[2017] CCJ 4 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCV2015/002
BZ Civil Appeal No 19 of 2013

BETWEEN

THE BAR ASSOCIATION OF BELIZE **APPELLANT**

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before the Honourables **Mr Justice Nelson**
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson

Appearances

Mr Eamon H Courtenay SC and Mr Andrew Marshalleck SC for the Appellant

Mr Denys Barrow SC for the Respondent

JUDGMENT
of
The Honourable Justices Nelson, Saunders, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Nelson
on the
15th day of February, 2017

Introduction

[1] This appeal concerns the judicial independence of judges of the Court of Appeal of Belize. It arises out of a constitutional motion filed by the Bar Association of Belize, a body corporate created by the Legal Profession Act Cap. 320, in fulfilment of its mandate to ensure the proper administration of justice and to be a watchdog over the civil liberties of the people of Belize.[1]

[2] By the constitutional motion filed on September 24, 2010, the Bar Association of Belize (hereinafter referred to as "the Bar Association") challenged the Belize Constitution (Sixth Amendment) Act 2008[2] ("the Sixth Amendment") in relation to the provisos to section 101(1) and section 102(1) inserted by that amendment. These provisos stated that where an existing or future instrument of appointment of a Justice of Appeal did not specify a period of appointment, the judge's term of office should be one year from the date of commencement of the Sixth Amendment or one year from the date of the issue of the future instrument of appointment, at the expiration of which the office would become vacant.

[3] The Bar Association contended that the Sixth Amendment was unconstitutional and violated the rule of law, the separation of powers principle and the basic structure of the Constitution of Belize. The Bar Association expressed concern that one-year appointments to the Court of Appeal undermined the security of tenure of such judges, politicized appointments and re-appointments, and eroded public confidence in the Court of Appeal as an "independent and impartial" court.

[4] The Attorney-General countered that the purpose of the Sixth Amendment was to correct the alleged invalidity of the appointments of two distinguished sitting judges, Mottley P and Morrison JA, and to prevent the recurrence of appointments with no specified period of tenure. The Attorney-General submitted that the constitutional procedure for amending the Constitution was fully complied with, and there was no alteration to the structure of the Constitution.

[1] Sections 40(1) and 40(3)
[2] No. 13 of 2008

[5] This Court has carefully considered the judgments in the courts below and the oral and written submissions of counsel. In our view, the Bar Association has not adduced sufficient evidence to persuade this Court that the Sixth Amendment contravenes the principle of judicial independence, the unwritten principles underlying the Constitution or its basic structure. The Court therefore affirms the decision of the Court of Appeal and dismisses the appeal.

[6] On the other hand, the Court is firmly of the view that the present arrangements for appointment of justices of appeal fall short of being ideal. In this regard, the Court will later in this judgment lay down what we consider to be best practice for the appointment and tenure of Justices of Appeal, and we would recommend that such practice should be introduced as soon as practicable in Belize by appropriate constitutional amendments.

The Sixth Amendment

[7] The Sixth Amendment Bill was tabled in the National Assembly on April 25, 2008. It was published in the Gazette on the following day. The Bar Association on May 19, 2008 published a position paper indicating its objections to the proposed amendments. A Constitution and Foreign Affairs Committee of the National Assembly ("the Committee") considered the amendments. Public consultations on the amendments were held. The Committee presented its report as well as amendments to the Sixth Amendment Bill. The Bill had its second reading on August 22, 2008. The procedure for altering the Constitution set out in section 69 of the Constitution was fully complied with. The Governor-General assented to the Sixth Amendment on March 30, 2010. The Sixth Amendment came into force on April 12, 2010.[3]

[8] Sections 15 and 16 of the Sixth Amendment amended sections 101(1) and 102(1) of the Constitution.

Section 101(1) of the Constitution in its un-amended form reads as follows:

[3] See Statutory Instrument No. 34 of 2010

"101(1) The Justices of Appeal shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition, for such period as may be specified in the instrument of appointment."

Section 102(1) of the Constitution in its original form provides as follows:

"102(1) Subject to the following provisions of this section, the office of a Justice of Appeal shall become vacant upon the expiration of the period of his appointment to that office or if he resigns his office."

