

JUDICIAL INDEPENDENCE AND THE REMOVAL OF JUDGES

By David Hacking¹ and Lydia Banerjee²

Introduction –

1. Judicial independence of judges is the buttress for the rule of law. When judges lose judicial independence the rule of law is eroded and ultimately lost. Thus judicial independence is enshrined in the United Nations Universal Declaration of Human Rights 1948³ – the phoenix of human liberty which arose out of the ashes of World War II - in the European Convention on Human Rights 1950⁴ and in the United Nations International Covenant on Civil and Political Rights 1996.⁵ When judicial independence goes judges are dismissed from office - like Chief Justice Gubbay of Zimbabwe⁶ and Chief Justice Iftikhar Muhammad Chaudhry of Pakistan⁷ - for the convenience of dictatorial government.
2. Yet judicial independence carries crucial responsibilities for holders of judicial office. The Bangalore Principles of Judicial Conduct of 2002 identified those

¹ Lord Hacking – Clare 1958-61

² Nee Carter – Downing 2003-2006

³ Article 10: United Nations Universal Declaration of Human Rights 1948

⁴ Article 6: European Convention on Human Rights and its Five Protocols 1950

⁵ Article: 14 United Nations International Covenant on Civil and Political Rights 1996

⁶ In March 2001 Chief Justice Anthony Gubbay was forced to resign having received death threats from Mr Mugabe's government. Mr Chinotimba, acting in support of Mr Mugabe, told Mr Gubbay that he was "putting his life at risk by remaining when we have made it clear we no longer want him. I told him to vacate his office today. If he does not go, we will declare war." The Independent Saturday 3 March 2001

⁷ In March 2007 Pakistan President Musharraf dismissed and arrested Chief Justice Chaudhry and about 60 other Pakistan Judges and suspended the Constitution because the Chief Justice and the Judges refused to recognise the legality of his re-election as President in February 2007. It was not until March 2009 that Chief Justice Chaudhry was restored to office. See Rule of Law papers edited by the authors: The ABA International Lawyer Spring 2009; Volume 43 Number 1

responsibilities under the heads of ‘Impartiality’ and ‘Propriety’: the principle of the first being

“Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.”⁸

and of the second being

“Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.”⁹

3. The application of these principles have been subject to scrutiny in three important cases. Two of them related to the office of Chief Justice and the other related to a Justice of the High Court. In each case a Tribunal of senior members of the judiciary was set up. Two of the Tribunals recommended the judge to be removed from office and the third found there were not proper grounds for removing the judge from office. The first related to Chief Justice Sharma of Trinidad and Tobago when the Tribunal, chaired by Lord Mustill (a former Lord of Appeal in the House of Lords), held there were not grounds for removing the Chief Justice from office, the second related to Chief Justice Schofield of Gibraltar and the third related to Madam Justice Levers, a Justice of the Grand Court of the Cayman Islands. In the former the Tribunal, chaired by Lord Cullen of Whitekirk (a former Lord President of Session in Scotland and a former additional Lord of Appeal in the House of Lords), held that there were grounds for the removal of the Chief Justice of Gibraltar and in the latter

⁸ The Bangalore Principles of Judicial Conduct 2002, Value 2

⁹ The Bangalore Principles of Judicial Conduct 2002, Value 4

the Tribunal, chaired by Sir Andrew Leggatt (a former Lord Justice of Appeal), similarly held there were grounds for Madam Justice Levers' removal. Since both of these Judges held office in territories subject to British rule, their cases were taken to the Privy Council in London where Judges of the UK Supreme Court preside. The Advice to Her Majesty concerning Chief Justice Scofield of Gibraltar was delivered by Privy Council Board on 12th November 2009¹⁰ and the Advice concerning Madam Justice Levers of the Cayman Islands was delivered on 29th July 2010¹¹. In both cases the Privy Council Board upheld the recommendation of the respective Tribunal although, concerning Chief Justice Scofield, a strong dissenting opinion was expressed by one Supreme Court Judge and supported by two other Supreme Court Judges. The importance of these two hearings before Privy Council Boards can be judged by the presence of seven Supreme Court Judges on each Board, by the President of the Supreme Court presiding over each Board and by the presence in each Board of the current Lord Chief Justice.

4. As it so happens one of the authors of this article was asked at an earlier stage to be an Observer of the Human Rights Institute of the International Bar Association at the trial in Gibraltar of Chief Justice Scofield relating to an alleged motoring offence. In his report to the Human Rights Institute of the International Bar Association of 12th February 2002¹² this author identified several of the matters which later became subject to the Tribunal's Report and to the Advice of the Privy Council Board.

¹⁰ [2009] UKPC 43

¹¹ [2010] UKPC 24

¹² Report of the observer of the Human Rights Institute of the International Bar Association at the trial of the Chief Justice of Gibraltar on a motor vehicle offence, Lord Hacking, 12 February 2002: see Lord Hacking's website: www.lordhacking.com

5. Lest it be thought that these are issues alien to our shores, judges in the United Kingdom are not always immune from political interference and nor are they immune from misbehaviour. In the 2000's, for example, the statutory Detention Orders relating to the suppression of terrorism put the UK Judiciary in conflict with the Government of the day. There was one occasion when Mr Charles Clarke, as Home Secretary, was publicly outraged when Lord Bingham of Cornhill, then the Senior Law Lord, refused to meet him to discuss measures he was proposing to counter terrorism.¹³

6. Turning to judicial misbehaviour, prior to 2006 the formal disciplinary process in England and Wales was that Lord Chancellor, as Head of the Judiciary, had the power to remove judges below the level of the High Court. Judges at High Court level and above could be reprimanded by the Lord Chancellor but their removal required a Resolution of both Houses of Parliament. The misbehaviour of a judge could be subject to examination in the appellate process if exercised by the aggrieved party. This was far from satisfactory because of the reluctance of appellant tribunals to allow appeals arising out of the misbehaviour of a judge. In a sense this was legitimate because of the difficulty of establishing the nexus between the misbehaviour of the judge and (say) the verdict of the jury. However a party may decide not to appeal a decision for a variety of reasons including cost, or even loss of faith in the judicial process - in the result the alleged misbehaviour of the judge went unaddressed.

7. In line with wider reforms to separate the executive and the judiciary the Office for Judicial Complaint ["the OJC"] was established by Statutory

¹³ [2009] UKPC 43, per Lord Hope at paragraph 240

Instrument and came into being in 2006. The OJC operates a system for investigating complaints of personal misconduct on the part of judicial office holders and issuing, where appropriate, disciplinary sanctions up to and including dismissal. Provision is made for review of any decision by a Review Body including two current or former judges. There is then a final avenue of appeal to the Ombudsman. These processes can also be applied to High Court Judges (which if applied would expose the High Court Judge to public reprimand making, in some cases, his or her position untenable) but the actual removal of a High Court Judge can still only be achieved on a Resolution of both Houses of Parliament.

