removal process as a mechanism for judicial accountability has therefore sought to carefully balance the constitutional norms of the separation of powers, the independence of the Judiciary and the rule of law. Confidence in the Judiciary is critical to the effective operation of the justice system. Section 137 reflects the constitutional values of ensuring that confidence in the independence of the Judiciary is not diminished by an errant judge. Equally, its high threshold is a means of entrenching fully the principles of the separation of powers and the independence of the Judiciary ensuring that the status of the judge is not lightly interfered. There is a threat to the institutional independence of the Judiciary where disciplinary action or attempts at removal are instigated to penalize, intimidate or harass a judge or Chief Justice out of office.

Section 137-Definitions of Inability and Misbehaviour

90. Several authorities have provided useful guidance on the definition of inability and misbehaviour used in section 137. However, it would be difficult to extract a rigid definition. To do so would restrict its application to a myriad of circumstances where the departure from accepted judicial conduct ought to be condemned. It is better instead to understand the core underlying values which judicial conduct must uphold.

91. These are some basic principles which serve as a guide:[64]

(i) While the Bangalore principles could be used to assess the conduct of a judge, not every breach of the principles would be ground for removal.[65]

(ii) The personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law.[66]

(iii) The conduct to be condemned is a question of fact and degree.[67]

(iv) Conduct that displays unfitness to discharge the duties of his high office which can no longer be condoned, and becomes misbehaviour so clear and serious that the Judge guilty of it can no longer be trusted to do his duty.[68]

(v) Conduct of the Judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution.[69]

(vi) Where the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the

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[64] In **"Judicial Conduct and Accountability"** Marshall noted at page 67:

> "There are a number of ways to look at the question of judicial conduct. It can be divided into misconduct in office and nonofficial misconduct, or, more simply, on-the-bench and off-the-bench conduct. Another way to look at judicial conduct is to consider the basic values that judicial conduct must uphold."

[65] **The Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833**) [2009] UKPC 43 paragraphs 28-31 and **Madam Justice Levers, Hearing on the Report of (The Cayman Islands)** [2010] UKPC 24 (29 July 2010) paragraph 48-50

[66] See **Judge Richard Therrien Q.C.J v The Minister of Justice** [2001] 2 R.C.S paragraph 110**. The Parliamentary Commission of Inquiry into the Conduct of Murphy J** 1986 2 Aust Bar Rev 203, provides guidance on the appropriate test of inability and misconduct

[67] **The Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833**) [2009] UKPC 43

[68] **Wilson v Attorney General** [2011] 1 NZLR 399 paragraph 59

[69] **Wilson v Attorney General** [2011] 1 NZLR 399 paragraph 59

confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit. If a judge, by a course of conduct, demonstrates an inability to behave with due propriety misbehaviour can merge into incapacity.[70]

(vii) While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function.[71]

(viii) Whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the Judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."[72]

(ix) Conduct can be characterised as "misbehaviour" upon considering the four **Gibraltar** questions:

a) Has the Chief Justice's conduct affected directly his ability to carry out the duties and discharge the functions of his office?

b) Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions?

c) Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office?

d) Has the office of Chief Justice been brought into disrepute by the Chief Justice's

[70] **Madam Justice Levers, Hearing on the Report of (The Cayman Islands)** [2010] UKPC 24 paragraph 50
[71] **The Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833**) [2009] UKPC 43 paragraph 31
[72] **The Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833**) [2009] UKPC 43 paragraph 31

conduct?[73]

(x) Where the integrity of the judicial function itself has been compromised.[74]

(xi) The content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold the office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed.[75]

(xii) Character flaws involving personal and volitional culpability that render the judge unfit to hold office. Criminal conduct or serious moral failings disqualifies the judge from holding any judicial office. Corruption, criminal conduct and certain misrepresentations and nondisclosures, may qualify as misbehaviour. So too may any conduct, whether falling within the categories above or not, which in the view of a wide cross section of reasonable members of the society brings the judiciary into public ridicule or opprobrium. Ultimately what amounts to misbehaviour depends on the mores and standards accepted by the society and the statutory context.[76]

(xiii) While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of a judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function.[77]

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[73] **The Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833**) [2009] UKPC 43 paragraph 203

[74] **The Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833**) [2009] UKPC 43 paragraph 262

[75] **Lawrence v Attorney General of Grenada** [2007] 1 WLR 1474, paragraph 45

[76] **Dean Boyce and others v The Judicial and Legal Services Commission** [2018] CCJ 23(AJ), paragraph 51

[77] Commonwealth Law Bulletin Volume 41, No 4, December 2015 "Chapter 3: Removal from Office", page 530

92. The question of removal under section 137 is therefore inextricably linked with the main questions of the ability to discharge one's functions as a judicial officer and the perception of a wide cross section of society of that conduct bringing the Judiciary into disrepute. The bar is set fairly high and "these formulations indicate that it would not be sufficient if a judge's conduct was merely unpopular with a large section of the public, as the shortcomings would have to be judged to be manifest, a more objective standard."[78] Unfortunately, as experience has shown, there may be grounds for complaint about judicial misbehaviour but it does not arise to the standard of such misconduct which warrants removal. Our own standards of conduct prescribe a schedule of scenarios and principles to be observed but explicitly is delinked from the constitutional question of removal.

Section 137: A Commonwealth Context

93. The experience of the Commonwealth and international norms with respect to the removal mechanisms of judges and Chief Justices set out some basic fundamentals which are useful to interpreting section 137. First, there are limited circumstances for removal: the two main grounds recognised to justify removal are inability to perform judicial duties and serious misconduct. Second, the judge has a right to be informed of the charges against him, to make a defence and to be judged by an independent and impartial tribunal. Third, the principle that judges of the High Court and above are entitled to security of tenure during good behaviour and removable only on an address to Parliament has been adopted in many modern constitutions and statements of principle. Fourth, while the Executive should not be the principal decision maker, it is still possible to justify a limited role for the Executive at the initial stage of proceedings.

International Norms

94. The Latimer House Principles indicates that there are very limited circumstances in which a judge may be removed from office being incapacity or misbehaviour that renders them unfit to discharge their duties. See Principle 1 Judicial Accountability of the Latimer House

[78] Commonwealth Law Bulletin Volume 41, No 4, December 2015 "Chapter 3: Removal from Office", page 530

Guidelines for the Commonwealth 19 June 1998.[79]

95. The Latimer House Principles state that the mechanism for determining whether a judge is to be removed from office should include appropriate safeguards to ensure fairness. In "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice" it is noted as a minimum standard that the executive should not be the principal decision maker with regard to judicial removals. An executive power to dismiss judges is a threat to judicial independence which undermines the right to a fair trial before an independent court.[80] However, the entire removal process need not be in the hands of a single body, it may still be possible to justify a role for the executive at the initial stage of proceedings. The IBA Minimum Standards of Judicial Independence envisage that the "executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not in the adjudication of such matters". The IBA Minimum Standards go on to recommend that the actual decision on whether to remove a judge should be entrusted to an institution independent of the executive, and should 'preferably be vested in a judicial tribunal.'

96. The importance of fairness and an independent tribunal is also envisaged in the UN Basic Principles on the Independence of the Judiciary.[81]

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[79] **1. Judicial Accountability**

(a) Discipline:

(i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:

(A) inability to perform judicial duties; and

(B) serious misconduct.

(ii) In all other matters, the process should be conducted by the chief judge of the courts;

(iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public Criticism:

(i) Legitimate public criticism of judicial performance is a means of ensuring accountability;

(ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts."

[80] "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice", Chapter 3 "Removal from Office" pages 88-89

[81] The UN Basic Principles on the Independence of the Judiciary provides:

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be

97. In the Commonwealth there are 16 jurisdictions which have a parliamentary system of removal.[82] In 10 jurisdictions, a permanent disciplinary council is entrusted with the decision.[83] In 20 jurisdictions, Trinidad and Tobago included, the removal mechanism utilized is that of the ad hoc tribunal which is formed only when the issue arises whether a judge should be removed from office.[84]

98. The commencement of tribunal proceedings signals that a judge faces credible allegations of misconduct which if proved would warrant his/her removal from office. Therefore, the decision to institute tribunal proceedings should not be taken lightly:

> "The decision to institute tribunal proceedings against a judge should not be taken lightly. The mere fact that tribunal proceedings have been commenced will generally be understood as signalling that the judge faces credible allegations of misconduct which are serious enough that, if proved, would warrant the removal of the judge from office. The impact is usually immediate and may not be fully undone even if the judge is subsequently cleared. It follows that the initial phase which precedes the making of such a decision is a particularly sensitive one, as the *UN Basic Principles of the Judiciary* recognise by requiring that, when a charge or complaint is made against a judge, "the examination of the matter

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> processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
>
> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
>
> 19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
>
> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."

[82] Australia, Bangladesh, Canada, India, Kiribati, Malawi, Malta, Maldives, Nauru, New Zealand, Samoa, Sierra Leone, South Africa, Sri Lanka, Tuvalu and the United Kingdom. See "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice", Chapter 3 Removal From Office

[83] Belize, Brunei Darussalam, Cameroon, Cyprus, Mozambique, Namibia, Nigeria, Rwanda, Pakistan, Swaziland, Tonga and Vanuatu. See "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice", Chapter 3 Removal From Office

[84] Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organisation of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda, Zambia. See "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice", Chapter 3 Removal From Office.

at its initial stage shall be kept confidential, unless otherwise requested by the judge."[85]

99. The Beijing Statement on Principles of the Independence of the Judiciary LAWASIA Region envisage that there should be some form of preliminary investigation into the allegations[86]*:*

> "……there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them."
>
> "3.4.7 Preliminary investigations may require both (a) a factual assessment of whether the allegations are credible, and (b) a legal assessment of whether, if proved, they would meet the standard of serious misconduct required to justify removal. Even if constitutional provisions do not expressly require such an assessment, they may do so implicitly, as the Supreme Court of Ghana (**Agyei Twum v Attorney General and Bright Akwetey** [2005-2006] SCGLR 732) decided when it held that the President was required to form the view that there was a *prima facie* case against the Chief Justice before forming a tribunal to inquire into his conduct."[87]

100. A review of the several cases concerning the removal of judges in the Commonwealth offer useful guidance on the nature of the discretion to be exercised by the Prime Minister. In reviewing the case law it offers guidance on two important aspects for this case, first the level of care to be exercised in initiating the removal process and second the type of serious misconduct that will attract a removal process. The removal process is plainly designed to protect the Judiciary from either frivolous, baseless or trifling complaints at one end of the spectrum and at the other end those complaints which though demonstrate a serious error of judgment do not damage the trust and confidence in the Judiciary or damage the trust in the judges to continue to carry out their role in the administration of justice.

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[85] Commonwealth Law Bulletin Volume 41, No 4, December 2015 "Chapter 3: Removal from Office" page 536
[86] Beijing Statement on Principles of the Independence of the Judiciary, 25
[87] The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice

Commonwealth Experience

101. In New Zealand, a unique structure has been implemented for the disciplining of judges. In **Wilson v Attorney General** [2011] 1 NZLR 399 an overview of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 was provided:

> "**[25]** The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act) created a regime for investigating complaints against judges and dealing with them according to their seriousness. Its purpose is to "enhance public confidence in, and to protect the impartiality and integrity of, the judicial system". It does so by:
>
> (a) providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office:
>
> (b) establishing an office for the receipt and assessment of complaints about the conduct of Judges:
>
> (c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.
>
> **[26]** The Act established the office of the Judicial Conduct Commissioner, who is appointed by the Governor-General on the recommendation of the House of Representatives after consultation with the Chief Justice. His functions are to receive complaints about judges and deal with them as the Act requires, to conduct preliminary examinations of complaints, and in appropriate cases to recommend that a Panel be appointed to inquire into any matter or matters about the conduct of a judge. He has all the powers necessary to carry out those functions. He must act independently.
>
> **[27]** Any person may complain about a judge's conduct. The complaint must be in writing and must state the subject-matter of the complaint against the judge concerned. The complainant may be required to complete a statutory declaration setting out the details."

102. The Court observed a number of salient features of their structure: the removal mechanism was designed to improve accountability of judges through a fair process that protects the requirements of judicial independence and natural justice. "These objectives are

designed collectively to enhance public confidence in the judicial system; that is, the legislation presumes that public confidence results not merely from increased accountability but also from protecting judicial independence and treating individual judges fairly."[88]

103. Judges are taken to have made a commitment to impartiality upon taking their oath of office. That quality of mind of impartiality is the rational of judicial independence which refers to "the status of judges and their relationship to others, particularly the Executive. In a community governed by the rule of law, judicial impartiality is of constitutional importance. To guarantee it, judges are given independence; they enjoy security of tenure and salary, they attract immunity from liability for their work, they are held accountable for their decisions only by appellate courts, and they may be removed only by the House of Representatives and then only on grounds of misbehaviour or incapacity."[89]

104. The Act itself supports judicial independence by investing in a mechanism that is impartial and fair: "The corollary of judicial independence is that when an individual judge does behave in a manner sufficiently incompatible with the judicial oath, it may be necessary that he or she be removed from office to ensure that the public retains confidence in the judicial system as a whole. The power of removal creates tension between accountability and independence, which the Act aims to address through processes and standards designed to ensure that judges are not lightly removed."[90]

105. With respect of the role and function of the Commissioner, the initiator of the process, it underscored that under their legislative arrangement the Commissioner must make a preliminary assessment and form an informed opinion over the complaint:

> "the Commissioner is not a mere conduit for complaints but a decision-maker. He decides which complaints are dismissed and which are referred to the Attorney with a recommendation that a panel be appointed. He must form an opinion whether the complaint, if substantiated, could warrant consideration of the judge's removal or whether there are any grounds for dismissing it. If his opinion is that neither the

[88] **Wilson v Attorney General** [2011] 1 NZLR 399, paragraph 39
[89] **Wilson v Attorney General** [2011] 1 NZLR 399, paragraph 40
[90] **Wilson v Attorney General** [2011] 1 NZLR 399, paragraph 41

appointment of a panel nor dismissal of the complaint is appropriate, under the legislation at the time he must refer the complaint to the relevant Head of Bench. So referral to the Head of Bench was the "default option", as counsel put it."[91]

106. The opinion though is a highly provisional one as there is no finding of fact, nor does it fix the standard by which the judge's conduct or capacity will be assessed. However, it is an opinion nonetheless and it must be honestly held, reasonably open on the facts available and based on the correct legal standard.

> "In this case the opinion must be that there is sufficient substance to the complaint to warrant the appointment of a panel; the Commissioner must believe both that the facts alleged in the complaint are sufficiently plausible to justify further investigation and that the conduct, if established, may be serious enough to warrant consideration of removal rather than referral to the Head of Bench. It is a low threshold, as Mr Goddard emphasised, but a definite one. To acknowledge that the Commissioner's decisions are provisional is not to accept that he can recommend a panel where he is unable to form the opinion required by s 15(1). In that case he must (under the legislation at the time) refer the complaint to the Head of Bench."[92]

107. In our case, therefore, it is not a case of the Prime Minister receiving a complaint and shrugging his shoulders to say "this is beyond me. Let me put this in the hands of a tribunal". That will be an abdication of his responsibility to sift the facts and make an informed opinion. The statute in New Zealand makes provisions if the Commissioner is unable to form an opinion or where it is indecisive. There is no such provision in our Constitution for that eventuality[93].

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[91] **Wilson v Attorney General** [2011] 1 NZLR 399 paragraph 42

[92] **Wilson v Attorney General** [2011] 1 NZLR 399, paragraph 44

[93] Section 15A (2)(c) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 provides:

> "(2)Reasons why further consideration of a complaint would, in all the circumstances, be unjustified, may be or include all or any of the following that apply to the complaint:
>
> ……..
>
> (c)that the complaint is one in respect of which the Commissioner, having started the preliminary examination required by section 15, concludes that there is no reasonable prospect of there being available to him or her information that would enable him or her to form an opinion on the matters specified in section 15(1)(b), (c), and (d).

108. All the parties referred to **Wilson** as a guide to the Prime Minister's decision making process. In **Wilson,** Wilson J, then a Judge of the Court of Appeal sought judicial review of the Commissioner's recommendation to the Acting Attorney General and the Acting Attorney General's decision to appoint the Judicial Conduct Panel to inquire into his conduct in a case in which he sat in a three member panel in the Court of Appeal. In that case, his close friend, Mr. Galbraith QC and business associate acted as Senior Counsel for the appellant. Saxmere complained to the Judicial Conduct Commissioner that Wilson J should have recused himself because of the business relationship he shared with Mr. Galbraith. Saxmere's appeal on the ground of apparent bias was subsequently dismissed but later remitted for consideration on fresh evidence. It held that Wilson J's personal statements might lead to the objective observer to conclude that she was disqualified from sitting on the panel that heard the case.

109. Thereafter complaints were lodged with the Commissioner about Wilson J's conduct. The Commissioner carried out a preliminary examination under section 15 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. He interviewed several people, took into

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Section 15A of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 states:

> "**15A Commissioner's power in certain circumstances to take no further action in respect of complaints**
> (1)The Commissioner may take no further action in respect of a complaint if satisfied that further consideration of the complaint would, in all the circumstances, be unjustified.
> (2)Reasons why further consideration of a complaint would, in all the circumstances, be unjustified, may be or include all or any of the following that apply to the complaint:
> (a)that the complaint has been resolved to the complainant's satisfaction following an explanation from the Judge who is the subject of the complaint:
> (b)that the complaint is genuine and made in good faith, but is based on a misunderstanding:
> (c)that the complaint is one in respect of which the Commissioner, having started the preliminary examination required by section 15, concludes that there is no reasonable prospect of there being available to him or her information that would enable him or her to form an opinion on the matters specified in section 15(1)(b), (c), and (d).
> (3)The fact that a complaint has been resolved to the complainant's satisfaction because of an apology by the Judge who is the subject of the complaint is not, by itself, a reason why further consideration of a complaint would, in all the circumstances, be unjustified.
> (4)Subsection (2) does not limit subsection (1).
> (5)If the Commissioner exercises his or her power under this section to take no further action in respect of a complaint, he or she must give the complainant and the Judge who is the subject of the complaint written notification stating—
> (a)that the Commissioner has exercised that power; and
> (b)the grounds on which he or she is satisfied that further consideration of the complaint would, in all the circumstances, be unjustified.

account the judgments, the documentation filed in the appeal, the written material provided by the complainants and written submissions. The Commissioner then wrote to the Acting Attorney General recommending that she appoint a Judicial Conduct Panel to inquire into matters concerning Wilson J's conduct pursuant to section 18 of the Act. The Acting Attorney General referred the matter to the Judicial Conduct Panel. Wilson J applied for judicial review of their decisions. He contended that they had failed correctly to identify the standard of misconduct warranting removal from office; had failed to apply that standard to the identified conduct; the Commissioner's investigation was flawed on the ground of procedural impropriety; and they erred in taking into account information that was hearsay, confidential and subject to legal privilege.

110. While the Court held that the Commissioner had identified the correct standard of conduct, namely that the conduct had to be very serious, going to the Judge's fitness for office, they however found that the Commissioner fell into an error of law when he failed to identify the matter/s of the Judge's conduct that were to be the subject of an inquiry by the Judicial Conduct Panel and when he failed to evaluate and form an opinion about the Judge's conduct during the period after the delivery of the Supreme Court's first judgment.

111. **Wilson** usefully suggests that it is the Commissioner's duty (the 1st Tier duty) to carefully scrutinise the complaint and to form an opinion as to its merits. It also discussed the relevant standard of misbehaviour to be applied is in most cases contextual.

112. In **Bradbury v Judicial Conduct Commissioner** [2014] NZCA 44 the appellants sought judicial review of the Commissioner's decision not to take further action of a complaint made about Venning J in failing to disclose his close association to an attorney appearing in a case before him. Importantly, it was accepted in that case that the Commissioner (as the Prime Minister in this case) is entitled to not take any action where the complaint is speculative or implausible. Interestingly, in that judgment the Court did not discuss the standard of review to be applied in reviewing the Commissioner's decision. Rather, it proceeded on the accepted basis that the judicial review Court would determine whether the Commissioner's opinion "was right"! It then analysed the possible inferences that were reasonably opened to the Commissioner to draw from the facts that were alleged. While it acknowledged that the

Commissioner (the Prime Minister for our purposes) is not the finder of facts, that is for the second stage of the process, the Commissioner must still evaluate the facts to determine where there is a sufficient evidential basis to justify either moving forward or not:[94]

> "[75] Equally apparent, however, is the fact that, as the High Court put it in Wilson and Goddard J endorsed, the Commissioner is not acting as a "mere conduit" but has to undertake a filtering or screening function of complaints and form an opinion as to which of the four possible approaches is to be taken to the complaint. That filtering function must entail some assessment of the facts and consideration of whether on the facts, if established, removal is possible. The parties to this appeal were content to proceed on the basis that, as the High Court put it in Wilson, "the facts alleged [must be] sufficiently plausible to justify further investigation and … the conduct, if established, [must] be serious enough to warrant consideration of removal" rather than one of the other courses of action available under the Act. As the Court said, the threshold is "low" but is "a definite one".
>
> [76] Accordingly, in Wilson the High Court concluded there was no error in law on the Commissioner's part in recommending a panel consider the adequacy of the Judge's disclosure. That was because there were "unresolved questions of fact about the advice and encouragement the Judge received … as to the disclosure he should make". The resolution of those factual questions would determine where the Judge's conduct sat on the spectrum of disclosure. However, the Court in Wilson found the Commissioner had erred in recommending the appointment of a panel to inquire into "any matter" concerning the Judge's conduct. That was because this reflected a failure on the Commissioner's part to sift out those matters the Commissioner did not consider warranted inquiry and/or which could not warrant removal."

[94] **Bradbury v Judicial Conduct Commissioner** [2014] NZCA 44, paragraph 73:

> "[73] As to the scope of the Commissioner's function there is no dispute that the Commissioner's task was preliminary in nature. It is not for the Commissioner, who may not necessarily be a lawyer, to decide disputed questions of fact; those are questions for a panel. However, as counsel for the Commissioner submitted, there is a distinction between finding facts and reaching the conclusion that there is an insufficient evidential basis to justify either recommending a panel be appointed or referral to the Head of Bench."

113. The Court analysed the structure of their legislation to justify their interpretation of this power of the Commission in making his preliminary findings. However, it also relied upon policy considerations that support the view that some inquiry and evaluation be made so as to form a judgment as to a proper evidential basis for a complaint:

> "[81] Policy considerations support this approach. A filtering exercise of the sort we envisage is a means of providing some protection of judicial independence and in this way maintaining public confidence in the judiciary. Although the panel process does not lead inexorably to removal, the mere fact of the appointment of a panel is a serious matter for the Judge and a source of considerable pressure."

114. **Australia**: In Australia useful guidance is obtained from **Bruce v Cole** [1998] 45 NSWLR 163 on their standard of review in reviewing the preliminary decision to refer a complaint of misconduct. In that case, Bruce J challenged the validity of the report made by the Conduct Division of the Judicial Commission of New South Wales which expressed an "opinion" that matters constituting the complaint could justify parliamentary consideration of his removal. These matters included that it had been proved that Bruce J suffered an incapacity to perform his judicial duties in his failure to write judgments some of which were outstanding since 1995. He contended that the expression of opinion by the Division was not unanimous (one member dissented) and the report was liable to be set aside on administrative law grounds. It was held, among other things, that it was unlikely that the legislature required that the opinion be unanimous; even though there was no finding of misbehaviour, the Division was satisfied that his incapacity was continuing at the time of the report; where the case directly involves the independence of the Judiciary it is particularly important that this Court avoids making a decision based on the merits in the guise of a recognised ground of review; the Division was entitled to give the Plaintiff's failure to adhere to the Judgments Schedule the weight that it did.

115. Importantly, that jurisdiction does not subscribe to the modern development of the proportionality and merits based review and have stuck stridently to the stringent Wednesbury unreasonableness standard. This standard is discussed below. However, importantly, in their Constitutional framework, latitude is given to the decision maker to draft

reasonable inference of facts for the evidence placed before it and would only be reversed on patent errors of law.

116. **Canada**: In Canada, section 95 of the Court of Justice Act (CJA) which provides the removal mechanisms of judges in three stages was analysed in **Judge Richard Therrien Q.C.J v The Minister of Justice, The Attorney General of Quebec and The Attorney General for Ontario** [2001] 2 R.C.S. In that case, the appellant had a criminal record for which he was sentenced to imprisonment for one year for unlawfully giving assistance to four members of the Front de liberation du Quebec. He continued his legal studies after serving his sentence. In 1987 he was granted a pardon under section 5(b) of the Criminal Records Act. In 1996, the Minister of Justice recommended that he be appointed as a Judge of the Court of Quebec. It was later discovered that he failed to disclose his criminal record to the Chairman of the Selection Committee which had recommended his candidacy. She advised the Minister of Justice of her discovery and the Minister lodged a complaint with the Quebec Conseil de la magistrature. The Counseil found the complaint was justified and recommended that the Minister initiate the process to remove the appellant by making a request to the Court of Appeal in accordance with section 95 of the CJA. The appellant thereafter filed judicial review proceedings, challenging the removal process. He also filed a motion for declaratory judgment challenging the constitutionality of section 95. The Court of Appeal dismissed the application for judicial review and the motion for declaratory judgment filed by the applicant. The appellant appealed but his appeal was dismissed. It was held that Section 95 CJA is constitutional and consistent with the requirements of judicial independence; the right to be heard was respected; the right to an impartial hearing was respected; the appellant had a duty to disclose his criminal record regardless of his pardon; a judicial forum was appointed by the legislature to make determinations concerning the conduct of a judge and a recommendation for removal in this case would not amount to arbitrary interference by the Executive in the exercise of the judicial function.[95]

[95] **Judge Richard Therrien Q.C.J v The Minister of Justice, The Attorney General of Quebec and The Attorney General for Ontario** [2001] 2 R.C.S:

> "**35** It is appropriate, first, to consider the ethical context of s. 95 *C.J.A.* The disciplinary process for provincial court judges established by the *Courts of Justice Act* consists of three stages. First, it is the

117. These provisions were seen as vital for the securing the constitutional requirement of judicial independence:

> **"39** ……To satisfy this guarantee as regards the removal of provincial court judges, the following two criteria must be met: (1) the removal must be for cause, which must be specific and be related to the judge's capacity to perform his or her judicial functions; and (2) there must be a judicial inquiry to establish that such cause exists, at which the judge

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function of the Conseil de la magistrature to receive and examine any complaint lodged against a provincially appointed judge (ss. 256*c*) and 263 *C.J.A*.). If the Conseil establishes that the complaint is justified following its preliminary inquiry, or if the complaint is lodged by the Minister of Justice, as in the case at bar, the Conseil establishes a committee of five persons chosen from among its members to conduct an inquiry (ss. 268 and 269 *C.J.A.*). If the report of inquiry establishes that the complaint is justified, then following the recommendations of the report of inquiry, the Conseil reprimands the judge, or recommends that the Minister of Justice and Attorney General file a motion with the Court of Appeal in accordance with s. 95 (s. 279 *C.J.A.*). It is therefore in the context of the second stage that a request by the Minister may come before the Court of Appeal. Finally, upon a report of the Court of Appeal, the Minister may remove a judge (s. 95 *C.J.A.*).