[9] Sections 15 and 16, which the Bar Association challenges, consist of two provisos to section 101(1) and a third to section 102(1). Sections 15 and 16 are set out hereunder:

"15. Subsection (1) of section 101 of the Constitution is hereby amended by adding the following ***Proviso*** *at the end thereof:* ***Amendment of section 101.***

"Provided that where no period is specified in an instrument of appointment, such appointment shall be deemed to subsist ***until*** *-*

(a) in the case of an instrument of appointment existing at the date of commencement of the Belize Constitution (Sixth Amendment) Act, 2008 - ***one year after such commencement;***

(b) in the case of an instrument of appointment issued after the commencement of the Belize Constitution (Sixth Amendment) Act, 2008 - ***one year after the date of issue of such instrument"***

16. Subsection (1) of section 102 of the Constitution is hereby amended by adding the following ***Proviso*** *at the end thereof:*

> *"Provided that where no period is specified in an instrument of appointment, the office of a Justice of Appeal shall become vacant upon the expiry of the period specified in the* ***Proviso*** *to subsection (1) of section 101."*

[10] The intention behind the provisos in the Sixth Amendment is that appointment under instruments with no specified period of tenure should cease. At the time the Sixth Amendment was passed there were four sitting judges, two Belizean judges (who had fixed date periods of tenure) and President Mottley and Justice Morrison (who were each appointed on May 31, 2004 by instruments of appointment, which specified no period of tenure). Pursuant to proviso (a) of section 15 the term of office of President Mottley and Justice Morrison would come to an end on April 11, 2011. It was common ground before this Court that the Sixth Amendment was not targeted at these distinguished judges. However, President Mottley resigned effective December 31, 2010. Justice Morrison was offered, and he accepted, a new appointment for four years from April 11, 2011. In the result, proviso (a) is chronologically spent, but it remains to be seen whether it was unconstitutional.

The Supreme Court proceedings

[11] On April 19, 2013, Legall J gave judgment in favour of the Bar Association. The learned judge held that the Sixth Amendment was unconstitutional, null and void in that it was contrary to section 102 which provided security of tenure to Justices of Appeal. Legall J. held that the Sixth Amendment was contrary to section 6(7) of the Constitution which required courts to be "independent and impartial." The amendments he held, were contrary to the rule of law and the basic structure of the Constitution. The substance of his judgment is encapsulated in the following passage taken from paragraph [11] of his judgment:

> *"Security of tenure is connected to the independence and impartiality of the judges. It seems to me that an absence of security of tenure of the judges is incompatible with judicial independence and impartiality. The essence of security of tenure is a tenure, whether until an age of retirement, or for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority. The effect of the amendments is to impose a period of appointment of one year in relation to Mottley P and Morrison JA after which their offices become vacant, unless*

they are re-appointed. The amendments impose upon these justices, and not the others, a reliance on the Executive for re-appointment, after the one-year period, which the Executive may, for a variety of reasons, refuse to do."[4]

The Court of Appeal proceedings

[12] The Court of Appeal (Hafiz-Bertram, Blackman and Ducille JJA) allowed the appeal of the Attorney-General on October 14, 2015.

[13] The Court of Appeal held unanimously that the Sixth Amendment was not unconstitutional. The learned Justices of Appeal rejected Legall J's conclusion that sections 101(1) and 102(1) as originally drafted breached the principle of judicial independence and impartiality. In any event, the Bar Association had sought no constitutional relief in respect of sections 101(1) and 102(1).

[14] The argument by the Bar Association that President Mottley and Justice Morrison had "full lifetime security" was rejected because their instruments of appointment had stated no period of appointment. It was imperative that a period of appointment be stated. The Sixth Amendment rectified the omission and would do so in the future if there was an omission to state the period of appointment. The Sixth Amendment, it was held, cured the defect of the instruments of appointment. It was wrong to read into section 101(1) a provision that an appointment of a Justice of Appeal should be until the normal retirement age or, if extended, to the age of 75.