8. Since its creation the OJC have received 9,274 complaints of which 5,898 related to members of the mainstream judiciary (i.e. not Magistrates nor Members of Tribunals). In that time four¹⁴ members of the mainstream judiciary have been removed from their posts, though others have resigned during the investigation or disciplinary process. Details revealed in the OJC press releases show that reasons for removal include: behaviour in court described as “inappropriate, petulant and rude”¹⁵; failing to disclose relevant information on the application¹⁶; bringing the profession into disrepute with a conviction for assault¹⁷; and failing to complete any sittings for five years¹⁸.

The Privy Council Cases

An outline of their facts, the Tribunal findings and the Privy Council reports

¹⁴ This figure is taken from the annual reports published on the OJC website. It does not include Judges at Magistrate or Tribunal level including the Employment Tribunal and the immigration Tribunal.

¹⁵ DJ Short, April 2009

¹⁶ Deputy DJ Gaynor Hall, July 2011

¹⁷ James Allen QC (deputy HC Judge and recorder), November 2011

¹⁸ Deputy DJ Armstrong, November 2011

9. Although the Judgment of the Privy Council Board in the case relating to Madam Justice Levers of the Cayman Islands was given about nine months after the Judgment relating to Chief Justice Schofield of Gibraltar, it is convenient to examine first the Levers Judgment. This is because the basic complaints against Madam Justice Levers related to her performance in court as a judge while the basic complaints against Chief Justice Schofield related to his behaviour as Chief Justice outside the law courts. It is also helpful to bring in the Chief Justice Sharma case because the Tribunal in this case made some very helpful observations on what is the right role of a Tribunal charged with the responsibility of advising whether a judge should be removed from office.

Madam Justice Levers and the Leggatt Tribunal

10. Madam Justice Levers was born in Sri Lanka and educated in England where, in 1967, she was called to the Bar. She practiced law in Sri Lanka, in England and subsequently in Bermuda. In 1977 she married a Jamaican and moved to Jamaica where she practiced law for the next 27 years. In 2002 she was invited to sit as an additional judge in the Grand Court of the Cayman Islands and in the following year successfully applied for a permanent appointment in the Grand Court of the Cayman Islands.
11. The Tribunal, and then the Privy Council Board, considered the conduct of Madam Justice Levers in ten criminal trials and in six family cases. In the former cases there was a court transcript but not, in the nature of family proceedings, in the latter cases. Both the Tribunal and the Privy Council Board found Madam Justice Levers guilty of serious misconduct in her blatant display of prejudices against (amongst others) female litigants and litigants

from Jamaica. In exhibiting these prejudices, as found by the Tribunal and the Privy Council Board, Madam Justice Levers frequently made “insensitive and inappropriate remarks”¹⁹. For example she commented, without evidence before her, about the promiscuity of female litigants and their alleged carelessness in becoming pregnant. Some of her comments were found by both the Tribunal and the Privy Council Board as being “highly offensive and racist”²⁰. In some cases the Privy Council Board took a less stringent view upon the behaviour of Madam Justice Levers than did the Tribunal but the overview of both the Tribunal and the Privy Council Board was the same.

12. There were also other instances of inappropriate behaviour by Madam Justice Levers such as bonding herself with a father in a family litigation because he shared the same kidney disease as herself and because, like herself with her children, he was proposing to send his child to boarding school in England. Hearing that the father in the family dispute had a father who had been a House Master at Rugby School she even took it upon herself to telephone her brother, who had been at the same school, to ask whether he remembered the male litigant’s father and then made this conversation known to the parties appearing before her!

13. Turning to her behaviour out of court both the Tribunal and the Privy Council Board held that she had expressed very hostile views towards the Chief Justice and the two other High Court Judges in a way which was public and damaging. It was one thing to make private comment about fellow judges it was another thing to make that comment openly to court staff and in the court

¹⁹ Paragraph 60, 89, Judgment of Lord Phillips [2010] UKPC 24

²⁰ Paragraph 84, Judgment of Lord Phillips [2010] UKPC 24

room. Although there was a strong suspicion that Madam Justice Levers had been writing letters under a pseudonym to a Cayman newspaper, in which some very disparaging comments were made about her fellow judges and the administration of justice in the Cayman Islands, both the Tribunal and the Privy Council Board, held that there was insufficient evidence to conclude that the letter writer had been Madam Justice Levers.

Chief Justice Sharma and the Mustill Tribunal

14. The procedures employed relating to Chief Justice Sharma were similar to those employed relating to two other Judges. Under the Constitution of the Republic of Trinidad and Tobago one of the grounds for the removal of a judge is based upon “infirmity or...misbehaviour”²¹. When matters, relating to a Chief Justice have been placed before him, justifying him to act, the President of the Republic of Trinidad and Tobago has the duty to set up a Tribunal consisting of (effectively) present or former High Court Judges “in some part of the Commonwealth”²². If a recommendation for removal is made then the Tribunal’s Report is placed before the Privy Council in London who is then under a duty to advise the President (as opposed to the Queen in territories still under British rule) whether the Judge or Chief Justice should be removed²³.

15. At the outset of its Report the Tribunal stated that the “picture presented to [it] almost defies belief.”²⁴ The picture included the public arrest of the Chief Justice and of him being placed three times in the dock of a criminal

²¹ The Mustill Report, at Paragraphs 1-4

²² *ibid*, at paragraphs 1-4

²³ *ibid*, at paragraphs 1-4

²⁴ *ibid*, at paragraph 5

Magistrates Court to undergo a summary trial on charges based on allegations against him made by the Chief Magistrate. It also included alleged intrigues relating to the Chief Justice, the Chief Magistrate and the Attorney General. As the Tribunal's Report went on to record: "The air was full of rumour, innuendo and gossip, around and across political and...ethnic divides."²⁵

16. Moreover, on an application for judicial review by the Chief Justice seeking an order for the curtailment of the prosecution against him, the matter did earlier come before the Privy Council in London, which (while rejecting the Chief Justice's application) commented that there were matters before them which were "troubling both individually and collectively"²⁶.

17. The issue before the Tribunal, and in the criminal proceedings against him, was whether the Chief Justice had interfered in the criminal proceedings brought against a former Prime Minister of Trinidad and Tobago, Mr. Baseo Panday. If he had, the Tribunal was clear that this was "misbehaviour"²⁷ within the meaning of the Constitution of Trinidad and Tobago - the suggestion being this would have been grounds for his removal from office.

