



The Judicial Committee of the Privy Council has recently issued its advice on the hearing of the report of the tribunal to the Governor of the Cayman Islands under s 4 of the Judicial Committee Act on Madam Justice Levers ([2010] UKPC 24). The opinion of the Board was, 'Levers J continued to behave in a manner that was unacceptable in the performance of her judicial duties.' The Board therefore concluded that '... by her misconduct Levers J showed that she was not fit to continue to serve as a judge of the Grand Court and humbly advises Her Majesty that she should be removed from that office on the ground of her misbehaviour.'

Last year the Judicial Committee issued its advice on the hearing of the report on the Chief Justice of Gibraltar ([2009] UKPC 43). In that case, while the Board agreed that the CJ's conduct showed a lack of judgment, they accepted that no criticism was made of his ability to perform his functions. The Board was not prepared to say that the Chief Justice's conduct amounted to misbehaviour and would not accept that his conduct demonstrated inability to perform his functions.

Nevertheless, the Board suggested that in the circumstances it was unrealistic to assume that the Chief Justice could resume the functions of his office. While the case against him was not made out, and the Board advised that the Chief Justice ought not to be removed from his office, they expressed the view '... that the proper course for him now to take would be for him simply to resign.' This seems to be something of a pyrrhic victory for the poor Chief Justice.

Some years ago, the Governor-General of Belize, acting on the advice of the Belize Advisory Council and following complaints of misbehaviour filed by the Bar Association of Belize, advised that a justice of the Supreme Court should be removed from office (*Meerabux v A-G Belize* [2005] UKPC 12). The particulars of the complaints as considered by the Belize Advisory Committee were appalling. These were—the judge had had colluded with the Solicitor General in preparing his judgment in a case where the Solicitor General had appeared; he had expressed a willingness to interfere improperly with the functions of the justice system; he had entered into an improper relationship with a defendant in a criminal proceeding; and on two occasions he had received gifts from litigants appearing before him. The Belize Advisory Council found the complaint sufficiently substantiated to recommend to the Governor-General that he should be removed from office. The judge's appeal against this decision to the Judicial Committee of the Privy Council was dismissed. Although recent allegations of judicial misconduct have also arisen in Guyana, Trinidad and Tobago, and the Cayman Islands, these have not been sustained.

Barnwell was a judge of the High Court of Guyana. He was accused of visiting the Chief Magistrate's chambers with a view to influencing the result of a case that was then engaging the magistrate's attention. The persons accused in that case were Barnwell's relatives. In the course of the hearing of Barnwell's application to the court challenging the Judicial Service Commission's representation to the President that the question of removing him from office ought to be investigated, and even on his own admission, it is clear that he had spoken to the magistrate in connection with the charges. Moreover, it was clear that he was seeking to have her impose a monetary penalty, as distinct from a term of imprisonment on those persons. Those allegations were communicated by the chief magistrate to the Chancellor of the Judiciary in Guyana, who is also chairman of the Judicial Services Commission. The Commission then made representation to the President of Guyana that the question of removing Barnwell from office should be investigated. In doing so, the Commission purported to act under the provisions of the Constitution. Barnwell was then suspended from office and he applied for judicial review of the commission's decision. Barnwell's application to the Supreme Court was refused, but he succeeded on appeal because he was not given an opportunity by the commission to address the allegations before they acted on them.

While *Barnwell v AG* reaffirms several important principles of administrative law, it raises some unsettling questions on the issue of misbehaviour in public office. It is quite clear that many regarded Barnwell's action as reprehensible. One judge in the Court of Appeal, Churaman JA, described it as a '... deplorable and lamentable lack of ethical and moral rectitude,' and an 'unbelievably shocking piece of insolence.' It is also significant that Barnwell's subsequent explanation of his behaviour may be regarded as unsatisfactory: He said that he was acting to secure a plea bargain. The Guyanese legal system did not contemplate plea-bargaining as an appropriate part of the system administration of justice. The important subtext to this decision is that promoting fairness and natural justice, and discouraging misbehaviour in public office, are both desirable objectives; but one cannot abandon the former objective to achieve the latter.