[15] The Court of Appeal further held that the learned judge wrongly concluded that the Sixth Amendment violated section 6(7) of the Constitution, which guaranteed "independent and impartial" courts. The test of independence and impartiality was to be found in the judgment of Le Dain J in *Valente v The Queen*[5]. The standard of judicial independence was not uniform but varied from jurisdiction to jurisdiction. The history and practice of appointment of Justices of Appeal in Belize showed that Justices of Appeal were appointed for short terms with a

[4] See: Supreme Court Judgment, Record of Appeal p 1464
[5] [1985] 2 SCR 673 at para 22

possibility of re-appointment. Therefore, one-year appointments were not contrary to the Constitution since the reasonable well-informed Belizean observer would not perceive judges so appointed as not having security of tenure or independence and impartiality.

[16] Hafiz-Bertram JA ruled that the conclusion of Legall J that there could be no security of tenure with a one-year appointment was based on a misconceived correlation between such an appointment and the removal of a Justice of Appeal. The Sixth Amendment left intact subsections (2) – (5) of section 102, which provide that a Justice of Appeal can only be removed for cause and set out the procedure for such removal. *Starrs v Ruxton*[6] was distinguishable. In that case the court held that trial of the accused by a temporary sheriff, appointed by the Lord Advocate, who was also the head of the public prosecution system, was incompatible with the accused's right to "an independent and impartial tribunal" under Article 6(1) of the European Convention on Human Rights. The Lord Advocate appointed the temporary sheriff for one-year periods and there were no legislative protections for the office. Re-appointment was at the discretion of the Lord Advocate. He exercised that discretion on grounds not sanctioned by statute, such as a minimum period of work and an age limit of 65.

[17] The decision of Legall J was also set aside on the basic structure point. The basic structure doctrine had been rejected by the Belize Court of Appeal in *Attorney-General of Belize v British Caribbean Bank Limited* and *Attorney-General v Dean Boyce*[7]. Even if the doctrine were part of Belizean constitutional jurisprudence it was clear that Justices of Appeal enjoy security of tenure in respect of one-year appointments. Accordingly, the Sixth Amendment did not violate the rule of law or judicial independence.

Judicial Independence

[18] We pause now to consider the nature of the constitutional principle of judicial independence. Judicial independence is an important principle and finds

[6] (1999) SCCR 1052
[7] Civil Appeal Nos. 18, 19 and 21 of 2012

expression in section 6(7) of the Constitution. Courts must be both independent and impartial.[8] The concepts of independence and impartiality are interrelated. The test for independence and impartiality is whether the tribunal may be reasonably perceived as impartial[9]. The perception must be as to whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence. Thus it is not merely the state of mind or attitude of the judges in the performance of their functions but their status or relationship to others particularly the executive branch of the government.

[19] One of the important components of judicial independence is security of tenure. Security of tenure implies that judges should only be removed for cause according to a prescribed procedure. The selection and appointment of judges should be free from political or other influence. Judges should receive adequate remuneration and have the security of a pension scheme.[10] Judges must be free from political and other pressures or associations which might appear to influence them in the exercise of their judicial functions.

[20] Judicial independence is, however, an evolving concept. Conceptions have changed over the years as to "what ideally may be required in the way of substance and procedure for securing judicial independence in as ample a measure as possible. Opinions differ on what is necessary or desirable or feasible."[11] A study of 48 legal jurisdictions of the Commonwealth reveals a variety of approaches[12]. In every case, the historical, cultural, social, geographical and political background is relevant. Thus, the fact that the Lord Chancellor formerly sat as head of the judiciary and as speaker of the House of Lords did not mean that judicial independence was absent from England and Wales.[13] It is with the foregoing basic principles in mind that the issues in this appeal must be approached.

[8] Misick and others v The Queen [2015] UKPC 31 at para 21
[9] Supra fn 5
[10] See UN Basic Principles on the Independence of the Judiciary, Article 11 endorsed by General Assembly resolutions 40/32 of 29th November 1985 and 40/146 of 13th December 1985.
[11] Supra fn 5 at para 25
[12] See J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law)
[13] See Constitutional Reform Act 2005 (UK)

The primary issue

[21] The Court of Appeal stressed at paragraphs [27] and [85] of its judgment that the Bar Association does not challenge the constitutionality of section 101(1) or section 102(1). The learned judge however, considered that the one-year appointment envisaged by the provisos in the Sixth Amendment was inconsistent with 101(1) and 102(1) in their original wording. Such a period of appointment under 101(1) and 102(1) would be contrary to the constitutional principles of independence and impartiality in section 6(7) of the Constitution. The conflict of opinion between the Court of Appeal and the learned judge raises the question of the proper construction of sections 101(1) and 102(1).