18. The charge against Mr. Panday was that, in breach of the Republic's Integrity of Public Life Act 1987, he had failed, three years running, to disclose an account which he possessed with the NatWest Bank in London and where there were apparently substantial funds. The charge against the Chief Justice, relating to this trial of Mr. Panday, was that he had held, with the view of influencing the process of this trial, on separate occasions, inappropriate

²⁵ *ibid*, at paragraph 5

²⁶ *ibid*, at paragraph 5

²⁷ *ibid*, at paragraph 30

discussions with both Counsel for Prosecution and for the Defence, had told the Chief Magistrate, who was presiding over the Panday trial, what points he should make in his judgment and asked to see a draft of it before it was delivered, made requests for the Chief Magistrate to produce a statement that he, the Chief Justice, had not sought to influence the Chief Magistrate in the conduct of this trial and nor had he interrogated the Chief Magistrate on questionable property deals into which the Chief Magistrate allegedly had entered²⁸. On the last, although the Tribunal did not go so far as to make this finding, the suggestion appears to be that the Chief Justice was manoeuvring to be able to ‘blackmail’ the Chief Magistrate.

19. The evidence to the Tribunal of the Chief Justice and the Chief Magistrate were so contrary that the Tribunal had no option but to believe one and not the other. It was here that the Tribunal focused into its true role. Holding that it was not conducting “a criminal proceeding” nor “a civil procedure” but an “Enquiry”²⁹. The same approach was adopted by the Cullen Tribunal who noted the Chief Justice was not “being ‘prosecuted’ by an accuser” and thus the “proceedings before us are inquisitorial in nature”³⁰ - an approach which the Leggatt Tribunal specifically adopted³¹. This led the Tribunal in the Levers case to conclude that it was “fallacious to assume that the criminal burden of proof must automatically be applied”³² and a more ‘flexible’ approach was needed depending on the seriousness of the allegations to be proved³³. If, therefore, the Mustill, Cullen and Leggatt Tribunals were not conducting a

²⁸ *ibid*, at paragraph 27

²⁹ *ibid*, at paragraph 73

³⁰ Fifth Schedule on page 205 of Cullen Report

³¹ Paragraphs 2.16 – 2.18 Leggatt Report

³² The Mustill Report, at paragraph 81

³³ *ibid*, at paragraph 81

criminal proceeding which, with the absence of any prosecution counsel, they were clearly not, then the corollary is that the Privy Council should not be acting as an Appellant Tribunal. This central point is further developed in this article.³⁴

Chief Justice Schofield and the Cullen Tribunal

20. The case relating to Chief Justice Schofield raised different issues and caused the Privy Council Board to be split with Lord Phillips, Lord Brown, Lord Judge (the Lord Chief Justice) and Lord Clarke holding that the Chief Justice should be removed from office and Lord Hope, Lord Rodger and Lady Hale taking a contrary view.

21. Chief Justice Schofield took up office in Gibraltar in 1996. On leaving school at age 16 he had gone into the English Magisterial Service and was called to the English Bar in 1970. He served as a Magistrate and later as a Puisne Judge in Kenya from 1974 to 1987. He later became a Judge in the Cayman Islands from where he took up his appointment as Chief Justice of Gibraltar.

22. Discontent with Chief Justice Schofield in Gibraltar came to a head in April 2007 when all of the Queen's Counsel in Gibraltar, with the exception of the Speaker in the House of Assembly, signed a Memorandum to the Governor in which, as it related to the Chief Justice, they expressed "their deep concern at a state of affairs which has developed seriously affecting the administration of justice and the reputational image of Gibraltar"³⁵. In this Memorandum they

³⁴ See paragraphs 58-60 below

³⁵ The Report of the Tribunal, "the Cullen Report" at Paragraph 4 of the Introduction

also stated that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office.

23. The difficulties, however, relating to the Chief Justice, as found by both the Tribunal and the Privy Council Board, went back to October 1999 when, in his speech at the Opening of the Legal Year, he publicly berated the Governor and the Government of Gibraltar. The next issue related to domestic maids who the Chief Justice and his wife had recruited from Jamaica without obtaining the appropriate work permits and without paying the necessary tax relating to their employment. Then in the year 2000 the Chief Justice was found to be driving his motor car without a road tax license and an 'in date' MOT certificate. Concerning the absence of the road tax licence the Chief Justice was entitled to claim protection under a general amnesty in Gibraltar for the driving of untaxed vehicles which had been extended to the owners of all motor vehicles because of administrative delays in issuing road tax licenses. The failure, however, to have a valid MOT certificate was a motoring offence for which the Chief Justice had no defence. Notwithstanding his admission that he had no valid MOT certificate at the material time he insisted on pleading not guilty in the Gibraltar Magistrates Court and involved that Court in four days of hearing as his Counsel took points relating to alleged 'abuse of power' by the prosecuting authorities and the alleged invalidity of the MOT Certificate Regulations – all of this placing pressures on the Gibraltar Judiciary, of which he was head, and damage to his office as Chief Justice.
24. As also recorded, there were then a series of other incidents where the Chief Justice, for reasons of pique, had refused to swear in the Deputy Governor

upon the departure of the outgoing Governor, became publicly involved in a debate over the new 2006 Constitution of Gibraltar where he openly clashed with the Gibraltar Government and got into similar positions of conflict with the Chief Minister and the Government over a proposed Judicial Service Bill. His conduct was also found to have given rise to a perception that he was acting in concert with his wife in relation to his wife's libel action against the Chairman of the Gibraltar Bar Council. He was found too to have acted most injudiciously, allowing his wife and her Counsel in this proceeding, to appear before him at a hearing in his Chambers. Again acting in pique he cancelled the Opening Ceremony for the Legal Year in 2007 and 2008 and launched judicial review proceedings in order to get his own way relating to provisions in the Judicial Service Bill.

25. Considering the Chief Justice's conduct in these matters, the Tribunal found that the Chief Justice's public behaviour "fell far short of what befitted the dignity of his office"³⁶, that he failed to conduct himself with "the detached, unbiased, unprejudiced, impartial, open-minded and even-handed approach which is the hallmark of a judge"³⁷, that he addressed what he perceived to be threats to judicial independence in a manner which was "confrontational"³⁸, "improper...inappropriate and disproportionate"³⁹ and in his "hostility" towards the Gibraltar Government he made "serious and unfounded allegations"⁴⁰. Concerning the maids issue his "communications with the Governor [were] less than frank" and "he committed a series of offences"

³⁶ *ibid*, at paragraph 7.7

³⁷ *ibid*, at paragraph 7.9

³⁸ *ibid*, at paragraph 7.8

³⁹ *ibid*, at paragraph 7.8

⁴⁰ *ibid*, at paragraph 7.12

relating to PAYE, social insurance and work permits and by so doing his conduct “caused damage to his office”⁴¹ and concerning the MOT Certificate issue “his behaviour [was not] consonant with the proper conduct of a Chief Justice in a small jurisdiction and with the dignity of his office”. Moreover “his conduct of his defence [in the motor offence trial] betray[ed] a remarkable lack of judgment and sense of proportion and a disregard for the damage done to the administration of justice in Gibraltar”⁴².

