Neutral Citation Number: [2024] CA (Bda) 4 Civ

Civil Appeal No. 19 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 201

Date: 24 January 2024

Before:

JUSTICE OF APPEAL SIR ANTHONY SMELLIE
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER
and
JUSTICE OF APPEAL CHARLES-ETTA SIMMONS (Acting)

- -

Between:

LEYONI JUNOS (ON BEHALF OF THE CIVIL JUSTICE ADVOCACY GROUP)
Appellant

- and -

THE GOVERNOR OF BERMUDA
Respondent

Ms. Leyoni Junos (said by her to be acting as McKenzie Friend on behalf of the Civil Justice Advocacy Group) for the Appellant
Mrs. Lauren Sadler-Best of the Attorney-General's Chambers, for the Respondent

Hearing date(s): 14 December 2023

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APPROVED JUDGMENT

Smellie, JA:

1. This judgment is given in relation to (i) an application for permission to appeal; and (ii) an appeal by the appellant, Ms. Leyoni Junos (said by her to be acting as McKenzie Friend on behalf of the Civil Justice Advocacy Group) ("the Applicant"), against a ruling of the Supreme Court delivered by Wolffe J. on 10 March 2023 ("the Wolffe Ruling"), by which he refused her application for leave to apply for judicial review of a decision of the Governor's, which is described in greater detail below.

2. This action itself, which is a claim for judicial review, gives rise to questions about the legality of the Judicial and Legal Services Committee (the "JLSC"), a standing group of qualified and experienced persons[1] convened by the Governor to advise on appointments of, and disciplinary complaints against, members of the judiciary. The Applicant brought the action as a result of her dissatisfaction with the fact that she was directed by the Governor's office, on the Governor's instructions, to resubmit a complaint which she had filed with the Governor's office with the JLSC. This is the decision of the Governor which is criticized and is the subject of the action (the "Governor's decision").

3. Having been refused leave to appeal against the Wolffe Ruling on 10 August 2023 by Bell JA, sitting as a single justice of appeal, the Applicant renewed her application to the Full Court for leave to appeal against the Wolffe Ruling.

4. On 14 December 2023, we heard the application for leave to appeal and, in addition, the appeal itself on a provisional basis, as we had previously informed the parties we would do. At the conclusion of the hearing we declared as follows:

> "(i) Permission to appeal is granted.
>
> (ii) We reserve our decision on whether the appeal should be allowed, ie:

[1] First convened by Governor George Ferguson in November 2013 as a standing committee to advise the Governors of Bermuda on their constitutional responsibilities in relation to the judiciary, including the power to appoint judges and magistrates and to make decisions concerning complaints about judicial conduct (other than issues relating to judgments which should or could be considered further in the courts). The JLSC comprises 8 persons including the President of the Court of Appeal as chairperson, the Chief Justice, two overseas judges, the President of the Bermuda Bar Association and three prominent lay members from the Bermuda community. See www.gov.bm/jlsc

whether the Applicant should have had leave to bring judicial review proceedings in the Supreme Court against the Governor's decision.

(iii) We also reserve judgment on whether, if we allow the appeal, we should also grant the judicial review application on the merits.

(iv) Costs reserved."

4. The application for leave to apply for judicial review of the Governor's decision, originally filed on 17 May 2019, was first decided on the papers by Acting Justice Delroy Duncan KC. It was refused by him on 8 July 2022, after an inordinate administrative delay of more than 3 years[2]. The relief which the Applicant then sought[3], which she sought upon her renewed application before Wolffe J and which in substance she would still seek if her appeal were now to be successful, was as follows:

1. a declaration that the Judicial and Legal Services Committee ("JLSC") is an unconstitutional body which has no statutory existence and therefore has no legal authority to vet, investigate or hear complaints against judges and/or the judiciary;

2. an Order of Mandamus that the Governor appoints a Tribunal in accordance with section 74(4) of the Bermuda Constitution Order 1968 (the "Bermuda Constitution") to investigate the Applicant's complaint against Chief Justice Hargun[4], the complaint which she had filed in the name of the Civil Justice Advocacy Group[5], at the Governor's Office (and which was redirected to be filed with the JLSC by the Governor's decision);

[2] An explanation, upon which we see no need to make further comment now, is given at [5] to [7] of the Ruling of Duncan AJ delivered in July 2022.

[3] See her Notice of Application for leave to apply for Judicial Review pursuant to Order 53, rule 5 of the Rules of the Supreme Court dated 17 May 2019.

[4] We have not seen the Complaint, the gist of which was explained to us by the Applicant in the course of her oral submissions. The merits of the Complaint, if any, are irrelevant to our determination of the issues now before this Court. We therefore express no views in that regard.

[5] The Notice of Application states the name of the Applicant (as does the Notice of Motion to Appeal before us) as "LeYoni Junos (for Civil Justice Advocacy Group)". Ms. Junos explained that her role is that of a McKenzie Friend for the Group which is an unincorporated body of persons. While no objection as to her standing to bring the application or to speak on behalf of the Group was taken before us, we reserved our position in relation to how that question of standing might affect our disposition of the costs of the proceedings.

3. a Protected Costs Order in favour of the Applicant and the Civil Justice Advocacy Group.

5. The gravamen of the Applicant's complaint upon which she seeks judicial review, is what she describes as the unlawfulness of the Governor's decision[6], directing as it did that the complaint against the Chief Justice which she had submitted to the Governor's Office, be instead resubmitted to the JLSC in keeping with the Judicial Complaints Protocol for Bermuda ("the Protocol"). The Protocol, dated 1 January 2014, had been issued by the Governor's Office for publication on the Government website[7].

6. As the Applicant questions the legitimacy of the JLSC itself, and hence the legitimacy of the Protocol also, she filed the application for leave to bring Judicial Review proceedings on 17 May 2019 to challenge and set aside the Governor's decision. Her grounds, as filed in her Notice of Motion of 17 May 2019 and as repeated before us, are:

(i) The Governor's decision (communicated via his Executive Officer) requiring the Applicant to refer the complaint against the Chief Justice to the JLSC was unlawful, in that the JLSC was an unconstitutional body that has no legal existence and no legal authority. [The Applicant's argument here is that the Governor should have kept control of the Complaint and that, had she followed his directive, she felt that she would have been agreeing to a process that was unlawful and unconstitutional].

[6] As given by or on behalf of then Governor John Rankin. The email from "*Government House-Executive Officer*" read: "*Dear Sir/Madam, Thank you for your email dated 4th February 2019 in which you attached a petition and supporting document for an investigation of the Chief Justice. I take this opportunity to advise you that complaints of this nature are ordinarily handled by the Judicial and Legal Services Committee. Please find below a link to the Complaints Protocol for your reference. If you wish to proceed with a complaint I would urge you to refer to the procedure as detailed in the protocol*". Then followed the link which read: https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf which, when opened, revealed the Protocol.