[22] At the outset when considering the constitutionality of a law, which may perhaps include a constitutional amendment[14], courts presume that the impugned law is valid and place the burden of establishing at least prima facie transgression on the party alleging breach.[15] The presumption of constitutionality will also apply where an instrument is issued or an act is done under the Constitution and the relevant provision of the Constitution can fairly be interpreted so as to preserve the constitutionality of the instrument or act.

[23] Before this Court, Senior Counsel on both sides conceded that the phrase "for such period as may be specified in the instrument of appointment" in section 101(1) can be construed as permitting the issue of an instrument of appointment with no specified period of tenure.

[24] The effect of such an appointment would be an unspecified period of tenure limited only by the lifetime of the appointee, his earlier resignation or removal for inability to discharge the functions of his office or misconduct. The tenure of all federal judges in the United States is "during good behavior"[16]. Until the Australian Constitution was amended by referendum in 1977 Chapter III provided that Justices of the High Court and of other federal courts would hold office for

[14] See the wide definition of "law" in section 131(1) of the Belize Constitution
[15] See Attorney General v Antigua Times Ltd. (1976) AC 16 at p 32; (1975) 21 WIR 560 at p 574, Mootoo v Attorney General of Trinidad and Tobago (1979) 1 WLR 1334 at p 1339, (1979) 20 WIR 411 at p 416
[16] See Article III (Judicial Branch) Section 1 of the United States Constitution

life. Indeed, it was thought that life tenure was necessary to preserve the independence of the High Court of Australia[17].

[25] However, what is clear is that in 2008, four years after conferring, wittingly or unwittingly, "lifetime" appointments on Mottley P and Morrison JA, Belize decided to enact the Sixth Amendment so that no future "lifetime" appointments to the Court of Appeal could thus occur. The UK[18] and Australia had done so in their final courts. It seems to us of little moment what the reason was – whether previous appointments were made in error or through inadvertence. We turn now to the provisos inserted by the Sixth Amendment.

Removal

[26] The case for the Bar Association was that proviso (a) was a disguised removal clause and as such undermined the security of tenure of Justices of Appeal. When one added to this the limited one-year period of tenure and that re-appointment was within the gift of the Executive, the independence of the Justices of Appeal was so undermined that a reasonable well-informed Belizean observer would not consider the Court of Appeal an "independent and impartial" court, as required by section 6(7) of the Constitution.

[27] Counsel for the Bar Association submitted that proviso (a) was a colourable device which had achieved its objective of removing President Mottley and Justice Morrison from office. That device had succeeded since President Mottley, appointed on May 31, 2004, resigned effective December 31, 2010. Justice Morrison's term of office ended on April 11, 2011, albeit he was offered and accepted a further four-year term.

[28] Hafiz-Bertram JA rightly rejected this submission when she held that the Sixth Amendment was not a removal provision. In fact, neither President Mottley nor Justice Morrison was removed from office. During their shortened term they still enjoyed the protection of section 102. They were only removable for cause or for inability to discharge their functions.

[17] See Murray Gleeson, A Changing Judiciary (2001)
[18] In the UK, lifetime appointments were abolished by the Judicial Pensions Act 1959

[29] The better argument would have been that proviso (a) in shortening their lifetime tenure to one year was an alteration of their terms of service to their disadvantage in breach of section 118(3) of the Constitution and section 5(2) of the Court of Appeal Act[19]. However, it is trite law that such alteration only amounts to a constitutional breach if the judge does not consent to the alteration. In the circumstances of this case, where counsel for the Bar Association did not consider that it was necessary to adduce substantial evidence, this Court has no evidence as to whether the learned judges agreed to shortened periods of tenure. Therefore, no breach of section 118(3) falls for consideration.