26. Running through these complaints against Chief Justice Schofield the Privy Council Board took a much more lenient view than the Tribunal and characterised the Chief Justice’s behaviour in much less severe terms. Nonetheless (as recorded above) the majority judges in the Privy Council Board held that cumulatively the conduct of the Chief Justice, and the actions of him and his wife, had “rendered his position as Chief Justice of Gibraltar untenable”⁴³. In doing so the majority judges in the Privy Council Board concluded:

“these were incidents in a course of conduct that has resulted in an inability on the part of the Chief Justice to discharge the functions of his office”⁴⁴

Chief Justice Schofield and the Privy Council Board

⁴¹ *ibid*, at paragraph 3.27

⁴² *ibid*, at paragraph 3.52

⁴³ [2009] UKPC 43, at paragraph 227

⁴⁴ *ibid*, at paragraph 228

27. Particular reliance was placed by the Privy Council Board on the “misbehaviour” test as expressed by Lord Scott of Foscote in *Clark v Vanstone* (2004)⁴⁵:

“It is clear from these expressions of opinion that, in order to constitute misbehaviour by the holder of an office, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office. For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term ‘misbehaviour’ is used with reference to the holder of an office, 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 an 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 parties, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct is properly characterised as ‘misbehaviour’ for the purposes of the relevant legislation.”

28. The Judgment of the Privy Council then went on to raise four questions

⁴⁵ *Clark v Vanstone* (2004) FCA 1104, (204) 81 ALD 21

“(i) Has the Chief Justice’s conduct affected directly his ability to carry out the duties and discharge the functions of his office?

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

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

(iv) Has the office of Chief Justice been brought into disrepute by the Chief Justice’s conduct?”⁴⁶

29. Another test applied, in the majority view in the Judgment of the Privy Council, was taken from a case in the Supreme Court of Canada: *Therrien v Canada [Ministry of Justice] (2001)*⁴⁷. Here Mr Justice Gonthier stated at paragraph 147:

“...before making a recommendation that a judge be removed the question to be asked is 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.”

⁴⁶ [2009] UKPC 43, at paragraph 203

⁴⁷ *Therrien v Canada (Ministry of Justice and another) (2001) 2 SCR3*

30. It was on the application of these citations that the majority view in the Privy Council Judgment came to the view that Mr Justice Schofield should be removed from the office of the Chief Justice of Gibraltar.

31. As delivered by Lord Hope, and supported by Lord Rodger and Lady Hale, a strongly differing minority view was expressed. Referring to the Tribunal's Report as a whole, Lord Hope said:

“Although the Tribunal says in paragraph 2.21 that it took full account of complimentary remarks by a number of witnesses, the impression that is created by the remorseless criticism of [the Chief Justice] that follows is that there was a marked lack of balance in [the Tribunal's] approach to the issues that were before it. I have the distinct impression that it failed to give proper weight to the context in which the various events which it was considering had arisen and to analyse them with a due sense of perspective and detachment. It seems to me that, in the result, it has presented us with a one-sided version of these events.”⁴⁸

Lord Hope then goes on to state that the Tribunal's report

“...fails to give proper weight to the crucial importance of protecting senior judges against attacks by the executive upon their efforts to uphold judicial independence in their jurisdiction.”⁴⁹

32. As Lord Hope later identifies

⁴⁸ [2009] UKPC 43, at paragraph 234

⁴⁹ *ibid*, at paragraph 235

“...no criticism is made of the Chief Justice’s ability to perform his judicial functions, and the fact is that for most of the time he was fulfilling his other functions as Chief Justice in a way that did not attract criticism.”⁵⁰

This appears to be the central reason why Lord Hope, Lord Rodger and Lady Hale disagreed with the majority view in the Privy Council Judgment.

33. Lord Hope pointed out that “bruising exchanges between the senior judiciary and the executive are not unknown in England and Wales”⁵¹ citing a severe attack by Lord Justice Hewart in 1934 against the Lord Chancellor and the serious attack made in the House of Lords in 1989 by Chief Justice Lane against the Lord Chancellor, Lord Mackay of Clashfern, and a later attack by Chief Justice Taylor of Gosforth in 1996 against the Home Secretary. In none of these instances was the English Lord Chief Justice removed from office or threatened with removal from office. Lord Hope therefore believed that the approach to the attacks made by Chief Justice Schofield against the Governor of Gibraltar and the Government of Gibraltar should be treated in the same light.

Matters arising

34. There are two immediate matters which arise out of these two Judgments of the Privy Council. The first is that the Judiciaries in both Gibraltar and the Cayman Islands were and are very small in number. In the case of Gibraltar there is just the Chief Justice and one Puisne Judge, presiding over High Court

⁵⁰ *ibid*, at paragraph 269

⁵¹ *ibid*, at paragraph 239

matters, and a Magistrate presiding over minor criminal and civil matters. In the Cayman Islands there was, in the High Court, the Chief Justice and three High Court judges. Hence in the written representation made by Mr Neish QC, Chairman of the Gibraltar Bar, he stated

“The seriousness of the matters complained of must be judged from the standpoint of Gibraltar and not from that of a larger jurisdiction. In, say, London with its larger number of judges the conduct of individual judges would not have the same impact on the judiciary or on the operation of the principle of separation of powers or on the justice system generally as would the conduct of a Chief Justice in a two judge jurisdiction in Gibraltar. Office holders in Gibraltar have to be particularly sensitive to the need to maintain the respect and confidence of the public, which are as necessary, if not more than institutional safeguards, for the proper discharge of their functions. The public in Gibraltar is much closer to public figures than in the case of say, England. Their scrutiny is more intense and their actions more directly felt.”⁵²

35. The second immediate matter relates to the relationship between the Tribunals and the Privy Council Board. In this Lord Phillips was anxious to point out that the approach of the Privy Council Board was not so much based upon an issue of the standard of proof but on the greater “matter of judicial assessment”⁵³. In this regard it is noticeable that in both cases the Privy Council Board came to a different view on a number of the findings made by

⁵² *ibid*, at paragraph 26

⁵³ *ibid*, at paragraph 16

each Tribunal. Since it was the Tribunals (not the Privy Council Boards) who had the direct evidence before them (with the opportunity to see and access witnesses) it is concerning how often, in both cases, that the Privy Council Board reached different findings from the Tribunal. Broadly in the Judgment, relating to Chief Justice Schofield, the majority view, and very much so the minority view, was that, in making different findings to it, the Tribunal was too ‘severe’ in its criticisms⁵⁴.

Size of the jurisdiction

36. In relation to the first matter it is appropriate to consider whether, and in what circumstances, it is right to take into account the relatively small community in which the events were unfolding.

37. When a judge acts inappropriately during the conduct of his official duties such conduct is so inextricably linked to the judicial system that it risks undermining public confidence in it. This is almost certainly the case for those directly involved such as court officials, witnesses, representatives and members of the public, but, particularly where the press are active, potentially a far wider segment of society. Although it is arguable that this problem is greater in a small community where there are fewer judges it is suggested that even in larger jurisdictions conduct of one or two judges, bringing the judicial system into disrepute, undermines the judiciary as a whole.