36 In those circumstances, when the Minister of Justice makes a request to the Court of Appeal under s. 95 *C.J.A.*, he does so after reading the report of the Conseil de la magistrature, which is involved at a preliminary stage and has already examined the matter. Its committee of inquiry has heard the appropriate witnesses and has gathered the necessary evidence in order to make a determination regarding the allegations of failure to comply with the provisions of the *Judicial Code of Ethics*, R.R.Q. 1981, c. T-16, r. 4.1. For example, I note that in this case, the committee of inquiry sat for eight days and heard more than 15 witnesses. It then analyzed the facts at length and made its findings, and then issued a recommendation. Accordingly, the Minister has the benefit of the administrative body's specialized knowledge and experience.

37 The report of the Court of Appeal is something quite different. First, the terms used by the legislator are different. Section 95 *C.J.A*. does not require that the Court of Appeal make a report of an inquiry, but a report made after inquiry, and it imposes no restrictions in terms of how it should be done. It does not limit the inquiry to collecting and analyzing the facts and evidence relating to the judge's conduct. As I said earlier, this stage, which involves actively seeking out the truth, has already been the subject, first, of an inquiry under the authority of the Conseil. It is also revealing that in the case at bar, during the hearing in the Court of Appeal, the parties agreed that all the evidence introduced at the committee of inquiry of the Conseil de la magistrature would be filed in the court, subject to the parties' right to submit additional evidence, which proved unnecessary.

38 Second, this is a judicial report and, moreover, one made by the highest court in the province. Its purpose is not simply to assist the Minister in making a decision; rather, it is an essential condition of the proceeding that may lead to the removal of a provincially appointed judge. In fact, Quebec is the only Canadian province that requires that the Court of Appeal be involved in the removal process: P. H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987), at p. 181, and M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), a report prepared for the Canadian Judicial Council, at p. 130. Its report is a mandatory stage in the proceeding that may lead to the removal of a judge of the Court of Québec. The fact that s. 95 *C.J.A.* provides that "[t]he Government may remove a judge only upon a report of the Court of Appeal" (emphasis added) is therefore not happenstance. Accordingly, it plays a vital role in the administration of justice in the province, and this is one factor that suggests that it should be recognized as a decision."

affected must be afforded an opportunity to be heard: *Valente*, *supra*, at p. 696; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 115. For the province of Quebec, this judicial forum is the Court of Appeal." See also **R v Moreau-Berube** 2002 SCR 249.

118. In **Michael Taylor v The Attorney General of Canada** 2003 FCA 55 Evans JA dismissed an appeal against the Canadian Judicial Council's handling of a complaint against Justice A.C Whealy who had refused to allow a member of the public to remain in the courtroom while wearing a kufi (a small head covering). The complaint raised serious questions about the judge's fitness to hold office in a multicultural society being insensitive to diversity. The Chairperson of the Committee closed the file stating while the conduct was inappropriate and improper, it did not warrant an investigation into the judge's removal but merited disapproval. The Court applied a "patently unreasonable" standard of review which required a high degree of deference to the decision maker.

119. Interestingly, in that case, it was noted that the provision allowing for a lesser form of discipline of "meriting disapproval" was intended to protect the judge from the adverse consequences of an erroneous, negative decision. It was also noted that making such complaints balance the need for judicial accountability and judicial independence. Because these are high constitutional values of importance, it requires a view of the right to be heard by the judge and the complainant at the Tier 1 stage.[96]

[96] **Michael Taylor v The Attorney General of Canada** 2003 FCA 55 it was noted at paragraphs 75-81:

"**75** Counsel for the Attorney General advanced two principal reasons why the Chairperson of the Judicial Conduct Committee owes no duty of fairness to a complainant when exercising the power to close a file. First, and most important, a complainant has no interest that is affected by the exercise of this power…..

76 Moreover, the argument goes, when considering a complaint against a judge, the Council is not deciding a dispute between a complainant and a judge, or determining whether to grant or deny relief to the complainant. Rather, its function is to decide whether a judge's misconduct is so serious as to merit removal from office……

77 On the basis of existing case law, this argument is not without merit. Canadian administrative law has not so far committed itself to the proposition that the public interest in accurate administrative decision making is in itself sufficient to engage the duty of fairness. Thus, even though the duty of fairness performs, among other things, the instrumental function of enhancing the substantive quality of administrative action, the duty does not apply where an individual is not adversely affected by the impugned decision. Despite the elasticity of the concepts of "affect" and "interest" in the Cardinal test, they have not been abandoned as necessary triggers for the duty of fairness.

120. **Africa:** Lord Carnwath in his address at the Commonwealth Magistrates' and Judges' Conference in Zambia "**Discipline and Removal of Senior Judges**"[97] referred to the Zambian case of **Attorney General v Mutuna and others** Appeal No. 088/2012, SCZ/8/185/2012. In that case the constitutional arrangements provided for a three tier approach but with more power on the Executive to secure the removal of a judge:

"The second method of providing checks on Judges is through Article 98 which deals with checks specifically prescribed for Judges only emanating from the President in his or her capacity as Head of State. Article 98(2) specifically limits this check to the Judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court. It specifies the basis upon which such office bearers may be removed. Article 98(3) gives powers to the President to deal with those office bearers exclusively. It does not

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78 Nonetheless, in my opinion, this is an exceptional case. While the closing of a file may not adversely affect a personal interest of the complainant, more is at stake than accurate decision making. To deny a complainant the right to procedural fairness is apt to frustrate the ability of the Council to perform its statutory function of improving the quality of judicial services by thoroughly and impartially investigating complaints in order that it may take appropriate action, and thereby enhance public confidence in the judiciary.

79 The fact that a judge is entitled to an impartial consideration by the Council of a complaint further [page37] strengthens the case for imposing the duty of fairness in favour of a complainant. In my opinion, it would be inimical to the sensitive role of the Council in enhancing the administration of justice in Canada to impose the duty of fairness to protect the independence of the judiciary, as well as the private interest of judges in their reputations and livelihood, but not to impose it to protect the equally important public interest in ensuring that judicial misconduct is accurately identified and appropriately dealt with. In a sense, a complainant may be seen as the self-appointed representative of the public interest in protecting "the right of persons who come before the courts to a fair trial by an impartial tribunal", to borrow words from Moreau-Bérubé, at paragraph 45. The fact that the By-laws confer participatory rights on the judge who is the subject of the complaint, but only provide that the complainant be advised when a file is closed, does not, in my view, preclude the imposition of the duty of fairness in favour of a complainant.

80 A second argument made against the application of the duty of fairness to complainants before a complaint file is closed by the Chairperson of the Judicial Conduct Committee is that, at this stage, the Council's function is incomplete. Counsel for the Attorney General rely on Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, at page 670, to demonstrate that the duty of fairness does not apply to non-final administrative action.

81 I do not accept this argument for two reasons. First, from the perspective of a complainant, the Chairperson's closing of the file is a final disposition of the complaint and the end of the statutory process by which an individual can have a judge's suitability to continue in office considered by the body entrusted with this responsibility. It has long been recognized that complainants to human rights commissions are entitled to procedural fairness before their complaints of discrimination are dismissed without being referred to adjudication, because a dismissal at this stage of the process may effectively be the end of the line for a complainant: Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human [page38] Rights Commission), [1989] 2 S.C.R. 879.

[97] 9th September, 2014

include any other classes of adjudicators neither does it include any other judicial officers or officers of judicature as defined by the Judicial Code of Conduct Act. Against that background, Article 98(3) gives power to the President who may receive reports on the conduct of a Judge, Chairman or Deputy Chairman of the Industrial Relations Court from any other sources which may not be in the public domain, may not even be through the Judicial Complaints Authority, to appoint a tribunal. In this Article, the legislators intended to lay down procedures of making it possible for the President as Head of State to deal with that exclusive class of adjudicators without recourse to the Judicial Complaints Authority…

……

On the ground of irrationality, which is referred to as Wednesbury unreasonableness, we are satisfied that bearing in mind the authoritative position of His Excellency, it would be illogical and unreasonable to hold that he did not receive credible information as President for him to act as he did. He is the overall authority on everything. His sources are exclusive to the public domain and must be impeccable."

121. **India:** In **C. Ravichandran Iyer v Justice A.M Bhattacharjee & ors** [1995] SCC (5) 457, the petitioner a practicing advocate sought to restrain the Bombay Bar Association and the Advocate's Association of Western India from "coercing" the Chief Justice of Bombay High Court to resign from office as Judge. India has adopted the parliamentary process for the removal of a judge where the judge is removed only where a motion was carried with the required majority of both Houses making such a recommendation. Justice Iyer recognised the yawning gap between "misbehaviour" warranting removal and bad conduct of a judge that needed correction[98]:

"Bad conduct or bad behaviour of a Judge, therefore, needs correction to prevent erosion of public confidence in the efficacy of judicial process or dignity of the institution or credibility to the judicial office held by the obstinate Judge. When the Judge cannot be removed by impeachment process for such conduct but generates widespread feeling of

[98] **C. Ravichandran Iyer v Justice A.M Bhattacharjee & ors** [1995] SCC (5) 457, page 11

dissatisfaction among the general public, the question would be who would stamp out the rot and judge the Judge or who would impress upon the Judge either to desist from repetition or to demit the office in grace? Who would be the appropriate authority? Who would be the principal mover in that behalf? The hiatus between bad behaviour and impeachable misbehaviour needs to be filled in to stem erosion of public confidence in the efficacy of judicial process. Whether the Bar of that Court has any role to play either in an attempt to correct the perceived fallen standard or is entitled to make a demand by a resolution or a group action to pressurize the Judge to resign his office as a Judge? The resolution to these question involves delicate but pragmatic approach to the questions of constitutional law."

122. He recommended an informal approach to discipline to marry the principles of accountability with the need to preserve judicial independence and embarrassment of the Judiciary.[99]

123. **Gibraltar:** In the seminal case of the **Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)** the constitutional arrangement provided for a three stage process with the initiator being the Governor under The Gibraltar Constitution Order 2006 ("the 2006 Order").[100] Notably the Governor considers whether the question of the removal arises and he appoints the Tribunal to advise whether the question should be referred to the Privy Council.

124. Lord Phillips pointed out that these constitutional arguments are vital to securing judicial independence. They do not therefore deal with question of disciplining a judge for misconduct but rather of deciding whether he is fit to perform his role as a judge. This case is more useful in defining the standard of misconduct which would attract the section 137 sanction.

125. **Caribbean:** In the Caribbean there are three authorities of note which bear relevance to this case referred to me by the parties. **Madam Justice Levers, Hearing on the Report of (The**

[99] **C. Ravichandran Iyer v Justice A.M Bhattacharjee & ors** [1995] SCC (5) 457, page 13
[100] **Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)**, paragraph 2

Cayman Islands) [2010] UKPC 24 , **Boyce v Judicial Legal Services Commission** [2018] CCJ 23 and **Meerabux v The Attorney General** [2005] 66 WIR 113. The Belizean constitutional arrangements bear similarities to section 137 with a notable intent, however, to insulate the process from political interference.

126. In **Meerabux** and **Boyce** the constitutional arrangements also constitute a three stage process:

> "**[16]** Chapter VII of the Constitution provides for the establishment for Belize of a Supreme Court of Judicature and a Court of Appeal. Among its provisions is s 98, which deals with the tenure of justices of the Supreme Court. Subsections (3) to (7) of that section are in these terms:
>
> '(3) A justice of the Supreme Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
>
> (4) A justice of the Supreme Court shall be removed from office by the Governor-General if the question of the removal of that justice from office has been referred to the Belize Advisory Council in accordance with the next following subsection and the Belize Advisory Council has advised the Governor-General that that justice ought to be removed from office for inability as aforesaid or for misbehaviour.
>
> '(5) If the Governor-General considers that the question of removing a justice of the Supreme Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then –
>
> (a) the Governor-General shall refer the matter to the Belize Advisory Council which shall sit as a tribunal in the manner provided in section 54 of this Constitution; and
>
> (b) the Belize Advisory Council shall inquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether that justice should be removed under this section.

(6) If the question of removing a justice of the Supreme Court from office has been referred to the Belize Advisory Council under the preceding subsection, the Governor-General may suspend the justice from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General and shall in any case cease to have effect if the Belize Advisory Council advises the Governor-General that the justice should not be removed from office.

(7) Except as otherwise provided in this section, the functions of the Governor-General under this section shall be exercised by him in his own deliberate judgment."[101]

127. It is noteworthy that the role of the Executive is bipartisan in nature unlike section 137 and that the Belize Advisory Council (BAC) is insulated from political interference and is in fact an independent advisory body of the Executive.

"**[36]** Their lordships do not overlook the fact that s 98(4) provides that a justice of the Supreme Court 'shall' be removed from office by the Governor-General if the question of his removal has been referred to the BAC and the BAC has advised the Governor-General that he ought to be removed. But they do not see this as a reason for regarding the issues which the BAC is required to decide as matters of civil right or obligation within the meaning of s 6(8). The effect of this provision is that the question whether the justice is to be removed from office is in the hands of the BAC and not the hands of the Governor-General. It is plain that this provision has been designed to reinforce the independence of the judiciary. The question of the removal of a justice of the Supreme Court on the ground of inability or misbehaviour is to be determined by an independent tribunal, not by the executive."[102]

128. In **Meerabux** complaints of misbehaviour by the appellant were made by the Bar Association to the Governor-General. The appellant, a High Court Judge of Belize was subsequently removed from office by the Governor-General on the advice of the Belize

[101] **Meerabux v The Attorney General** [2005] 66 WIR 113, paragraph 16
[102] **Meerabux v The Attorney General** [2005] 66 WIR 113, paragraph 36

Advisory Council. The appellant applied to the court for declarations that his rights under s 6(8) of the Constitution had been infringed. The High Court and Court of Appeal refused to grant the relief sought by the appellant. The appellant appealed to the Privy Council complaining that the decision of the BAC had been tainted by bias because the Chairman of the BAC was also a member of the Bar Association of Belize who made the complaints to Governor General. The appeal was dismissed.

129. The case of **Boyce** also concerned the issue of the removal of a judge. In that case, the issue was whether the conduct of Mr. Justice of Appeal Awish while sitting as a judge of the Supreme Court of Belize prior to his elevation, is relevant to his removal from office as a Justice of Appeal. Section 102 of the Constitution of Belize provides for the removal from office of a Justice of Appeal for inability or misbehaviour. The JLSC had refused to refer to BAC the question of whether Justice Awish should be removed from office for inability and/or misbehaviour brought by the appellants. The appellants complained of the judge's delays in delivering judgments as well as the manner in which he conducted proceedings in cases. The appeal was allowed. The Caribbean Court of Justice held that the JLSC was wrong to dismiss the complaint as being premature because the impugned conduct arose prior to the judge's elevation and that prior conduct may, depending on the case be relevant to an assessment of whether the question of the removal of a judicial officer should be referred to the BAC.

130. In both cases it is important to note that there was no merit review of the decision under challenge. The ground of unreasonableness was abandoned in **Meerabux**. The question whether the BAC acted irrationally in **Boyce** was left undecided. The main grounds of review in both cases were from purely a process perspective of the incidents of a fair hearing. Bias in **Meerabux** and consideration of prior misconduct in **Boyce**.

> "**[39]** There remains then the common-law rule that proceedings of the kind contemplated by s 98(5) must be fair. In the context of the common law an oral hearing for the resolution of disputes is not mandatory. Fairness does not always require such proceedings to be held in public. The advantages of subjecting proceedings to public scrutiny are well known. Where grave allegations are made, as was the case here, they ought, unless there are compelling reasons to the contrary, be subjected to the test of

public scrutiny. This protects persons against whom allegations are made in secret from misunderstandings based on suspicion and rumour. It makes the proceedings transparent by bringing them out into the open for all to see. It reinforces the need for self-discipline in the conduct of the proceedings by the decision-maker and it contributes to public confidence.

[40] But the common law does not go so far as to lay this down as a basic rule of procedural fairness. As Prof Feldman in *English Public Law* (2004), para 15-04, has explained, the common-law requirements of procedural fairness are essentially two-fold: the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made or implemented, and he has the right to an unbiased tribunal. Moreover, publicity may be the very last thing that a judge against whom complaints have been made which he believes to be unfounded and who wishes to return to the Bench will want. *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81, where the inquiry into the sheriff's fitness for office was held in private, was such a case. So there is no absolute rule on this point. The question whether the proceedings are fair must be determined by looking at the proceedings as a whole."[103]

131. **Boyce** is particularly useful for not only is it a judgment of a Caribbean apex Court, the Caribbean Court of Justice but in its reliance on **Rees** to summarise the important powers of the JLSC and its constitutional significance in the unique framework.

132. As to the JLSC's (in this case the Prime Minister) filtering process, Mr. Justice Anderson remarked:

> "Both sides agreed that in relation to the role of the Commission in the removal process, the cases of **Meerabux v The Attorney General of Belize and The Bar Association of Belize** and **Rees v Crane** were applicable. The arguments canvassed before us were that the JLSC is not a "conduit" for the transferral of complaints to the Council but is tasked with ensuring that claims are not "fanciful or of the crack-pot variety or hopelessly groundless". In doing so, the Commission need "not

[103] **Meerabux v The Attorney General** [2005] 66 WIR 113, paragraphs 39-40

establish the validity of the allegations" but must assess the complaint "to see if it is sufficiently serious to warrant referral". Before the Commission decides to refer, it must "be satisfied that the complaint has prima facie sufficient basis in fact". The Appellants suggested, however, that at the stage of the Commission's enquiry, the threshold would be low."[104]

133. It examined both **Rees** and **Wilson** to make clear the JLSC's role (the Tier 1 process). It bears repeating:

> "[33] The section makes clear that the JLSC's role in the removal process is neither that of a mere conduit for complaints nor the decider on the merits of the complaint. The role of the Commission is to consider and recommend while the BAC's role is to investigate and advise. The JLSC considers whether there is sufficient evidence of inability and/or misbehaviour to justify referring matters to the BAC; if referred, the BAC investigates and evaluates the merits of the evidence presented to it before reporting its findings and advice to the Governor-General. **Meerabux** and **Rees** are at one on this point. In Meerabux, which involved the question of the removal of a Supreme Court Judge under section 98 of the Constitution (which is similar in terms to section 102), Conteh CJ opined that the "validity, veracity or otherwise of the allegations is for the Belize Advisory Council…the fact-finding and reporting body charged with the responsibility of establishing the veracity or otherwise of the allegations by an enquiry into them". That being said, Conteh CJ, referring to the role of the Governor-General (now assumed by the Commission) in terms of the referral process, opined that:
>
> > "…there must be present some indicia of investigation by the Governor General into allegations levelled against a judge. It may not be the fullblown battle royale of the adversarial process or one involving the forensic skills of a sleuth, but in the process of considering whether the question of the removal of a judge ought to be investigated by referral to

[104] **Boyce v Judicial Legal Services Commission** [2018] CCJ 23, paragraph 29

> the Belize Advisory Council, the Governor-General must surely do some probing, some investigating to establish that the allegations are not merely fanciful or hopelessly groundless. In this process, the GovernorGeneral must, in consonance with natural justice and fair play, hear from the judge or give him an opportunity to put his own side or version of whatever the allegations may be about. This requirement would be fulfilled if the Governor-General writes to or informs the judge about the allegations. This act itself is, in my opinion, investigatory.
>
> But in my view, this investigation by the Governor-General at the consideration stage of the question of the removal of a judge is not to establish the validity of the allegations, but I think to ensure that they are not fanciful or of the crack-pot variety or hopelessly groundless."

……

[35] The Board also opined that the decision by the commission to recommend the impeachment of a judge "must be made…only upon allegations which have substance and require public airing, rather than…alternative and sensitive resolution." Their Lordships also outlined the distinct stages of removal under section 137 of the Constitution of Trinidad and Tobago, the terms of which are similar in context to the removal provisions in Belize.

.....

[36] In making the determination as to whether to refer, there is a low threshold in establishing the existence of a prima facie case.

……

[37] The authorities discussed are all ad idem as to the role and function of the Commission. Once a complaint is lodged with the Commission, its consideration process must be triggered. Put differently, once it receives a complaint, the JLSC must consider and assess whether the grievances outlined are of such gravity and

are sufficiently established on the facts before it, that a referral for investigation is warranted so that the Council can then evaluate whether there actually is sufficient evidence to justify taking the matter further. The Commission is not a mere channel for transmitting complaints to the Council; it has an independent discretion to exercise. However, whereas there is a discretion as to whether the question of removal should be referred to the BAC for investigation; there is none as it relates to the requirement for proper consideration."[105]

134. In **Levers**, it was brought to the attention of Justice Levers by the Chief Justice of **17** incidents in which her conduct was open to criticism. This included discourtesy to counsel, unfavourable treatment of female complainants, lack of sensitivity and injudicious use of language and criticism of fellow judges. The Chief Justice then wrote to the Governor about Justice Levers' behaviour. Justice Levers was given an opportunity to respond by the Governor to the allegations in which she submitted that no case of misbehaviour was made out. Thereafter, the Governor informed Justice Levers that he had decided to refer her conduct to a tribunal. The tribunal expressed the view that Justice Levers was guilty of misbehaviour justifying removal and advised that the question of her removal should be referred to the Privy Council. Justice Levers subsequently challenged the tribunal's conclusion contending that the tribunal had exceeded its functions in expressing those conclusions and that the procedure that was followed, before and after the appointment of the tribunal had infringed the principles of natural justice. The Privy Council was satisfied that Justice Lever's misconduct showed that she was unfit to continue to serve as a judge.

135. The removal mechanism in the Cayman Islands is found in section 49J of the Cayman Islands (Constitution) Order 1972:

"**[2]** Subsections (2) and (4) of s 49J of the Cayman Islands (Constitution) Order 1972 ('the Constitution') provide as follows:

'(2) A judge of the Grand Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or

[105] **Boyce v Judicial Legal Services Commission** [2018] CCJ 23, paragraphs 33, 35, 36 and 37

mind or any other cause) or for misbehaviour …

(4) If the Governor considers that the question of removing a judge of the Grand Court from office for inability as aforesaid or for misbehaviour ought to be investigated then—

(a) the Governor shall appoint a tribunal, which shall consist of a Chairman and not less than two other members selected by the Governor from among persons who hold or have held high judicial office.

(b) the tribunal shall inquire into the matter and report on the facts thereof to the Governor and advise the Governor whether he should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee …"

136. The Law Lords found similarities with the section 137 referral process. It recognised that similarly under this Constitution there existed pre-initiation processes which incorporated basic principles of fairness. To that extent the Chief Justice should have alerted the sitting Judge of the complaint before making any reference to the initiator of the process.

Returning Home: A Societal Context

"Trinidad may seem complex but to anyone who knows it is a simple colonial philistine society"- Sir Vidiadhar Surajprasad (VS) Naipaul[106]

137. At the hearing I raised the question of how is the use of power to be viewed in our Caribbean context of our societies that are usually suspicious of authority. Indeed suspicion of a legal order that was superimposed on its constituents and was not one that was autochthonous and organic. There is no greater indicator of our society's perception of the independence of the Judiciary than in the Mighty Spoiler's calypso "Magistrate Try Himself" and the question of how our judges are to be held accountable. He sang of a Magistrate conducting his own trial of criminal charges brought against himself: *"himself asked himself you are charged for speeding/himself told himself de police man lying/himself told himself*

[106] (1958), Times Literary Supplement

don't shout/and he charge himself with contempt of court."

138. Professor Drayton[107] points out that our constitutional lineage is much a feature of our colonial repression. To that extent the poignant societal question for the Judiciary raised by the Mighty Spoiler, as it is with all holders of power is, who shall guard the guards? What objective mechanisms are in place to prevent tyranny, abuse of power and privileges?

139. Moreover, the question is pertinent for reflection on the role to be played by the judge in the changing landscape of small Caribbean societies. With a unique Trinbagonian experience a multicultural society with undertones of racial conflict, how are relationships between the Judiciary, Legislature, the Executive and the public perceived? In this society there is a fierce sense of equality, repulsion of oppression, suspicious of restraint. Add to this the baggage of a largely post-colonial slave and indentured population, the fact that our supreme law was a negotiated instrument with our colonial rulers and not organically developed and fashioned to meet the needs of a unique post-colonial society, throws up a very complex social order. Historically, our peoples have borne the scars of a world of privilege, elitism and inequality. It is natural in this society to have a heightened sense of injustice against barriers to accountability.

140. The challenge then is, for our laws and our Constitution to have meaning, it must earn the trust of our peoples.

141. To a certain extent the judgments of our constitutional courts have begun to untangle our society from its colonial baggage of unjust laws and begun to reshape our legal world consistent with the new dynamism of post-colonial Trinbagonian society. These judgments are heavily value laden on changing perceptions of the demands of our publics for freedom and equality. See **Jason Jones v The Attorney General of Trinidad and Tobago, The Equal Opportunity Commission, The Trinidad and Tobago Council of Evangelical Churches, The Sanatan Dharma Maha Sabha of Trinidad and Tobago** CV.2017-00720, **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (No2)** 64

[107]"Whose Constitution? Law, Justice and History in the Caribbean" Sixth Distinguished Jurist Lecture 2016 by Professor Richard Drayton PhD FRHistS

WIR 68, **Sanatan Dharma Maha Sabha v The Attorney General of Trinidad and Tobago** 76 W.I.R 378, **Sharon Roop v The Attorney General of Trinidad and Tobago** CV2017-03276.