The one-year term

[30] Counsel for the Bar Association also contended that the effect of the grant of a one-year term was to undermine security of tenure, one of the pillars of judicial independence. Appointments should be for a sufficiently long period.

[31] Counsel for the Attorney-General in response pointed out that under the un-amended section 101(1), which was not challenged by the Bar Association, one-year appointments were possible.

[32] Counsel for the Bar Association further contended that since judicial appointments in the Court of Appeal were made by the Executive (the Governor-General in accordance with the advice of the Prime Minister after consultation with the Leader of the Opposition), appointments to the Court of Appeal were not by an independent body. Judicial re-appointment, he contended, was within the gift of the Executive, with the result that there could be no independent and impartial tribunal as required by section 6(7) of the Constitution.

[33] As regards the one-year term, the Court of Appeal rightly rejected the blanket proposition that a one-year term automatically entailed a breach of section 6(7) of the Constitution. A similar view was expressed by Lord Reed in *Starrs v Ruxton*[20]:

> *"A short term of office is not, in my opinion, necessarily objectionable, as the Dupuis decision indicates. Indeed, the Convention itself provides for the*

[19] Cap. 90 of the Laws of Belize, Rev. Ed. 2011
[20] Supra fn 6 at p 1091

appointment of ad hoc judges to sit on the European Court of Human Rights appointed for the purpose of a particular case: art. 27."

[34] As regards re-appointments, Lord Reed in *Starrs v Ruxton*, however, acknowledged that appointments with a short term of office were liable to compromise the judge's independence when the appointment can be renewed.[21] In *Misick v The Queen*, Lord Hughes elaborated on this point when he said:

> *"A critical reason why short-term appointments may betoken lack of independence is if it is the Executive which is in control. The risk to independence is less when control is in the hands of the judiciary or an independent Commission."*[22]

[35] This Court endorses the view that re-appointment by the Executive lends fragility to judicial independence. However, that fragility arises from the fact that the Executive is the appointing body under the Constitution. The power of the Executive to appoint and re-appoint arises from the un-amended section 101(1) which is not challenged and not from the Sixth Amendment. Therefore, it is difficult to see how the Sixth Amendment, in the abstract and without more, can be declared unconstitutional because of the existence of an unchallenged power in the Constitution.

The diversity of judicial independence

[36] The dicta cited at [34] have to be understood in the context that while there may be agreement as to the key facets of judicial independence – appointments, tenure, salaries, removal – there is, as Hafiz-Bertram JA insightfully stated at [56] of her judgment, no uniform standard of judicial independence. In *Valente v R*, the Supreme Court of Canada recognized that different standards of judicial independence might apply between Provincial Court judges and superior court judges. Le Dain J. stated:

> *"The standard of judicial independence cannot be a standard of uniform provisions but rather must reflect what is common to the various*

[21] Ibid
[22] Supra fn 8 at para 24

approaches to the essential conditions of judicial independence in Canada."[23]

[37] In *R v Kuldip*[24], Lamer CJ commented as follows: "The Charter aims to guarantee that individuals benefit from a minimum standard of fundamental rights."

[38] In *R v Remuneration of Judges of the Provincial Court*[25], Lamer CJ again elaborated on the nature of judicial independence:

> *"… the essential objective conditions consist of those minimum guarantees that are necessary to ensure that tribunals exercising criminal jurisdiction act and are perceived to act in an impartial manner. Section 11(d) does not empower this or any other court to compel governments to enact "model" legislation affording the utmost protection for judicial independence."*

The special case of Belize

[39] In the context of Belize it is important to examine the historical facts relating to the Belize Court of Appeal. The Appendix attached to the written submissions of the Appellant demonstrates that since independence short term appointments to the Court of Appeal Bench have dominated. Most of the judges appointed have been non-resident Caribbean retired Justices of Appeal or members of the Inner Bar of a Caribbean country. Section 101(2) of the Constitution indicates that only a high calibre of appointee may be considered. The appointees listed in the Appendix to the Appellant's written submission might well be described, as Lord Hughes did in *Misick,* as persons "for whom all ambition was spent, save that of retiring with the highest judicial reputation."[26]

[40] In a study[27] on the appointment, tenure and removal of judges in the Commonwealth, Dr. Jan van Zyl Smit states:

> *"In 18.7% of Commonwealth jurisdictions (9 out of the total of 48 independent jurisdictions) the executive has sole responsibility for*

[23] Supra fn 5 at para 26
[24] [1990] 3 SCR 618
[25] [1997] 3 SCR 3 at p 334
[26] Supra fn 8 at para 28
[27] Supra fn 12 at p 16

appointment to all the courts of status equivalent to the High Court or above[28] *…"*

This group includes Australia, New Zealand, Singapore and Barbados.