38. When a judge acts in a manner which may be considered unwise or inappropriate in relation to his private life the link between his or her conduct and the judicial system can be more conspicuous in a small jurisdiction but

⁵⁴ [2009] UKPC 43, at paragraph 50

should judges be held to different standards depending on the size of the jurisdiction in which they operate?

39. The Bangalore Principles state that “a judge shall ensure that his or her conduct, both in and out of court, [emphasis added] maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary”⁵⁵. Furthermore, the Bangalore Principles recognise the public nature of the role of the judge and record “As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.”⁵⁶ In addition to the conduct of the judge there are several references in the Bangalore Principles that make it plain that a judge’s duty to act with propriety may, in some circumstances, include the conduct of family members.⁵⁷

40. The Bangalore Principles apply regardless of the size of the jurisdiction in which the judge operates and, if the size of the jurisdiction is relevant, it is only as part of an assessment of the impact of the conduct. Injudicious comments or actions outside of a judge’s official role which receive nominal attention are not likely to cause damage to the reputation of the judiciary and the consequential sanction of the removal of the judge. Such comments or actions which attracts coverage in the national press may require greater sanction. This applies to all jurisdictions. The issue is what is the actual or likely damage to the integrity of the judicial system. Many factors may be

⁵⁵ Bangalore Principles of Judicial Conduct 2002, Value 2 Impartiality, 2.2

⁵⁶ *ibid*, Value 4 Propriety, 4.1

⁵⁷ see for example, *ibid*, Value 4 Propriety, 4.7, 4.8, 4.9

considered in assessing this including, but not limited to, the judicial system in place, the judge's role within that system and the nature of the offending conduct. In this sense the conduct of Chief Justice Schofield in bringing judicial review proceedings, and basing those proceedings on the grounds which he chose, would amount, it is suggested, to misbehaviour even if he were operating in a larger jurisdiction of which he was one of several senior judges.

The role of the Privy Council – analogy with appellate court re: evidence

41. We turn then to the second issue, that of the appropriate roles of the Privy Council and the Tribunal. It is helpful first to set out the more familiar roles played by a court of first instance and an appellate court. The principle has long been that the court of first instance hears the 'live evidence'⁵⁸ from the witnesses of fact and expert witnesses and reviews the documents relied upon. On the basis of all the evidence a decision is made. If that decision is the subject of appeal the role of the appellate court is not to re-hear the evidence and, within prescribed confines, not to re-valuate it. Instead the question that the appeal court must decide is whether the decision is wrong in law or one which is unsound in that it is unsupported by the evidence. It has long been well established in the House of Lords (now the Supreme Court) that findings of fact established in the lower courts will not be disturbed unless it can be clearly shown that the finding was erroneous⁵⁹.

⁵⁸ The authors use this description throughout this article to identify the evidence of witnesses giving first hand evidence before original tribunals.

⁵⁹ *The P. Caland*. [1893] AC 207, applied in *Hicks and another v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65

42. The reason for the deference shown to the decision of first instance is that the appellate court does not hear ‘live evidence’ on the issues and is not in a position to form an assessment of the witnesses. The seminal case of *Thomas v Thomas*, which established these principles, was heard in the House of Lords in 1946. It was at a time when transcripts taken by Court shorthand writers were replacing the earlier form of record of the Judge’s handwritten notes. As Lord Macmillan put it in this case:

“The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanor of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court.”⁶⁰

43. The *Thomas v Thomas* case was followed in the House of Lords in 1955 in *Benmax v Austin Motor*⁶¹ where Viscount Simonds made a sharp distinction between the finding of primary facts, which should be left to the trial judge, who had the opportunity of seeing and assessing the witnesses, and the inference to be drawn from those facts. In doing so he drew the analogy of a negligence claim – it being the duty of a judge, sitting without a jury, to find the facts, which was his responsibility, but an appellate tribunal could draw a different inference on the facts as found by the trial judge.

⁶⁰ *Thomas v Thomas* [1947] AC 484 at 490

⁶¹ (1955) AC 370

44. It is important to emphasise that the House of Lords in *Thomas v Thomas* treated the findings of fact as all part of the “opinion” which the trial judge forms in assessing the witnesses and evidence before him⁶². It was, therefore, not open to the Appellate Court to come to a different “opinion” or “assessment”⁶³ on the facts found by the court or tribunal of first instance.

45. In more recent authorities the position of the appellate court in considering findings of fact from the court of first instance has become more refined. Clarke LJ (as he then was) in *Assicurazioni Generali SpA v Arab Insurance Group BSC*⁶⁴ made the following points:

“in cases in which the court was asked to reverse a judge’s findings of fact which depended upon his view of the credibility of the witnesses, it would only do so if satisfied that the judge was plainly wrong.”⁶⁵

“In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of

⁶² Speeches of Viscount Simon and Lord Du Park

⁶³ [2009] UKPC 43, paragraph 16 of the majority view

⁶⁴ [2003] 1 All ER (Comm) 140

⁶⁵ Ibid, paragraph 12

primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.”⁶⁶

46. He then went on to cite, in paragraph 19, Lord Hoffmann in *Biogen Inc v Medeva plc*⁶⁷:

“The need for appellate caution in reversing the judge’s evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuance*), of which time and language do not permit exact expression but which may play an important part in the judge’s overall evaluation.....Where the application of a legal standard such as negligence....involves no question of principle but simply a matter of degree, an appellate court should be very cautious in differing from the judge’s evaluation.”

47. It is because the appellate court does not hear ‘live evidence’ and does not have the opportunity to form its own assessment of the witnesses that it should demonstrate considerable deference to the view formed by the trial judge. However, where a finding has been made on the basis of predominately written evidence which an appellate court may review there is an increasing willingness to challenge the judgment of the first instance judge. Where a full

⁶⁶ *ibid*, paragraph 14

⁶⁷ (1996) 38 BMLR 149 at 165

transcript of the proceedings exists a review of the oral evidence becomes more tempting as exhibited by Ward LJ in his dissent in the *Assicurazioni Generali* case⁶⁸.

48. It has to be noted that the Cullen and Leggatt Tribunals took ‘live evidence’ over a significant period of time. The Cullen Tribunal heard from 18 witnesses over 12 days⁶⁹. The Leggatt Tribunal heard from 28 witnesses also over 12 days⁷⁰. In neither case did the Privy Council take any witness evidence although they did have access to the transcript of the evidence, the documents relied upon and the witness statements prepared for the Tribunals.