142. How a Prime Minister, himself under intense public scrutiny, is to respond to the allegation of abuse of power of a judge is a matter steeped in societal suspicion and latent distrust. It is also adjudged against changing societal norms and values. Any attempt to untangle these issues must be done with extreme delicacy on transparent terms and the clearest of evidence.

Section 137: Trinidad and Tobago Judiciary's Statements of Principle and Guidelines for Judicial Conduct

143. The Judiciary laudably and consistent with international trends have implemented a statement of principles. See Latimer Principles V.1(a) –(b). This is not binding and a breach of them do not warrant removal from office. However, the codes are treated as a means of buttressing judicial accountability by providing judges guidance on their conduct both professionally and in their private lives.

144. The Statements of Principle and Guidelines for Judicial Conduct in Trinidad and Tobago followed from the development of the Bangalore Principles of Judicial Conduct which incorporated the six core judicial values: independence, impartiality, integrity, propriety, equality, and competence and diligence. In 2007 the United Nations Human Rights Commission (UNHRC) endorsed the Bangalore Principles. At the 9th Meeting of Caribbean Heads of Judiciary in Port of Spain, Trinidad, the importance of a judicial code of ethical conduct for Caribbean judiciaries were addressed. In November 2011, after a process of wide consultation, Trinidad and Tobago's Statements of Principle and Guidelines for Judicial Conduct was finalised. I have set out as an appendix[108] the relevant principles for this case from our Statements of Principle and Guidelines for Judicial Conduct.

145. There is wide breadth to these rules and guidance. Although a breach of these rules do not provide a ground for removal from office, it enhances judicial accountability by calling

[108] See Appendix A

upon judges to adjust their moral compass and to minimise the possibility of calls for removal from office. Institutionally, it provides a transparent method of demonstrating to the public the high standards to which judges ought to abide.

A Compromise of Constitutional Principles?

146. Does section 137 represent a compromise of the principle of the independence of the Judiciary and the separation of powers? There was a conditional "yes" by all the parties. The parties recognise that our removal mechanism represents a "modest inroad" into the separation of powers with the power to initiate the process of removal conferred in the Executive. It is, however, a permissible compromise and is in fact a model replicated in other Commonwealth countries.

147. However, I am still unsettled by this constitutional arrangement. Having regard to the constitutional provision, the importance of the independence of the Judiciary, the delicate balance of accountability and independence, the rule of law being upheld by a Judiciary that is free and untangled from abuse of power by the Executive, the section 137 involvement of the Prime Minister may go too far. The Prime Minister effectively has a whip in hand always over the Chief Justice. Not only is the Executive in the shape of the Prime Minister in a plainly partisan manner making the referral and formatting the charge but also appointing the judges to hear the charges setting up his own machinery to remove the Chief Justice. The Mustill Report makes it plain that such a system carries remarkable consequences in this complex multicultural society. While we trust that those that sit in the seat of the Chief Justice are robust and fearless, I am discomforted with such an ultimate sanction being forever over a Chief Justice's head which may affect a sitting Chief Justice who may not be of "sterner stuff".

148. Some comfort lies in the fact that the Prime Minister's actions are subject to judicial review and to the review of the Court of public opinion. However, a power such as this if abused is capable of having disastrous consequences to both the Chief Justice and the wider Judiciary. It is an "Achilles heel" in our Constitution which hopefully can be the subject of future discussions for review.

149. In the Queens Hall Debates, referred to by Counsel for the LATT, it was noted by the

architects of the Constitution that some level of comfort was taken by the fact that several Commonwealth countries had this model. The fact that other jurisdictions have the same provision is not a satisfactory answer, these are nations with a different culture and a different perception of the power of the Executive. One only needs to look at the case of **Attorney General v Mutuna and others Appeal** No. 088/2012, SCZ/8/185/2012 which Lord Carnwath notionally observed the bare tenets of good public governance. Was that a model suitable for a country with a history such as ours? Where on the one hand as **Endell Thomas v Attorney General** [1981] UKPC 28 pointed out great pains was made to insulate serval public commissions from political interference and even more recently Aboud J in **The Attorney General of Trinidad and Tobago v The Law Association of Trinidad and Tobago and The Judges of the Supreme Court** CV2018-01231 (the sabbatical case) discussed our insulation from the Executive, yet the head of our Judiciary is nakedly exposed to it seems to be a constitutional aberration.

150. This constitutional dilemma is not an issue in this case, but it underscores the delicacy in the exercise of power under this section.

The Section 137 Process-Summary of Principles

151. This brief excursion around the Commonwealth and a reflection on the various contexts in which this section 137 power exists, demonstrates the subtle nuance of power, the delicacy of the task, and the maturity of thought and restraint necessary to maintaining equanimity with conflicting principles of law.

152. Each of the three stage process involve their own set of complex considerations. With respect to the Tier I process the question of referral is not a decision to be made lightly as section 137(4) demonstrates that even such a referral can jeopardise the status of the judge who may be suspended or stigmatised in the eyes of a suspicious public.

153. As there are no constitutional provisions that prescribe detailed process or guidance based on the number of authorities rehearsed above, I set out a summary of the principles which apply to the exercise of the section 137 (3) referral discretion. It can be viewed as a protocol to guide a Prime Minister in the exercise of this power:

- The section 137 process preserves the independence of the Judiciary and uphold the rule of law by making it accountable for serious acts of misconduct which renders the judge unfit for office.
- The provisions contemplate three stages with modest though significant involvement by the Executive.
- A decision to refer is a serious one with severe consequences. It sets in motion a process which can only end after the second or third stages and in most cases accompanied by the suspension of the judge. It sends a message that the Chief Justice is subjected to an impeachment process and bound to negatively impact the respect and confidence to the judicial function.
- While no express provisions are made in the Constitution outlining the processes to be followed, at each stage process choices are to be compliant with principles of common law and constitutional values. While no statutory guide is provided for the exercise of the Prime Minister's discretion he must comport with the general principles of public law.
- The Prime Minister must exercise a real discretion in considering a compliant. He is not simply a conduit for complaints.
- The Prime Minister must assess the quality of the evidence and make a determination as to fact and law on the question of whether there is material relevant to warrant a further investigation.
- The Prime Minister must be satisfied that the complaint has a prima facie basis in fact sufficiently serious to warrant a representation that the Chief Justice should be removed from office.
- The Prime Minister must ask himself the **Gibraltar** questions: Has the Chief Justice's conduct affected directly his ability to carry out the duties and discharge the function of his office; Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions; Would it be perceived

to be inimical to the due administration of justice in Trinidad and Tobago if the Chief Justice remains in office; Has the office of the Chief Justice been brought into disrepute by the Chief Justice's conduct.

- The discretion is to be exercised cognisant of the importance of the separation of powers, the independence of the Judiciary and the rule of law.
- The Prime Minister must conduct such pre-investigation enquiries that are appropriate in the given circumstances to discharge his **Tameside**[109] duty. In short, he must inform himself of the relevant facts, if required do some probing or investigation so as to establish that the allegations are not merely fanciful or hopelessly groundless. In doing so however, the Prime Minister is not conducting a fact finding exercise and is not engaged in an adversarial process or develop the investigation skills of a sleuth. However, he must apply his mind to the available evidence.
- Ultimately once seized of a complaint the Prime Minister must make a decision on it after adopting such steps prudent for determining whether circumstances warrant the referral of the question.
- His opinion must be honestly held and be based on the relevant legal standard on the facts available to him. He must determine if the facts alleged are sufficiently plausible to warrant the establishment of a Tribunal.
- It is open to the Prime Minister to decide if the allegations, even those justified, are not sufficiently grave to justify impeachment. While the highest standards are expected of a Chief Justice, not every failure to meet those standards would necessarily be enough to justify the removal.[110]

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[109] **Secretary of State for Education and Science v Tameside Metropolitan Borough Council** [1977] AC 1014

[110] **Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)** [2009] UKPC 43:

> "**[30]** A summary of the standard of behaviour to be expected from a judge was given by Gonthier J when delivering the judgment of the Supreme Court of Canada in *Therrien v Canada (Ministry of Justice) and another* [2001] 2 SCR 3:
>
> > "The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and

- Even though the threshold is naturally relatively low as the Prime Minister is not to making any finding of fact, however, the threshold is a definite and serious one.
- The Prime Minister is exercising a public duty subject to the rules of fairness. See **Permanent Secretary, Ministry of Foreign Affairs and Prime Minister Patrick Manning v Feroza Ramjohn** [2011] UKPC 20 and **Taylor**. The subject of the complaint must be given fair opportunity to be heard. In certain limited circumstances the complainant would also be entitled to be heard before a complaint is "dismissed."
- Any reference to a Tribunal must be clear in terms.
- The Prime Minister must moreover respect the limits of his jurisdiction and function.[111]
- The Prime Minister must give written reasons for his decision (discussed later in this judgment).
- The Prime Minister must only refer on allegations which have substance and require public airing rather than alternative and sensitive resolution. Later in this judgment I have opined that prior to referring the question the Prime Minister may and should in most cases ask the complainant and the subject of the complaint to attempt an ADR process and to report to him on the results of the meeting.

Part C

The Standard of Review

"Judicial independence and judicial accountability are not inconsistent. The Judiciary cannot

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integrity. What is demanded of them is something far above what is demanded of their fellow citizens."

[111] See **Madam Justice Levers, Hearing on the Report of (The Cayman Islands)** [2010] UKPC 24 (29 July 2010) admonishment of the tribunal for going too far.:

> "…the Board considers that it was not appropriate for the Tribunal to castigate Levers J's conduct in the extreme terms adopted in the Executive Summary. It is one thing for an investigating tribunal to identify conduct that it considers amounts to misbehaviour justifying removal. It is quite another to do so in terms that may irreparably damage the reputation of a judge before her conduct has been appraised by the Judicial Committee."

treat itself as ungovernable or elitist. It must be accountable to the other branches of a government, to itself and to the people. The maintenance of judicial independence depends upon public support for the judicial process and respect for the principle" Chief Justice David Simmons[112]

154. The constitutional framework of section 137 deliberately excludes the local Judiciary from the decision making process to remove a judge or Chief Justice. Yet in the exercise of its supervisory jurisdiction of judicial review the local Judiciary can influence its outcome. While section 137 upholds the rule of law by balancing values of the independence of the Judiciary and accountability, it cannot exclude the role of the Court to enforce the rule of law as the guardians of the standard of legality to ensure that public bodies and no less the Prime Minister is subject to the law. A reviewing Court should be sensitive to this. It immediately raises the pressing question interrogated by the parties in this case: What is the appropriate standard of review to be applied by our Courts in reviewing the exercise of the section 137 referral power of the Executive? In the modern spectrum of review, from taking a highly "deferential" approach to the Executive, to making very rigorous demands on the Executive to justify its decision and decision making process, where does the review of this section 137 referral lie? The parties naturally posited the two extreme views: a demanding or intense standard of review on one end of the spectrum to a less rigorous or "light touch" approach to the decision of the Prime Minister on the other. The detailed arguments from the attorneys in this case took us on an excursion around the globe to determine the suitable standard of review.[113] It inevitably has led this Court to revisit the Wednesbury standard of review and to posit a need to recognise a merits based standard of "correctness" or proportionality as a separate ground of review.

155. In this case where the main challenges have been on the grounds of illegality, irrationality/unreasonableness, relevant/irrelevant considerations and fair hearing, I examine in this part the applicable standard of review that a Caribbean Court should utilise

[112] "Judicial Independence and Accountability" Sir David Simmons, Chief Justice of Barbados, Commonwealth Law Conferences, Nairobi, Kenya, 2007.
[113] United Kingdom, Canada, Australia, Africa, New Zealand, India

in reviewing the exercise of the section 137 power. I also revisit the Wednesbury reasonableness test to determine whether the evolved "anxious scrutiny" test should now best be reserved for a separate head of review of proportionality rather than under a reasonableness review.

156. The main thrust of the LATT's case is that the Court must take an intense and demanding review of the decision of the Prime Minister. It advocated for a modern modified or flexible standard and not a rigorous irrationality standard. This modern flexible standard is appropriate in cases in which constitutional principles are in issue. It is akin to a merits based approach under the euphemism of "anxious scrutiny". It argues that in a case relating to a matter of disciplining judges a matter of high constitutional principle, such an intense review is required. It relied on Lord Mance's judgment in **Kennedy v Charity Commission (Secretary of State for Justice and others intervening)** [2015] AC 455 advocating for more demanding scrutiny of decisions which impact constitutional rights :

> "**55** Speaking generally, it may be true (as Laws J said in a passage also quoted by Lord Bingham from *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading Ltd* [1997] 1 CMLR 250, 278-279) that "*Wednesbury* and European review are two different models—one looser, one tighter—of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power". But the right approach is now surely to recognise, as *de Smith's Judicial Review*, 7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation. Among the categories of situation identified in *de Smith* are those where a common law right or constitutional principle is in issue. In the present case, the issue concerns the principles of accountability and transparency, which are contained in the Charities Act and reinforced by common law considerations and which have particular relevance in relation to a report by which the Charity Commission makes to explain to the public its conduct and the outcome of an inquiry undertaken in the public interest."

157. The LATT also referred to Lord Carnwath writing extra judicially[114] on the Zambian case of **Attorney General v Mutuna and others**:

> "As far as I can judge from my limited reading of the case, the arguments turned on a relatively narrow application of that principle, based particularly on Lord Diplock's famously restrictive definition of irrationality in the CCSU case in 1985 (was the decision "so outrageous in its defiance of logic or of accepted moral standards that no reasonable person in his position could have acted in the way he did?"). I confess, with respect to that great judge, that I have never found that part of his speech easy to follow. Judicial outrage seems a curiously inappropriate criterion for the reasoned and objective decision-making normally required of a judge. In any event, that narrow approach has been substantially modified in later case-law, particularly where constitutional principles or basic human rights are at stake:
>
> > "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends upon the context."
>
> I quote the leading judgment of Lord Mance in a Supreme Court case earlier this year. It may be, I say no more, that the flexibility allowed by such developments in the law provides a route to a greater degree of judicial supervision of decisions relating to the discipline of judges, even in cases where constitution appears to give unfettered power to the President."

158. The Defendant, however, argued that there is no requirement to subject this decision to the anxious scrutiny test as no constitutional right is being impacted. The test remains the "Wednesbury unreasonableness" test or light approach to determine whether the decision was so outrageous in its defiance of logic of accepted moral standards that no reasonable person in the position would have acted in the way he did. They also relied on a judicial review

[114] Lord Carnwath at the Commonwealth Magistrates' and Judges' Conference, Zambia "Discipline and Removal of Senior Judges" 9 September 2014 at page [6]

of a decision to remove a judge in Australia in **Bruce v Cole** (1998) 45 NSWLR 163.[115]

159. With the LATT's analysis the Court is entitled to probe the Prime Minister's decision closely to examine his trends of analysis, his presumptions, his considerations and judge it against the underlying values and constitutional principles in play. With the Defendant's analysis all that is required is to determine whether the decision is logical, not to determine if it is correct. The Court is simply entitled to say that the decision is one of a range of possible outcomes. The fact that the Court may disagree with it does not make it unreasonable so long as it is inherently logical in its approach. There is merit in both parties arguments.

160. **Context:** The parties would agree that the starting point is context. Context is everything. To that extent the sections above have already set out the complex and nuanced context of the section 137 power that is under examination. A first consideration is that section 137 confers a wide and unfettered discretion on a politician. This section 137 decision is however not a political decision at all for the reasons exhaustively examined above. The recent Brexit case of **R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland** [2019] UKSC 41 demonstrates clearly the Court's role in reviewing the acts of the Executive. It must ensure that the Executive does not operate above the law. The constitutional principles dictate the legal limits of power. There is a need to provide reasons to justify the exercise of power and to the extent the decision of the Executive violates fundamental constitutional principles there must be a reasonable justification for it. The separation of powers confers on the Judiciary the important role to ensure that the Executive stays within its legal limits.[116]

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[115] **Bruce v Cole** (1998) 45 NSWLR 163, paragraph 22

[116] **R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland** [2019] UKSC 41:

[48]….So the same question arises as in relation to Parliamentary sovereignty: what is the legal limit upon the power to prorogue which makes it compatible with the ability of Parliament to carry out its constitutional functions?

[49] In answering that question, it is of some assistance to consider how the courts have dealt with situations where the exercise of a power conferred by statute, rather than one arising under the prerogative, was liable to affect the operation of a constitutional principle. The approach which they have adopted has concentrated on the effect of the exercise of the power upon the operation of the relevant constitutional principle. Unless the terms of the statute indicate a contrary intention, the courts have set a limit to the lawful exercise of the power by holding that the extent to which the measure impedes or frustrates the operation of the relevant principle must have a reasonable justification. That approach can be seen, for example, in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR

161. **Wednesbury-A Sliding Scale:** I have already examined the sliding scale of the reasonableness review in my previous judgments representing the evaluation of the traditional Wednesbury reasonableness standard: **TOSL Engineering Ltd v Minister of Labour and Small and Micro Enterprises Development** CV2013-02501, **Primanth Geelal and Rupnarine Geelal v The Chairman, Aldermen, Councilors And Electors Of The Region Of San Juan/Laventille** CV2017-04558 and **National Carnival Bands Association of Trinidad and Tobago v Dr. Nyan Gadsby-Dolly, The Minister of Community Development, Culture and the Arts and Trinidad and Tobago Carnival Bands Association** CV2018-03359. I even offered the opinion that the Wednesbury test as it now exists runs perilously close to a "dressed up" merits review. I confess that there is a great degree of uncertainty with the modern view of the application of the Wednesbury test and what the Court is actually doing.[117]

162. The authorities relied upon by the LATT calling for close examination of the decision demonstrates that the hard edged review advocated by them is restricted only to areas where human rights are in play and not mere matters of general constitutional principles. The LATT has not pointed to any fundamental human right that is jeopardised in this case save for the no less important constitutional values of the separation of powers and the independence of the Judiciary.

163. The authority relied upon by the Defendant **Bruce v Cole** comes from a jurisdiction which is extremely deferential and has persevered with the traditional Wednesbury test resistant to the various modifications adopted in the United Kingdom over the years with the advent of convention rights. See **Judicial Review of Administrative Action by Mark Aronson, Bruce Dyer and Matthew Groves 4th Edition.** See also **W44/01A v Minister for Immigration** [2002] FCAFC 212, **W195/01A v Minister for Immigration** [2002] FCA 396, **W375/01A v Minister for Immigration** [2002] FCA 379, **Minister for Immigration and Multicultural Affairs Ex parte**

409, paras 80-82 and 88-89, where earlier authorities were discussed. A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation. However, a prerogative power is only effective to the extent that it is recognised by the common law: as was said in the *Case of Proclamations*, "the King hath no prerogative, but that which the law of the land allows him". A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.

[117] Lord Sumption gives the Administrative Law Bar Association Annual Lecture Anxious Scrutiny 4 November 2014

Applicant [2003] 198 ALR 59, **Bugdaycay v Secretary of State for Home Department** [1987] AC 514, R (Macrae) v **County of Herefordshire District Council** [2012] EWCA Civ 457. That is so in Australia for strictly constitutional arrangements in place in that territory which do not exist in our jurisdiction.

164. In my view the Defendant is correct that the reasonable standard should keep faith with the Wednesbury unreasonableness standard. However, the LATT is also correct that in matters of extreme constitutional importance like this one demands a close review by the Court. However, as the modern "anxious scrutiny" approach runs perilously close to a merits based review, such a standard should appropriately be recognised as a "proportionality review." The labels for these grounds are not esoteric. They are indeed substantial. A "reasonableness review" and "proportionality review" both immediately highlight the varying intensities of the review. Further, as a matter of process, it is important to highlight in advance to the decision maker the type of review under consideration, the burden of proof and the nature of the evidence required. Functionally, however, our analysis under either ground is theoretically achieving the same purpose, a level of satisfaction that the thought processes are consistent with good administrative practice and public law governance. In clarifying that a demanding review should be recognised as a proportionality review gives the law room to further evolve under the head of proportionality to a full merits review or a standard of correctness test, a standard recently developed in Canada![118]

165. **Wither Wednesbury Reasonableness**: It is time we clear this uncertain area of the law rather than leave under the umbrella of reasonableness a wide and uncertain spectrum of review. This case as well as the case of **Attorney General v Mutuna and others** demonstrates the impact the application of the wrong standard may have on the subjects affected by the decision. Indeed in **Attorney General v Mutuna and others** while the Court applied a light touch Wednesbury review, they saw the injustice in allowing the Tribunal to be convened and recommended that the President although legally correct ought not to proceed.

166. In my view the reasonableness standard is adequately described as an output oriented

[118] See the trilogy of **Canada v Vavilou** 2019 SCC 85, **Bell Canada v AG** 2019 SCC (two appeals)

concept. Its focus is on whether the result is a reasonable, logical and consistent. Any other standard requiring a more demanding review which approximates to whether the decision is correct in that whether different weight should have been given to different factors should better be placed under a separate ground of proportionality. In this way parties are clear with regard to the level of scrutiny, defendants are forewarned that justification of their decision is important and the Court has a free hand in the scrutiny of the merits of the decision. While both concepts are laden with value considerations in the latter core societal and constitutional values play a more dominate and dynamic role.

167. Our Courts have consistently applied the standard Wednesbury reasonableness standard as refined in **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935 (CCSU). **Wednesbury** requires another look at what was decided. **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**[119] in and of itself was a simple case of the plaintiff seeking to obtain from the court a declaration that the condition imposed by Wednesbury Corporation restricting children under the age of 15 years whether accompanied by an adult or not from attending Sunday performances in the plaintiff's cinema was ultra vires. The Court held that it was not ultra vires the licensing authority when allowing a theatre under section 1(1) of the Sunday Entertainments Act 1932 to be opened on Sundays to take into consideration matters concerning the well-being, physical and moral health and to impose a condition restricting their access to the theatre on Sundays.

168. One could argue that the restriction to see a movie on any given day interferes with one's right to movement or freedom of expression. How would **Wednesbury** be decided today by a modern judicial review Court? The answer immediately demonstrates that our review processes with the interplay of fundamental human rights are value laden. It simply makes the point that delicate value judgments are in play in the exercise of any discretion. No less so in the exercise of the section 137 power.

169. Lord Greene's analysis of the judicial review generally was that a discretion conferred by statute must be exercised within the established principles of law such as having regard to

[119] **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680

relevant considerations, disregarding matters not germane to the subject matter, not acting dishonestly or in bad faith or disregarding relevant considerations of public policy and acting unreasonably. This is uncontroversial. On the question of what is an unreasonable action he noted:

> "It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider.
>
> He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, **all** those things largely fall under one head."[120]

170. Once it has acted within those principles the discretion cannot be questioned. It is not an appeal on the merits nor does it substitute its views for the local authority. Lord Greene appreciated that the decision is in most case value based but on that matter regardless of the varied view on those values the discretion is not unreasonably exercised:

> "Theoretically it is true to say—and in practice it may operate in some cases—that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is right, but that would require overwhelming proof, and in this case the facts do not come anywhere near such

[120] **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680 at 682-683

a thing. Counsel in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense, not that it is what the court considers unreasonable, but that it is what the court considers is a decision that no reasonable body could have come to, which is a different thing altogether. The court may very well have different views from those of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse. All over the country, I have no doubt, on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority who are put in that position and, provided they act, as they have acted here, within the four corners of their jurisdiction, the court, in my opinion, cannot interfere."[121]

171. Explicitly, Lord Greene appreciated a margin of considerations based on the weight attributed to factors taken into account by the decision maker. Different views on the subject matter will be based on the weight different persons place on different values.

172. **CCSU** refined this test in a very restrictive manner but it ought not to detract from a number of important aspects in understanding **Wednesbury**. First, it was made in an era prior to the advent of the Convention and Human Rights legislation in UK. Second it was made in a period of high Executive authority with the main theme of a deferential approach and the struggle of Courts in dealing with ouster clauses and its own jurisdiction to review executive decisions. Third the subject matter of the decision was policy based with weight being placed on certain societal mores and values. There was a margin of appreciation within with the decision maker may decide what values were important for the decision. Fourth, the decision maker in **Wednesbury** was viewed as an expert so to speak in that area.

173. It should be noted that the Wednesbury reasonableness standard in truth is a last stop position. A final look at a decision after other well-known areas of review would already have been examined such as proper purpose, relevant considerations, legality. To that extent it is

[121] **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680 AT 683

a "bird's eye" approach to the decision making analysis. The relevance of **Wednesbury** is seen in **R v Somerset County Council ex p Fewings** [1995] 1 WLR 1037 , **R v Secretary of State OF Foreign and Commonwealth Affairs** [2008] QB 289, **Tesco Store Ltd v Secretary of State for the Environment** [1995] 1 WLR 759. In the House of Lords' case, **R (Pro-life Alliance) v BBC** [2003] UKHL 23 [2004] 1 AC 185 challenging a refusal to screen a party political broadcast, Lord Walker said:

> "The Wednesbury test, for all its defects, had the advantage of simplicity, and it might be thought unsatisfactory that it must now be replaced (when human rights are in play) by a much more complex and contextually sensitive approach. But the scope and reach of the Human Rights Act is so extensive that there is no alternative. It might be a mistake, at this stage in the bedding-down of the Human Rights Act, for your Lordships' House to go too far in attempting any comprehensive statement of principle. But it is clear that any simple 'one size fits all' formulation of the test would be impossible."

174. The difficulty with **Wednesbury** emerges with its application in **Council of Civil Service Unions** which imposed a rather stringent test:

> "By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 **All ER** 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…"[122]

175. **Anxious scrutiny:** The emergence of the anxious scrutiny doctrine or the "flexibility of the Wednesbury test" thereafter, in my view, was the natural counterfoil to this restricted view of Wednesbury that seemed to suggest an extremely deferential approach to reviews of the Executive.