"In another 8.3% of jurisdictions (4 jurisdictions) the executive has sole responsibility for appointing the members of the highest court.[29]*"*

[41] This latter is the group to which the Bahamas and Belize, Sri Lanka and Tanzania belong. In the absence of any specific evidence, the Court is not minded to treat the absence of a non-political independent Commission as indicating that a lack of judicial independence exists in Belize.

[42] As regards tenure, van Zyl Smit further observes at pp 63-64:

"… some smaller jurisdictions, mainly for reasons of population size and geography, have no alternative but to seek judges who are prepared to serve in the higher and appellate courts for a fixed term of years. There may be a shortage of candidates with the legal skills and experience required at this level of the court system where judges authoritatively determine the law of the jurisdiction and contribute to its development through precedent."

The learned author also notes that fixed term appointments may be attractive to

"non-nationals who may be prepared to accept a part-time travelling post of a limited period."

[43] For the reasons advanced by the learned author and the fact that no concrete evidence suggesting any deficit of judicial independence in Belize has been adduced, the Court is constrained to agree with the Court of Appeal that a reasonable well-informed Belizean would not conclude that the Justices of Appeal in Belize lack security of tenure and are not independent or impartial.

[28] The reference is to the highest locally appointed court
[29] See fn 28

The Basic Structure Doctrine

[44] The Appellant contends that the Basic Structure Doctrine, which had its origins in India, applies in Belize. By that doctrine the National Assembly cannot constitutionally amend the Constitution if the effect of the amendment is to dilute or destroy certain basic features of the Constitution. Such features include the rule of law, the separation of powers and the independence and impartiality of the judiciary. Since the Sixth Amendment impacts these basic features, it was argued, the Amendment under section 69 of the Constitution, although correct procedurally, is unconstitutional.

[45] In *Attorney-General of Belize v The British Caribbean Bank Limited* and *Attorney-General v Dean Boyce*, the Belize Court of Appeal (Sosa P., Mendes and Awich JJA) rejected the Basic Structure Doctrine, holding it was not applicable in Belize, a decision which was followed and approved by the Court of Appeal in these proceedings. Hafiz-Bertram JA, with whom Blackman and Ducille JJA agreed, expressly disapproved the judgment of Legall J at first instance applying the Basic Structure Doctrine.

[46] Although this Court was being invited to overrule *Attorney-General of Belize v The British Caribbean Bank Limited*, no analysis of that case was presented to us. Nor was any attempt made to dissect the judgments of the Justices of Appeal in that case. Be that as it may, this Court is satisfied, as was counsel for the Attorney-General, that even if the Basic Structure Doctrine was part of the law of Belize, nothing in the Sixth Amendment purports to "alter the Constitution in such a way as to limit or destroy" any of the "unwritten principles that represent the ethos" of Belizean society. The Court accepts the submission of Senior Counsel for the Attorney-General that essentially, the Sixth Amendment confers no new power on the Executive and alters nothing in the structure of the Constitution. The power to make short-term appointments to the Court of Appeal under section 101(1) always existed. Therefore, the Basic Structure Doctrine does not fall to be applied in this case.

[47] The second limb of the Appellant's argument on this aspect of the case was really an attenuated form of the argument on the Basic Structure Doctrine. The

contention was that even if the Basic Structure Doctrine did not apply in Belize, there were implicit limitations on the National Assembly's legislative powers to amend which prohibit "interference with judicial independence."

[48] No explicit limitation on the National Assembly's power to amend appears in section 69 of the Constitution. Section 69(8) of the Constitution is extremely wide and broadens the concept of amending to include "a simple modification or an outright revocation with or without a replacement."