49. Given the division between the Tribunals and the Privy Council Board in relation to the hearing of ‘live evidence’, should not the Privy Council Board have more strictly adopted the approach of the appeal courts when differing from the findings of fact made by Courts of first instance and tribunals? Where there is transcript the written words only give part of the picture. It is for precisely this reason that Lord Macmillan and his fellow judges in *Thomas v Thomas* resisted the temptation to review the factual findings based on the transcripts provided.

50. What the Privy Council Board did in both cases was to exercise what Lord Phillips called “judicial assessment” and, in doing so, reached a number of findings or conclusions which significantly differed from those reached by the original Tribunals.

The role of the Privy Council as expressed by them

⁶⁸ *ibid*, paragraph 219 to 229

⁶⁹ The Cullen Report, Schedule 1, paragraphs 8-11

⁷⁰ The Leggatt Report, paragraph 1.19

51. The concern, therefore, is that there should be a clear division between the findings, being made by Tribunals of very experienced members of the judiciary, and those made by Privy Council Boards.
52. Where the Privy Council Board is acting as an appellate court there should be a much greater respect for the findings, and the conclusions from those findings, as made by tribunals unless they were clearly wrong. Regrettably it appears that the Privy Council Board in the Schofield and Levers cases did not adhere to this.
53. In the case of Chief Justice Schofield both the Gibraltar Constitution⁷¹ and the Judicial Committee Act 1833⁷² provide the Privy Council with jurisdiction and permit the Board, if it so chooses, to conduct its own hearing of the evidence. However, in the view of the majority of the Board the hearing before them was one of an appellate process.⁷³ In contrast the minority view was that the Board was not sitting as a court of appeal but was rather “required” to act in “an original jurisdiction”⁷⁴.
54. The problem of this conflict between the majority and minority views is self-evident. In the one approach the Privy Council Board considers the Tribunal’s findings of fact but reaches its own conclusion on them. In the other the Privy Council Board places itself as the prime finders of fact. In the event, as we have seen, the Board in Schofield adopted something of a half-way house at times considering and criticising the Tribunal’s reasoning without the benefit of the ‘live evidence’ before it and yet not seeking to hear live evidence on

⁷¹ The Gibraltar Constitution Order 2006, section 64

⁷² The Judicial Committee Act 1833, section 4

⁷³ [2009] UKPC 43, paragraphs 12-14

⁷⁴ *ibid*, at paragraph 233

points of dispute or areas where they were dissatisfied with the Tribunal's findings.

55. In *Levers* the Privy Council Board considered its role only briefly in the context of a challenge made that the Tribunal should not have expressed a view on the whether or not the misconduct they found justified removal of the Judge. While accepting that it was appropriate and indeed desirable for the Tribunal to express a view the Privy Council criticised the Tribunal for expressing that view in such severe terms. This they felt could cause "irreparable damage [to] the reputation of the judge" before the Board had adjudicated on the issue. The Board recognised that "to some extent this will make the task of the Judicial Committee appellate in nature" and went on to record that it "will be likely to accept the Tribunal's findings of primary fact, unless these can be demonstrated to be unsound. As to the consequences of those findings, however, it is for the Board to form its own views as to whether they amount to misbehaviour or incapacity justifying removal"⁷⁵.

56. This accords with the view that the approach of the appellate courts in relation to findings of fact should be applied to these types of proceedings before the Privy Council.

57. The greater question is whether the Privy Council, in these circumstances, should be acting at all in an appellant capacity. As expressly decided by the Tribunals in the *Schofield* and *Levers* cases, the proceedings before them were not prosecutions with Counsel for the State and Counsel for the Accused but rather they were 'Enquiries' into the conduct of these two judges as a pre-

⁷⁵ [2010] UKPC 24, at paragraph 44 to 46

requisite for advising the President (in the case of Levers) and the Governor (in the case of Schofield) whether a request should be made for a referral to the Privy Council. It follows, therefore, there did not arise as such an ‘appeal’ out of these proceedings before these two Tribunals either by the ‘prosecution’ (which didn’t exist before either Tribunal) or by the ‘defence’. Indeed if the Tribunal finds there is no case for a referral in the Privy Council, as it did in the Sharma case, there is no process whatever for the decision of the Tribunal to be appealed or challenged – short of some very extended attempt at a judicial review.

58. Thus, in these circumstances, the natural position of the Privy Council is one of a ‘reviewing’ body and not an ‘appellate’ body. While it is true under Section 4 of the Judicial Committee Act (1833) the Privy Council has the right to conduct its own hearing of the evidence⁷⁶ the reality is that the task of taking evidence and fact finding had fallen upon the Tribunals in each of these three cases. These were Tribunals consisting of distinguished and experienced former members of the Judiciary who largely conducted all their proceedings (unlike the Privy Council) in the territories where the events, the subject of their enquiries, took place.

59. Hence, if the task of taking evidence and fact finding has been fully performed by the Tribunals what justification is there in the Privy Council engaging in the same process without having the benefit of receiving the evidence first hand in the place where the events, the subject of the ‘Enquiries’, occurred? This surely moves the Privy Council into the position of a ‘reviewing’ body who should not intervene into the fact finding, and conclusions therefrom,

⁷⁶ [2009] UKPC 43, paragraph 12

unless they were patently wrong, or where, in the process itself, there were significant breaches of natural justice.

60. This brings the Privy Council, for these cases, into a similar position as in those cases which are brought to the English Courts under the Judicial Review process. As is well established in the Judicial Review cases, the Courts do not interfere with the decision making and the fact finding of the body (for example a Planning Inquiry) which is the subject of the Judicial Review but looks to whether proper processes have been followed. When there has been a significant breach of proper processes such as illegality, abuse of power, breach of human rights, manifest unreasonableness, bad faith or material errors, the Court will intervene but not otherwise.⁷⁷

The actions of the Privy Council and the way in which they departed from their role

61. As already submitted, the Privy Council Board went a long way in making different findings of fact from the Tribunal whose primary role was just that. For example, relating to the evidence of the Chief Justice Schofield, who appeared before the Tribunal for the best part of two days, the majority view in Privy Council Board, having noted that the Tribunal “Repeatedly found [the Chief Justice’s] evidence incredible and rejected it”, held that they had

“...reviewed the Tribunal’s findings and, concluded that there was no firm basis for rejecting the Chief Justice’s evidence”⁷⁸.

62. The criticism of the Tribunal becomes considerably stronger when the views of the minority in the Privy Council Board are taken into account. As cited

⁷⁷ Halsbury’s Laws of England Volume 61 (2010) 5TH Edition Paragraphs 601 – 603 and 604 - 650

⁷⁸ (2009) UKPC Paragraph 207

above in paragraphs 31 and 32 Lord Hope suggests that the Tribunal had “a marked lack balance in its approach”, “failed to give proper weight...to the various events...which it was considering...and to analyse them with a due sense of perspective and detachment”⁷⁹. It has to be said that these comments are rather surprising when the quality and experience of the Tribunal (a former Lord President of Session in Scotland and two former English Justices of Appeal) is taken into account.