[7] The Protocol actually comprises two Parts – Part 1 is a Convening Note or Introductory which explains the history and rationale. Part 11 sets out the complaints procedure. During the hearing Ms Sadler-Best, after enquiries undertaken with the Governor's Office at the direction of the Court, confirmed that the version available on the website is that which was in existence and published at the time of the Applicant's complaint and has remained operative throughout for the purposes of these proceedings.

(ii) In law, the only body which can investigate and advise the Governor as to whether a Judge's (mis)conduct is sufficient to require his removal from office, is the Tribunal referred to in Section 74(4) of the Bermuda Constitution Order.

(iii) Having received a detailed complaint about the Chief Justice, it was unreasonable[8] for the Governor to require the Applicant to re-submit the complaint (to the same address) under the specifics of a JLSC form and protocol, which is itself unconstitutional in any event.

(iv) The Governor's directive would also result in procedural impropriety because referral to the JLSC would create an additional investigative layer to that which is constitutionally provided, thereby extending the length of time it would take to investigate and deal with the complaint.

(v) The Governor, by accepting but nonetheless referring the complaint to a non-statutory JLSC for investigation and advice, had created a legitimate expectation that it would be referred for investigation to a proper and lawful body, ie: the Tribunal established by section 74(4) of the Constitution and so the Court should order by Mandamus that he now does so.

7. We will return to address each of these grounds.

The proceedings below

8. It is necessary to examine the history of the matter as it proceeded before the Courts below. In disposing of the first application, by refusing leave to bring Judicial Review (JR) proceedings, Duncan AJ stated as follows at [4] and [6] of his Ruling (referring to

[8] Which we understand to mean in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*. [1948] 1 KB 223, [1947] EWCA Civ. 1 where a three-pronged test was articulated as the bases for the Court's intervention to set aside a bad administrative decision, including on the ground of unreasonableness in the special sense which was later authoritatively restated by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6, [1985] A.C. 374: "*So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."* We will return to consider this argument below.

the Justice Advocacy Group rather than Ms. Junos as "the Applicant"):

"*The Applicant seeks a declaration that the Judicial Legal Services Committee has no legal authority to carry out its stated functions, including hearing complaints against judges. However, such a declaration in isolation would not achieve the stated ultimate purpose of the application, which is to secure an investigation into the conduct of the Chief Justice. The application for an order of mandamus asserts that such an investigation can only be carried out by the 1st Respondent*[9] *appointing a tribunal under section 74(4) of the Bermuda Constitution Order 1968.*

The Judicial and Legal Services Committee is yet to decide how to respond to and address the Applicant's complaint. That Committee has a range of options, one or more of which may satisfy the Applicant's complaint. Further, the Judicial Legal Services Committee is empowered to make recommendations to the 1st Respondent which address the complaint. Only after the Judicial Legal Services Committee has made a decision can the Applicant determine whether it will obtain the ultimate relief it seeks. If the Applicant is not satisfied with the response from the Committee, at that juncture it can reconsider its application for judicial review. For this reason, in my judgment, this application for judicial review is premature: R.(on the application of Paul Rockham Ltd v Swaffham Magistrates Court [2004] EWHC 1417 (Admin) (at paragraph 16)"

9. The Applicant did not accept that decision which, by implication since she had not already done so, advised her to submit her complaint to the JLSC. Instead, she filed a renewed application for leave to bring JR proceedings. The renewed application came on before Wolffe J. At [12] of the Wolffe Ruling, he described the factual basis of the Applicant's claim for judicial review, as being the Governor's decision or directive that she resubmit her complaint to the JLSC which, she asserted, "*had no lawful existence or authority*". The Judge then conducted a survey of the history of the JLSC, identifying the main reason for its formation as outlined in the introductory paragraphs (Convening Note) of the Protocol; ie: the historical absence in Bermuda of a protocol or procedure

[9] In the Notice of Application filed in May 2019 the Governor was the 1st Respondent and a Ms Sara Smalley (described in email correspondence as both the Executive Officer at the Governor's Office and as Secretary to the Judicial and Legal Services Committee) was the "Respondent".

for dealing with disciplinary complaints against members of the judiciary. He summarized the position as follows from [20] of his judgment:

"20. *Appreciating that there was an "identified gap" in the Bermuda Constitution in respect of giving constitutional or statutory credence to a body which appoints judges and deals with complaints of judicial misconduct the Protocol stated the following in paragraph 7:*

"*But meanwhile, the Governor has appointed a standing, non-statutory group to advise him on matters relating to both judicial appointments and complaints against the judiciary. Within a non-statutory framework, it broadly follows the pattern of the Cayman Islands*[10]*, but includes the Chief Justice and two senior overseas judges*."

10. The Judge then proceeded upon his analysis of the Applicant's arguments at [21] to [30] of his Ruling, as follows:

"21. So the Applicant is perfectly correct that the JLSC is not enshrined in the Bermuda Constitution or any statute. The Applicant, and this is not a criticism, rightly spent time at the hearing asserting that because Gibraltar and Cayman saw fit to create judicial services commissions within their respective constitutions that the absence of such specific provisions in the Bermuda Constitution makes the JLSC legally ineffective. I do not accept this line of argument for a number of reasons.

22. Firstly, although jurisdictions such as Gibraltar and Cayman sought fit to put their judicial service commissions in the infrastructure of their respective constitutions, other jurisdictions such as Australia and the Isle of Man, like Bermuda, have designed non-statutory frame works to afford members of the public a means by which they can make complaints against judicial officers. Therefore, one cannot definitively state that the JLSC, and its procedures, must have constitutional or statutory origins for them to have legal and procedural import. To this point, I refer to and follow the words of President Zacca and Chief Justice Kawaley who having accepted that the JLSC did not emanate from the Bermuda Constitution or any statute

[10] This is a reference to the position in the Cayman Islands as it then stood, in January 2014, under the Constitution. The Cayman Islands Constitution was amended in 2016 to bring into being a fundamentally different approach to the discipline of judicial officers and this will be the subject of further discussion below.

they went on to explain why it still has a legal and procedural validity. I will recount verbatim their words in the Protocol in this regard as they are pertinent to the Applicant's renewed application. Paragraphs 3 and 4 of the Protocol state:

"3. The current trend is clearly in the direction of creating a framework for members of the public to be able to make complaints about the conduct of judges which relates to the propriety of their ethical conduct in cases where no suggestion of serious misconduct calling for their removal from office arises. A few examples illustrate this shift in the direction of increasing the accountability of the Judiciary to the public in a way which supports judicial independence:

(a) In England and Wales a legislative scheme for judicial complaints was introduced in 2006, the same year our own Guidelines for Judicial Conduct was adopted;

(b) In Australia non-statutory judicial complaints procedures have been developed at the Federal and State level[11] *in recent years;* [emphasis added]

(c) the Cayman Islands 2009 Constitution obliges the Judicial and Legal Services Commission to both create a code for judicial conduct and a procedure for making complaints of judicial misconduct;

(d) the Isle of Man Judiciary introduced non-statutory 'Procedural Notes in Respect of Complaints of Personal Misconduct against Members of the Judiciary of the Isle of Man' in October 2012.