In 2006, the Chief Justice of Trinidad and Tobago faced the imminent prospect of prosecution on a charge of attempting to pervert the course of public justice. To avert such prosecution he obtained leave from the High Court to seek judicial review of the Deputy Director of Public Prosecutions' decision to prosecute, and an order staying all actions consequential on that decision. Similar orders were later sought and made against the Commissioner and the Assistant Commissioner of Police. The respondents appealed to the Court of Appeal of Trinidad and Tobago and succeeded in having the grant of leave to seek judicial review set aside. The Chief Justice's further appeal to the Judicial Committee of the Privy Council was dismissed. In the opinion of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, '... judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy.' Baroness Hale of Richmond, Lord Carswell and Lord Mance shared a similar opinion.

The allegations of misconduct against the Chief Justice came from the Chief Magistrate. After he had heard a case against the leader of the opposition, and convicted and sentenced him for failure to disclose certain assets contrary to the Integrity in Public Life Act, the Chief Magistrate reported that on three occasions during the trial, and on one occasion after it, the Chief Justice has sought to influence the decision in favour of the defendant. The Chief Justice's response to these allegations, in the language of the Judicial Committee of the Privy Council:

"... involves an accusation of improper, politically-motivated, interference in the prosecution process by the Prime Minister and the Attorney General; of politically-inspired dishonesty by the Chief Magistrate, a subordinate but important figure in the judicial hierarchy; and of improper, politically-inspired, decision-making and conduct by the Deputy Director, the Assistant Commissioner and the Commissioner, respectively an attorney discharging the important functions of the Director of Public Prosecutions and two of the most senior police officers in the state."

In the final analysis, as the Chief Magistrate refused to give evidence at the trial of the Chief Justice, neither set of allegations were put to the test in a court of law. In the interim, between the making of the allegations of misconduct and the withdrawal of the charges before the magistrate, the Prime Minister initiated steps to remove the Chief Justice from office under the provisions of the Constitution.

The procedure for removing a Chief Justice from office in Trinidad and Tobago requires that the Prime Minister represents to the President of the Republic that the matter ought to be investigated, that the President appoints a tribunal of persons who hold or have held high judicial office in some part the Commonwealth, and that this tribunal enquire into the matter and recommend to the President that he should refer the question of removal of the Chief Judge from office to the Judicial Committee of the Privy Council. In this case, the Prime Minister made appropriate representation to the President who appointed the tribunal under s 137 of the Constitution. The tribunal recommended that the question of the removal of the Chief Justice from his office should not be referred to the Judicial Committee. The allegations of the Chief Magistrate were unsatisfactory. The tribunal were of the opinion that on the question '... whether the allegations against the Chief Justice are proved so as to make the Tribunal sure beyond reasonable doubt that they are well founded, then all the Members of the Tribunal are of the unanimous opinion that they are not so proved.'

In September of 2008, a judge of the Grand Court of the Cayman Islands was arrested on

suspicion of misconduct in public office. He was fingerprinted, photographed, and had a DNA sample taken. His home and judicial chambers, including the court computers, were searched. He was interviewed by the police on two separate occasions for a total of almost five hours. In the subsequent judicial review which followed, the judge who heard the application described the conduct of the police the arrest and search of the Judge as, "... the gravest abuse of process" for which the Cayman Government paid US\$1.275M in damages. Whatever else might have motivated the actions of the police officers involved in the investigation, it is difficult not to conclude that those actions were also calculated to embarrass the Cayman judiciary in general and this judge in particular. Misconduct in public office is not an arrestable offence in the Cayman Islands. The arresting officers, Metropolitan Police officers from the UK who were on assignment as special constables and consultants to the Cayman government, had not sought local legal advice but relied instead on the expertise of an English lawyer.

Prior to his appointment to the Grand Court, the judge had a distinguished career as a lawyer, prosecutor and Supreme Court judge in British Columbia; and until his arrest, he had an impeccable reputation. The particulars of the offence, of which the judge was accused, were never made completely clear; but it seems that he was accused of violating a local online news publisher's rights to privacy by 'using his influence' in asking a journalist to find out the identity of the author of certain objectionable letters published on the online news service that were critical of the judiciary in general and Chief Justice in particular.

Most remarkably, in a statement on the 'unprecedented' corruption investigation that led to the judge's arrest, the governor also found it appropriate to reassure the public that the judge was not charged with any crime. One wonders that if the judge was not charged, or would not be charged, why he was arrested? In subsequent applications for judicial review, Cresswell J held that the search warrants and arrest warrants were illegal, and consequently so were the subsequent actions taken based on them. Within a matter of weeks of the arrest, the Attorney General announced that the judge was no longer a subject of the investigation; but the damage to the reputation of the Cayman judiciary was already done.