63. The role played by the Privy Council Board in the Schofield case can be tested in the MOT Certificate issue. Here, relating to the MOT prosecution against Chief Justice Schofield, the Privy Council Board held that “the report does not place this incident in its context nor set out the full story of the matter”⁸⁰. The case, as presented against the Chief Justice in the Gibraltar Magistrates Court was that he had no right to drive a motor car without a valid MOT certificate. Unlike with the road tax licence, which he also did not possess, there was no amnesty granted by the authorities in Gibraltar relating to not having a valid MOT certificates. What was at issue before the Cullen Tribunal was the conduct of the Chief Justice in the proceedings before the Stipendiary Magistrate in Gibraltar. On this the Cullen Tribunal concluded that the conduct of the Chief Justice in instructing his Counsel to present at length (taking over three days of Court time) the defences of ‘abuse of power’ (relating to the manner in which a caution had been presented to him and withdrawn) and of ‘invalidity’ (relating to the MOT Regulations in Gibraltar) when all the while it was undeniable that he did not have a valid MOT Certificate when stopped by the police, displayed “a remarkable lack of

⁷⁹ *ibid*, at paragraph 234

⁸⁰ See paragraph 84 on page 29 of Privy Council Judgment (2009) UKPC 43

judgment and sense of proportion [by the Chief Justice] and a disregard for the damage done to the administration of justice in Gibraltar” – a view with which the Privy Council Board broadly agreed.

64. What, however, is troubling - and what appears to be the reason why the Privy Council Board criticised the Cullen Tribunal for taking matters out of “context” and not setting out “the full story” – is that the Privy Council Board recorded that the Chief Justice was being permitted by the police to drive a motor car without a valid MOT certificate if he had booked in for an MOT inspection⁸¹. As one of the authors recalls this evidence was not presented in the Magistrate’s Court proceedings and would have put into a different light the Chief Justice’s driving a car without an MOT Certificate. Moreover, in statements made by the Chief Justice to the Cullen Tribunal, he accepted that this evidence was not put forward in the Magistrate’s Court proceedings. On this issue there was evidence before the Cullen Tribunal that the Deputy Registrar of the Chief Justice’s Court had received a telephone call from “a female officer” in the Gibraltar Police Superintendent’s Office to the effect that the Chief Justice could continue driving his car with an out of date MOT Certificate provided he had booked in for an “MOT appointment”. However the Cullen Report also records that the Chief Justice had admitted that the Gibraltar police “denied” this conversation with the Deputy Registrar⁸². It is not known how the Privy Council Board came to accept this disputed evidence but it illustrates the danger of a Privy Council Board entering into the fact process without the advantages that the original tribunal has of being on the spot with the actual evidence being placed before it.

⁸¹ Privy Council Judgment paragraph 85

⁸² See Paragraphs 3.49 and 3.50 of the Cullen Report

65. More importantly all of this evidence – and the Privy Council’s Board criticism of the Cullen Report relating to it – misses the point. The Cullen Tribunal was not focusing on the merits of evidence which could have been put forward in the Magistrate’s Court - but which the Chief Justice chose not to have put forward - but upon the whole manner of the conduct of the Chief Justice, through his Counsel, in the Magistrate’s Court. Thus the Cullen Report records that they found “no assistance” over whether or not the above evidence could have been introduced before the Stipendiary Magistrate⁸³.

66. The same problems arose, although less severely, when the Privy Council Board considered the findings of the Leggatt Tribunal relating to Madam Justice Levers. As noted in paragraph 55 above the Privy Council Board believed that its basic role was “appellate in nature” and hence it should “accept” the Tribunal’s “findings of primary fact unless these can be demonstrated as unsound” but reserved to itself whether “the consequences of those findings” amounted to “misbehaviour or incapacity justifying removal” of the Judge. The difficulty, however, is that the primary findings of fact and the “consequences” of those findings are entwined together, for the reasons given by Lord Hoffman in the *Biogen* case⁸⁴, and are ones over which the Tribunal, with direct access to the evidence, is in a much better position to exercise judgment.

67. The Privy Council Board took particular exception to the terms of the Tribunal’s ‘Executive Summary’ which appeared at the beginning of its

⁸³ Paragraph 3.52 of the Cullen Report

⁸⁴ See paragraph 46

Report⁸⁵ where the Tribunal described the Judge's comments in Court as "disgraceful", her "conduct" towards the Chief Justice of the Cayman Islands "of such disconcerting proportions that no judicial system could reasonably expect to tolerate" it and that she "had poisoned the well to such an extent that her reputation...will inevitably precede...her" wherever she may in future seek to sit as a judge concluding, therefore, that it is "unthinkable that she should be allowed to resume or continue to sit [as a judge] in any jurisdiction". Hence it was the view of the Privy Council Board that "it was inappropriate for the Tribunal to castigate [the Judge's] conduct in [these] extreme terms". However, while these terms may, indeed, appear to be "extreme" in far away London are they to be judged to be in "extreme" in the Cayman Islands?

68. The Privy Council Board then went through, in detail, the ten criminal trials and the six family cases upon which the Tribunal had focused as the proceedings where opinions could be formed on the Judge's behaviour in sitting as judge. In doing so it, in one case, the Privy Council Board held that the Tribunal had wrongly concluded the conduct amounted to 'serious misconduct' and in two other cases, the Privy Council Board took a more severe view of the conduct in question than the Tribunal had done.

69. It is, therefore, worth testing the different positions which the Privy Council Board adopted from those of the Leggatt Tribunal in two examples:-

The R Litigation

70. The complaint against Madam Justice Levers was that she had behaved inappropriately when conducting a family case in which a former wife was

⁸⁵ Paragraphs 1-16 pages 3-7

claiming child maintenance from her former husband. It was alleged that the Judge throughout the two hearings displayed a strongly favourable bias towards the husband and, in contrast, made persistent disparaging comments against the wife. With the husband she aligned herself as having the same kidney disease as him and discussed with him during the hearings their shared symptoms and medical treatment. This much contrasted with the Judge's hostile attitude towards the wife who, arriving pregnant in the Chambers, was greeted with the comment "I see there is another member of the human race on the way" adding that it should be made clear that this was not the husband's child which made the wife feel that she was some 'lowly irresponsible person who had got herself pregnant by some stray guy'. So the disparaging remarks went on relating to her attending college part-time during a ten year period while actively looking after her children and being in full employment upon which the Judge commented "That's some commitment. How long before you finish? Another ten years?". Finally at the end of the hearing, the Judge, having been chided by the wife's Counsel for only wishing the husband "good luck", retorted that why should you give the same greeting to the wife "Good luck for what? Pregnancy?"