4. A unifying feature of all of these judicial complaints procedures is that complaints will not be entertained where in substance a litigant is dissatisfied with whether or not a decision made by a judicial officer is right or wrong. The remedy for such a complaint lies in the appeals process. This non-statutory Protocol is designed to provide members of the public who consider that a judge has acted in a way which is inconsistent with the

[11] While this statement may have been entirely correct in 2014, several Australian States now have statutory frameworks for dealing with disciplinary complaints against the judiciary. See for instance: The Judicial Officers Act 1986 (as amended). New South Wales: www.legislation.nsw.gov.au.; Judicial Conduct Commissioner Act 2015, South Australia: www.legislation.sa.gov.au. ; Judicial Commissions Act 1994 (as amended), Victoria: http://www8.austlii.edu.au. The Australian experience will also be the subject of further discussion below.

> *standards set in the Guidelines for Judicial Conduct with a clear pathway for having their concerns heard. This not only makes the Judiciary accountable to the public. It also affords judges against whom unmeritorious complaints are made with a mechanism through which they can be vindicated. Consistent with international best practice, the Protocol is also designed to preserve judicial independence by ensuring that the Executive is not directly involved in imposing penalties on serving judicial officers".* [Emphasis added].

> *23. It may very well be aspirational to eventually follow the lead of Gibraltar and Cayman and give the JLSC constitutional and/or statutory viability and no doubt this was the spirit behind the words of Chief Justice Hargun at the Opening of the Legal New Year in 2020. However, as was/is in Australia and the Isle of Man constitutional or statutory support is not necessary, and therefore the absence of such is not fatal to the existence of the JLSC.*

24. Secondly, the overall impact of the judicial complaint regime governed by the Protocol and implemented by the JLSC provides members of the public with a far wider layer of redress which the Bermuda Constitution does not expressly allow. The Bermuda Constitution is confined to questions which only involve the "removal" of a judge. Sections 74(3) and 74(4) of the Bermuda Constitution, as read with section 89, are solely concerned with the removal of a judge of the Supreme Court from office for inability or misbehavior, and this is only after a constituted tribunal recommends removal, and, only after the Privy Council recommends removal. The Bermuda Constitution is silent on the disciplinary process to be followed for the plethora of other types of judicial complaints which do not call for the ultimate penalty of the removal of a judge. As the Protocol states, under the Bermuda Constitution "the Governor's disciplinary powers for matters other than removal are implicit rather that explicit" [12] [emphasis added].

[12] *Paragraphs IO and 11 of the Protocol.*

25.What the "Guidelines for Judicial Conduct" (published by the Chief Justice Richard Ground on the 21st July 2006), the formation of the JLSC, and the content of the Protocol collectively do is to fill the glaring lacuna in the Bermuda Constitution as it relates to the public's recourse when they are confronted with all manner of judicial misconduct. So while there may be no express provisions in the Bermuda Constitution for the creation of the JLSC its existence actually bolsters and gives strength to section 74(4), and most importantly gives the Applicant an avenue for redress which she would not have ordinarily had.

26. This leads me to my third point. I agree with the submissions of Ms. Sadler-Best that in the absence of explicit constitutional or legislative guidance the Governor is entitled to formulate processes and procedures as to how judicial complaints are to be handled. I would even conclude that the Bermuda Constitution permits the Governor to do so. Section 89 of the Bermuda Constitution instils in the Governor not only the power to remove a judicial officer but to also "exercise disciplinary control" over judicial officers. The ability to exercise this disciplinary control over judicial offices must reasonably involve the Governor devising written guidance by which aggrieved persons who are seeking to have judicial officers disciplined, and those judicial officers who are facing a complaint, would have consistency and certainty in how judicial complaints are resolved. The promulgation of the Protocol through the JLSC does this.

27.Moreover, paragraphs 16 and 20 of the Protocol makes it pellucid that the work of the JLSC is limited in that it goes no further than to recommend, not dictate, a course of action to be taken by the Governor when determining a judicial complaint. As to the remit of the JLSC paragraph 16 of the Protocol stipulates that it is to:

> *"(a) advise the Governor on judicial and legal appointments and discipline;*

> *(b) develop and maintain a database of precedents and operational principles for judicial selection and promotion;*
> *(c) develop and maintain a database of precedents and operational principles for judicial disciplinary matters."*

28. As to what should be done thereafter paragraph 20 of the Protocol provides that the JLSC shall report its findings to the Governor and can make recommendations to the Governor as to what action can occur if the complaint of judicial misconduct is substantiated. In this regard, paragraph 20 of the Protocol states:

> *"The Governor upon receipt of such a recommendation may either:*
>
> (1) *accept the recommendation;*
> (2) *decide that no action be taken; or*
> (3) *decide that some other action should be taken,*
>
> *and, in either case, shall as soon as practicable communicate his preferred course of action to the Chief Justice or (where the respondent to the complaint is the Chief Justice or a member of the Court of Appeal) to the President of the Court of Appeal."*

29. Therefore, the functions of the JLSC does not (sic) in any way whatsoever usurp or erode the final decision making power of the Governor. As Ms. Sadler-Best states, the JLSC is nothing more than an advisory body to the Governor on matters relating to the disciplining of judicial officers. The Governor still retains the exclusive power to make the final say as to what is to happen to the judicial complaint and what penalty, if any, would be imposed on a judge if the Governor deems that their behavior amounts to judicial misconduct. There is nothing in the Protocol which, expressly or impliedly, delegates to the JLSC the decision-making power which is vested in the Governor to discipline or sanction judicial officers. [Emphasis added].

> *30. Essentially, a complaint against a judicial officer starts with the Governor and ends with the Governor. This is evidenced by the fact that the genesis of a judicial complaint is the filing of the required documentation set out in Annex C of the Protocol by the complainant (paragraph 7 of the Protocol) and the resolution of the judicial complaint ending with the Governor communicating to the Chief Justice what action is to be taken, or not taken, against the judicial officer (paragraph 20 of the Protocol). Colloquially speaking, the buck stops with the Governor."*

11.As will be discussed further below, these conclusions by the Judge as to the procedural import of the Protocol, as vesting only an advisory role in the JLSC, are largely acceptable but only in so as far as they go. The Protocol goes further in terms which appear not to have been examined by the Judge and which in our view, give rise to reasonable concern as to their legality and justified the leave which we granted to the Applicant to bring her appeal.