176. The anxious scrutiny test first peeped through the case law in **Bugdaycay v Secretary of**

[122] **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935 at 951

State for the Home Department [1987] A.C. 514[123] and explained in **Kennedy**. In **Kennedy** there was a direct challenge to the right to withhold disclosure in the FOIA legislation based upon reading into the Act of the Article 10 Convention right of the right to freedom of expression. At the outset an important human right was being advanced as an important consideration in the subject matter of the dispute. While the section of the FOIA were not inconsistent with Article 10 rights Lord Mance commented that the Court should be sensitive to underlying human rights that are recognised in the common law in that instance the freedom of expression. To that extent that human right underpinned the concept of open justice and disclosure being necessary to fulfilling the public interest. Lord Mance powerfully commented on the flexibility of the Wednesbury test and noted the context of the emergence of the test of proportionality. Ultimately there are these two main points made by Lord Mance that the nature of judicial review is contextual and there is no longer a uniform application of a rigid test of Wednesbury unreasonableness or irrationality:

> "Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment'…where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' (per Lord Bridge of Harwich, at pp 596-597). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used: 'Review is stricter and the courts ask the question posed by the majority in *Brind*, namely, "whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable."[124]

177. The nature of the scrutiny by the reviewing Court is more demanding where individual

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[123] **Bugdaycay v Secretary of State for the Home Department** [1987] A.C. 514 at 531:
> "the court must … be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines".

[124] **Kennedy v Charity Commission (Secretary of State for Justice and others intervening)** [2015] AC 455, paragraph 53 referencing **IBA Healthcare Ltd v Office of Fair Trading** [2004] ICR 1364

rights are at stake and that the Court still does not conduct a merits review:

> "Both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved…"[125]

178. Unlike Lord Mance, Lord Carnwath was more reserved in his prediction of the impact of convention rights on the approach under the traditional heads of judicial review. He also noted that the practical consequences of taking the flexible approach of the reasonableness standard give rise to some uncertainty:

> "**244** ….If on the other hand I am wrong about the ability of the court to read down section 32, so that remedies under the FOIA are excluded, Mr Kennedy's article 10 rights could be asserted in court by an application for judicial review under HRA. Under HRA, as I have said, the claimant would have a right to full merits review by the court, again on fact and law. The court's function in such a case is to decide for itself whether the decision was in accordance with Convention rights; it is not a purely reviewing function: see *Huang v Secretary of State for Home Department* [2007] 2 **AC** 167, para 11, per Lord Bingham. Such proceedings for judicial review would incidentally provide an opportunity to test the scope of any related common law rights.
>
> **245** By contrast, under the alternative "common law" approach, which eschews reliance

[125] **Kennedy v Charity Commission (Secretary of State for Justice and others intervening)** [2015] AC 455, paragraph 54

on article 10, the applicant would be entitled only to judicial review on conventional administrative law principles, subject to the ordinary incidents as respects fees and costs. As Lord Mance JSC points out, there is authority for a closer or more "intense" form of review (or "anxious scrutiny") in some contexts, particularly where fundamental human rights (such as the right to life) or constitutional principles are at stake. However, even in cases to which it applies, as appears from the words of Lord Phillips MR (*R (Q) v Secretary of State for the Home Department* [2004] QB 36, para 112) cited by Lord Mance JSC (para 52), the role of the courts is often more about process than merits."

179. The Australian authorities were resistant to proportionality. See **Bruce v Cole**:

> "Mr Conti invoked the concept of 'proportionality', as explicating the well-known ground of unreasonableness based on the formulation of Lord Greene MR in Associated Provincial Practice Houses Ltd v Wednesbury Corporation [1948] 1KB 223 @ 229-230. It can be accepted that a complete lack of proportion between the consequences of a decision and the conduct upon which it operates may manifest unreasonableness in that sense. However, the Plaintiff also invoked 'proportionality' as a new and separate ground of review.
>
> The concept has proven to be useful in the Constitutional context for purposive powers and, for not dissimilar reasons, in the context of judicial review of subordinate legislation. (See Leask v Commonwealth (1996-7) 187 CLR 579 @ 593-5; 600; 612-5; 624; South Australia v Tanner (1989) 166 CLR 161 @ 165, 178; Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd (1996) 91 LGERA 31 p37-p38, p45-p46, p81-p84; Bayne "Reasonableness Proportionality and Delegated Legislation" (1993) 67 ALJ 448.
>
> Proportionality has not been adopted as a separate ground for review in the context of judicial review of administrative action, notwithstanding a considerable body of advocacy that it be adopted. See State of New South Wales v Macquarie Bank Ltd (1991) 30 NSWLR 302 p321-p325; Minister of State for Resources v Dover Fisheries Pty Ltd (1993) 43 FCR 565 @ 575-8; R v Secretary of State for the Housing Department

ex parte Brind [1991] 1 AC 896 p762, p766p767, p756, p769, p750; New South Wales v Law (1992) 45 IR 62 @ 63; Craig Administrative Law 4th ed 1994 p411-p421; Aronson & Dyer Judicial Review of Administrative Action 1996 @ 375-9.

The concept of proportionality is plainly more susceptible of permitting a court to trammel upon the merits of a decision than Wednesbury unreasonableness. This is not the occasion to take such a step in the development at administrative law, if it is to be taken at all,"

180. In Australia, the doctrine of proportionality remains "at the boundaries" of administrative law": **Bruce v Cole** (1998) 45 NSWLR 163 (per Spigelman CJ at 185).

181. However, what is clear is that while the Australian authorities are resistant to incorporating a merit review test, there is still debate on how it should be treated in the Caribbean while the United Kingdom and other parts of the Commonwealth have been adapting a proportionality test or conducting hard edged reviews or merits based reviews depending on the context of the dispute and the impact on human rights.

182. **From Prussia with Love**: The origin of proportionality comes from Prussia, in German law it can be traced back to the principle of necessity developed in the jurisprudence of Prussian administrative courts in the field of police law.[126] It has seeped through Europe and the rest of the world. In Canada, the proportionality analysis was introduced in **R v Oakes** [1986] 1 S.C.R. 103. In Latin America proportionality began to appear through violations on the principle of equality[127]. Unless there is an interference in the application of Conventions rights or rights under EU law, the proportionality test will not be used to judge the lawfulness of a public body's decision. In cases where such rights are not in issue, a decision that is "wholly" or "manifestly disproportionate" is likely to be "irrational." As such, proportionality is not

[126] American Balancing and German Proportionality- The Historical Origins: Mosche Cohen-Eliya, International Journal of Constitutional Law, Volume 8, Issue 2, April 2010.

[127] **Action of *tutela* number T-298, Jorge Eliecer Rangel Peña *v.* Recursos Naturales Renovables y del Ambiente, INDERENA, Action of *tutela* number T-28139, Juan de Jesús Jiménez *v.* COOP-FEBOR, decided by the 3rd Chamber of Revision of the Constitutional Court, 1994, Action for unconstitutionality C-022/96, made by Alvaro Montenegro García, decided by the Colombian Constitutional Court, sitting *en banque*, 1996, the '*juicio de amparo en revisión 1659/2006.***

commonly recognised as a ground for judicial review in cases that do not involve convention rights or rights under EU law. In such cases, the Courts apply an irrationality test.

> "Proportionality and judicial review share similar methodology. At their core lies the idea that the legality of decisions made by public authorities depends on the justification offered by the decision-maker. In the parlance of administrative law, the *quality* of the reasons matters.
>
> Proportionality and judicial review also allow for varying intensity of oversight. Different margins of appreciation apply in different circumstances, and courts must, in certain circumstances, defer to the decision maker. Judicial deference in both administrative and constitutional law is justified by the fact that there are many situations where there is no single right answer to the question under review. It is not always a judicial court's role to seek out whether a given question could be answered in a better way. Some decision makers must be afforded more leeway than others."[128]

183. I had previously examined the role of proportionality in our judicial review toolkit. See **National Carnival Bands Association** and **Geelal.** Proportionality is now gaining some force here in recent cases. See **Dale Makoonsingh v His Worship Mr. Aden Stroude** CV2018-00681 and **Sanctuary Workers' Union v The Minister of Labour and Small Enterprise Development** CV2019-01113. Notably in **Sanctuary Workers' Union** the Claimants actually pleaded proportionality as a separate ground of review from reasonableness. I believe this is the way forward in our jurisdiction.

184. It is clear in my view that the Court will not conduct a merits based review. However, a hard edged review to the extent that it incorporates the principles of proportionality will not be permissible as it was not properly advanced by the LATT in this way and the traditional view of the rigorous standard is restrained to matters where fundamental human rights is at stake. However, I do not agree with the Defendant that a decision with such an important impact on fundamental constitutional principles deserves a light touch approach similar to

[128] **Proportionality, Justification, Evidence and Deference: Perspectives from Canada** The Right Honourable Beverley McLachlin

that applied in the case of **Attorney General v Mutuna**. It is doubtful whether the Wednesbury test in the traditional application is a viable test in a modern democracy with such high demands of accountability, transparency and good public governance. The chains of **Wednesbury** ought not to shackle a Caribbean reviewing Court in the 21st century to prevent us from upholding the rule of law consistently with fundamental constitutional values enounced in our Preamble.

185. While I accept the LATT's submissions that the decision raises and impacts upon general principles of Constitutional law, the fact remains it has not impacted upon any identifiable human right which deserves "anxious scrutiny" by the Court. Indeed the function of the Courts in upholding the rule of law is to ensure that the generality of principles and the benefits of the many are not used to oppress and defeat the right of the individual. It is when the right of the individual whose only recourse is to turn to the law for protection that the Courts correctly become very demanding on public authorities. The LATT's appeal to deeper and more general constitutional principles for a more demanding review should be better placed as a proportionality review.

186. The emergence of the "anxious scrutiny" was an example of the Court overworking the concept of Wednesbury reasonableness in the face of laden value judgments which impacted upon core principles of the rule of law and human rights. "Anxious scrutiny" is an unhelpful expression of examining the merits with some detail and some care. Anxious scrutiny unhelpfully describes the judge as a "Gollum"[129] obsessed with the precious truth slithering through the valleys and hills of every sentence in a given decision. In truth the "anxious scrutiny test" was properly placed as a test of proportionality without really embracing it as a separate ground of review. But it is and ought not be.

187. The Wednesbury unreasonableness has already been stretched to its limit and such a further extension would make this ground of review no longer intelligible. It is better placed under a separate ground of proportionality. To this extent I note that our Judicial Review Act does not restrict the common law development of new grounds of review.

[129] A central character in J.R.R Tolkein's epic fantasy trilogy "The Lord of the Rings".

188. I agree, however, that regardless of nomenclature, that a careful review is required on the basis of the constitutional principles in play even in the absence of a challenge of fundamental human rights. This is such a case of grave constitutional importance of the rule of law and the separation of powers and independence of the Judiciary. Regardless of the standard applied, ultimately I have found the decision to be reasonable. So that there can be no doubt in such an important matter such as this I have examined this decision both through the traditional Wednesbury reasonable/rationality lens and that of a more demanding review of the Prime Minister's decision making, in deference to the LATT.

189. I have applied the following principles as the appropriate guide for the Court in its applicable standard of review on this judicial review claim:

- Judicial review is the mechanism by which the Courts fulfil the rule of law by preventing arbitrary, unwarranted and unlawful actions of the executive and public bodies. The principles governing judicial review seek to address the tension between judicial vigilance and judicial restraint to arrive at the right balance of legitimate administrative action. See **Kangaloo JA in Steve Ferguson v The Attorney General of Trinidad and Tobago** C.A. CIV 207/2010.

- Judicial review actions ought not to be viewed by this Defendant as an attack or an action against it but rather an examination of its decision and where appropriate be seen as an opportunity to improve the quality of the decision making process. See **Re Waldron** 1986 QB 824.

- The Court in an application for judicial review will not substitute its views for that of the administrator nor conduct an "appeal" of its decision. Its focus is on the process by which administrative decisions are made. See **Fordham, Judicial Review Handbook, 6th Edition** para 2.1.3 and **R v Panel on take overs and mergers ex parte Datafin PLC and another** [1987] QB 815.

- This is not an appeal from the decision of the Prime Minister. See **Reid v Secretary of State for Scotland** [1999] 2 AC 512 and **R v Secretary of State for the Home Department ex p Brind** [1990] 1 All ER 469. The Court cannot substitute its views

for the Minister and re consider this matter afresh. It is not part of the exercise of judicial review to substitute the opinion of the judiciary for that of the executive or public authority vested with the power to decide the matter in question. The main reason for this approach is that in judicial review the Court is concerned with the process by which a decision has been made and not the substance or merits of the decision. **R Crown Court at Manchester ex p McDonald** [1999] 1 WLR 841.

- In some case judicial review courts in determining whether a decision is illogical or irrational, are in reality engaged in a merit based review. To that extent Fordham in his Judicial Review Handbook 6th ed. (2012) p 30.1 recognised a "soft" and "hard edged" review. "Judicial Review principles demand an understanding of the defendant's body function, to decide questions such as whether its conduct (1) is reviewable at all (2) engages in "soft" or "hard" edged review and (3) involves a public wrong warranting the courts interference. Functional insight is essential to the court's approach complementing the contextualism which is the hallmark of judicial review."

- Decisions of a public body will be unlawful if it is irrational, illegal or procedurally improper. The test of "Wednesbury unreasonableness" is whether the decision could have been reached by a decision maker acting reasonably or whether it was within the range of reasonable decisions open to the decision maker. A deferential approach to an authority in not conducting merit based reviews preserves the doctrine of separation of powers. However, there are cases which warrant a greater intensity of review such as where property and human rights are involved. In such cases, the demands of accountability, transparency, rationality and fairness all call for anxious scrutiny of the merits of the decision. To this end, the Court have developed an issue sensitive approach to the question of the reasonableness test. **See Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, **R v Secretary of State for the Home Department** [2003] EWCA Civ 364.

- The Court will respect the decision making process with regard to its assessment of the facts and the law unless it trespasses the legal limits for the exercise of the discretion. To this extent the use of the word paying "deference" to a decision maker is an unfortunate expression as the Court does not abdicate its supervisory role nor show blind reverence to the decision. It is not abdicating our responsibility to ensure that decision making comports with the fundamentals of good public law governance. See **Dunsmuir v New Brunswick** [2008] 1 SCR 190 and **TOSL.**

- **Wednesbury** is not to be regarded as a monolithic concept. It is a mutable standard of review; "it is no Procrustean bed". There are now various standards of the **Wednesbury** ground of review. The graver the impact of the decision on the individual affected by it, the more substantial the justification that will be required of the decision maker and the discretionary area of judgment of the decision-maker is smaller; the standard of review of the Court is stricter. The "super-Wednesbury test", a more searching test in the context of fundamental rights, has been counterbalanced by a less searching standard in cases involving macro-economic issues or questions of policy. The intensity of review "will depend on the subject-matter in hand" which will call for variable reasonableness. Ultimately, the context of the decision will determine the required scrutiny of the Court. See **Fordham, Judicial Review Handbook**, 6th Edition para 60.6.1. In **Kennedy v Information Comr** (SC(E)) [2014] 2 WLR, Lord Mance JSC referenced **IBA Health Ltd v Office of Fair Trading** [2004] EWCA Civ 142, [2004] ICR 1364[130].

[130] Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith para 13-056-7). Examples are R v Secretary of State, Ex p Nottinghamshire County Council [1986] AC 240, and R v Secretary of State, Ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1 AC, per Lord Bridge of Harwich, at pp 596-597). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:

> "Review is stricter and the courts ask the question posed by the majority in Brind, namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.' (de Smith para 13-060, citing Ex p Brind [1991] 1 AC 696, 751, per

In appropriate cases the traditional Wednesbury unreasonableness test is not appropriate for a truly "hard edged review". The test of proportionality should be recognised under a separate ground of review.

- Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to procuring a favourable result or after it is taken with a view to procuring its modification or both. **R v Secretary of State for the Home Department ex p Doody** [1994] 1 AC 531 and **Lloyd v McMahon** [1987] AC 625.

- The public body must subscribe to the "Tameside duty" of sufficiently acquainting itself with relevant information, fairly presented and properly addressed and to take reasonable steps to acquaint itself with the relevant materials so that it can answer the questions before it correctly. See **Secretary of State for Education for Science v Tameside Metropolitan Borough Council** [1977] AC 1014, **Fordham, Judicial Review Handbook**, 6th Edition, para 51.1, **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago** CA. Civ P075/2018.

- It is a basic principle of administrative law that the public body should take into account all relevant consideration and no irrelevant considerations. See **R v Secretary of State for Trade and Industry, ex p Lonrho Plc** [1989] 1 WLR 525, 533D. The public body ought not to take into account irrelevant matters or refuse

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Lord Ackner)."

92. A further factor relevant to the intensity of review is whether the issue before the Tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment: see Ex p Brind [1991] 1 AC at 767, per Lord Lowry. On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene: such questions are to be answered not by reference to Wednesbury unreasonableness, but "in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge"' (R v Panel on Take-overs and Mergers, Ex p Guinness plc [1990] 1 QB 146, 184, per Lloyd LJ)."

to take into account matters relevant to the decision. See **R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions** [2001] 2 WLR 1389 at 50. In the absence of any statutory guide on what is relevant as in this case lies within the purview of the decision maker and subject to Wednesbury unreasonableness. See **Judicial Review Handbook, Fordham, and M. (6th ed.) at page 564, paragraph 56.2.4** and **R v (on the application of Jones) v North Warwickshire Borough Council** [2001] EWCA Civ 315 The Time 30th March 2001 at 20**:**

> *"*The general law as regards the duty of a public decision-maker to take relevant considerations into account is well-known. (1) If the operative statute provides a lexicon of relevant considerations to which attention is to be paid, then obviously the decision-maker must follow the lexicon. (2) If however the statute provides no such lexicon, or at least no exhaustive lexicon, then the decision-maker must decide for himself what he will take into account. In doing so he must obviously be guided by the policy and objects of the governing statute, but his decision as to what he will consider and what he will not consider is itself only to be reviewed on the conventional Wednesbury principle."

190. Having examined the applicable standard of review and the principles to govern the exercise of the Prime Minister's discretion in this section 137 process, I now turn to examine the facts in more detail and the parties' submissions on the Prime Minister's decision.

Part D

The LATT's Complaint and The Prime Minister's Decision

"The burden on judges are heavy. The pressures upon their independence vary with the enlightenment of the particular societies in which they are obliged to function"

- Sir Shridath Ramphal

191. It is important to appreciate from the outset, as correctly submitted by the Defendant,

that many complaints made about the Chief Justice were either found to be not substantiated by the LATT itself in its investigation. More importantly with respect to the complaints the LATT made about the Chief Justice only one complaint forms the subject of these proceedings: the HDC Housing issue. Implicitly, the LATT must be taken to accept the Prime Minister's reasoning, rationale and thinking process for rejecting the other complaints the LATT made against the Chief Justice.

192. This controversy commenced or around November 2017 to January 2018 with media publications levelling allegations against the Chief Justice of impropriety. The Trinidad Express Newspaper published allegations that the Chief Justice had sought to influence Judges of the Supreme Court of Judicature to alter their State provided security arrangements in favour of a private company at which a close friend of the Chief Justice worked (the "Security Allegation"). This allegation became sensationalised in the press with compromising photographs which were later alleged to have been photo shopped and the LATT saw no substance in the allegations of any close relationship. Prior to this controversy the LATT had passed a motion of no confidence in the Chief Justice arising out of his handling of certain judicial appointments.[131]

193. Emerging out of the series of sensational reporting however was the allegation that the Chief Justice had between 2013 and 2015 provided recommendations for twelve persons (including Dillian Johnson) to the Housing Development Corporation (the "HDC") for them to obtain public housing (the "Housing Allegation"); and that the Chief Justice had communicated by telephone and social media with a senior official at the HDC in order to fast-track the applications of those persons. It carried the inference that the CJ was acting in concert with convicted felons by seeking to defraud innocent persons to obtain HDC housing.

194. The media was relentless in its pursuit of the Chief Justice. For his part the Chief Justice exercised as he described restrained silence. As the Court of Appeal commented the silence did little to assuage the public nor the controversy. Eventually, on 29th November 2017 the Council of the LATT established a sub-committee (the "Committee") to inquire into the facts

[131] Referred to in the judgments of the Court of Appeal in the LATT inquiry proceedings

upon which the Security Allegation and the Housing Allegation were made and to report back to the Council.

195. On 30th November 2017, the LATT met with the Chief Justice who acknowledged that he recommended persons in need for housing consideration. He commented "is it wrong to help persons in need".

196. On the 15th of December 2017 via a press release issued by the Court Protocol and Information Unit the Chief Justice denied the Security Allegation and admitted that in 2015 he had forwarded the names of "needy and deserving persons" to the HDC for consideration as the HDC might consider appropriate.

197. The LATT wrote to the Chief Justice on 20th January 2018 explaining that it had established a Committee to investigate into the allegations. They also provided particulars of the Security Allegation and the Housing Allegation and invited him to provide the Committee with a response by 26th January 2018. The particulars were in the following terms:

> "(i) You recommended two persons for HDC housing in 2013, namely Calvin Asgarali and Sherwin Rawlins.
>
> (ii) You asked for favourable consideration for ten applicants for HDC housing in 2015, namely, Augustina Alexis, Kathy-Anne Alexis, Nicole St Clair, Agnes St Clair, John Allan, Eboni Fletcher, Hanna Guevara, Jermaine Ferguson, Kern Trotman and Natalie John.
>
> (iii) There is no letter from you in the HDC records concerning any of these recommendations, and the inference is that you made these recommendations orally or by some other social medium.
>
> (iv) You followed up your recommendations with WhatsApp messages and personal calls to a senior HDC manager, whose identity has not been disclosed to us.
>
> (v) You called the Managing Director of the HDC concerning outstanding applicants.
>
> (vi) In your WhatsApp message to and calls with the senior HDC manager, whose identity we have not been able to ascertain, you sought to encourage the HDC manager to fast track the applications.

(vii) Mr Dillian Johnson was one of the persons whose names were mentioned in your WhatsApp messages.

(viii) You caused your friend or acquaintance, Mr. Colin Edwards, to contact an HDC manager to make representations on behalf of two applicants for HDC housing, providing Mr Edwards for that purpose with the applicants' names and their application numbers. We have not been given the names of the two applicants.

(ix) You communicated with the Prime Minister, Dr Keith Rowley, sometime after the election in 2015, recommending the following applicants for HDC housing: Dylan Huggins, Carol Williams and Felicia Pierre.

(x) Dylan Huggins and Carol Williams were both persons who Mr. Kern Romano had approached and from whom he obtained money on the promise that you would intercede with the HDC on their behalf.

(xi) There were other persons, whose names were not given to us, who you recommended and were approached on similar terms by Mr. Romano.

(x) You recommended the persons referred to in (x) and (xi) above at the request of Mr Romano, your personal friend, and as a favour to him."

198. By a pre-action letter of 5th January 2018 the Chief Justice eventually defended himself rejecting as utterly false the defamatory allegations of corruption. On the 31st of January 2018 the Chief Justice's Attorneys-at-Law wrote to the LATT requesting copies of certain material from the LATT which they said was required before the Chief Justice could provide a substantive response. This material was provided on the 6th February 2018.

199. On 23rd February 2018 a pre-action protocol letter was issued to the LATT by the Chief Justice's Attorneys-at-Law notifying the LATT of the Chief Justice's intention to apply for judicial review of the LATT's decision to investigate the allegations against the Chief Justice. The LATT was requested to hold its hand on the Committee's inquiry until the Court's ruling on the matter.

200. The Chief Justice commenced judicial review proceedings against the LATT on 27th

February 2019. Kangaloo J found that the LATT had acted out with its authority under the Legal Profession Act by continuing its investigation into the allegations but that it was not actuated by bias. The Court of Appeal allowed the appeal and determined that section 137 of the Constitution did not restrict the LATT from enquiring into or investigating the conduct of the Chief Justice. On 16th August 2018 the Judicial Committee of the Privy Council determined that the LATT had the power to conduct its investigation.

201. There is no dispute that the complaint of the LATT was made bona fides and in good faith and in the discharge of its duty to uphold the administration of justice. The Court of Appeal and PC have already pronounced on the validity and integrity of the LATT in pursuing its investigation. The judgments of the Privy Council and Court of Appeal are pertinent to this dispute as they examined the nature of the section 137 process in determining whether the LATT's investigation unconstitutionally usurped the section 137 process.

202. This was extensively examined by the Court of Appeal and the Privy Council in their judgments (the LATT inquiry proceedings). In short those decisions establish:

(a) The complaints swirling in the public were serious to warrant an inquiry by the LATT.

(b) The LATT was empowered to conduct such an enquiry.

(c) The LATT cannot however call upon the Chief Justice to account to it.

(d) The LATT must respect the section 137 process and if it was of the view that a complaint should be made then it is for the Prime Minister to make his decision on the material submitted to it by the LATT.

(e) It was the allegations of corruption swirling by the sensational media reports which the Court of Appeal described as gravely serious. The Courts comments on the gravity of the matters before it then were general in nature and not referable to the precise allegations being pursued by the LATT in these proceedings.

(f) The LATT should however observe all the established tenets of fair process.

203. The LATT continued its investigations after the completion of those proceedings. On 22nd August 2018, the LATT invited the Chief Justice to respond to its letter of 20th January 2018.

On 24th of August 2018 the Chief Justice's Attorneys-at-Law requested copies all material referred to in the Committee's report which the LATT provided on 5th September 2018.

204. The Chief Justice wrote to the LATT on 14th September 2018 through his Attorneys-at-Law denying the Security Allegation. In relation to the Housing Allegation, the Chief Justice relied upon his press release of 15th December 2017. The Chief Justice therefore denied only two (2) of the twelve (12) particulars of the Housing Allegation.

The Complaint

205. Upon receiving the Chief Justice's response, the Committee prepared an addendum to its Report on 3rd October 2018 which it provided to Dr. Francis Alexis QC and Mr. Eamon H Courtenay SC seeking their advice on the complaints.

206. The main complaints of the Committee in its report were as follows:

i. The Chief Justice attempted to persuade judges to engage the services of a private security firm with which the Chief Justice's friend, Dillian Johnson, is concerned. However, the Committee found insufficient evidence to substantiate this allegation and did not pursue it.

ii. The Chief Justice discussed the judiciary's security needs with his friend Dillian Johnson via whatsapp messages in terms which suggest that the Chief Justice was informing him of opportunities which might be available and of interest to Mr. Johnson. (**I and ii referred to as the Security issues**)

iii. The Chief Justice recommended certain persons for HDC Housing and urged HDC officials to fast track the applications of those persons. (**the HDC issue**)

iv. The Chief Justice unilaterally discontinued security arrangements for Justice Frank Seepersad. **(the Seepersad J issue**)

v. The Chief Justice has not denied any of the allegations set out at paragraphs 4(i) to (vi) and (viii) to (xii) of the Committee's letter of 20th January 2018.

207. The Committee sought advice from Dr. Alexis QC and Mr. Courtenay SC on the following questions:

i. On the assumption that the allegations made against the Chief Justice are true, do they constitute inability to perform the functions of his office or misbehaviour under section 137 of the Constitution;

ii. Having regard to the said reports, is there a sufficient basis for the Prime Minister to represent to the President that the question of removing the Chief Justice ought to be investigated?; and

iii. In all the circumstances, would it be proper for the Law Association to call upon the Prime Minister to consider making such a representation to the President.

208. Mr. Courtenay SC and Dr. Alexis QC delivered their opinions to the LATT on the 19th of October 2018 and the 7th of November 2018 respectively.

209. The main findings of Mr. Courtenay SC were:

i. The Chief Justice's allegations set out in the Committee's Final Report do not support a finding that the Chief Justice is not performing the functions in his office nor is there any notion that he is suffering some mental or bodily infirmity or other cause that impacts his performance.

ii. The matters contained in the Final Report may after a section 137 investigation amount to "serious moral failings" and/or "conduct….which in the view of a wide cross section of reasonable members of the [Trinidad and Tobago] society beings the judiciary into public ridicule or opprobrium." If the **Gibraltar** questions are asked they may receive affirmative answers in light of the contents of the Final Report. On the assumption that the allegations made against the Chief Justice are true, they may constitute misbehaviour under section 137 of the Constitution.

iii. The allegations in the Final Report are very serious and have had a deleterious impact on the judiciary and the rule of law in Trinidad and Tobago. Whether there is a sufficient basis for the Prime Minister to represent to the President that question of removing the Chief Justice ought to be investigated can only be determined after the Prime Minister has given the Chief Justice an opportunity to respond to the

allegations. However, there is sufficient basis for the Prime Minister to represent to the President that the question of removing the Chief Justice ought to be investigated.

iv. There was sufficient gravity to the allegations for the LATT to send the Final Report to the Prime Minister. Inevitably, the Prime Minister ought reasonably to refer the very serious allegations together with any response from the Chief Justice to the President.

210. The main findings of Dr. Alexis QC were:

i. As to paragraph 4(i) of the LATT's letter of 20th January 2018, that the Chief Justice in 2013 recommended for HDC Housing the two persons there referred to cannot constitute inability or misbehaviour.

ii. As to paragraph 4(ii) of the LATT's letter of 20th January 2018, that the Chief Justice in 2015 asked for favourable consideration for HDC Housing the ten persons there referred to cannot constitute inability or misbehaviour.

iii. As to paragraph 4(iii), (iv), (v), (vi) and (viii) of the LATT's letter of 20th January 2018, it has not been shown that the manner or form in which the said recommendations were made by the Chief Justice was improper; so his use of that manner or form cannot constitute inability or misbehaviour.

iv. At paragraph 6.10 of his opinion, Dr. Alexis QC states:

> "What really, the Committee points to in this issue of HDC Housing is this. Inferentially, it appears that the Chief Justice recommended a certain three persons for HDC Housing, and sought the assistance of the Prime Minister in this regard, not because the Chief Justice determined that those three persons were needy and deserving, but because the help of the Chief Justice in this matter was sought by his close personal friend Kern Romero ('Romero'), who had received money from those three persons on his promising them that he could get the Chief Justice to intercede with HDC on their behalf."

In response to this, Dr. Alexis QC noted:

> "As to para 4(ix) of the letter, certain propositions may be stated tentatively. It

appears that Dylan Huggins and Carol Williams were interceded for regarding HDC housing by the Chief Justice on the Chief Justice being approached by Romero in that behalf. If so, and if the Chief Justice forwarded the names of Huggins and Williams as needy and deserving persons, a certain question arises, namely, whether the Chief Justice, independently of Romero, had indeed genuinely satisfied himself that Huggins and Williams were needy and deserving. It must be borne in mind that the Committee is satisfied there is no evidence to contradict the assertion by the Chief Justice that he knew nothing of Romero's fraudulent scheme, para 6.26 refers. Further focus may, then, be put on the circumstances surrounding the Chief Justice recommending Huggins and Williams for HDC Housing."

v. A Chief Justice runs a serious risk of being held accountable for showing extremely poor judgment in entering and maintaining or developing a close personal relationship with a person who has the potential to being into disrepute both the office of the Chief Justice and the administration of justice. The Chief Justice must expect to have to answer to this ground regarding both Kern Romero and Dillan Johnson. (this latter allegation was apparently discarded by the Claimant after receipt of the Chief Justice's response on 14th September 2018 and forms no part of the present challenge.)

vi. The way the Chief Justice handled the issue of security for Justice Seepersad may be unfortunate but cannot constitute inability or misbehaviour.

vii. It is not for the LATT to decide whether there is a sufficient basis for the Prime Minister to make a removal representation regarding the Chief Justice. Rather the LATT may bring to the attention of the Prime Minister such material as it has, and leave it to the Prime Minister to consider and decide whether there is a sufficient basis for him to make such removal representation.

211. Interestingly, to the extent that the LATT would go on later to criticise the advice received by the Prime Minister, the advice received by the LATT differed both in style, content,

analysis, and the weight each attorney placed on the common facts. It resulted in two different views from Mr. Courtenay SC and Dr. Alexis QC on the gravity of the allegation to warrant removal. It is a classic de ja vu of the Wednesbury conundrum pointed out by Lord Greene "All over the country I have no doubt on a thing of that sort honest and sincere people hold different views."[132] It has not been argued by the LATT that there is one correct view, nor could it. The analysis of the Prime Minister's decision must be restricted to whether his decision making process remained within the four corners of the established principles to guide the lawful exercise of his discretion.

212. The LATT supplied a copy of the Committee's report to the Chief Justice's Attorneys-at-Law.

213. On 11th December 2018, at the Special General Meeting of the LATT it was resolved that the Committee's report should be referred to the Prime Minister for his consideration under section 137 of the Constitution. By letter dated 13th December 2018 the LATT provided the Prime Minister with a copy of the Committee's report, the Addendum dated 3rd October 2018, the Procedural Timeline, the Addendum to the Procedural Timeline, the opinions of Dr. Alexis QC and Mr. Courtenay SC and the Executive Summary of the Report. The letter of complaint to the Prime Minister was neutral in terms and left it entirely to the Prime Minister to make his determination under section 137.

The Decision

214. I pause here in the chronology to set out some important considerations in law on the provision of reasons for a decision.

215. There is no doubt that although there is no express requirement to give reasons under section 137, it is the duty of the Prime Minister to give his reasons in writing on the question where he will refer the matter of the removal to the President. This is so having regard to the type of decision, the decision maker, the significance of the decision, the constitutional context and consistently with the principles of openness and transparency. As explained by

[132] **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680 at 683

Sedley J in **R v Higher Education Funding Council ex parte Institute of Dental Surgery** [1994] 1 All ER 651: "The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process.[133]

216. In **South Bucks DC v Porter (No 2)** [2004] UKHL 33 Lord Brown further noted the importance of giving reasons:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

See also **R (on the application of the Asha Foundation) v Millennium Commission** [2003] EWCA Civ 88.

[133] **R v Higher Education Funding Council ex parte Institute of Dental Surgery** [1994] 1 All ER 651, 665-666

217. Where there is no express provision as to the timing of the reasons there is however, having regard to the public importance of the subject matter, a duty to give reasons contemporaneously. See para 10:32 **Judicial Review Principles and Procedure, Auburn, Moffett, Sharland.**

218. There is no standard form for giving reasons in this case. However, identifying the issues that were vital and critical to the complaint and conclusion and explaining the manner it was resolved should comprise the core of the reasons provided. There is no necessity to identity every single consideration and factor that weighed in the appraisal of the evidence.

> "Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole. I do not think that the Tribunal member intended to convey that she made up her mind about the evidence of the applicant/appellant before taking account of the evidence of the witness who was said to corroborate him."[134]

219. Where there is no statutory duty to give reasons the Court is cautious in accepting late reasons. However, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly:

220. The decision under review is the Prime Minister's letter dated 22nd July 2019. However, while the Defendant and Interested Parties contend that the reasons for the decision are comprehensively set out in that document, the LATT correctly contends that it is entitled to examine all the surrounding circumstances of the Prime Minister in making his decision to determine what were the complete and real reasons for the decision. To this extent the following public oral statements of the Prime Minister are important:[135]

[134] **Re Minister for Immigration and Multicultural Affairs** [2003] HCA 30

[135] Paragraph 6 of the Supplemental Affidavit of Douglas Mendes. Interview dated 1st April 2019, CNC3 Morning Brew with Ms. Hema Ramkissoon.

"Ms. Ramkissoon: Prime Minister, there was an article that was published, and even I have spoken extensively on it, the state of the Judiciary. We understand the powers—separation of powers. It's a fundamental principle of any democracy, but the image of the Judiciary has taken a beating. There are allegations, and we understand that. We appreciate what has happened in the past, but the Judiciary is a pillar of our democracy. Do you feel that this pillar is crumbling?

Hon. Dr. Rowley: I am going to reserve my comment on the Judiciary and to be very circumspect in how I comment on the Judiciary because, um, comments that are coming from me, while it might be factual, might be unhelpful in a situation that is quite troublesome. I am concerned about some people's perspective of the Judiciary and I would have a lot to say about that in the very near future. What is happening in Trinidad and Tobago now is that there are some people who believe that the Judiciary is available for their use and purpose and, from where I sit in the Executive, um, I'm aware of what is happening, I'm aware of their objective, I've kept my silence, I have passed on their invitations and I take careful note of the conspiracies, and I say no more about that. But I will speak to the people of Trinidad and Tobago on this matter in the not too distant future.

Ms. Ramkissoon: Now, you were part of the, at that time, of the Manning regime, and you are right, you have kept your distance and you have kept your silence on this, but the longer the uncertainty remain, the more damage in terms of public confidence. When will we be hearing from you? And also—

Hon. Dr. Rowley: Well—

Ms. Ramkissoon:—in relation to the Law Association—

Hon. Dr. Rowley:—I took—

Ms. Ramkissoon:—report that was done in December?

Hon. Dr. Rowley:—I took careful note—I take careful note of the constant invitation, from all quarters, invitation to the Executive to get involved in

matters of the Judiciary, but I know that the minute the Executive begins to get even close to far less to be involved in these matters, the same people will turn out and say they don't want political interference in the Judiciary, they don't want the Executive in the Judiciary, because you got the separation of powers. This persistent call to the Executive to get involved in the Judiciary is being made by people with their own agendas, and one of these days I'm going to tell this country what the agenda is, who is involved, what they're doing and the danger they pose to the good order in Trinidad and Tobago.

Ms. Ramkissoon: The section 37 that everyone is citing, is that something that is under active consideration?

Hon. Dr. Rowley: Section what?

Ms. Ramkissoon: Section 137 of the Constitution, looking at even the Law Association, er, submitted a report last December, at that time you asked for more time to seek legal advice. What is the status of that? They at that time looked at it.

Hon. Dr. Rowley: I, I will, I will be advised and I will act on—act based on the advice that I have. So, the Constitution is very clear and, as I say, it's not available for the convenience of persons with their own agendas. Section 137 requires that the Prime Minister act in a particular way if the Prime Minister is satisfied of certain matters. I had people threatening to sue me that I should act, and had people, um, you know—let me not say too much about it, but rest assured that the Government of Trinidad and Tobago is not a, is not a sleeping bystander in this matter, eh, and the—some of the problems in the Judiciary are of its own making, and those who are in charge of the Judiciary have a responsibility to the country, the same way those of us in the Parliament or in the Executive have it. So, there, there, there is, there is enough in this country to say—suffice it to say that people need to understand that institutions in which they participate are bigger than them. And there are those who have to understand that the institutions have to be defended and that those who have

to understand also that our institutions are not available for their nefarious activities.

Ms. Ramkissoon: Looking—you mentioned that you too are troubled and that we'll be hearing from you. Is this an attack on the Chief Justice to hound him out of office?

Hon. Dr. Rowley: I am not going to comment on those matters in this way at this time, except that the government will inform itself and will stay within its borders of the Constitution, and I can't say no more on that."

221. On 18th July 2019, prior to the date of his letter, at a press conference, the Prime Minister announced that he had decided to not make a representation to Her Excellency, the President. It would appear that three days prior to the date of the letter which the Defendant and Interested Parties contend is his decision, he had publicly announced that he had already made his decision. It may well be that by the 18th July he had made up his mind on the matter after reading all the correspondence. At the press conference it appears that his decision was not to refer and he had to provide his reasons for doing so.

222. Notably, the press conference was not convened to announce his decision. It was convened presumably, as there is no evidence from the Prime Minister, to provide his comments on a decision by the DPP not to investigate a complaint the Prime Minister had made of impropriety against some members of the opposition, arising out of a series of emails, known colloquially as "e-mail gate". The DPP found there to be insufficient evidence to proceed on any further investigation and the Prime Minister was vocal in his defence of making the request and critical of the circumstances surrounding that decision.[136] After his announcement of the "e-mail gate" issue he entertained general questions from the media on that issue and matters of national importance, the State and the economy. It is in that context that the issue of section 137 arose. However, at that press conference the Prime Minister made some unfortunate statements in relation to the political motivation of the LATT. In answer to the question from a news reporter on the status of the LATT's complaint,

[136] Interestingly in this case the LATT has made the request for an investigation and the Prime Minister is the one who is critical of the LATT in making the request.

the Prime Minister said:

> "From where I sit, it was never, I would never part of that, all kind of attempts were made to draw me into it. As a matter of fact, I think there is some matter in the court right now, and that is one of the reasons why I have been reluctant to say much about it publicly, because there is a matter in the court that sprung up overnight somewhere, about some conspiracy between me and the Chief Justice, and that is an attempt to overthrow a judgment that exists in the court. Are you all aware of that? The UNC took the PNM to court in the election petition matter and a judgment has been given in favour of the PNM members. Out of the blue, arising from this left field of the law association and its various incarnations and activities, overnight while I am dealing was this matter of them sending me their correspondence and their volume of documents, a matter sprung back in our court here seeking…
>
> **Prime Minister Rowley asks Minister Stuart Young:** "It's at pre-action protocol stage but have they filed suit?" I don't know the details, but what I do know is that extreme caution is required because what is happening is that some sort of a trap is being laid to draw me into this matter of the actions of the Chief Justice, so as to make a case against the case that they have lost. To have a judgment overturned, we dealing with some dangerous people here you know, and I now have to be very careful to take the advice that I get, and I have been doing that scrupulously. Thank you very much ladies and gentlemen."

223. Notably there is no evidence in this case to suggest any conspiracy on the part of the LATT and the Opposition. The overwhelming evidence is to the contrary. The statements drawing a connection between the complaint and a litigation involving the United National Congress (UNC) where some members were imputing bias on the part of the Chief Justice were clearly factually baseless.

224. On the 19th of July 2019 the LATT, now being aware for the first time that a decision had been actually made on its complaint, wrote to the Prime Minister requesting a copy of the advice to which he had referred at the press conference on the 18th of July 2019.

225. By letter dated 22nd of July 2019 the Prime Minister provided the letter to the LATT

advising of the decision and the reasons why he had decided not to represent to Her Excellency that the question of removing the Chief Justice from office ought to be investigated under section 137 of the Constitution. He also provided the legal advice received from Mr. Howard Stevens QC. It is only by way of affidavit of the Attorney General that the signed copy of the letter of reasons was provided.

226. In his decision letter, the Prime Minister noted the following:

i. Alleged WhatssApp Communication with Johnson: There was considerable doubt whether the complaint relating to the disputed Whatsapp exchange between the Chief Justice and Johnson could be substantiated. The Whatsapp communication does not provide a sufficient basis for concluding that the question of the Chief Justice's removal ought to be investigated.

ii. Seepersad J's Police Escort: The Chief Justice through Ms. Pierre informed Seepersad J that the Senior Superintendent, Special Branch had confirmed that the police escort was requested by the judge and instituted at his insistence and that a draft risk assessment submitted to the Commissioner of Police for his approval did not recommend a police escort. According an undated document which appeared to be communication from Seepersad J, not only was he never provided with the risk assessment but both the Commissioner and Inspector Knutt indicated there was no interim report. It was not for the Prime Minister to resolve this conflict of evidence. There is no suggestion or allegation that the Chief Justice fabricated the account provided to Seepersad J by Ms. Pierre. It was difficult for the Prime Minister to see how this complaint could be found to amount to such serious misbehaviour as to require removal from office.

iii. HDC Complaints

First HDC Complaint: The first HDC complaint is that the Chief Justice contacted the Prime Minister via WhatsApp recommending Dylan Huggins, Carol Williams and Felicia Pierre for HDC Housing or seeking his assistance in obtaining HDC Housing for them. The Prime Minister confirmed that he did not receive from the

Chief Justice nor did he send any whatsapp messages to him regarding HDC Housing nor did he have any communication with the Chief Justice regarding HDC Housing.

Second HDC Complaint: The second HDC complaint was that the Chief Justice recommended a number of other (unidentified) people for HDC Housing because Romero asked him too. The evidential basis for this complaint was problematic. The authenticity of the email from Siama Fonrose to Lauren-Ann Legall dated 5th August 2015 was uncertain. Ms. Renne did not provide her source for the email and Mr. Brent Lyons the Managing Director of HDC noted inconsistencies in the print layout of the email which did not match prints from their email server. Ms. Fonrose accepted it was possible she sent such an email but denied ever speaking to the Chief Justice. The Committee suggested that while accepted that she might have sent such an email, it provides support for the Chief Justice having submitted the names in the email for consideration. However, the Prime Minister was doubtful as to how much weight should be attached to such a suggestion bearing in mind the large number of recommendations received by the HDC from officials according for Ms. Jerlean John.

iv. Third HDC Complaint: The third HDC complaint is that the Chief Justice contacted a senior HDC manager and made recommendations for housing and asked that they be fast tracked. There was evidence to suggest some contact between the Chief Justice and the HDC as the Chief Justice accepted there was. It did not necessarily follow that any contact between the Chief Justice and the HDC went further than the Chief Justice suggested in his press release or that it was inappropriate. Even if the Chief Justice went further than he ought to have done in relation to any applicant, it was unlikely that it could justify removal from office. He might be criticised for lack of judgment but not for such serious misbehaviour as to require removal.

227. Unfortunately, again, on 28th July 2018 the Prime Minister made further public statements suggesting that the LATT acted at the behest of the United National Congress in

investigating the allegations against the Chief Justice and in making the reference to him of the Committee's report. The Prime Minister also referred in his statements to the allegations of bias against the Chief Justice in the election petition matter[137] which he suggested was fabricated by the LATT and the United National Congress. He further suggested that a representation to Her Excellency under section 137 would strengthen the allegations of bias against the Chief Justice. Almost five minutes immediately after his introduction the Prime Minister launched into the LATT.

> "The new society that we are trying to build is one that will have a Law Association that would know that it ought not to be at the behest, at the call, at the coming and going of a corrupt political party. The society we are trying to build is not one where the legal fraternity is one where a handful of people with serious political agenda could call a meeting in the law association, this one bring twenty of his party members, that one bring ten and out of four thousand lawyers of thereabout, a hundred and fifty vote to remove the Chief Justice. Led by two of them who are on criminal charges in front of the court. And the same Law Association has suddenly awaked from its slumber to cast aspersions on me and all those who gave advice in this matter...
>
> I'll tell you something else. I just mentioned to you the level of nastiness and danger that the UNC poses to this country and to me personally. They pose the same threat to you as a people. Last election, we, the PNM, took part in an election. It rained very heavily on that day and towards the end of the day the EBC did what most people would do around the world and would have done, and something strange, they extended the polling time by an hour. When that happened on that day, the UNC thanked the EBC for doing it because they thought that it would have benefited them. All of us was exposed to it.
>
> At the end of the day, we won five seats, some by 3,000 votes, the UNC decide that these are marginal seats and the seats must be declared vacant because the EBC did something wrong and the results of the election must be overturned. Ladies and gentlemen, you will

[137] **Dr. Shevanand Goopeesingh v Faris Al-Rawi and The Returning Officer for the Constituency of San Fernando West** Civil Appeal Number S293 of 2016

have to stretch your imagination a long way from that to what I just told you about the Chief Justice to see a continuous highway between the EBC and that.

But, you see, the UNC sees the local courts in Trinidad and Tobago as their political playground and they believe that once they get the matter to the court they have an upper political hand. I could tell you, the first thing they did was to go to court and accuse the Elections and Boundaries Commission of acting improperly. They lost that case. The five PNM members who had to defend themselves, the argument made about the seats being overturned was lost. But, halfway through the case, when the PNM said it should be thrown out of office without even being heard because it was a nonsense, the court said, no, it should be heard.

Oh yes? PNM lost. UNC had costs to collect. They said their costs is $15 million. When the case came to the end when finally the Appeal Court ruled in the PNM's favour and cost is now owed by the UNC, how much you figure that costs were? Up to this day, we're still talking about assessing the costs, but the bottom line is, the UNC has that cost to pay because they lost the substantive matter and, of course, they still think that they could overturn the election results.

So you know what they've done? They filed a petition to the Appeal Court, listen to this very carefully, you know. At the same time they're trying to entrap me and embroil me in some foolishness at the Law Association, they filed a petition to the High Court saying in the High Court that the election petitions which the PNM won in the court must be overturned because the Chief Justice acted with bias in coming to the decision that gave victory to the PNM on that matter against the UNC.

Would you believe that? In attempting to overturn a court decision, this Law Association elements and the UNC fabricate this bias story and file a matter. The matter is in the court going on in the court right now, and while the matter is going on in the court, they want me, as Prime Minister, to strengthen their argument in the court by opening impeachment process against the Chief Justice and that will be their argument to the court to overturn the petition that the Chief Justice was, in fact, biased. Would you believe

that? Would you believe that?

And that is what this is all about, you know, because if you look, if you look at who drove the impeachment proceedings at the Law Association, they had about 150 persons on that who voted on that day. Anand Ramlogan went with about 20, Saddam Hosein (fn AR and SH are well known public figures, attorneys at law and members of the UNC opposition) went with about another 20, Israel Khan went with about 20 and a few stragglers. Those are the ones who voted, you know. While you on bail for attempting to pervert the course of justice, you are a knight in shining armour standing up in defence of the Judiciary in Trinidad and Tobago. While they're being charged with all manner of evil, you are the ones that the children would look up to for defending the Judiciary and the Prime Minister, having not agreed, the Prime Minister and the government, the PNM, must be pilloried. We I will ignore them totally.

And the only thing that they are doing in your eyes is to encourage indiscipline in the Judiciary and in the public service. That's what they're doing and hoping that that will work for them politically because it is a destabilization of our society. They want nothing good for the people of Trinidad and Tobago."[138]

228. These statements imputing improper motives of the LATT are of course baseless in fact to the extent that the Prime Minister has not sought to justify them and the evidence in this case clearly demonstrates no link whatsoever between the LATT's complaint and any such motive or plot or trap. The Defendant instead sought to characterise these false statements as mere political puffs, part of the "Mauvaise-langue" that is par for the course in our "gayelle" of politics. **Faaiq Mohammed v Jack Warner** CV2013-04726, **Yousef v Hadeed 3204/2013, Baksh v DPP** CA 145/2009.

229. The LATT responded to the Prime Minister's letter indicating their disagreement with his decision and took issue with his decision not to refer the matter to the President.

230. It must be noted, however, that the LATT now takes no issue with the reasoning and

[138] Speech delivered by the Prime Minister on 28th July 2019

decision of the Prime Minister in relation to the first two issues: the resolution of the Security issue and the Seepersad J issue. Notably as well in the letter it did not identify to the Prime Minister which of its complaint or allegations against the Chief Justice it was pursuing.

231. Prior to the delivery of this decision, the Court of Appeal delivered its decision in the election petition case in **Dr. Shevanand Goopeesingh v Faris Al-Rawi and The Returning Officer for the Constituency of San Fernando West** Civil Appeal Number S293 of 2016 which it dismissed the claim of apparent bias against the Chief Justice. The Defendant has argued that while the matters are distinct the decision does inferentially suggest that the HDC complaints can be reasonably viewed as being insufficient to warrant the removal of the Chief Justice. I agree with the LATT that the considerations of bias in that appeal are distinct from the matters to be considered in this matter of the ingredients of misbehaviour and its gravity to warrant removal. The Court of Appeal itself was careful to draw the distinction and it is not meant to have any legal impact on these proceedings. It is however significant to note en passé that the HDC housing relationship bore no impact on the judicial process of an ongoing litigation in which the Chief Justice was involved. The resolution of that issue was based upon what would have been in the informed observer's mind in the unique circumstances of that case. It was not, for example, litigation involving the HDC.

232. **Adverse inferences:** The LATT has urged on this Court to draw adverse inferences from the Prime Minister's failure to explain his reason or to give some clarity as to his oral statements. There is no evidence filed by the Prime Minister to explain his decision or the matters that were taken into account in arriving at his decision. The authorities are clear on the duty of candour expected of public authorities where their decisions are under challenge. This is not a case of strategy or tactics. This is simply an obligation to the Court so that it can ultimately assist both parties to ensure that the principles of good public governance has been complied in the distribution of resources or impact on fundamental rights as a result of a decision in public law.

233. In **R v. Lancashire County Council ex parte Huddleston**, [1986] 2 All ER 941 (CA), per Lord Donaldson, M.R. noted at p 945:

"… The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why … Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands." The Huddleston duty was also underscored by Ibrahim JA in **Rees v Crane**.

234. The only evidence from the Prime Minister is through the Attorney General producing a copy of his signed letter. There is no explanation of why an unsigned copy was sent, there is no explanation of the delay in sending the letter, no explanation of why he made the contemporaneous statement immediately before the date of the letter suggesting that he had already decided and it was a matter of putting pen to paper, whether he had taken into account the motivation of the LATT in making this complaint, whether he viewed the complaint as a "trap" or a genuine matter which may arise having regard to his own observations of the reports on the Judiciary. The complaint indeed was not unexpected and was well telegraphed in the LATT inquiry proceedings prior to the making of the complaint. The Prime Minister has adopted instead the position in legal submissions that his complaint and the advice that he received is fulsome enough to distil from it the logic, its reasoning, the evidence taken into account and to determine on its face the question of reasonableness. There was therefore no need to file any affidavit.

235. I agree with the Defendant that the letter sets out comprehensively the reasons for the Prime Minister's decision which gives adequate information for this Court to analyse the decision making process. With respect, however, to the allegation that the Prime Minister took into account an irrelevant consideration there is only before this Court the LATT's unanswered evidence by the Prime Minister of his contemporaneous remarks. The letter expressly states in no uncertain terms that all the Prime Minister "carefully considered" was

the material submitted to him.[139] From this it appears, at best, that while the Prime Minister viewed the LATT with suspicion and thought that they maliciously made this complaint and did so on the behest of the UNC as a strategy to overturn a decision in the election petition proceedings, all that he considered was the LATT's complaint.

236. The Court expects both parties to discharge its duty of candour. Specifically in relation to the Defendant, the duty lies on the Prime Minister to fully explain the facts and circumstances and reasoning underlying the decision challenged and to disclose relevant documents unless in the circumstances of the case militate against such disclosure. **Dennis Graham v The Police Service Commission and the Attorney General of Trinidad and Tobago** [2011] UKPC 46 establishes the classic rule of the duty of candour of the public authority to produce such information for the Court to arrive at an accurate decision. Sir John Laws commented that there is a very high duty to assist the Court with full and accurate explanation of all the facts relevant to the issue.

237. The decision maker in some cases are obliged to make candid disclosure of the reasoning behind the decision under challenge. The LATT refers to **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (No2)** 64 WIR 68. However, it depends on the nature of the decision and the details provided.[140] The Court must assess all the facts and circumstances.

238. The LATT's criticism of the Prime Minister's failure to condescend to an explanation is appropriate. A critical issue raised clearly in these proceedings is the full reasoning of the Prime Minister. While no doubt the letter under challenge sets out a comprehensive set of

[139] Prime Minister's decision letter dated 22nd July 2019:

> "I have carefully considered the Reports and other documents, including the opinions of Dr. Alexis QC and Mr. Eamon Courtenay QC and I further sought the express advice on all matters from Mr. Howard Stevens QC, who as you may be aware has direct and specific experience in considering section 137 of the Constitution issues in our jurisdictional context, he having participated in a previous section 137 issue relating to a previous Chief Justice in Trinidad and Tobago. Having done so, I have decided **not** to make a representation to Her Excellency the President.
>
> I summarise below the reasons for my decision.
>
> If I do not mention any particular matter, you should not assume that I have not considered it. I have considered all the material submitted as well as Queen Counsel's advice before coming to a decision."

[140] Some comment was made en passé to Part 10 of the Civil Proceeding Rules 1998 (CPR) but that is inapplicable here. There is no default position.

matters taken into account, the legitimate question still arises was this the only considerations taken into account. In light of the Prime Minister's contemporaneous statements made immediately before and after delivering his decision and during an exchange with the LATT on the validity of his decision making process, the question genuinely arises as to what are the true reasons of the Prime Minister's decision? Courts of course will be cautious in accepting late reasons or evidence to modify the reasons of the decision maker but it depends on the circumstances of the case.

239. Indeed even if a public body is not entitled to rely upon subsequent evidence as to its reasons, if such evidence as is put forward reveals an error of law that was not apparent from the original reasoning the Court may have regard to that evidence as a basis for impugning the decision. See **R v Mental Health Review** [2001] EWHC 901. See also **R v City of Westminster ex p Ermakov** [1996] 2 All ER 302 where the public body was permitted to rely upon subsequent evidence where is elucidates or corrects or adds to the reason originally given. In **Ermakov**[141] Hutchison LJ set out the following principles which a Court should take into account:

- The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should be very cautious about doing so. For example where an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity.
- The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties.
- In cases where the reasons stated in the decision letter have been shown to be

[141] **R v City of Westminster ex p Ermakov** [1996] 2 All ER 302 at 315-316

manifestly flawed, it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings. Accordingly, efforts to secure a discretionary refusal of relief by introducing evidence of true reasons significantly different from the stated reasons are unlikely to succeed.

240. In **Nash v Chelsea College of Art and Design** [2001] EWHC 538 Stanley Burnton J in referencing **Ermakov** noted the following on reasons:

"**[34]** In my judgment, the following propositions appear from the above authorities:

(i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in *Northamptonshire County Council ex p D*) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.

(ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:

(a) Whether the new reasons are consistent with the original reasons.

(b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

…….

[36] Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members."

241. The Prime Minister's reasons therefore fall in a grey area. The letter speaks for itself. However, the oral statements made prior to the delivery of the written reasons gives rise to the inference that this statement explains or adds to his oral reasons. If so it is a serious ground considered by the Prime Minister that the LATT's complaint was politically motivated. The reasonable observer would have gathered from his interview that he perceived the LATT and by its extension the complaint as a political trap. Taking a light touch approach one may tend to accept the reason on its face, or to say that even if it was a political trap the decision was logical. However, a more probing analysis would require some explanation from the Prime Minister. Putting this at its mildest, the question arises: did the Prime Minister fairly consider the legal advice he received, the complaint itself and attach the appropriate weight to different considerations? Was he satisfied enough not to have continued his own inquiries? Did this irrelevant consideration prevent him from making such enquiries of the Chief Justice? Legitimately, it calls into question the decision making process and notwithstanding that his decision is a reasonable one to be drawn when faced with a number of other reasonable conclusions such an irrelevant consideration taints the serious non-political section 137 process.

242. The failure of the Prime Minister to be forthright with the Court on his political statements leaves the Court in the invidious position of having to distil the impact those statements would have had on his decision making process notwithstanding his full written reasons. I am not comforted with the unrefuted fact that the Prime Minister appears on the one had to have considered the complaint on its face but on the other hand viewed the complaint as a ruse to manipulate him into making a referral. His failure to respond on affidavit is regrettable and the Court is left to draw such inferences available to it on the evidence before it. Indeed even if as the Defendant contends that the LATT has posited a weak case against the Prime

Minister of irrelevant considerations, in my view, the LATT's case simply has been made stronger by his silence.

Part E

The Grounds of Challenge

"A decision to remove a judge from office is a momentous decision not only for the judge but the judiciary as a whole. It will be a decision of great moment regardless of whether it is legally valid. Those who have been endowed with legal authority to dismiss a judge from office may before exercising that authority seek assurance that what they propose to do is lawful or is susceptible to challenge before a court of law"- Enid Campbell[142]

Unlawfulness/Illegality

243. The Prime Minister would have acted lawfully if he exercised his discretion within the four corners of his section 137 power in the context analysed earlier and subject to the implied limitations set by the common law. To the extent that the LATT has raised a challenge of the failure to act lawfully, it is on the basis that the Prime Minister failed to take into account relevant considerations and took into account irrelevant considerations. That is dealt with later in this judgment.

Unreasonableness

244. There is no doubt that the standard of review is malleable, it varies with the context of each case. It is accepted by the LATT that the mere fact of a breach of any part of the Bangalore principles cannot automatically lead to misconduct warranting removal. What is required is an assessment of the nature of the breach its context, frequency and consequences. With respect to the Prime Minister the LATT argues that the issue would have been whether any such breach was so de minimis or inconsequential that it could fairly be said that they did not require investigation at all.

245. The real question on the reasonableness standard is whether the decision at this stage

[142] Judicial Review of Proceedings to Remove Judges [1999] UNSWLS 1

must be so restricted to a de minimis test or whether it also encapsulates a complex assessment in itself imposing an important value judgment to distinguish between errors of judgment and arguable grounds for removal. Therefore it is not only the question of misconduct which must be assessed but its consequences on whether it would warrant the removal of the particular judge. Is there a prima facie case of misbehaviour warranting removal, not only a prima face case of misbehaviour simpliciter?

246. The section 137 process is not invoked to discipline a judge. It is invoked to remove him/her. It is effectively impeachment proceedings only resorted to where there is a sufficient basis in fact and sufficiently serious ground of misconduct to warrant removal.

247. The LATT has highlighted the importance of the independence of the Judiciary in the context of its appearance of impartiality which is a fundamental pillar of the Bangalore principles as it is the rule of law. The Judge must not be seen as cowing to the wishes of the Executive. Much emphasis was placed on the prohibition of direct and indirect benefits being received by a judge from the Executive.[143] So that "any issue of servility or obligation between the Executive and judiciary becomes even more dangerous"[144]. Hence a breach of those codes and principles which protects and insulates the Judiciary from the Executive would be on the more serious scale of misconduct.

248. The LATT submitted:

> "The repeated and long standing practice of judicial provision of recommendations to facilitate advantages in the allocation of public housing appears to suggest a routine, pervasive and unfortunate practice of flouting aspects of the Bangalore Principles. The particular context and impact of such breaches will be addressed in the subsequent

[143] Paragraph 71 of the Claimant's submissions filed 2nd December, 2019:

> "A purpose of Principle 4.9 is plainly to prevent the appearance of impartiality from being undermined by the receipt of benefits through the judicial office. This undermines the careful protection imposed under the Constitution to ensure that such benefits are protected from both diminution and supplementation either of which is sufficient to undermine independence. The proscription on benefits to advance the interest of third parties is plainly to address and avoid the possibility of indirect benefits, whereby benefits may be redirected at the behest of a judicial office with the same consequent adverse and corrosive impact upon judicial independence."

[144] Paragraph 72 of the Claimant's submissions filed 2nd December, 2019

sections."[145]

249. The following are the main criticisms made by the LATT of the Prime Minister's decision:

- That the Prime Minister failed to acknowledge that the complaint was about the Chief Justice making recommendations and breaching the separation of powers principles.
- The Prime Minister failed to give sufficient weight to the fact that the Chief Justice in recommending persons was participating in an arbitrary and process contrary to the public law principles of good governance.
- That the Prime Minister adopted wholescale the advice of the legal adviser.
- The HDC legislation incorporated and advanced transparent policies for the provision of houses and this "policy arrangement" violated the principle and essence of the objects of the legislation. The Minister of Housing was thereby obliged by public law principles to exercise powers under the HDC Act to give effect to the purpose for which the powers were conferred[146].
- It makes heavy criticism of the arbitrary policy which advanced nepotistic distribution of housing. In short without saying it, the LATT is saying the HDC policy is a corrupt act.
- It argues there is no evidential basis to suggest that the recommendations were made pursuant to the Cabinet policy at all.
- There is no evidential basis that the persons recommended were indeed deserving people and therefore buttresses the view that the recommendations were a participation in a process of elitism, preference, favouritism and privilege.
- It concludes: "The referenced but undisclosed Cabinet approved Allocation Policy

[145] Paragraph 75 of the Claimant's submissions

[146] Paragraph 92 of the Claimant's submissions filed 2nd December, 2019

> "The Minister's discretion must be exercised in a manner which furthers the Legislative Purpose of the HDC Act. Lord Bingham, writing extra judicially in *The Rule of Law*, set out as a fundamental principle of the rule of law that "*Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, and for the purpose for which the powers were conferred without exceeding the limits of such powers and not unreasonably*."

which provides for 25 percent on the recommendation of the Housing Minister to deal with "special cases/circumstances" is self-evidently vague in that there is no delineation of what constitutes special cases; this inevitably lends itself to arbitrariness. This is particularly objectionable when one considers there are no set guidelines for the exercise of this discretion, and it deals with the issue of public housing well known domestically to be in short supply[147]. Indeed, in light of the above principle it may well be said that the random and or nepotistic distribution of public housing is anathema to the rule of law and clearly contrary to the legislative purpose and parliamentary intention of the HDC Act. This Cabinet policy then, is problematic. It is made even more so by the fact that it is not published anywhere."

250. I fail to see the lack of reason or logic in the Prime Minister's decision. Taking either a soft or hard edged review of the Prime Minister's decision return a conclusion reasonably open to the Prime Minister to make: That the complaint submitted by the LATT did not meet the threshold of being sufficiently serious to warrant the removal of the Chief Justice.

251. A close analysis of the letter sufficiently disposes of this ground of review. From an overview the Prime Minister sets out clearly the materials considered and his approach guided by law which was the correct standard. His approach was clearly guided by the comprehensive legal advice received.[148] Importantly, in the advice given to the Prime Minister it was made clear that the advice was to assist the Prime Minister to exercise his discretion but it was for him to make the decision and to properly exercise his discretion. This careful approach is reflected under the rubric "Approach" in the letter. He identifies the Statements of Principle and Guidelines for Judicial Conduct for the Judiciary. He identifies that his task is to establish if the allegations bear a sufficient basis in fact and if so if it was serious to warrant a representation that it would lead to removal from office. He importantly noted that it was not his obligation to resolve conflicts or uncertainty in facts. This was carefully pointed out to him in his Queen Counsel's advice. However, he still had to determine "sufficiency" by

[147] See letter of the LATT to the Prime Minister dated 28 July 2019 at page 2
[148] See Mr. Howard Stevens' QC letter of advice

performing a sifting exercise the nature and the quality of the evidence.

252. Although the Prime Minister does not specifically mention valuable constitutional principles of separation of powers, independence of the Judiciary, accountability and the rule of law or the Bangalore Principles, it is not to be assumed that he did not consider them as all these principles are clearly spelt out in detail in the Statement of Principles and Guidelines for judicial conduct which he considered in his legal opinion.

253. Sequentially, the Prime Minister then approached an evaluation of the evidence submitted in relation to the Security issue, the Seepersad J issue and the HDC issue. He carefully pointed out that there were some allegations made which the LATT found were not substantiated and therefore rather than focus on those unsubstantiated complaints, the Prime Minister correctly focused on the complaints the LATT considered were still live matters.

254. The Prime Minister first turned to the Security issue. There is no complaint about the Prime Minister's analysis of this issue. He assessed the relative strengths and weaknesses of the evidence: In reference to the evidence he stated:

> "In any event, I note that Ms. Renne (though she claimed to be confident of the authenticity of the various Whatsapp messages in her possession) was not prepared to reveal the identity of her source. Thus as the Committee puts it (paragraph 50 of the Report) "*[s]hort of interviewing Johnson ourselves and obtaining a statement from him, we are therefore reliant entirely on Ms. Renne's report of what she was told by her source and Mr. Johnson'*- Johnson, according to Ms. Renne, having verified the message. Even if Johnson, who is said to have left the country in "*dramatic circumstances"* (paragraph 9 of the Report), could be interviewed, the reliability of his evidence would clearly be doubtful; apart from anything else, he has been convicted of an offence of forging the signature of a judicial officer.
>
> There must, therefore, be very considerable doubt as to whether the complaint relating to the disputed Whatsapp exchange (based as it is on an apparently disputed document provided by an unidentified source and being otherwise uncorroborated) between the

Chief Justice and Johnson could be substantiated. I consider that I am entitled to, and should, take both paucity and poor quality of the evidence in this regard into account in considering this complaint."[149]

255. He then turned to the Seepersad J issue. He relies on the apparent lack of evidence, conflicting evidence and the relative trivial nature of the complaint including the advice of Dr. Alexis QC in arriving at his conclusion that it did not warrant a referral.

256. He then turned to the HDC issue. It is only this issue which the LATT is concerned about his analysis, his approach, his relative weight attributed to various facts. The Prime Minister comprehensively sets out his assessment carefully to identify the different complaints and how he resolved them. It is a high threshold for the LATT to cross to demonstrate that what indeed is not an illogical conclusion on its face is deficient because different weight ought to have been attributed to different factors.

257. The nub of the complaint is accurately captured in the Prime Minister's letter in dealing with the HDC complaints:

> "Whilst the evidence on which each of the HDC complaints depends is different, the graveman of two of them is the same, namely, that the Chief Justice acted at the behest of Romero, regardless of the merits of the application; in other words, the complaint is that he made the recommendations merely because Romero asked him to. Additionally, it is suggested that he asked that various applications be fast-tracked."

258. The Prime Minister's conclusions that there was no prima facie basis in fact was based on the doubtful nature of the documents, on unspecific hearsay evidence, the fabrication of an email to himself, the conscious weakness of the evidence, the fact that the matters were already subject to the LATT's own investigation, no direct evidence, the inference which do not necessarily point toward wrongdoing. The uncertainty of the evidence is a matter to be considered having regard to the delicacy and context in which a section 137 decision is to be made. It was not in any event a matter to warrant removal.

[149] Pages 2-3 of the Prime Minister's decision letter dated 22nd July 2019

259. The LATT also took a "birds eye" view approach by relying on the Court of Appeal decisions which set the standard so to speak of the gravity of these charges and contended that should on its face demonstrate that the matter warrants a section 137 reference. To refuse to make a section 137 reference in the face of the comments of the Court of Appeal just does not add up. However, LATT's reliance of the Court of Appeal judgments are however misplaced. The Court of Appeal judgements deal with a number of swirling allegations before the Committee's report was finalized. In no way did it make any judgment or prescription on the referral process of section 137. There is no doubt that the allegation is a serious one and that it involves a breach of the principles of our codes of conduct. But is it serious enough to warrant removal? That is the subject of the Prime Minister's inquiry and this review.

260. There is no dispute that the Chief Justice did make a number of housing recommendations. Whether it was in 2013 or only in 2015 is of no moment. By all accounts one recommendation alone is a notable indiscretion. By the LATT's own reasoning it was sufficiently serious if he did fail to observe the principles of independence of the judiciary and mindlessly involved himself in an arbitrary policy of housing allocation by the State. The real complaint of the LATT is that the Prime Minister failed to attribute significant weight to the principles of the independence of the Judiciary, the Chief Justice's impartiality, the Statements of Principle and the public perception of the image of the Judiciary participating in an in appropriate HDC allocation. I note that the LATT was careful in its submission in relation to the participation in this policy of HDC housing not to label the Chief Justice's act as corrupt or illegal. Taken at its highest it was ill advised.

261. An analysis of the Prime Minister's written reasons however demonstrate a sober and mature deliberation over the entirety of the LATT's complaint:

- The letter sets out all the documentation reviewed by the Prime Minister and was careful to explicitly state that he considered all the matters referred to him whether specifically mentioned in the latter or not.
- He properly set out the test that guide his deliberations in section 137 as promulgated by **Rees v Crane**. There is no issue with the three matters which he had to consider:

"Before making any representation to the President, I must therefore be satisfied of three things: first that one or more of the matters in respect of which the Committee has expressed concern (I shall refer to them as complaints) may amount to one of the two circumstances provided for by section 137 in which a judge may be removed from office, namely inability or misbehaviour; secondly, that one or more of the complaints has *prima facie* sufficient basis; and thirdly that such complaint or complaints is/are sufficiently serious to warrant a representation to the President- i.e sufficiently serious that, if substantiated, it/they might ultimately lead to the Judicial Committee advising the President that the Chief Justice ought to be removed from office."

- He took into account and had regard to the Statements of Principle and Guidelines for Judicial Conduct and the Bangalore Principles.
- His role in his assessment was properly formulated in not trying to resolving conflicts or uncertainties in the available evidence but at the same time he had to assess the seriousness of the misbehaviour alleged and that he had to make some assessment of the nature and quality of the material placed before him.
- It is noted that the LATT is not pursuing any complaint of the logic, reasoning and decision of the Prime Minister in relation to the first two issues: the security issue and the Seepersad J issue. However, when one examines the Prime Minister's decisions on these issues it contained an assessment of the available evidence and his own view of the unreliability, weakness of untested and unavailable sources of information. He doubted whether if persons could be interviewed, whether their evidence would be reliable. He also criticised some evidence as being uncorroborated. The Prime Minister also appeared to accept the accounts of the Chief Justice. The LATT, however, while implicitly accepting these as patently logical or at least they make no complaint of it, they make the criticism of the Prime Minister's analysis of the HDC allegation of assessing the evidence in a similar manner: of drawing conclusions of the unavailability of evidence, doubting the ability of unnamed sources proving any

evidence and accepting the account of the Chief Justice. The Prime Minister also goes on to consider not only whether the Chief Justice can be criticised for his conduct but whether that conduct amount's to such behaviour to warrant his removal.

- With respect to the HDC complaint the Prime Minister outlined the gravamen of the complaint. It is not the case as the LATT alleges that the Prime Minister mischaracterises the LATT's complaint in failing to appreciate the nexus of the recommendations and the Bangalore principles. The Prime Minister has clearly stated that he bore those principles in mind in assessing this complaint:

  > "In considering these complaints, I have borne in mind paragraph 3.12 of the *Statements of Principle and Guidelines,* which provides: '*A Judge shall not use or lend the prestige of the judicial office to advance his private interests or those of a member of the judge's family or of anyone else, nor shall a judge permit others to convey the impression that anyone is in a special position to influence the judge in the performance of his duties."*

  He was merely capturing the factual essence of the complaint which in essence comprise the HDC complaint of making recommendations at the best of someone and therefore giving rise to whether or not the recommendations are genuinely for needy persons and whether he was participating in a fraud and secondly in fast tracking the recommendations seeking favours from the Executive.

- It was reasonable for the Prime Minister to have discounted the fact that the Chief Justice was unaware of any fraudulent scheme, saw no direct evidence of the Chief Justice participating in a scheme with Romero, relied on the fact that he had not sent nor received any Whatsapp messages from the Chief Justice. Indeed there is nothing in the LATT's evidence to suggest that there was. In making such a serious allegation that a Whatsapp message was made by a Chief Justice to a Prime Minister, the LATT for the very least should have placed before the Prime Minister credible evidence to support this. Instead the Prime Minister was left with unspecific hearsay evidence of what a reporter said she saw without any information that the messages have been

backed up or saved or stored and available for production. The Prime Minister was entitled to draw negative inferences from the discrepancies in the evidence which he identified in pages 5 to 6 of his decision. Indeed the rationale of the Prime Minister that he bore in mind that the inquiries of the Committee with respect to Mr. Lyons made it doubtful whether any further investigation will bolster this evidential position, is logical and is consistent with his assessment of the other complaints of which the LATT takes no issue.

- There is nothing illogical for the Prime Minister to conclude that if in an investigation of the LATT invigorated with the authority of the Privy Council's ruling to embark on it, with all of its own probing that sources were still unwilling to give evidence that anything further would come out of the Prime Minister's own enquiries or that of a Tribunal.[150]

- The allegation of fast tracking also suffered from evidential difficulties. Notwithstanding this however the Prime Minister was prepared to accept that the Chief Justice interceded on behalf of deserving persons. There was no reason to doubt the Chief Justice's account that he interceded for deserving persons as the Committee itself saw no substance to any complaint of the Chief Justice being involved in a corrupt scheme of Romero or Johnson. Instead the LATT criticises the Prime Minister for justifying the recommendations in failing to take into account the illegality of the HDC policy. This criticism fails to characterise the decision as unreasonable on two main grounds. First no direct allegation was made by the LATT of the involvement in the illegal policy as the ground of the complaint. Second the Prime Minister nevertheless correctly considered the effect of such recommendations, the principles of conduct, the Bangalore principles to determine whether it was serious enough to warrant removal. He criticised the Chief Justice for his lack of poor judgment but it could not rise to an impeachable offence. It was tantamount to a **Taylor** decision to rebuke the judge and close the file.

[150] See exhibits to "D.L.M.28" and the sealed affidavit filed on behalf of the Claimant

- Taking an overview of the LATT's complaint. There is no allegation of dishonesty. There is no allegation of corruption. There is no allegation of deceit. On its face there is a complaint of a sitting judge giving assistance to needy persons by making recommendations for housing hoping that it will find favour with the Executive for preferential treatment. Based on this fact the LATT must make the case that the Chief Justice is not fit to hold office. He is disqualified from sitting as a judge. His impartiality is so affected that he cannot sensibly be perceived by the public as one who could dispassionately carry out his duties. The overall public perception is that he has eroded confidence in the Judiciary. He has fallen so far from grace in the public eye that his reputation is so tarnished his judgments will no longer be respected. Is this not taking the case too far? These facts on their face when added up is open to a reasonable tribunal to find that there is no suggestion that the judicial officer is forever impaired in his judgment discharge his duty. It is open to hold that there is no serious misdemeanour even accepting the importance of the separation of powers and the appearance of impartiality which makes the judicial officer unfit to sit. Moreover and fundamentally this allegation is no licence to disentitle the Chief Justice from sitting at all. At best it may give cause for an application for his recusal from cases dealing with the HDC. However, this makes the point that the legal processes already has in place a mechanism to hold the judge accountable and to preserve the independence of the Judiciary in such a recusal hearing. The decision is one which is not inherently illogical nor irrational.

262. Further, the LATT's complaint that the Prime Minister went too far in his assessment is a contradiction of its own submission that he should have made his own inquiries to properly assess the complaint.

263. Ultimately, the decision is not one that fails to add up or is lacking in reason or logic. It is neither perverse nor outrageous. It is balanced and sanguine in its approach to the issues. The fact that the LATT disagrees with the decision is understandable but it does not rob the decision of its genuine considerations of the complaint. Regardless of the nature of the policy or whether the Chief Justice was aware of it, the bare fact remains that the Chief Justice

participated in a policy of recommending persons for favourable treatment. From a fair view of the evidence put before the Prime Minister it was open to him to reasonably conclude that the conduct did not amount to such serious misconduct which warrants his removal. Disciplining the Chief Justice for lack of proper judgment is one thing, removing him from office is quite another. In light of the practice ill-advised as it may be, it was open to the Prime Minister to view a judge of the seniority and sobriety of a Chief Justice not to be partial to the Executive because it may leapfrog his recommendees.

264. It is not for this Court to say that there was only one inescapable correct answer. That is whether in my opinion the material before him could only have one conclusion of not establishing a prima facie basis in fact of acts of misconduct which warrants the removal of the Chief Justice. Instead I have probed the analysis of the Prime Minster to determine whether it was inherently logical to come to that conclusion. I also applied a more rigorous standard to determine whether appropriate weight was given to all the relevant considerations in the complaint. Whether the material was fairly balanced, considered and evaluated to make the determination. By either a Wednesbury reasonableness or more demanding standard the decision has passed reasonableness muster.

An Insufficient Inquiry?

265. The LATT was severely critical of the Prime Minister's failure to conduct his own inquiries to determine whether the complaint had passed the **Rees** threshold of a sufficient prima facie case to warrant the removal of the Chief Justice. There are several dimensions of the LATT's complaint. Their starting position is the uncontested legal principle that public bodies must sufficiently acquaint itself with relevant information fairly presented and properly addressed and to take reasonable steps to acquaint itself with the relevant material so that it can answer the questions before it correctly. This **Tameside** duty was discussed **in The Law Association of Trinidad and Tobago v The Honourable Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** and can be characterised as comporting to the following general principles:

- The authority must ask itself the right question and take reasonable steps to acquaint

itself with relevant information to answer the question correctly.

- The obligation is a corollary to the duty to make an informed decision.

- Having decided to resolve certain factual issues it must carry out investigations in that regard in a thorough and balanced way.

- The authority must take reasonable steps to answer the question it poses correctly.

- The wider the discretion imposed on the authority the more important it is to obtain all the relevant information before making a decision.

- Unless the Tameside duty is complied with the decision is unlawful.

266. Further Hallett LJ in **R (Plantagenet Alliance Ltd) v Secretary of State for Justice** [2014] EWHC 1662 (Admin) sets out the Court's approach in determining whether a public body properly discharged this duty to carry out its own inquiries:

> "1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R (Khatun) v Newham LBC [2005] QB 37 at paragraph [35], per Laws LJ).
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406).
>
> 4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301 ; cited with approval by Laws LJ in (R(Khatun) v Newham

LBC (supra) at paragraph [35]).

5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education (supra) at page 323D).

6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G)."

267. In **Naraynsingh v Commissioner of Police** [2004] UKPC 20 the Court of Appeal was critical of the Commissioner of Police in failing to conduct his own inquiries and investigation before rejecting the appellant's allegation of a complaint without more. The Prime Minister receiving a section 137 complaint however is much different from the Commissioner of Police. It is accepted, however, that a public body in exercising a discretion does have a duty to inform itself before making the decision. In this case however, context is everything. The LATT's submissions are multidimensional. The Prime Minister failed to make any investigations into the HDC issue. The issue of whether the HDC issues was sufficiently serious required some inquiry. The Prime Minister ought to have considered the office of the Chief Justice and his duties, the impact his behaviour must have in discharging those duties, the perception of his office, whether repeated breaches affect his ability to perform his functions or affect the "perception of others in relation to the office so that any purported performance of the duties of office will be perceived widely as corrupt, improper or inimical to the interest of the person or organisation for whose benefit the functions of the office are performed."

268. Failing to make these inquires rendered his decision that the allegations were not sufficiently serious, flawed and unreasonable. Further the Prime Minister acted unreasonably

by confining himself to the review of the Committee report and excluded any independent inquiry of his own.

269. The LATT expounded on this failure in their supplemental submissions and emphasise that the Prime Minister's role is independent of the LATT's complaint and investigation. By the force of the swirling public contentions and the judicial pronouncement of the Court of Appeal and Privy Council of the seriousness of the matter it should have triggered the Prime Minister's own concern to conduct his own investigation and inquiries and not simply treat the complaint as a document for his review. To do so would abdicate his functions under section 137. See **Levers** and **Boyce v Judicial Legal Services Commission** [2018] CCJ 23. In fact the LATT contended that in conducting its own inquiries the LATT was doing what the Prime Minister himself failed to do but in submitting the complaint to him that was merely the starting point and not as the Prime Minister treated it as the final point in the investigation. The LATT's submissions bear repeating:

> "19. The Court of Appeal gave a clear indication as to some of the matters which arose for inquiry. These are:
>
> (i) Who were the persons for whom the Chief Justice has in the past actively lobbied the HDC for housing?
>
> (ii) By what means were the recommendations of the Chief Justice communicated to the HDC?
>
> (iii) What yardstick did the Chief Justice use to determine whether the persons recommended were needy or more needy than the many other applicants?
>
> 20. The following questions logically and obviously arose and for which answers should be sought:
>
> (i) Did the Chief Justice seek priority or special expeditious treatment of these Applicants and if so, on what basis?
>
> (ii) To whom were these recommendations forwarded and by what means were they communicated to the HDC?

(iii) Was there anything apart from his office as Chief Justice which placed him in a position to advocate on behalf of those applicants?

21. In order to comply with his constitutional responsibility the Prime Minister had to make a reasonable effort to obtain the answers to these questions.

……

34. Furthermore, as submitted above there were relevant matters of fact which required disclosure, explanation or inquiry. For instance, can the WhatsApp messages be traced and verified? Should the Prime Minister have directed the HDC to determine whether the e-mail containing the list of persons recommended by the Chief Justice existed by searching its databases? Should he have enquired into any unverified records of the HDC? Could the Prime Minister properly fulfil his constitutional duty of determining whether a referral should be made to the Investigatory Tribunal if he did not investigate these matters, or should he leave it to be enquired into by the Constitutional Tribunal? It is submitted that by refusing to make the recommendation, not having himself made reasonable enquiries, the Prime Minister usurped the role or frustrated the functions of the Constitutional Tribunal contrary to the law as illustrated by Boyce [2018] CCJ 23.

…….

36. If the nominees of the Chief Justice had made a proper and normal application to the HDC, it is only reasonable to believe that they would have stated their needs and qualifications for consideration. What more could the Chief Justice add to their application but the prestige of his office? In what terms were the recommendations made? What criteria did the Chief Justice use in selecting those he recommended? Did he seek special or priority treatment for his nominees? Would other applicant's feel that the Chief Justice had unfairly weighted the scales against them?"

270. I agree with the LATT that a decision maker must properly inform itself of the facts before making a decision. In the context of our section 137 it is admitted by all the parties that no express process is set out to guide the Prime Minister in this important consideration. Unlike the detailed provisions of New Zealand, the Commissioner in that case has the explicit duty

to make inquiries and cause an investigation into the facts before making his decision. The Commissioner in that legislative scheme, however, is not a Prime Minister nor the Executive. A Prime Minister must inform himself but also be circumspect on the nature of his inquiries lest he is accused of constitutional overreach. Whatever steps are taken by the Prime Minister, he must be also mindful of the role of the Tribunal to determinate facts of the complaint. This therefore sets a limit to any permissible inquiry by the Prime Minister to go too far will overreach his section 137 referral process. In my view the Prime Minister was mindful of not overreaching the limit of his own investigation and limited his role properly to the assessment of the detailed facts submitted after a prolonged investigation by the LATT to determine sufficiency and seriousness. The main complaint of the LATT is the failure to independently determine the facts. This on its face dangerously pushes the Prime Minister to the boundaries of the Tribunal's jurisdiction and while some inquiry may be justified, the range and depth of those inquiries depend on the context of the matter in dispute.

271. Another dimension of the LATT's submissions of inquiry is perhaps this. If further inquiry was needed to resolve some conflict in facts, then the Prime Minister had to refer it to the Tribunal. This however, ignores the Prime Minister's duty to determine for himself the plausibility of the available evidence.

272. In this case the following matters of context are extremely important. First, the findings of the Court of Appeal and Privy Council commented on the serious nature of the general allegations being made in the public domain. Importantly, the Court of Appeal did not have before it the actual complaint. Its findings were not before the Court nor was it aware of the Committee's own findings of deficiencies in evidence and implausibility of some of the allegations. It is difficult to properly discern from the judgment exactly what charge was the subject of their comments or whether it was a realistic overview of the entire debacle of disparaging defamatory public statements against a Chief Justice without any fulsome response from him. His silence exacerbated the perceptions.

273. Second, as outlined in **Boyce** the Prime Minister is not in the position of a DPP or COP, he is not a "sleuth". What in fact was put before him was a comprehensive report of the LATT after investigations conducted over months after interviewing witnesses and after comprising

several documentary evidence and interviewing the Chief Justice. It is reasonable for the Prime Minister to have treated with this complaint as more than a mere starting point. It was a serious allegation based on a comprehensive "dossier" submitted to him.

274. Third, it was not unreasonable for the Prime Minister to not launch his own independent investigation on the basis of the general reports of the media. The LATT's own Committee findings demonstrated how dangerous that would have been as some turned out to be unsubstantiated. The most that could have been done would have been for the Prime Minister to ask the Chief Justice for a response to what was in the public domain. Unsurprisingly, to do so however, would have put the Prime Minister in a positon of properly formulating the exact nature of the allegations.

275. Fourth, to formulate proper allegations for investigation by a Tribunal was one of the comments made by Lord Mustill who found difficulty in interpreting the matter that was placed before that Tribunal. It was reasonable therefore to have distilled from the complaint the exact nature of the allegations before taking it further. Indeed one of the steps to take it further if satisfied with the material that was presented would have been to put the allegations to the Chief Justice for his response.

276. Fifth, the Prime Minister acted on legal advice. That advice had been criticised by the LATT, however, it is a reasonable step taken by the Prime Minister in discharging his **Tameside** duty of properly informing himself of the subject matter.

277. Sixth, in a recent judgment of **Geelal** (under appeal) I was critical of a public body in not making its own inquiries. However, in that case, the role of that body and the Prime Minister are entirely different. One had the statutory power to conduct oral hearings, a far wide ranging power to ascertain and distil facts. In contrast, the extent of the Prime Minister's factual assessment is constrained by the constitutional context of section 137 explored earlier and the jurisdiction of the Tribunal which is mandated to carry out an intense factual inquiry only if the Prime Minister is satisfied there is a prima facie basis in fact.

278. Seventh, as revealed in the **Rees** judgment of the Court of Appeal, the Prime Minister did conduct a proper analysis of this report in his trend of inquiries delving into the veracity of

the complaints and the credibility of the allegations. Subjecting the complaints to the forensic evidential tools were entirely permissible and it was not unreasonable having regard to the jurisdiction of the Tribunal for the Prime Minister to not decide to launch an inquiry on his own after an inquiry of the LATT.

279. Eighth, it must be fairly said that the LATT's investigation itself was a thorough one as can be and in fact the Courts had paved the way for the LATT to be uninhibited in its access to information and to prepare as fulsome a report as possible, unrestricted by any constitutional or statutory fetter. The failure of the allegation that it was conducting a section 137 inquiry is therefore important in two respects. First, that it was free to conduct an intensive investigation without comment from the Chief Justice and second that its "investigative" role was being criticised as being that of the Tribunal and not of the Prime Minister. It is reasonable for the Prime Minister therefore in light of those judgments to treat the report of the LATT as a thorough complaint and not a mere letter from the man on the street or a note from a newspaper reporter or a memo that "he found in his mailbox".

280. For these reasons I am of the considered view that the Prime Minister discharged his **Tameside** duty and properly informed himself before arriving at his decision.

Fairness

281. The judgments of the Privy Council and the majority of the Court of Appeal were at pains to point out the significance of the referring power of section 137 and its damaging impact on a sitting judge. The common law and constitutional principles of fairness applies with equal force to the exercise of this power. The Attorney General submitted that this is a special power and no question of fairness arises. It is not a "**Ramjohn**" power. While there is a difference in the powers being exercised to initiate an impeachment process and a discretion to veto an appointment of a civil servant, they both carry serious consequences to the office holder. While the requirements of fairness will vary with the context of the matter, **Taylor** as (explored earlier) suggests that the exercise of this power is such an exceptional one, the rules of natural justice can supplement the processes and require exceptionally that not only the subject of the complaint but the complainant be heard on material aspects of the

decision. The complainant's right to be heard is not wide or free ranging but in this case limited to where new matters come to the attention of the Prime Minister not included in the complaint.

Relevant/Irrelevant Considerations

282. While the finding that the Chief Justice's recommendations did not amount to such misconduct that warranted an investigation into his removal from office was not unreasonable there are two further features of the decision making process: the Prime Minister failing to take into account relevant considerations and considering immaterial considerations.

283. The LATT argued that the Prime Minister failed to take into account a number of matters in his assessment:

a. "failed to take any account of the views expressed by the members of the Court of Appeal of Trinidad and Tobago on the serious nature of the allegations made against the Chief Justice;

b. took into account an irrelevant consideration, namely the incorrect assumption that the Ministry and/or the HDC's policy to permit applications for housing to be fast tracked at the recommendation of officer holders including members of the judiciary;

c. failed to take any or any sufficient account of the undisclosed and secret nature of these recommendations which did not all form part of the records of the HDC and which were not published and/or were not available to or known to members of the public including litigants before the Courts and other applicants for housing;

d. failed to take any or any sufficient of the fact that the Chief Justice denied only two (2) of the twelve (12) particulars of the Housing Allegation.

e. failed to take any or any sufficient account of the statutory underpinning of the HDC and the allocation of housing by the State which does not provide any basis for priority to be afforded to applicants upon the basis of Judicial or any recommendation;

f. failed to consider the constitutional and common law obligations of all public authorities involved in the allocation of public housing to act fairly and equally in relation to members of the public and not to afford priority to any applicants on the basis of non-statutory and /or undisclosed criteria, including judicial recommendation.

g. Failed to take any or any sufficient account of the need for an effective constitutional separation between the members of the Judiciary and the Executive and the impropriety of third party benefits being secured from the Executive on the private and undisclosed recommendation of members of the Judiciary;

h. failed to take any or any sufficient account of the Bangalore Principles of Judicial Conduct and /or paragraph 3.12 of the Statements of Principles and Guidelines for Judicial Conduct which prohibits a judge from using or lending "*the prestige of the judicial office to advance his private interests or those of a member of the judge's family or of anyone else* …".

i. was plainly wrong in finding that the involvement of a judicial officer in making secret recommendations for housing, in light of the foregoing, did not meet the threshold for a reference under section 137 of the Constitution"[151]

284. I do not find merit in these criticisms I have examined above the Prime Minister's consideration of the relevant matters taken into account and in any event there were some matters of weight which is a value laden judgment and the Prime Minister is entitled to a margin of discretion in ascribing the relevant weight to these matters. The Prime Minister plainly considered the legal advice tendered to him which had set out the considerations of the principles of judicial conduct as well as the views of the Court of Appeal. The Prime Minister fairly considered the problem of the Chief Justice making recommendations to the HDC. The HDC policy of accommodating requests does not detract from the significance of the Judiciary intermeddling in those recommendations. I do not see in the decision any discount being made by the Prime Minster for the Chief Justice by reason of an alleged accommodation by the HDC policy. The "illegality" of the HDC housing policy was not

[151] The Claimant's submissions

specifically made out in the complaint but in any event was fairly considered by the Prime Minister and his legal advisor in questioning the propriety of the Chief Justice in making the recommendations.

285. The main relevant consideration that the Prime Minister failed to consider as alleged by the LATT made clear in its written submission was the public confidence in the Judiciary and the preservation of the rule of law. The LATT was highly critical of the Prime Minister's "blindness" to the disastrous impact that these unanswered allegations will have on the public confidence of the Judiciary and his failure to properly weigh and assess the constitutional role of the Judiciary and the maintenance of its reputation of an independent institution was palpable. Public confidence in the judiciary is no doubt important:

> "Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment. (Canadian Judicial Council, *Ethical Principles for Judges* (1998), p. 14)"

286. I am not impressed with the LATT's submission as the Prime Minister clearly articulated in his letter that he had given consideration to the Bangalore principles, the independence of the Judiciary and the rule of law. It is unfair to criticise the decision in failing to go into the minutiae of detail in setting out the importance of the constitutional principles of the independence of the Judiciary or the perception of the public and the confidence it reposes in the Chief Justice or wider Judiciary. It is not warranted as there is no indication on the face of either the letter or the advice received that the impact of these allegations on the rule of law and the perception of an independent Judiciary was not considered. Indeed the conclusions made were certainly in any event open to a reasonable tribunal to make even on a proper assessment of the impact of the allegation on the perception of the public.

287. While the Prime Minister's decision does not condescend to examining any test of public confidence, it does take into account the importance of the Chief Justice's position in the administration of justice and a fair assessment of the manner in which the facts were assessed demonstrates, in my view, a sensitivity to the larger question of moral integrity, honesty in decision making and general public honour.

Irrelevant Considerations

288. However, far more unsettling are the Prime Minister's remarks which are the foundation of the LATT's criticism of the Prime Minister considering irrelevant considerations in arriving at his decision. Prior to the delivery of his decision the Prime Minister improperly and ill-advisedly made several political statements describing and labelling the LATT as his political foes. I have earlier in this judgment analysed the effect of these public statements and the duty to give reasons for the decision. These statements must raise in the reasonable person's mind that the Prime Minister perceived the complaint as illegitimate based upon the perceived motivations of the LATT. The two irrelevant considerations referred to are his perceived improper motives of the LATT and the purported political influence of the UNC as the genesis to the complaint.

289. Why were these statements made? On what basis were these statements made? If it was on the "hustings", was there any basis for making these statements? How serious were these allegations made against the LATT? Although the LATT makes no complaint of bad faith or of apparent bias, these questions still linger in these proceedings. In my assessment of the Prime Minister's decision making process while I am satisfied that his conclusion was a reasonable one open to him to be made, I am extremely uncomforted by these unanswered questions and how it may have affected the decision making process.

290. I have already concluded above in analysing his public statements that it was his duty to explain to the Court whether they had any impact on his decision making process and if it did, how was that factored in the exercise of his section 137 discretion. There is no doubt that the Prime Minister must exclude from his consideration matters which are irrelevant to what he has to consider. In the absence of an explanation from the Prime Minister about these

statements, a fair assessment of these statements is that he considered it serious enough to warrant a comment to the public as part of his reasons for rejecting the complaint and further serious enough to bring it to the attention of his constituency to sway their minds against his political foes. The section 137 request from the LATT was then reasonably to be assessed from his statement to have been viewed by him as a political trap. While indeed any Prime Minister, as discussed earlier in this judgment, who ill-advisedly and unreasonably initiates the section 137 process will suffer grave political consequences from the electorate, and to that extent a complaint can be viewed as a hidden trap for the unwary and a careless Prime Minster. However, it is uncertain whether seeing a complaint as a trap helpfully demonstrates that the Prime Minister discharged his constitutional role to dispassionately and judicially consider the matters which were the subject of the complaint.

291. I have taken note that the decision in **Ermakov** suggests that reasons may not be confined to the actual decision expressed by the decision maker:

> "There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive."

292. **De Smith**[152] makes the point that:

> "It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters

[152] De Smith's Judicial Review 8th Edition paragraph 5-131

and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision. However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial."

293. Having been demonstrated, as I have explained above, that the decision was open to a reasonable Tribunal to make, to this extent one may submit that these political statements can be treated as de minimis or not affecting the final result. However, in treating with a such an important constitutional role of section 137 and explaining the depths of the intersection of deep constitutional societal and historical values in this judgment, there is no role for politics in this process and it was incumbent on the Prime Minister to make that very clear in his section 137 assessment. If in fact this was a matter which he took into account, then he ought to have brought that to the attention of the LATT. It would have been at the very least an entirely new matter and **Taylor** suggests that in these exceptional circumstances the complainant should be heard before closing the file.

294. Furthermore, the alleged political motives of the LATT is, unless the Prime Minister can justify it, from all accounts on the facts of this case plainly irrelevant and unjustified. In the decisions of the Court of Appeal and Privy Council it was clearly stated that the LATT has acted in a bona fide manner and without bad faith in discharging of their solemn duty. Senior Counsel for the Attorney General himself was full of praise of the fortitude of the LATT and their passion in upholding the rule of law.

295. To the extent, therefore, that the Prime Minister has left it open to this Court to conclude that on a fair assessment he took into account the political motivations of the LATT in making the section 137 complaint, he plainly fell into error.

Bad Faith

296. Curiously despite my specific invitation to the LATT to address this issue this matter is now abandoned. I must record my strong disapproval however for litigants to make allegations of bad faith lightly. Perhaps had the pre action process properly taken its course this allegation

would not have seen the light of day. This claim is unsubstantiated and is dismissed.

Part F-Relief

297. The Court is also entitled to exercise a discretion in granting relief. The exercise of the section 137 Tier 1 power is an important matter of the exercise of a constitutional function which also demands transparency and accountability in decision making. The main issue in dispute in this public law claim is whether the Prime Minister exercised his section 137 discretion lawfully rationally and fairly. In my view, the exercise of the discretion was a rational one and the Prime Minister did satisfy his common law duty of inquiry, was reasonable, took into account relevant considerations and the public interest and there is no evidence of bad faith. The arguments advanced by the LATT fail to pass the threshold test of arguability and in any event fails at the substantive stage for considering whether any relief on these grounds are to be granted.[153]

298. However, for the reasons advanced, while the LATT has failed in those challenges, it succeeded on its claim of irrelevant consideration[154]. Due to the statements made by the Prime Minister before and after giving his decision it has affected the decision by taking into account an irrelevant consideration. It has demonstrated an improper matter that has affected the objective assessment of the complaint. The LATT has therefore demonstrated an arguable ground for review on the basis of irrelevant considerations and is granted substantive relief of quashing the decision of the Prime Minister not to represent to Her Excellency the President that the question of removing the Chief Justice on the HDC issue ought to be investigated. The decision on the HDC issue is remitted for reconsideration to the Prime Minister to be viewed with an open mind without regard to any motive of the complainant. If the Prime Minister is to have regard to that consideration he should give the LATT an opportunity to be heard on it.

299. My order therefore is that the application for leave to apply for and the claim for judicial

[153] Paragraphs i,ii,iii,iv,vi of the Claim
[154] Paragraph v of the Claim

review of the Prime Minister's decision on the grounds of rationality/reasonableness, not made in the performance of his constitutional functions in the public interest, bad faith and failure to take into account relevant considerations in paragraphs i, ii, iii, iv, vi of the claim is dismissed. The application for leave for judicial review of the decision on the ground that he considered an irrelevant consideration is granted and the Court declares that the Prime Minister's decision on the HDC issue was made taking into account the irrelevant consideration of the political motivation of the LATT in arriving at his decision. The said decision on the HDC issue will be quashed and the decision on the HDC issue be remitted to the Prime Minister for his reconsideration with an open mind without regard to that consideration and if the political motivations of the LATT are being taken into account, to give the LATT an opportunity to respond.

Part G-Costs

300. In arriving at a decision on the question of costs, the Court must consider who is entitled to costs and on what basis would those costs (or proportion thereof) be quantified. In this case costs of course will be on the assessed basis. The question is who is entitled to those assessed costs. Costs of course are in the wide discretion of the Court but it must act on established principles. Those principles are set out in Part 66.6 CPR and the Court must also bear in mind the overriding objective.[155] The structure of the rules themselves promote the

[155] Part 66.6 of the CPR provides:

"Successful party generally entitled to costs 66.6

(1) If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may, however, order a successful party to pay all or part of the costs of an unsuccessful party.

(3) This rule gives the court power in particular—

(a) to order a person to pay only a specified proportion of another person's costs;

(b) to order a person to pay costs from or up to a certain date only; or

(c) to order a person to pay costs relating only to a certain distinct part of the proceedings, but the court may not make an order under paragraph 3(b) or 3(c) unless it is satisfied that an order under paragraph 3(a) would not be just.

(4) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(5) In particular it must have regard to—

(a) the conduct of the parties;

(b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;

principles of the overriding objective of economy, proportionality and equality.

301. In dealing with the entitlement to costs there are three matters that I have taken into account. First an issue approach to determining the "winner" of the contest. Second, the conduct of the parties and third the public interest.

302. The general rule of course is that the winner is entitled to its costs. To that extent the Court must take into account all the circumstances to determine who is the ultimate winner. Ultimately, it can be said that the LATT has won in having the decision quashed. But in judicial review this is hardly an obvious answer. See **TOSL** costs judgment. Taking an issue approach it is clear that LATT has lost on four of its five main reliefs. It also has lost on four of the five main issues advanced by them matters which have taken up considerable time and energy such as reasonableness, unlawfulness, relevant considerations and sufficient enquiry were all determined against them.

303. Second I have taken into account the parties conduct. The LATT pleaded an allegation of bad faith when they failed to demonstrate merit in doing so. While the LATT criticised the Prime Minister's lack of candour, that is not a matter which works in its favour on the question of costs as it in fact earned a victory based on that lapse by the Prime Minister.

304. Further and more egregious, the fact is there is no pre-action letter. I have always maintained the three important pillars upon which the pre-action protocols are based are: information exchange, identification and narrowing of issues for determination in litigation and discussions towards an amicable resolution of the dispute. Pre-action conduct must be

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(c) whether it was reasonable for a party—
(i) to pursue a particular allegation; and/or
(ii) to raise a particular issue;
(d) the manner in which a party has pursued—
(i) his case;
(ii) a particular allegation; or
(iii) a particular issue;
(e) whether a claimant who has won his claim caused the proceedings to be defended by claiming an unreasonable sum; and (f) whether the claimant gave reasonable notice of his intention to issue a claim.
(6) The conduct of the parties includes—
(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol; and
(b) whether either or both parties refuse unreasonably to try an alternative dispute resolution procedure.

focused to achieve any or all three endeavours prior to the commencement of litigation. In my previous judgments of **The Trinidad and Tobago Unified Teachers Association and Emelene Hassanally v The Attorney General of Trinidad and Tobago** CV2019-00331 and **BS v Her Worship Magistrate Marcia Ayers-Caesar and The Attorney General of Trinidad and Tobago** Claim No. CV2015-02799, Claim No. CV 2015-3725 I outlined the importance of pre-action conduct in administrative law matters as it is an important feature of the reforms of our civil rules.[156] The Court will expect all parties to have complied in substance with the terms of the protocols. See 2.1 and 2.3 of the Practice Directions.

305. The sanctions for non-compliance include an order under Part 26 (Powers of the Court) or Part 66 (Costs-General).The Court may make an order that the party at fault pay the costs of the proceedings or part of those costs, of the other party or parties. The Court may order that the party at fault pay those costs on an indemnity basis. (See Practice Direction 2.4)

306. Taking into account the failure of the LATT to comply with pre-action protocols makes a compelling case of the LATT to bear a portion of the costs of the Defendant. I do not accept the excuse proffered by the LATT in their submissions. I was troubled for example by the allegation of bad faith. In my view those types of allegations if made in the pre-action stage would have ferreted out the merits of pursuing it without it being pleaded.

307. However, taking into account the public interest, in my opinion, in this case there are no winners, nor losers. The LATT has pursued a complaint primarily on the basis that there is merit in their allegations that there was sufficient material for the Prime Minister to have triggered the section 137 tribunal to investigate the facts of their complaint. They have failed

[156] Lord Woolf commented:

> "1. These (pre-action protocols) are intended to build on and increase the benefits of early but well-informed settlements which genuinely satisfy both parties to a dispute. The purposes of such protocols are:
>
> a) To focus the attention of litigants on the desirability of resolving disputes without litigation;
> b) To enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
> c) To make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and
> d) If a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.

in that effort. However, the elucidation of areas surrounding this matter deserved judicial examination. The Defendant in defending this action has failed to properly explain his political perception of this complaint raising the problem of his considering an irrelevant consideration. However, the subject matter of the proceedings raised important constitutional and public law issues. The adversarial nature of these proceedings should not further polarise the parties and orders for costs should not rub salt in old wounds when we should all collectively be looking for a salve for them.

308. There will be no order as to costs[157].

Part G- Peace Jurisprudence- A Non-Binding Guide

"Humanism is the soul of justice.." Dr Justice Pasayt

309. To be truly accountable a Court should produce results which earn the trust of the various publics which we serve. In my view, true accountability can also be achieved when our results can serve a therapeutic purpose of promoting healing rather than acrimony. Promote reconciliation rather than simply ending a legal dispute. Infuse a humanistic philosophy in our approach to dispute resolution. There can yet be a synergy between the ethos of mediation's pillars of collaboration, consensus and compassion into our mainstream judging. Such an approach can be accommodated under the umbrella of peace jurisprudence which is an approach of synergising principles of therapeutic jurisprudence, restorative justice, mediation and consensus building into our traditional adversarial system. It is an attempt to look for humane solutions which can further enhance trust and confidence in the system of justice beyond the settlement of limited legal issues.

310. For this reason I had engaged the parties very early in the proceedings with the underlying values and interests that can be addressed arising out of this dispute[158]. I was heartened by the robust, frank and earnest contributions by Senior Counsels on the questions of reform and mediation/ADR.

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[157] See **Taylor v R** where there was no order as to costs on the basis that the matter was in the public's interest.
[158] See Appendix B

311. In this interplay of judicial independence and accountability is the deeper rooted relationship between the Judiciary and the LATT. These are two sacred institutions which must work in tandem as two wheels of the chariot of the rule of law. While I have settled the legal dispute I propose to make observations which are entirely non-binding but which I trust will further the public interest and satisfy the underlying constitutional and societal values in issue in this claim.

312. I advocated in this case with the parties a need to examine a suitable ADR process that is not with a view necessarily to result in a settlement nor is it with a view to applying traditional mediation practices but to build a platform of dialogue to examine the underlying relationship issues that need to be rebuilt and treated. The Judiciary's relationship with the LATT, the public and press are for starters in need for such therapeutic treatment. This all arises in circumstances where the only available accounting mechanism is the heavy hand of section 137. On a properly constructed platform of dialogue concerns of accountability, trust, appreciation of the work and integrity of judges would not be lost in a bruising adversarial climate. Nowhere in our section 137 process is there an opportunity for humanism, to humanely treat genuine issues and concerns.

313. Should the Executive be clothed with such powers as initiating section 137 removal processes? How is trust of the public in our Judiciary restored and improved? How is the public to be educated of the role of the Judge? How is the Judge to change in this modern society? How are the demands of the public to be reoriented into judicial outcomes? How is the press to respect the boundaries of legitimate comment of the endeavours of the Judiciary? These are the pressing questions that arise in this matter that deserve a sensitive, delicate and mature discussion

314. As a way forward for the parties I make two observations. First in the absence of a formal system of disciplining judges, save for a section 137 removal process, a wide range of conduct of judges is left to be regulated to a certain degree in informal mechanisms: appellate systems, the Bar, the Press. The relationship with the press needs careful attention.

315. There is no question that the Press plays a vital role in our system of "open justice".

Shetreet observes that the press plays an important role in checking judicial misbehaviour. “Justice has no place in darkness and secrecy. When a judge sits on a case he himself is on trial…If there is any misconduct on his part, any bias or prejudice there is a reporter to keep an eye on him”. We also depend on the Court to ensure the public is aware of the cases that are pending and the manner in which they are dealt with. “The right to criticise judges may be one of the safeguards which helps to ensure their high standard of performance and also that the same meticulous care which has always been taken in appointing them in the past will continue to be taken in the future.” We need the press to properly educate the public. However with the advent of unregulated social media and the sensationalism of the modern media the press would be well to be reminded of the responsibility inherent in their important role.

316. In this case the problems with the Chief Justice surfaced from a press report. The allegations swirled in the public domain and the press maintaining a sustained attack on the Chief Justice and by extension the wider Judiciary. Lord Hope in **Gibraltar** observed the power “The ability of the press too to stir up trouble must not be underestimated”. Lord Hope referred to a particular headline in The Scotsman's report following one such disagreement: "Warning over threat to justice":

> “245…From then on the press sought to exploit what they saw as a rift between me and the Secretary of State over issues of policy. As report fed upon report the number of occasions on which I had intervened were said to have been much greater than they actually were. So much so that when it was announced that I was to resign as Lord President on my appointment as a Lord of Appeal in Ordinary the headlines were "Was he pushed or did he jump?" and "(Minister) tightens grip on crime as Lord Hope quits". I was able to correct this impression in an interview after my resignation. But it was obvious to me that any attempt to do so earlier would only have provided the press with further copy and made matters worse.”

317. In this case the press was dogged and relentless. What was also clear is that in the absence of reliable information and explanation speculation became rife. Reasonable criticism of judgments or of the administration of justice are expected and the press has an important

role to play to hold us accountable. The search for truth is a valuable asset of our democracy. Freedom of speech and responsibility must find the right balance as it is for the independence of the Judiciary and accountability discussed above. Responsible reporting should value the very institution of justice which the press should desire to keep intact to protect their own interests and those of the public whose interest we serve. Equally we owe a duty to provide reliable information. It is a matter which deserves further collaboration.

318. As this matter no doubt will weave its way through our judicial structure one would expect nothing less than fair and accurate reporting of these proceedings as well as the final disposition of the section 137 process and a sensitivity to the impact certain types of reporting will have on the confidence of the public of the entire administration of justice.

319. Second this is an opportunity for collaboration and reform. Our Constitution is not a rigid instrument nor is a tablet cast is stone. It is an organic, living instrument. To the extent that interpretative tools can strengthen the underlying values of our Constitution there must come a time when the instrument itself must yield to change to keep apace with the changing demands of our society. Further in the absence of constitutional change there can be properly formulated processes to deal with gaps. The lack of clear processes to guide important public officials in the discharge of an important and delicate constitutional task; the gap between indiscipline and misconduct that warrants removal; the potential for abuse by the Executive of unlawfully exerting pressures on the Judiciary under the guise of accountability and a renewed responsibility adopted by the Judiciary to the development and maintenance of the public trust. These are matters which deserve our attention.

320. I was heartened to hear the response of the LATT that they are open to this prospect and of the Chief Justice's willingness to collaborate with the LATT. There is much ground here already gained for renewing the relationship. It is not the purpose of this judgment to suggest any particular type of reform, but it bears repeating that there already exists novel ideas in

the public domain[159].

321. Mediation processes can also be integrated into present and future arrangements for the discipline of judges. Indeed some complaints can be resolved from proper communication of concerns and creating private opportunities for proper explanations and gestures of remorse and commitment to improve. There was some concern expressed by Senior Counsel of the unsuitability of mediation as a process due to its private and confidential nature being at odds with the demands for open transparency. While this may be a legitimate concern it is not insurmountable. The global record stands unimpeached of many high profile public law matters being resolved in mediation or further still in global conflict being resolved in private peace talks. The truth is the public interest is better served by parties agreeing to speak and agree terms of a truce than to unceremoniously destroy public institutions in cold dispassionate warfare. Looking back at the LATT's first approach to the Chief Justice, it was a missed opportunity for the intervention of a neutral facilitator(s) or certified mediator(s) skilled in such areas to engage the parties in such a sensitive dialogue.

322. In introducing the idea of ADR to the parties in these proceedings I had in mind a process of engagement where the principal parties primarily the Chief Justice and the LATT can be given their privacy to hold discussions with the assistance of trained facilitators with the commitment to publish an agreed public statement at the end of each session or at the end of the engagement. This is a suitable compromise for meeting the interest of the parties to achieve peace and transparency both of which is in the public interest.[160]

323. Indeed a more effective rider to the relief granted in my decision of quashing the decision and remitting it for reconsideration, would be not only for the Prime Minister to reconsider his decision, but also for the Prime Minister to invite the LATT and the Chief Justice to consider the possibility of first mediating their dispute by a suitably certified mediator or co-mediators

[159] Senior Counsel for the Chief Justice has already alluded to the latest 2006 Draft Constitution which outlined an independent process for the removal of judges and the Chief Justice. Some further thought can be given on whether the Statements of Principle and Guidelines for Judicial Conduct can be adopted as a code of conduct to be regulated by a judicial body.

[160] I am well aware of the public outcry of a recent scandal in India and attempt to privately resolve that matter. The failure in my view of that system is not to accommodate some system of reporting to the public on developments as the private engagement progresses to its conclusion.

to facilitate their discussions and to agree on a suitable mechanism to facilitate their dialogue. The range of their topics and their agenda would be entirely left to them and certainly is not restricted to the complaint but includes the larger issues that we face in the administration of justice. At the end of that process the mediator(s) shall submit their report as agreed by the parties to the Prime Minister for his further consideration.

324. These recommendations are of course non-binding in nature and offered only for the parties' consideration for reconciliation.

Conclusion

"If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: 'Hold on!'" Rudyard Kipling "If"

325. The end result of quashing the decision and remitting it for reconsideration is in keeping with the standard principles of public law that is demanding of the Prime Minister to ensure that the standard of good public governance is attained in the section 137 process. There should be no room for speculation of the matters taken into account in an important matter such as a section 137 removal process nor any hint of politicisation.

326. It will be an understatement to say that our Judiciary is not and never will be a cloistered virtue. We will continue to bear the public demands for accountability. While our ideal in entrusting the rule of law in the hands of a Judiciary is a sacred trust in humans of high moral virtue, super beings of impeccable integrity, it is nonetheless a human system and the strength of our Judiciary and the administration of justice, of which the LATT is a part, is equally in our humanity. This will be the test of us as humans as it will be a celebration of it. The stark reality of section 137, however, is that in this human system there are human failings which do not rise to the level of impeachable conduct but yet displays a failing in our judicial values which need correction. Without proper constitutional processes to channel these demands for accountability, section 137 becomes the disfigured receptacle of all and

any complaints of judicial misbehaviour.

327. I have attempted in my non-binding recommendations to point the parties in the direction of restoration and reconciliation. I do so recognising that our judicial function must change and adapt to the needs of a demanding Trinbagonian society.

328. There is no doubt that the LATT and the Chief Justice remain the two important institutions that must work in tandem for the improvement of the administration of justice. While the LATT no doubt complied with its statutory mandate in making the complaint to uphold the rule of law, it also joins with the Judiciary in rebuilding it after such a long and bruising battle played out in the public domain. This is not for the moment to seek to trivialise the deep constitutional issues that were raised in this matter nor to minimise the deep emotional hurt that these issues would have generated to Bench and Bar. But peace is often forged from the rubble of our deconstructed selves, when our focus on joint co-existence reinvents our outlook on our perceived differences. When we can celebrate our humanism in our joint search for new futures to break from the cyclical mistakes of our past, collaboration can yet be the pathway to a stronger administration of justice an endeavour which can ill afford any division, atrophy or lack of compassion. Together we serve a varied and demanding publics. Together with our heart, nerve and sinew we can build a new dispensation of social justice celebrating the rule of law by addressing the myriad of considerations that call for deep mature discussion in a properly facilitated platform of dialogue. It is not beyond us. There is no better body to begin these peace talks and guide the public than both Bench and Bar. That will be a good start for the healing to begin.

"Because now more than ever we must show /discipline tolerance and production./To build a stronger and better nation /I say that is the main foundation./So come let us work hand in hand /because this is our land./Come my brother come my sister/Let us build a nation together" –Merchant

Vasheist Kokaram

Judge

APPENDIX A

STATEMENT OF PRINICIPLE AND GUIDELINES FOR JUDICIAL CONDUCT

I. JUDICIAL INDEPENDENCE

Statement of Principle

Judicial Independence is a pre-requisite to the rule of law and a fundamental guarantee of the constitutional right to a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Guidelines

1.1 A Judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law and free of any direct or indirect extraneous influences, inducements, pressures, threats or interference from any quarter or for any reason.

1.2 In performing judicial duties, a judge shall, within the judge's own court, be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.3 A judge must firmly reject any attempt to influence his decisions in any matter before the court outside the proper process of the court.

1.4 A judge shall not only refrain from inappropriate connections, and influence by, the executive and legislative branches of government, but also must appear to the reasonable observer to be free of such.

1.5 A judge shall encourage and uphold arrangements and safeguards for the discharge of judicial duties, in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary, which is fundamental to the maintenance of judicial independence in our democratic society.

1.7 Judges individually and collectively should protect, encourage and defence judicial independence.

Commentary

1. In order that the integrity and independence of the Judiciary may be preserved, a Judge shall observe high standards of conduct. Deference to the judgments and ruling of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favour.

2. Judicial independence is a constitutional right of all members of society. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making. Judicial independence thus characterizes both a state of mind and a set of institutional and operational arrangements.

3. Both individual and institutional relationships are involved in the concept of judicial independence:

a. The individual independence of a judge is concerned with the judge's impartiality in fact, that is his state of mind in fact, that is his state of mind or attitude in the actual exercise of the judicial function. This is reflected in such matters as security of tenure.

b. Collective/institutional independence is concerned with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and appearance of independence and impartiality. Judicial independence also involves the institutional independence of the court or tribunal over which the judge presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. Judicial independence is a status or relationship resting on objective conditions or guarantees, which directly speaks to the inability of the executive and legislative arms of government to alter the terms and conditions of the judge's office to the disadvantage of the judge.

The Statements of Principle and Guidelines deal with aspects of judges' ethical obligations as regards both their individual and collective independence.

4. The first qualification of a judge is the ability to make independent and impartial decisions. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law.

5. Judges must reject improper attempts by litigants, politicians, officials or any other persons to influence their decisions. They must take care that communications with such persons that judges initiate could not raise reasonable concerns about their independence. Regardless of the source, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected.

6. Judges are not restrained from consulting with colleagues when challenging legal issues arise since this is important in the maintenance of uniformity and standards. In the performance of judicial activities, however, a judge shall be independent of judicial colleagues and solely responsible for his decisions.

7. Public confidence depends upon the rule of law and the independence of the judiciary. Lapses and questionable conduct by judges tend to erode that confidence. Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. Judges therefore share a collective responsibility to promote high standards of conduct.

8. Care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to any proposed change in the operational or institutional arrangements affecting the judiciary. Judges should be vigilant with respect to any such attempts to undermine, and should be staunch defenders of, their own institutional and operational independence. The form and nature of the defence must be carefully considered.

9. Public education with respect to the judiciary and judicial independence is an important function. Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence.

II. INTEGRITY

Statement of Principle

Integrity is essential to the proper discharge of the judicial office and is vital to maintaining public trust and confidence in the Judiciary.

Guidelines

2.1 A judge shall ensure that his conduct is above reproach in the view of reasonable fair-mined

and informed persons.

2.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

2.3 A judge, in addition to observing personally the standards of these Guidelines, shall encourage and support their observance by judicial colleagues and others.

Commentary

1. An effective judicial system is essential to public confidence in and respect for the Judiciary and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect of the judiciary. Another factor which is capable of undermining public respect and confidence is the conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should strive therefore to conduct themselves in a way that will maintain public respect and confidence in their integrity, impartiality and good judgment.

2. The ideal integrity is easy to state in general terms, but it is much more difficult and perhaps even unwise to be specific. Conduct which constantly reflects fitness to undertake the responsibilities of judicial office is the ultimate standard for integrity. The judge should exhibit respect for the law and integrity in his private life. The Judge should avoid the appearance of impropriety.

3. Judges, too, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public. The judge's personal development and the public interest will not be served if judges are unduly isolated from their communities. An out of touch judge is less likely to be effective.

4. A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities-even activities

that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family.

5. In addition to judges observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same, as questionable conduct by one judge reflects on the judiciary as a whole.

IV.IMPARTIALITY

Statement of Principle

Impartiality is crucial to the proper discharge of judicial office. Judges must be and should appear to be, impartial with respect to their decisions and in the process of their decision making.

Guidelines

Definition

In this Guideline:

'Fiduciary' includes such relationships as executor, administrator, trustee and guardian;

'Financial interest' means ownership of a legal or equitable interest or a relationship with another as director, advisor, manager or other active participant in that other's affairs. It includes:

a) The proprietary interest of a shareholder in a limited liability company, a police holder in a mutual insurance company, a depositor in a mutual savings association, or a similar proprietary interest in the issuer **only if** the outcome of the proceeding could substantially affect the value of the interest;
b) Ownership of government securities in the issuer **only if** the outcome of the proceedings could substantially affect the value of the securities; and
c) Mere ownership in a mutual or common investment fund that holds securities **only if** the judge participates in the management of the fund, **provided that** a judge by virtue of his holding office in any educational, religious, charitable, fraternal or civic organisation shall

not be deemed to have a financial interest in the securities held by those organizations.

'Third degree of relationship' means great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

Guidelines

4.1 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

4.2 A judge shall perform his judicial duties without favour, bias or prejudice.

4.3 A judge shall ensure that his conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

4.4 A judge shall, so far as is reasonable, so conduct himself as to minimize the occasions on which it will be necessary for the judge to be disqualified from hearing, ruling or adjudicating in a cause or matter.

4.5 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be viewed as likely to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

4.6 A judge shall disqualify himself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which a reasonable, fair minded and informed person might believe that the judge is unable to decide the matter impartially.

4.7 If a judge is a member of a fraternal body, it would be appropriate for him to disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

4.8 A judge should strive for transparency so as to combat against suspicion of corruption, nepotism and favouritism, and should also encourage Court staff to assist in its promotion, so as to ensure public confidence in and respect for the role, functions and operations of the Court.

4.9 A judge shall disqualify himself in any proceedings in which there might be a reasonable perception of a lack of impartiality of the judge including, but not limited to, instances where:

a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
b) The judge previously served as an attorney-at-law or was a material witness in the matter in controversy;
c) The judge was a partner or an associate have control over the matter in a firm or belonged to Chambers which acted for a party in the matter in controversy, during the period when the judge was still a partner or an associate of the said firm or a member of the said Chambers;
d) The judge's spouse is acting or has acted as an attorney-at-law in the proceedings;
e) The judge knows that any member of his family is acting as an attorney-at-law in the proceedings;
f) An attorney-at-law, who is a material witness, was an associate or a partner of a firm of belonged to Chambers to which the judge was attached;
g) The judge, either individually or as a fiduciary, or his spouse or minor child residing in his household has a financial interest in the subject matter in controversy or is a party to the proceeding that could be substantially affected by the outcome of the proceeding;
h) The judge or his spouse or any person within the third degree of relationship to either of them or the spouse of that person is:
    i. a party to the proceeding, or an officer, director, or trustee of a party;
    ii. known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
    iii. to the judge's knowledge likely to be a material witness in the proceeding.

4.10 A judge who would otherwise be disqualified on the foregoing grounds may, instead of withdrawing from the proceedings, disclose on the record the basis of such disqualification. If, based on such disclosure, the parties, independently of the judge's participation, agree in writing or on record, that the judge may participate, or continue to participate, in the proceedings, the judge may do so.

4.11 A judge shall inform himself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.12 Disqualification of a judge is not required if necessity obliges the judge to decide the matter in controversy including cases where no other judge may lawfully do so or where, because of urgent circumstances, failure of the judge to participate might lead to a serious miscarriage of justice. In such cases of necessity, the judge shall still be obliged to disclose to the parties in a timely way any cause of disqualification and ensure that such disclosure is included in the record.

4.13 Save for the foregoing, a judge has a duty to perform the functions of judicial office and litigants do not have a right to choose a judge.

Commentary:

I. There is inevitable overlap between **Propriety** and **Impartiality**. The specific headings are:

A. <u>General</u>

A.1 The Statement of Principle and Guidelines do not and are not intended to deal with the law relating to judicial disqualification or recusal.

A.2 Judicial impartiality and independence are distinct concepts, yet they are closely related. The right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice guaranteed by the Constitution of Trinidad and Tobago. Both independence and impartiality are fundamental, not only to the capacity to enact justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived. Judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary pre-requisite for judicial impartiality.

A.3 Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and pre-judgment. This dual aspect of impartiality is captured in the oft-repeated words of Lord Hewitt C.J in ***R v. Sussex Justices, ex parte Mc Carthy*** that *"justice must not only be done, but manifestly and undoubtedly be seen to have been done."*

A.4 The judge's fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality which also extends to minimizing any reasonable apprehension of bias. Judges should, therefore, avoid deliberate use of words of conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality. Everything from his associations or business interests to remarks which the judge may consider to be "harmless banter", may diminish the judge's perceived impartiality. A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole and the good administration of justice.

A.5 The expectations of litigants may be very high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Every effect should be made to ensure that reasonable grounds for such a perception are avoided or minimized. On the other hand, judges have an obligation to treat all parties fairly and even-handedly; those litigants who perceive bias where no reasonable, fair minded and informed person would find it are not entitled to different or special treatment for that reason.

B. Judicial Demeanour

B.1 Judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. Judges are also obliged to ensure equality of treatment for all court users, taking care that judicial demeanour is, and is seen to be, fair and respectful.

APPENDIX B- THE COURT'S FIRST BENCH MEMO TO THE PARTIES

Previous decisions of our Courts have identified this question of allegations made against the Chief Justice as impacting upon public trust and confidence in the rule of law. This case concerns the "section 137" process in dealing with such allegations. I look forward to the co-operation of all the parties in resolving the legal dispute within the shortest possible timeframe. In doing so, we shall all collaborate in giving effect to the overriding objective. I also invite the parties to give careful thought and consideration to the wider issues which affect all of us: the relationships between the Executive, Chief Justice/Judiciary, legal profession and the public. The discussion I wish to engage the parties today will be on designing the appropriate conflict resolution design for both the legal and wider disputes. While I appreciate the legal dispute presented on the Applicant's application is the easier to resolve, all of us should not shrink from giving thought to creative ways to deal with wider questions that may underpin this legal dispute.

This memorandum should serve as a discussion paper for all parties to assist them in focusing on the issues which they would want this Court's assistance. I appreciate that this memorandum is being issued before I have heard the parties. By no means must this memorandum be construed as the Court having any pre-determined or closed view on the merits or the legal issues. To the contrary, it gives the parties amply opportunity to address the Court on matters which it has gleaned from the papers and may be relevant to their dispute and is simply a proactive step to ensure that the parties views can be properly articulated and understood by this Court.

THE LEGAL DISPUTE

The main question: Is the main question: Whether the Prime Minister's decision not to make a section 137 referral is unlawful and whether he should reconsider his decision?

Are the main grounds: Illegality, unreasonableness, taking into account irrelevant considerations, failing to take into account relevant considerations, bad faith and unfairness.

Are the main facts in support of these grounds?

(i) The treatment and analysis of the Law Association of Trinidad and Tobago's (LATT) "HDC complaint".

(ii) The alleged treatment and perception of the LATT as a "political foe".

Should these matters be the important questions for consideration?

(vii) What is the threshold question for consideration by the Prime Minister under section 137 of the Constitution?

(viii) What is the function of the section 137 Tribunal?

(ix) If the threshold question is to establish the existence of a prima facie case in the allegations made for a section 137 investigation:

(a) Can the Prime Minister resolve contested issues of fact/conduct a factual assessment of the credibility of the allegations and how is this to be accomplished?
(b) Make a legal assessment of whether, if proved, the allegations meet the standard of serious misconduct and how is this to be accomplished?
(c) What is the minimum and maximum extent or permissible range of enquiry of the Prime Minister to conduct the section 137 threshold exercise?

(x) What is the rationale for the Executive conducting a section 137 threshold exercise?

(xi) Is there any degree of separation between the analysis of the Prime Minister's section 137 threshold exercise and his political hustings?

(xii) If one affects the other, is there an inherent weakness in the section 137 judicial accountability mechanism and if so what are suggestions for improvement/reform?

(xiii) What would a "best practice guide" on the exercise of the section 137 threshold exercise look like?

THE WIDER DISPUTE

Is there a wider dispute which deserves to be resolved on:

(i) The nature of the relationship between the LATT and the Chief Justice?
(ii) Is it in need of repair and if so what options exist to deal with that question?
(iii) Are there other mechanisms other than section 137 which can achieve the purpose of judicial accountability?

Can the parties collaborate and agree on points of law with respect to the section 137 threshold question? Parties may consider it useful to produce a list of best practices for the exercise of this discrete 137 process. Such points of law can be:

- Section 137 contemplates a three (3) tier process. Each functionary at each stage performs its own inquiry for specific purposes.
- The Prime Minister is neither that of a mere conduit for complaints nor the decider on the merits of a complaint.
- The role of the Prime Minister and Tribunal are separate and distinct. The former's role is to consider and recommend.
- The Tribunal's role is to investigate and ascertain the facts and determine validity of allegations.
- The Judicial Committee of the Privy Council's (JCPC) role is to make the legal assessment of inability/misbehaviour to justify removal.
- The Prime Minister must determine that the complaint(s) has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President. This would involve a preliminary investigation involving (a) a factual assessment of whether allegations are credible (b) a legal assessment of whether if proved the meet the standard

of serious misconduct required to justify removal. [The threshold exercise]

- In doing so the Prime Minister discharges the Tameside duty to inform himself of relevant information.
- The Prime Minister may in this threshold exercise do some probing, some investigating to establish that the allegations are not merely fanciful or hopelessly groundless. It is a filtering exercise to ensure that they are not fanciful or of the crack-pot variety or hopelessly grounded.
- The process engaged to do so must be in consonance with natural justice and fair play.
- The standard in the threshold exercise is a low threshold in establishing the existence of a prima facie case.
- The Prime Minister must form his opinion on the information that he has available to him following his preliminary examination.
- The opinion must be honestly held, reasonably open on the facts available, and based on the correct legal standard.
- If he forms the view that the matter should be referred he should give the Chief Justice an opportunity to be heard before making such reference OR he should give the Chief Justice an opportunity to be heard in the discharge of his Tameside duty?

See **Rees v Crane** [1994] 43 WIR 444, **Meerabux v The Attorney General** [2005] 66 WIR 113, **Dean Boyce et al v The Judicial and Legal Services Commission** [2018] CCJ 23(AJ), **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T, The Appointment, Tenure and Removal of Judges under Commonwealth Principles, A Compendium and Analysis of Best Practice**.

Is the Prime Minister's analysis of the HDC allegations in conducting this section 137 threshold exercise flawed for the reasons advanced by the LATT?