71. It was the view of the Tribunal, having been impressed by the evidence before it of the wife, that this final remark was "cruel, unnecessary and inappropriate, and was redolent of bias". Moreover the Judge's comment on the wife's "academic endeavours was cheap and uttered without regard to [her] worthy efforts to support herself and her children" while, at the same time, undertaking further study. It was on this basis that the Leggatt Tribunal concluded that the "degree of bias and the insensitive way with which [the

Judge had] treated the wife throughout [the hearings] amounted to....very serious misconduct”.

72. Although the Privy Council Board did feel that the “manner in which [the Judge had] dealt with the pregnancy was insensitive and inappropriate”, it was influenced by a statement from the wife’s Counsel (who did not appear before either the Tribunal or the Board) in which it was suggested that the final comment of the Judge could have been made light heartedly and held that “a case of misconduct....has not been made out”.

The SE Litigation

73. As in the case above, the complaint against Madam Justice Levers was that she had behaved inappropriately when conducting a family case – this one relating to matrimonial property. It was alleged the Judge made comments against the wife relating to having men in her bedroom which couldn’t be done “in front of the children” ending up with comment “That’s what you get for being married to a black man. If you had married an Englishman or a white man that would not have happened to you”. The Tribunal was, however, unhappy about accepting the evidence of the wife (who had appeared in front of them) which was not corroborated by her Counsel and concluded that the Judge’s “conduct fell short of serious misconduct”.

74. The Privy Council Board, influenced by its view that the comment about being married to a black man was “outrageously racist”, took the view (notwithstanding the insult was not against the wife but her former husband) that Judge’s conduct in this court hearing “constituted serious misconduct” adding that in “making its own appraisal of the significant facts found by the

Tribunal the Board must be free to differ from the views of the Tribunal in either direction”.

75. The question which has to be asked is: ‘what is this all about?’. Three very experienced Judges, having had twelve days of evidence, placed before them, make their own assessment of Justice Levers’ behaviour. Seven other very experienced Judges in the Privy Council Board assess Justice Levers’ behaviour differently. This was a collective view as was the view of the three Judges in the Leggatt Tribunal. In all probability, left to the individual assessments among all ten Judges, there would have been more differences of opinion on what was ‘misconduct’, ‘serious misconduct’ and so forth. How can it be said that any of the views is more right than the other?

Concluding remarks

76. The heart of the problem, which this article seeks to address, is that the Privy Council, was operating under a statute⁸⁶ of a 160 years ago which effectively placed it in an appellate position giving it power to examine witnesses⁸⁷ and power to require by writ the attendance of witnesses and the production of documents⁸⁸ and even to direct new trials of issues before them⁸⁹ while, at the same time, being (as it were) the servant of the Constitutions of Commonwealth Countries⁹⁰ all of which give the power and duty to the Head of State to set up judicial tribunals of eminent jurists fully to investigate and report upon the issue of the removal of the judge. The reality is that these

⁸⁶ The Judicial Committee Act 1833

⁸⁷ *ibid* at sections 7 and 8

⁸⁸ *ibid* section 19

⁸⁹ *ibid* section 13

⁹⁰ In this case the Constitutions of Trinidad & Tobago, Gibraltar and The Cayman Islands

reports, as received by the Privy Council, amount to a full investigation by the appointed tribunal of all the relevant matters (concerning whether a judge should be removed from office) which make redundant the powers of the Privy Council under the Judicial Committee Act (1833) except as giving Advice to Her Majesty the Queen (for those territories still under British rule) and, by inference, to the President of a Commonwealth Country (no longer under British Rule) on whether the judge in question should or should not be removed from office.

77. As pointed out by Lord Phillips, in the Levers Judgment, a Memorandum of the Lords in Council on the Removal of Judges in 1870 recognised that it was impractical for the Privy Council to exercise ‘original judgment’ and the requisite British Governor should, therefore, carry out an investigation before referring the matter to the Privy Council – this measure now being in the Constitution of Commonwealth Countries as identified in this article concerning Trinidad & Tobago, Gibraltar and the Cayman Islands.

78. The question is, with this statutory background and with the constitutional framework of the various jurisdictions, what should the Privy Council now do?

79. For as long as the Judicial Committee Act of 1833 remains the governing statute the Privy Council is bound to act in some appellate capacity. However the absence of a ‘prosecution’ or ‘judgment’ in the proceedings before the Tribunal leaves open the temptation to the Privy Council to exercise original judgment based on the material identified in the Tribunal investigation.

80. It is regrettable, therefore, that the Privy Council missed a valuable opportunity to clarify the way in which they should conduct these types of proceedings. Without acting contrary to the Judicial Committee Act it would have been possible for the Privy Council to set out the way in which these issues would be tackled. In particular, it is suggested that the correct approach for the Privy Council in cases of this type is to act in an appellate capacity, as they are required to do, but in a manner akin to the English Courts in Judicial Review cases. This reviewing role would enable the Privy Council to consider the fairness of the process adopted and would mean that they would only intervene if the conclusion was unsound due to procedural irregularities or unsupported by the evidence as found by the Tribunal appointed to hear the live evidence.

81. This would accord with the approach now adopted domestically in the UK where the views of the investigating judge on issues of judicial misbehaviour are reported to the Lord Chancellor and Lord Chief Justice in order for them to consider the appropriate sanction. Their decision being subject to review by the Review Body and, indeed, an Ombudsman. Neither the review body nor the Lord Chancellor or Lord Chief Justice re-examine the facts found by the investigating judge.⁹¹

82. The discord identified in the Schofield and Lever cases, between the Tribunal and the Privy Council Board, does not, it has to be respectfully suggested, reflect well on this judicial process. There will always be differences of opinions between individuals considering the same facts. However, to turn on

⁹¹ See paragraphs 7 & 8 above

their head findings which a Tribunal has permissibly made does not further the interests of justice.

83. The processes, over which concern is expressed in this article, may arise infrequently. Indeed it is hoped that, in future, issues relating to whether judges in the Commonwealth should be removed from office will only most rarely arise. Yet there should be some more satisfactory way of dealing with such cases. A repeal of the 1833 Statute and its replacement by a new Statute setting up, as is suggested, review rather than appeal processes would be the best solution but it is likely to be very difficult to get Parliamentary time and interest. This is also a subject which could be taken up by the Law Commission but since this issue only affects a small number of persons at fairly rare intervals it might be thought that the Law Commission should not take up time upon it notwithstanding its constitutional importance in the Commonwealth. Yet if this subject is not addressed all the problems, to which this article draws attention, will arise again if once more the removal of a judge in the Commonwealth comes before the Privy Council. Moreover, based on these two Privy Council cases, there will an expectation of a judge, who is subject to proceedings for his or her removal, that he or she is entitled to the same appellate processes – an expectation which should not be denied unless and until new processes are put in place. What can, however, be stated is that never again should the Privy Council Board find it necessary to trawl through, and vary, the findings of fact of these Tribunals, as set up in Commonwealth countries and served by eminent and experienced judges, and in doing so end up exercising original jurisdiction.