12. At page 9 of the Protocol, under the heading "*Summary dismissal of complaints*", the following rubric appears:

> *"11. A preliminary assessment of the merits of complaints will be carried out by a Complaints (filtering) Sub-committee comprising the President (or such other member of the Committee as he may designate) and by a lay member of the Committee (i.e. a member of the Committee who is not legally qualified).*
>
> *12. Complaints may be dismissed without any full investigation where they are unmeritorious on their face**.** Complaints will be summarily dismissed where:*
> *(a) it does not adequately particularise the matter complained of;*
> *(b) it is about a judicial decision or judicial case management, and raises no question of misconduct;*
> *(c) the action complained of was not done or caused to be done by a judicial office-holder;*
> *(d) it is vexatious;*
> *(e) it is without substance or, even if substantiated, would not require any disciplinary*

action to be taken;

(f) it is untrue, mistaken or misconceived;

(g) it raises a matter which has already been dealt with and does not present any material new evidence;

(h) it is about a person who no longer holds any judicial office;

(i) it is about the private life of a judicial office-holder and could not reasonably be considered to affect his or her suitability to hold judicial office;

(j) it is about the professional conduct in a non-judicial capacity of a judicial office-holder and could not reasonably be considered to affect his or her suitability to hold judicial office; or

(k) for any other reason it does not relate to misconduct by a judicial office-holder."

13. The Protocol then sets out the procedures for dealing with those complaints which may be regarded as deserving of further consideration before returning at [23], to stipulate in the following terms on the treatment of those which, on preliminary assessment under [12], are found to have no merit:

> "23. *Where the Sub-committee decides that a complaint has no merit and should be dismissed, the Sub-committee shall communicate this decision to the complainant and the judge complained against, and shall give brief reasons for its decision."*

14. Thus, while the Protocol itself does not state that there has been by the Governor, a purported delegation to the JLSC (and its Sub-Committee) of any disciplinary power vested in him in respect of judges, the clear implication is that such a delegation has indeed taken place in respect of complaints which (in the words of the Protocol at [12]) " *are unmeritorious on their face*". That is because, under the Protocol, the JLSC may decide which complaints come, or do not come, within that category and may summarily dismiss those which are regarded as coming within it. And it follows by necessary implication, that all others, whether of sufficient seriousness to warrant proceedings for removal or some lesser sanction, would remain to be determined by the Governor. It also follows that, to the extent that the Protocol would operate to delegate the resolution of complaints which are "*unmeritorious on their face*", the statements in the Wolffe Ruling, as expressed in the words in emphasis in [29] above and in the vernacular in [30] that the "*buck stops with the Governor*", are shown *pro tanto* to be incorrect.

15. Paragraphs 3 and 10 to 13 of Part 1 of the Protocol (the Convening Note) are also of further significance for present purposes. Under the heading "Discipline and security of tenure", they express the stated assumption of a power in the Governor to exercise ongoing disciplinary control over the superior court judges (beyond the power to initiate an inquiry for removal from office) upon which the Protocol is stated to proceed and which found approval with the Judge in his Ruling. These provisions also reflect upon the Governor's disciplinary remit over the magistracy in ways which also invite comment. As will be seen, they nonetheless acknowledge implicitly, in the following terms, the uncertain nature of the premise which they adopt and of the subject-matter they seek to address:

> *"10. Section 89 of the Constitution expressly provides that the power to remove magistrates, etc., is vested in the Governor acting in consultation with the Chief Justice. As far as Supreme Court Judges and Court of Appeal Judges are concerned, the Governor's disciplinary powers for matters other than removal are implicit rather than explicit.*
>
> *……*
>
> *12. By necessary implication, the Governor must exercise general disciplinary control over superior court judges in respect of matters which do not give rise to any consideration of removal. However, there is no constitutional or legislative support for the disciplinary process which ought to be followed and for the disciplinary measures (apart from removal) which can be imposed.*
>
> *13. The position of magistrates and other judicial officers is opaque. There is no constitutional or legislative support for the disciplinary process which should be followed in all cases, including cases where removal is being considered. The security of tenure of such judicial officers is accordingly substantially less than superior court judges, despite the fact that the criminal jurisdiction exercised by magistrates is now equivalent (in many respects) to that of the English Crown Courts.* " [emphases added]

16. In our view, against this background, at least three questions arise for determination:

(a) What is the nature and extent of the power vested in the Governor for the discipline of members of the judiciary?

(b) Can that power, or any aspect of it, be properly delegated to the JLSC, a non-constitutional and non-statutory body? Or may the JLSC operate only as an advisory body?

(c) If the JLSC is entitled to determine disciplinary complaints, has delegation been effectively made so as to allow the JLSC to undertake necessary enquiries and provide an effective outcome to enquiries, in particular as they may relate to complaints which may not result in removal from office?

17. The starting point for the examination must be with the Constitution itself. The provisions of primary significance relating to the discipline of the judiciary are, as the Judge noted, in sections 74 (4) and 89 respectively. However, the provisions of section 74(2), (3) and (5) to (7) are also of significance and so are also included in the following citation:

"*(2) A judge of the Supreme Court 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, and shall not be so removed except in accordance with the provisions of subsection (3) of this section.*

(3) A judge of the Supreme Court shall be removed from office by the Governor by instrument under the Public Seal if the question of the removal of that judge from office has, at the request of the Governor, made in pursuance of subsection (4) of this section, been referred by [His] Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act 1833 or any other enactment enabling [His] Majesty in that behalf, and the Judicial Committee has advised [His] Majesty that the judge ought to be removed from office for inability as aforesaid or misbehaviour.

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

(a) the Governor shall appoint a tribunal, which shall consist of a Chairman and not less than two 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; and

(c) if the tribunal so advises, the Governor shall request that the question should be referred accordingly.

(5) The provisions of the Commissions of Inquiry Act 1935 [title 28 item 19] of Bermuda as in force immediately before the coming into operation of this Constitution [2 June 1968] shall, subject to the provisions of this section, apply as nearly as may be in relation to tribunals appointed under subsection (4) of this section or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under that Act.

(6) If the question of removing a judge of the Supreme Court from office has been referred to a tribunal under subsection (4) of this section the Governor may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the Governor, and shall in any case cease to have effect-

(a) If the tribunal advises the Governor that he should not request that the question of the removal of the judge from office should be referred by [His] Majesty to the Judicial Committee; or

(b) If the Judicial Committee advises [His] Majesty that the judge ought not to be removed from office.

(7) The powers conferred upon the Governor by this section shall be exercised by him acting in his discretion."

18. These provisions of section 74, as both the Convening Note and the Judge correctly acknowledge, are clearly concerned only with questions of removal from office of judges of

the Supreme Court. Similar provisions are set out in section 78 of the Constitution in respect of the removal from office of judges of the Court of Appeal. Provisions in like terms appear, in respect of judges of superior courts of record, in the Constitutions of all the British Overseas Territories, as they do in the written constitutions of the former British colonies, now the independent countries of the Commonwealth of Nations[13]. They are expressly aimed only at circumstances where there may be need for enquiry for removal of a judge from office either for inability[14] to discharge the functions of office or for misbehaviour, regarded, in modern parlance, as serious misconduct[15].

19. It follows that the provisions do not contemplate failings or misconduct which, although calling for some lesser sanction such as formal advice or guidance, the imposition of a deadline for delivery of judgment or a reprimand; could not rise to the level of justifying removal from office. These are matters which in many Commonwealth jurisdictions are now regarded as matters of internal discipline[16], calling for no more than what, for sake of the present discussion, I would describe as an "*intermediate sanction*".

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[13] A survey of the many countries which had adopted these provisions by 1966 when his seminal and authoritative work was published, can be found in Sir Kenneth Roberts-Wray's book: *Commonwealth and Colonial Law*, at p 499 – 501. Countries which have gained independence since then, as well as the remaining British Overseas Territories have also adopted the same model.

[14] As considered and described by the Privy Council in *Re Chief Justice of Gibraltar* [2009] UKPC 43, at [200] and following. Note should also be taken of the powerful dissenting judgment of Lord Hope.

[15] See *Report of the Tribunal to the Governor of the Cayman Islands -Madam Justice Levers (Judge of the Grand Court of the Cayman Islands)* [2010] UKPC 24, ("*the Justice Levers Appeal*") where at [50] Lord Phillips explained on behalf of the Privy Council that "*The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that the judge shall not be removed for misbehaviour unless 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 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 – see Therrien v Canada (Minister of Justice) [2001] 2 SCR 3*."

[16] By virtue of the 2016 amendment to section 106 of the Constitution, in the Cayman Islands the Chief Justice is responsible for matters of internal discipline involving the magistrates and judges of the Grand (High) Court and the President of the Court of Appeal for such matters involving judges of the Court of Appeal. By implication, if such a complaint which could clearly not result in removal arises against the Chief Justice or President of the Court of Appeal, the matter must be left to be resolved at the discretion of those very senior judicial officers. It is yet to be seen however, whether a process will be implemented for an independent investigation (say by the President of the Court of Appeal in the case of such a complaint against the Chief Justice or vice versa). If a complaint appears serious enough to justify invoking the constitutional process for removal, then it becomes a matter upon which the Cayman Islands Judicial and Legal Services Commission would advise the Governor in keeping also with section 106 of the Constitution. This amendment to the Cayman Islands Constitution came about after a petition, challenging the asserted power in the Governor to exercise ongoing disciplinary control over the local judiciary including as could lead to intermediate sanctions, was accepted by Her Late Majesty the Queen for referral to the Judicial Committee of the Privy Council but was referred back to the local judiciary by the Judicial Committee for trial by way of JR proceedings. See: *Chief Justice of the Cayman Islands v the Governor and The Judicial and Legal Services Commission* [2012] UKPC 39. The amendment by Order in Council in 2016 was introduced to avoid the need for the Chief Justice to pursue those proceedings. See: https://www.legislation.gov.uk/uksi/2016/780/article/3/made. Similar provisions appear in the Constitution of the Turks and Caicos Islands which leave matters of internal discipline of the

20. As the Protocol itself acknowledges, to the extent that it contemplates disciplinary proceedings against superior court judges other than in contemplation of removal from office, it finds no basis in the Constitution. In relation to such judges, the Constitution does not provide for circumstances where complaints, while important enough to warrant an intermediate sanction, could not justify removal from office. And it follows, that neither does the Constitution provide for a power in the Governor to enquire into such complaints or to delegate to the JLSC a responsibility to determine such complaints.

21. However, as [10] and [11] of the Protocol suggest, the Governor is regarded by necessary implication (but without citation of authority for the proposition), as having the power to discipline judges for such lesser transgressions. As shown above, the Judge, at [25] of his Ruling, adopted this proposition bolstered by his own view of the import, in this regard, of section 89 of the Constitution.

22. But section 89 is rather more limited in its operation, providing as it does as follows:

> "(1) *Power to make appointments to the offices to which this section applies and to remove or exercise disciplinary control over persons holding or acting in those offices is vested in the Governor acting after consultation with the Chief Justice.*

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judges and magistrates to the Chief Justice, or to the President of the Court of Appeal in relation to the judges of the Court of Appeal. See https://www.legislation.gov.uk/uksi/2011/1681/made. (as consolidated in 2014), section 87 (3).

In England and Wales the Lord Chief Justice and the Lord Chancellor are jointly responsible for considering and determining complaints about personal conduct of all judges. However, the Lord Chief Justice, after consultation and agreement with the Lord Chancellor, has the right to impose an intermediate sanction, such as to give a judge formal advice, formal warning or a reprimand, or to suspend him or her from office in certain defined circumstances. See Courts and Tribunals Judiciary, Judicial Conduct: https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/jud-conduct/, See also section 108 of the Constitutional Reform Act 2005 UK.

In Northern Ireland the Lord Chief Justice, in exercise of powers given under the Justice (Northern Ireland) Act 2002, exercises disciplinary control over judicial officers. There are a number of circumstances where the Lord Chief Justice may take disciplinary action, including by way of the imposition of intermediate sanctions. See the latest Code of Practice issued 31 August 2021 at www.judiciaryni.uk/codeofpractice. Where the complaint is against the Lord Chief Justice, the process may involve an inquiry being undertaken by the senior Lord Justice of Appeal is "gross misconduct" is not alleged. If gross misconduct is alleged, the process may involve an enquiry by another Lord Chief Justice or a Justice of the Supreme Court of the United Kingdom. See "Complaints about the conduct of the Chief Justice Code of Practice" : www.judiciaryni.uk.

In the Australian States mentioned above at fn 11, there are statutory procedures of internal discipline for dealing with less serious complaints against judicial officers such as could lead to the imposition of intermediate sanctions.

> *(2) This section applies to the offices of magistrate, member of any civil court subordinate to the Supreme Court and registrar of the Supreme Court or the Court of Appeal and of such other officers of the civil courts of Bermuda who are required to possess legal qualifications as the Legislature may by law prescribe*."

23. Thus, it is clear that to the extent section 89 vests in the Governor the power to exercise disciplinary control over members of the judiciary, not only for removal but also of a kind which could result in an intermediate sanction, that power is confined only to circumstances involving judicial officers of a rank below Supreme Court judges.

24. As noted above, the Protocol also proceeds on the assumption that by necessary implication, such a power also exists in relation to Supreme Court judges. That is in our view, an erroneous assumption. First, this is because it is a settled principle of construction that where an enactment mentions a specific thing, it excludes other things of the same kind. The principle is often expressed in the Latin maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), or for short, the *expressio unius* principle. See *Bennion on Statutory Interpretation*, 7th Edition at Code s.23.12.

25. The principle, in our view, applies here equally to section 74 of the Constitution to exclude transgressions which could not result in removal from its remit, as it does to section 89, to exclude its applicability to the Superior Court judges from ongoing disciplinary control by the Governor.

26. There are further well-established grounds for this limited view of the import of these sections. They are rooted in the precepts of judicial independence and separation of powers, precepts which have been settled ever since, and have their direct origins, in section 3 of the Act of Settlement 1770. They emerged after a centuries-long struggle between Parliament and the Sovereign[17] over whether the Superior Court Judges should be answerable to the Sovereign,

[17] Enlighteningly discussed by Sir Kenneth Roberts -Wray (op cit) at pp 483-501, and in "*The Lion and The Throne, The Life and Times of Sir Edward Coke*" by Catherine Drinker Bowen, available at Amazon Book Store, www.amazon.uk., as well as in a recent paper entitled "*Removal of Judges from Office*" by the Hon Geoffrey Nettle AC QC, a former justice of the High Court of Australia, published in the Melbourne University Law Review Vol. 45 (1). There Justice Nettle concludes after his comprehensive survey of the history and judicial examination of the removal provisions, including that under the Federal Constitution of Australia that " (it*) provides little if any assistance in addressing judicial misbehaviour or other opprobrious conduct falling short of section 72 (ii)* [ie: the equivalent of section 74 (2) of the Bermuda Constitution] *standard*."

in the mode as Sir Francis Bacon infamously postulated that they "*must be lions, but yet lions under the Throne, being circumspect that they did not check or oppose any points of sovereignty*". That notion was finally rejected by Parliament by the provision in section 3 of the Act of Settlement that "*Judges Commissions be made Quamdiu se bene gesserint, and their salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them.*"

27. Thus, it became established that Superior Court Judges in England would enjoy security of tenure, not at the pleasure of the Sovereign but "*during good behaviour*" and henceforth would be accountable to the public through Parliament which retained control, such that the power of removal, although today ultimately exercisable by the Sovereign, is exercisable only upon an address by both Houses. See the Senior Courts Act 1981, U.K., section 11[18]. The position in the Overseas Territories, to be examined below, is unsurprisingly, directly related.

28. As explained at fn 15 (above), there are modern provisions in England and Wales for dealing with disciplinary complaints against Superior Court Judges which could not result in dismissal but in a form of intermediate sanction such as formal advice, formal warning or reprimand. While even such sanctions can be imposed only by the Lord or Lady Chief Justice in agreement with the Lord Chancellor, the procedure is internal to the judiciary, involving, with the administrative support of the Judicial Conduct Investigations Office (JCIO), a process of investigation and recommendation by a panel of "fact finders", ie: in the case of senior judges, a nominated judge or an investigating judge.

29. There is no power in the Lord or Lady Chief Justice and the Lord Chancellor to impose an intermediate sanction except that expressly given by statute in section 108 of the Constitutional Reform Act 2005. The assumption, by mere implication that such a power is reposed here in the Governor, as assumed by the Protocol, is fraught with obvious dangers and difficulties. We will attempt to identify at least some of them in the context of the discussion which follows.

[18] Section 11 (3) states: "*A person appointed to an office to which this section applies shall hold that office during good behaviour, subject to a power of removal by [His] Majesty on an address presented to [Him] by both Houses of Parliament."* Subsection 3A goes on to explain: "*It is for the Lord Chancellor to recommend to [His] Majesty the exercise of the power of removal under subsection (3)."*

30. The modern constitutional provisions in the Overseas Territories (as in the former colonies now independent states of the Commonwealth of Nations) for the removal of judges for serious misconduct or inability, emerged against the background of the procedure established by section 3 of the Act of Settlement 1770. However, as Sir Kenneth Roberts Wray explained[19] the Imperial Parliament was not prepared to entrust the local legislatures with the process because of continuing fears of overweening loyalty to the Sovereign. Matters came to a head as a result of a petition in 1868 addressed to the Secretary of State for the Colonies by a number of inhabitants of Singapore[20], objecting to the power of the Governor to suspend a Judge and resulting in the subject of removal of a colonial Judge being referred to the Lords of the Privy Council and the Judicial Committee, for their recommendations.

31. The Memorandum in which their Lordships' views were presented began with the following general statement[21]:

> "*It is obvious that some effectual means ought to exist for the removal of Colonial Judges charged with grave misconduct, and that these means ought to be less cumbrous than those existing for the removal of one of Her Majesty's judges in this country. The mode of procedure ought to be such as to protect Judges against the party and personal feelings which sometimes sway Colonial Legislatures, and to insure to the accused party a full and fair hearing before an impartial and elevated tribunal. Hence, it is considered in the case of Mr Justice Boothby,[22] that although the Legislature of South Australia had passed Addresses to the Crown for his removal; that measure did not suffice, as it would have done in England; that, although the Legislature might act as his accuser, it rested with the advisers of the Crown in England to dispose of the charges against him*."

32.As further explained in *Commonwealth and Colonial Law* (op cit at pp 494 – 495), while recognizing that the Colonial legislatures could not be deprived of their constitutional right to address the Crown (in the form of the Privy Council) for the removal of a Judge, the Memorandum went on to deprecate that mode of procedure, explaining at some length the

[19] Op cit, ibid.
[20] The administration of which had in 1867 been transferred to the Crown from the East India Company.
[21] As excerpted in Commonwealth and Colonial Law *op* cit at 494.
[22] The Judge of the Supreme Court of South Australia whose judgments raised questions about the validity of colonial laws and led to the crisis in South Australia which resulted in the passage by the Imperial Parliament of the Colonial Laws Validity Act 1865; see as discussed in *Commonwealth and Colonial Law*, op cit, 396 and following.

objections to the exercise of original jurisdiction by the Privy Council: in short, it was more dilatory and more expensive, more onerous to the parties and less satisfactory to their Lordships than suspension or amotion (removal), either of which necessitated an inquiry on the spot, where the witnesses were, and normally reached the Privy Council on reference or appeal. They therefore favoured proceedings by the Governor, subject to review in England either by the Secretary of State or the Privy Council, except that, *where the misconduct was purely judicial*, the maintenance of the independence of the Judges required:

> "*that judicial acts should only be brought into question before some tribunal of weight and wisdom enough to pronounce definitively upon them, and this function appertains with peculiar fitness to the Privy Council, which, as a Court of Appeal, has to review the decisions of all the Colonial Courts*."

33.While the meaning of "*judicial acts*" in this context was not apparently defined, it is implicit from the debate, that any kind of judicial misconduct other than could justify removal from office was in contemplation and so were recommended to be left to the Privy Council in its judicial capacity for resolution.

34.The fact that this Memorandum became the *fons et origo* of the modern constitutional provisions was recognized by the Privy Council in the *Justice Levers appeal* (above) where at [43] Lord Phillips, referring to the Cayman Islands Constitution, declared on behalf of Court as follows:

> "*43. The procedure for the removal of a judge in the Constitution has its origin in the Memorandum of the Lords of the Council on the Removal of Colonial Judges (1870) 6 Moo. N.S. Appendix ix. The Memorandum stated that it was unsatisfactory for the Judicial Committee to exercise an original jurisdiction in relation to the removal of Colonial judges because of the difficulty and delay in placing evidence before it. The scheme proposed was one whereby the Governor would investigate the facts and make a provisional decision whether they justified removal. If so, the Governor would suspend the judge and refer the matter to the Judicial Committee for review. The Memorandum suggested an exception to this scheme in respect of misconduct charged that was "purely judicial". This was not amenable to the decision of the Executive*

> *acting on the advice of Law Officers or "advisers of inferior rank" and should be considered directly by the Privy Council."*

35. For present purposes we consider that two conclusions can be drawn from the foregoing review of the history of the constitutional provisions. The first is that there was a clear intention on the part of the Imperial Parliament in accepting the Recommendations, that the removal from office of judges of the superior courts of the colonies, who would enjoy security of tenure "during good behaviour," was no longer to be a matter for the Royal Prerogative but a matter for which express legislative provisions were required. Hence the provisions in that regard which eventually found their expression in the written Constitutions. The Governor would continue to have a role but only insofar as prescribed in the constitutional provisions. The second is that, while misconduct of the "purely judicial" kind was recognized without, apparently, any constitutional or legal provision prescribed for dealing with it (by way of reference to the Privy Council or otherwise), the intention was that such misconduct too should be dealt with by way of judicial intervention and not by means of Executive action.

36. This is, of course, all in keeping with the established precepts of judicial independence and the separation of powers which flowed from the Act of Settlement 1770. As Sir Kenneth Roberts-Wray reminded in his introductory remarks to his review of the history of the subject in Commonwealth and Colonial Law (op cit, at 483):

> "*Of prime importance in the preservation of judicial independence is the extent to which, and the means whereby, the independence of the judiciary is safeguarded by protecting them from interference, while at the same time, a procedure is prescribed for the removal of a Judge on proper and adequate grounds. For a full understanding of the present position it is necessary to go some way back in English history and trace developments".*

37. What we therefore learn from the above history is that it is not safe to draw the inference that the Governor, in the absence of express provision in the Constitution to that effect, has a power of ongoing disciplinary control over the Judges of the Superior Courts for matters which could not lead to removal from office. On the contrary, the history teaches us that, in the absence of constitutional or other statutory provision which itself must reflect and respect the

constitutional framework, such matters must be left to be resolved within the ranks of the senior judiciary itself. This would not be an untenable outcome, given that the Bermuda Judiciary has voluntarily agreed to adhere to a modern written Code of Conduct[23] and given the implicit recognition in the Constitution of the Chief Justice as leading judge who, while although *primus inter pares* and being cognizant and respectful of the individual independence of every judge, will be best placed to provide advice, guidance and administrative oversight. As shown above, many Commonwealth jurisdictions now deal with these matters as the subject of internal discipline.

38. The contrary proposition which would vest ongoing disciplinary control in the Governor, acting in his or her discretion, would be antithetical to the established constitutional precept of judicial independence - which perhaps ironically, the Protocol itself, (in [4] of the Convening Note as excerpted in emphasis above) declares as its aim to protect and preserve. One only has to test the antithetical proposition by a few questions for the appropriateness of the foregoing conclusion to be confirmed. For instance, on what basis would the Governor identify and define a transgression warranting his intervention short of removal from office? Such matters are likely to involve concerns about a judge's performance in his/her judicial role, or for example a failure to give a timely judgment. How would the Governor adjudicate such a matter from a position which is necessarily external to the judiciary and its administration? Further, would the Governor, deemed to be acting entirely in his or her discretion, be allowed to impose intermediate sanctions? If so, what would they be? Would they include a written and public reprimand, or even suspension from office? How would such a situation affect the public perception of the independence of the judge in question or indeed, of the judiciary as a whole? How would public confidence be affected by the unseemly appearance of the judges sworn to their oaths of office while under the yoke of such executive control? [24] What would be the result if a sanction by the Governor is not obeyed? Would that, in and of itself, be regarded by the Governor as serious misconduct justifying proceedings for removal from office?

[23] Available at www.gov.bm. Without express reference to them, the Code adopts and reflects the 1985 United Nations Basic Principles on the Independence of the Judiciary as further developed by the 2001 Bangalore Principles which are now universally adopted for the guidance of judicial conduct around the Commonwealth of Nations. See www.undc.org/bangaloreprinciples. The Bangalore Principles were expressly approved by the Privy Council in the Justice Levers case at [48] as setting "*The standard of behaviour to be expected of a judge."*

[24] In this regard it must not be forgotten that the Governor in his or her official capacity, is not infrequently a party to proceedings before the Courts.

39. Questions such as these clearly identify the potential for interference, whether actual or perceived, and the slippery downward slope along which the judiciary would be propelled, with the inevitable loss of public confidence in the integrity of the judicial system.

40. It is perhaps also objectionable, for the reasons mentioned in the Protocol itself (the words in emphasis from [13] above) that the Governor should be vested with ongoing disciplinary control over the Magistracy but that is what section 89 of the Constitution clearly states and, at least, the provision is tempered by the fact that the power can only be exercised in consultation with the Chief Justice.

41. The important point to be taken for present purposes, is the clear distinction between the treatment afforded by the Constitution in respect of ongoing discipline in relation to the lower ranks of the judiciary, where express provision is made, and on the other hand, that in relation to the senior judiciary in respect of which the Constitution is entirely silent. We conclude that the language of sections 74 and 89 is clearly intended to reflect the history of the constitutional developments so as to leave lesser transgressions of the senior judiciary as matters for internal discipline.

42. There remain for discussion the other questions raised, ie: whether there is a proper delegation of disciplinary authority to the JLSC (through its sub-committee), to decide on complaints which may be regarded as "*unmeritorious on their face*" (see [12] of the Protocol) and whether the JLSC may finally decide such matters.

43. In so far as what is proposed by the Protocol might be seen as a delegation of power to decide finally on a disciplinary complaint against a Superior Court Judge, however lacking in merit it might be regarded, we consider that the answer is plain. The Governor cannot delegate a power which is not vested in the Governor and for the reasons explained above, there is no power vested to deal with disciplinary complaints against the senior judiciary which could not lead to removal from office.

44. It is also very doubtful whether the Governor may delegate the power which he holds in consultation with the Chief Justice under section 89 of the Constitution to exercise ongoing discipline control over the lower ranks of the judiciary. We are prepared to suggest, without

deciding the issue, because we have not heard argument on it , that the well-known maxim *delegatus non potest delegare*[25], applies as much to the Governor exercising powers under the Constitution, as it does to the exercise of any other delegated power, the Constitution itself being an Order in Council made by Her Late Majesty the Queen in exercise of powers delegated to Her by the Westminster Parliament, by way of the Bermuda Constitution Act 1967[26]. A strong indication in support of this proposition is to be found in section 83 of the Constitution itself, where the Governor is expressly allowed by regulations to delegate disciplinary powers over the holders of many public service offices. Had the constitution intended a similar power of delegation in relation to the section 89 powers, one would expect that it would have been similarly expressed.

45.So what then, is the upshot of the foregoing conclusions both as they might affect the status of the JLSC, the validity of the Protocol in general and its procedures as they might relate to the complaint filed by the Applicant?

46. First, we do not find that the JLSC itself or the Protocol which is intended to inform the conduct of its affairs, are without effective value. Far from it. In the continuing absence of a statutory scheme for dealing with all kinds of judicial complaints, as a standing body of suitably qualified persons to advise the Governor on complaints which could require his intervention under section 74 of the Constitution for removal of a judge or for differentiating between such complaints and those less serious but which might require other forms of intervention, the Governor is perfectly entitled to rely upon the JLSC. Indeed, when presented with complaints, the Governor is entitled to seek the advice of any suitably qualified person or persons he wishes. This would be an example of the exercise of discretion generally allowed by section 74 (7) of the Constitution.

47. This is confirmed, in the case of complaints which could justify removal from office, by the Privy Council in the *Justice Levers case,* where at [14] to [17] of his Judgment on behalf of the Court, Lord Phillips considered, with approval, the fact that the Governor had referred the complaints overseas to the Head of the Office of Judicial Complaints for England and Wales for advice in the first instance. Having received her initial advice, including in relation to the

[25] In this context the maxim means that a person entrusted with a discretionary power must exercise that power personally unless authorized to sub-delegate it to someone else. See *Bennion* (op cit) Chap. 3 Code 3.14.
[26] See the sub-title to the Constitutional Order 1968.

appropriate procedure to follow, the Governor then engaged his own leading counsel to advise on the substance of the complaints and further on the procedure, before deciding to convene the constitutional Tribunal. Significantly also, the correctness of the advice, accepted and acted upon by the Governor, that Justice Levers should have been afforded an opportunity to comment on all the allegations before he decided to convene the Tribunal, was also affirmed[27].

48. What matters in this context, is that the JLSC is a suitably qualified body of persons capable of giving sound advice to the Governor for dealing with such complaints as may involve the removal of a judge from office, including where appropriate, as to whether the complaint crosses the threshold of seriousness and requires the convening of the Tribunal contemplated by section 74 of the Constitution.

49. It would follow, as a collateral matter, that where such a complaint arises against a judicial member of the JLSC, that member will be recused from its deliberations.

50. It follows logically also, that the JLSC should be allowed to advise on the differentiation between complaints which appear to cross the section 74 threshold; those which appear not to do so but which nonetheless appear to require internal judicial inquiry and intervention; and those which, in the words of the Protocol, are "*unmeritorious on their face"* or patently without merit. And we acknowledge that a good guide for the identification of this third category would appear to be that set out in [11] and [12] of the Protocol itself (above).

51. The problem with the way in which the Protocol is expressed in this regard, is that it plainly contemplates the JLSC sub-committee members themselves taking the final decision whether a complaint comes within the third category and if so, finally dismissing it. Miss Sadler-Best's submission to the contrary - that as the category was approved by the Governor, the JLSC merely apply the Governor's criteria rather than decide on such cases - is, in our view, plainly untenable and wrong. Several items of the category would require a critical evaluation of the complaints, perhaps most pointedly in this regard item (f) which calls for an evaluation whether the complaint is "*untrue, mistaken or misconceived."*

52. The point to emphasise here is that the function of the JLSC in relation to any of the three categories can be only advisory and the results of their deliberations must be expressed in terms of advice. There is no basis upon which either the Governor (when considering what should

[27] Following *Rees v Crane* [1994] 2 A.C 173.

become of a section 74 complaint), nor the Governor in consultation with the Chief Justice (when considering what could become of a complaint under section 89), might leave the matter to be determined finally by the JLSC. Where a complaint appears to come within the contemplation of either of those sections, the JLSC's role is strictly advisory.

53. And of course, there will be those complaints against members of the senior judiciary which, while plainly not serious enough to warrant the section 74 process for removal, may appear to require some form of internal disciplinary intervention. Here too, in our view, the JLSC's role can be to advise on the proper course to take. As discussed above, the course of such a complaint would be by way of reference to the Chief Justice for administrative intervention, if appropriate by the application of an intermediate sanction. This is of course, without suggesting that when confronted with deliberate or chronic failure to observe intermediate sanctions, the Chief Justice would be precluded from filing with the Governor what could become, after receiving the JLSC's advice, a complaint warranting the invocation of the section 74 procedure for removal.

Conclusions

54. With the foregoing in mind, we now turn to express our conclusions on the Applicant's grounds for appeal and the relief which she seeks:

(i) While it is common ground that the JLSC has no constitutional or other statutory existence, there is no basis for doubting the validity of its existence as a standing body of advisors convened to advise the Governor on disciplinary matters involving the judiciary. It follows that while the Governor's decision, in redirecting the Applicant first to lodge her complaint with the JLSC, may be regarded as unhelpful, it was not unlawful. We say "unhelpful" because the complaint could, and in light of the Applicant's concerns, should have been accepted by the Governor's Office even while making clear that the complaint would be referred to the JLSC for advice[28]. It follows that we refuse the Applicant's argument that the Governor's

[28] This is in effect what Justice Bell suggested should happen when, as a single judge, he refused the Applicant's leave application.

decision could properly be described as irrational or unreasonable in the *Wednesbury* sense (above).

(ii) While we accept that in law the only body authorized to investigate and advise the Governor as to whether a judge's conduct justifies removal from office, is the tribunal contemplated by section 74 of the Constitution, the Governor is entitled, in the exercise of discretion, to seek advice from the JLSC (or any other suitable person) as to whether, in the first place, a tribunal should be convened. It will be a matter for the Governor to consider whether such advice is required and so there can be no question now of ordering, by way of mandamus, or otherwise, the convening of a section 74 Tribunal. The mere fact that the Governor was prepared to refer the complaint to the JLSC did not ground a legitimate expectation in favour of the Applicant that he would convene a tribunal.

(iii) It follows from the foregoing, that while the Protocol itself is not strictly "unlawful", it requires re-drafting, as discussed above, in order to remove and/or amend as appropriate the provisions relating to the purported "summary dismissal of complaints" by the Complaints (filtering) Sub-committee and to confirm the purely advisory role of the JLSC.

(iv) The Applicant's appeal is therefore dismissed, as is her application for leave to file JR proceedings against the Governor's decision.

(v) We recognize nonetheless that the Applicant had reasonable concerns about the role of the JLSC and how that might have affected the treatment of her complaint. In the clear articulation of her arguments, she has helped to bring to light the shortcomings of the Protocol and the erroneous assumptions upon which the JLSC is thought to be able operate, all as discussed above. Accordingly, we consider that there has been a significant public interest served by her Application and while we see no need to make the Protected Costs Order she seeks, we conclude that there should be no order for costs, either in respect of the proceedings before this Court or in the Court below, (whether before Acting Justice Delroy Duncan KC or before Wolffe J.).

Gloster, J.A.

I agree.

Simmons, J.A. (Acting)

I also agree.