[49] Subsequent to the Sixth Amendment, the National Assembly on October 25th, 2011 passed the Belize Constitution (Eighth Amendment) Act 2011 (hereinafter referred to as the Eighth Amendment).[30] One of the intentions of the Eighth Amendment was to prevent any valid amendment to the Constitution from being treated as unconstitutional. Since we have held that the Sixth Amendment is constitutional as in fact the Attorney General argued, there was no need to pray in aid the Eighth Amendment. Neither in the Court of Appeal nor the Supreme Court was the Eighth Amendment discussed. In the written submissions of the Appellant reference was made to the Eighth Amendment. It was emphasized that the Eighth Amendment would not have protected the Sixth Amendment from constitutional challenge. Since the Attorney General contended that the Sixth Amendment was valid, there was no argument before this Court that the Eighth Amendment validated the Sixth Amendment. In any event, until the contrary is argued, the Court would rely on its power to interpret the Constitution in sections 20 and 95 of the Constitution, which give such an interpretive role to the Supreme Court and a right of appeal.

[50] Since *Hinds v R*[31], it is possible to imply unwritten constitutional principles in the Constitution in order to declare primary legislation unconstitutional. Therefore, by analogy it is difficult to disagree with *obiter dicta* of Mendes JA in *Attorney-General of Belize v British Caribbean Bank Limited*[32] that unwritten constitutional

[30]However, the substantive rights of the parties must be determined by the law as it existed when the action was commenced in September 2010. This is so whether the law is changed before the hearing of the case at first instance or while an appeal is pending see Volume 96 Halsbury's Laws of England (2012) 5th ed para.1185, Hitchcock v Way (1837) 6 Ad & El 943 at 951–952 Re A Debtor [1936] Ch 237 at 243

[31] [1977] AC 195 (P.C); See AG v Joseph [2006] CCJ 3 (AJ) at para 60 (de la Bastide P and Saunders J), para 18-20 (Wit J) ; Zuniga v AG of Belize [2014] CCJ 2 (AJ) at para 63

[32] Supra fn 7 at para 264

principles may likewise limit the power of the National Assembly to amend the Constitution of Belize. However, even if there is such an implied power, for the reasons stated in relation to the Basic Structure Doctrine, the evidence in this case does not suggest any infringement of those unwritten constitutional principles.

Conclusion

[51] As indicated earlier in this judgment, the concept of judicial independence is constantly evolving. The Court is mindful of the fact that Belize is a country with a relatively small population and has therefore in the past staffed its Court of Appeal in part with non-resident judges of high quality.

[52] The Latimer House Guidelines for the Commonwealth (Guideline II.I) state:

> "*Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be irresistible, such appointments should be subject to appropriate security of tenure*."[33]

[53] Although we have come to the conclusion that the impugned (Sixth Amendment) legislation as such is not unconstitutional, it is clear that one-year appointments under the Constitution, thus amended, could be in breach of the Constitution, in particular section 6(7). We recommend a further evolution of the concept of judicial independence so that Justices of Appeal have the same security of tenure as Supreme Court judges. This Court notes that Belize is moving towards a Court of Appeal Bench with non-resident fixed term judges serving alongside permanent Belizean appointees. It is desirable that the executive system of judicial appointments in respect of resident and non-resident judges be replaced by an independent appointing body such as the Belize Judicial and Legal Services Commission that deals with appointments to the Supreme Court Bench. This independent Commission should appoint non-resident persons to the Court of Appeal until the normal retirement date or the extended retirement date of Supreme Court judges but would require non-resident judges to sit only as and when invited to sit by the President of the Court of Appeal. Where an appointee

[33] See Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government at p 17

is over 75, the Commission would have a discretion to offer a shorter period of tenure.

[54] This Court recognizes that short, renewable terms of appointment weaken the guarantee of judicial independence and therefore, additionally, recommends that the practice of one-year periods of tenure under section 101(1) should cease until the guidelines proposed in the preceding paragraph are implemented.

Disposition

[55] (1) The appeal is dismissed.

(2) The Belize Constitution (Sixth Amendment) Act 2008 (No. 13) stands.

(3) Each party will bear its own costs of this appeal.

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson