IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Application No. BZCV2017/004
BZ Civil Appeal No. 24 of 2014

BETWEEN

DEAN BOYCE	**FIRST APPELLANT**
BRITISH CARIBBEAN BANK LIMITED	**SECOND APPELLANT**
LORD MICHAEL ASHCROFT, KCMG	**THIRD APPELLANT**

AND

THE JUDICIAL AND LEGAL SERVICES COMMISSION	**RESPONDENT**

Before the Honourables: **Mr Justice Saunders, PCCJ**
Mr Justice Wit, JCCJ
Mr Justice Hayton, JCCJ
Mr Justice Anderson, JCCJ
Mme Justice Rajnauth-Lee, JCCJ

Appearances

Ms Magali Marin Young, SC for the First Appellant and Mr Eamon H Courtenay, SC for the Second and Third Appellants

Mr Nigel Hawke, Ms Leonia Duncan and Ms Radha Permanand for the Respondent

JUDGMENT
of
The Honourable Justice Saunders, President, and the Honourable Justices Wit, Hayton, Anderson and Rajnauth-Lee, Judges

Delivered by
The Honourable Mr Justice Anderson

on the 31st day of July, 2018

Introduction

[1] The question raised in this appeal is whether the conduct of Mr Justice of Appeal Awich, while sitting as a judge of the Supreme Court of Belize and prior to his elevation to the Court of Appeal of Belize, is or may be relevant to his removal from office as a Justice of Appeal. Resolution of this question requires interpretation of section 102 of the Constitution of Belize which provides for the removal from office of a Justice of Appeal for inability or misbehaviour.

[2] In the matter before us, the Judicial and Legal Services Commission ("the Commission" or "the JLSC") declined to refer to the Belize Advisory Council ("the Council" or "the BAC") for investigation the question of whether Mr Justice Awich should be removed from office for inability and/or misbehaviour. The request for the referral was made to the JLSC by Lord Michael Ashcroft KCMG, Mr Dean Boyce, and British Caribbean Bank Limited ("the Appellants") in a joint letter dated 17 July 2012 ("the Complaint").

[3] Dissatisfied with the JLSC's decision, the Appellants proceeded to file claims in the Supreme Court for administrative orders; no prerogative orders were sought. The Appellants requested, *inter alia*, a declaration that the JLSC's decision was unlawful, void and of no effect. They succeeded. Abel J declared that the JLSC erred in concluding that the conduct of Mr Justice Awich prior to his elevation to the Court of Appeal could not be considered. The judge referred the Complaint back to the Commission for reconsideration.

[4] The Commission appealed to the Court of Appeal which reversed the decision of the trial judge. That court held that the complaints against Mr Justice Awich as a Supreme Court judge were not relevant to the consideration of his removal from office as a Justice of Appeal under section 102 (2) and (3) of the Constitution. It is from that decision that the Appellants appeal to this Court.

Appointment as Justice of Appeal

[5] Mr Justice of Appeal Awich was appointed/elevated to that office on April 24, 2012 by the Governor-General on the advice of the Prime Minister of Belize, the Honourable Dean Barrow, after consultation with the Leader of the Opposition, the Honourable Francis Fonseca. He was sworn in on May 16, 2012. Prior to this appointment, and since March 1995, Mr Justice Awich had a varied judicial career in Belize and elsewhere. He acted as Chief Justice of Belize from October 2010, when the former Chief Justice Dr Abdulai Conteh retired, to

September 2011 when the Honourable Justice Kenneth Benjamin was appointed Chief Justice. Mr Justice Awich himself would have been a candidate for substantive appointment but for his age.

[6] Mr Justice Awich's elevation to the Court of Appeal came amidst objections from the Bar Association of Belize and the Leader of the Opposition. In a letter to the Opposition Leader dated April 19, 2012, the Prime Minister indicated that careful thought was given to his objections relating to Mr Justice Awich's proposed appointment but that he, the Prime Minister, remained resolute as to Mr Justice Awich's eminent suitability for the post.[1] The Prime Minister referenced the judge's outstanding judicial career, noting his proven integrity and character, and stated that prior to the "complaint about the delay in the delivery of judgments, Justice Awich was never accused of any improper conduct". The Bar Association's complaints about delays in judgment delivery by Justice Awich and other judges in the Supreme Court, which climaxed in 2009, as well as the unprecedented Statement issued by the judiciary in response to the Bar's actions at that time, were also recounted in the Prime Minister's letter. Against that background, the Prime Minister indicated that the Bar's contentions about the delays in judgment delivery were not new and had been answered before. He further sought to allay the Opposition Leader's concerns by pointing out that on the Court of Appeal Bench, Awich JA would be part of a panel and that the President or Presiding Judge would set time lines for judgment delivery. Accordingly, the issue of delay was "unlikely to arise".

[7] The Bar Association's objection was brought to the Prime Minister's attention by an undated letter[2] from the Association challenging "short term" judicial appointments and alleging Mr Justice Awich's unsuitable candidacy for the office of Justice of Appeal. The complaint as to the judge's suitability was predicated on "his well-established record of excessive delays in the delivery of judgments, his very slow and lax approach to work and a want of judicial acumen". By another letter dated April 23, 2012[3], the Bar Association informed the Prime Minister of a resolution[4] passed by its members in relation to Mr Justice Awich's appointment. The resolution, which was enclosed with the letter, cited Mr Justice Awich's alleged lack of "judicial wherewithal" which is

[1] CCJ Record of Appeal, Volume 2, pp 587 – 588.
[2] CCJ Record of Appeal, Volume 2, p 584.
[3] CCJ Record of Appeal, Volume 2, p 585.
[4] CCJ Record of Appeal, Volume 2, p 586.

"required of a Justice of Appeal" and his "failure to deliver judgments in a timely manner". This resolution was passed with 28 votes for, 0 against and 1 abstention. The letter then closed by requesting a reconsideration of Mr Justice Awich's appointment for the reasons set out in the resolution.

[8] These objections did not find favour with the Prime Minister. Indeed, it is to be noted that Mr Justice Awich was re-appointed as a Justice of Appeal in 2014 for a further term. In total the judge has now served six years on the Bench of the Court of Appeal.

The Complaint

[9] By letter dated July 17, 2012, the Appellants wrote jointly to the Honourable Chief Justice Kenneth Benjamin, the Chairman of the Commission. The Appellants stated that they were writing "in relation to the appointment of Justice of Appeal Awich (Justice Awich) to the Court of Appeal".[5] The Appellants requested that the JLSC consider and recommend to the BAC the question of removal from office of Justice of Appeal Awich for misbehaviour and/or inability to perform the functions of the office, under section 102(3) of the Constitution of Belize.[6] The Complaint gave as the reasons for removal Mr Justice Awich's conduct while he was a Judge of the Supreme Court which, the Appellants contended, amounted to "'misbehaviour' and/or 'inability'". Specifically, the Appellants complained of the judge's delays in delivering judgments as well as the manner in which he conducted proceedings in cases.

[10] According to the Complaint, it was reported by the Belize media at the time of the Bar Association's grievance in 2009 that there were some 9 – 10 cases in which Mr Justice Awich had not delivered judgment, with some of those cases dating as far back as 2004. The Complaint further outlined comments made by the Court of Appeal and this Court in a number of cases[7] where Mr Justice Awich's delay in delivering judgment was decried as being "shocking and inordinate", "very much to be regretted", cause for "deep concern", "inordinate" and "unacceptable". These, the Appellants contended, were an indication by the judge's peers that the delays undermined the due administration of justice and

[5] CCJ Record of Appeal, Volume 2, pp 572 – 581.
[6] CAP 4.
[7] *Attorney General v Betson* (Civil Appeal Nos 27 and 28 of 2007 at [4])*; Mayan King Limited v Jose Luis Reyes* (Civil Appeal No 19 of 2009 at [97])*;* and *Mayan King Limited v Jose Luis Reyes* [2012] CCJ 3 (AJ) – CCJ commented on a delay of 4years and 9 months.

were relied on in the Complaint as indicating that the judge fell short of the standards required by the Bangalore Principles of Judicial Conduct.

[11] The Appellants alleged in the Complaint that there was on record clear examples of Mr Justice Awich's violation of parties' rights and of sound principles relating to the administration of justice in cases in which they were parties. The cases were referenced to "demonstrate that it is inimical to the interest of the due administration of justice that Justice Awich remains in office". The Appellants recounted certain events which took place in three (3) specific cases: *The Attorney General v Jose Alpuche et al*,[8] *The Attorney General v Belize Telemedia Ltd and Belize Social Development Ltd*[9] and *The Attorney General v Belize Social Development Ltd.*[10] On appeal in the *Alpuche* case,[11] Morrison JA in the Court of Appeal set aside an injunction granted by Mr Justice Awich against Dunkeld International Investment Limited and 9 named individuals (including Mr Dean Boyce and Lord Ashcroft KCMG) on the basis that, on the evidence, the injunction was "so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it". In his 2010 judgment,[12] Mr Justice Awich admitted to falling into error in granting the 2009 *ex parte* injunction but nonetheless continued the injunction against Lord Ashcroft, Dean Boyce and others as he was not impressed by evidence given on behalf of the respondents that they exercised no control over Dunkeld and the affidavit evidence gave rise to "'too many questions'".[13]

[12] In relation to the other two cases, the criticisms of Counsel in those matters were relied upon. The criticisms concerned Mr Justice Awich's grant and extension of without notice injunctions, an application to serve out of the jurisdiction and allegations of bias in the Government's favour. *The Attorney General v Belize Telemedia Limited and Belize Social Development Limited* involved the granting of an injunction, without notice, against Belize Social Development Limited ("BSDL") by Mr Justice Awich. In April 2012, Counsel wrote to the Registrar expressing concern about the history of the matter. Counsel was troubled by the fact that "for no discernible reason" Mr Justice Awich heard

[8] Claim 1042 of 2009.
[9] Claim No 317 of 2009.
[10] Claim No 140 of 2011.
[11] *Jose Alpuche et al v The Attorney General* (Court of Appeal of Belize, 14 June 2010) (*Morrison JA*) at [6].
[12] Claim 1042 of 2009; Civil Appeal No. 8 of 2010, [6]
[13] CCJ Record of Appeal, Volume 2, pp 572 – 581.

without notice an application for an injunction against BSDL and for permission to serve out of the jurisdiction even though it was clear from the papers that it was meant to be on notice. The judge held that it was intended for the applications to be heard without notice.

[13] Mr Justice Awich also granted the application to serve BSDL, a British Virgin Islands-registered company, in Belize although no reason was given as to why it could not be served at its registered offices. In relation to the injunction, the judge extended it twice on a without notice basis and, it is alleged, the judge made no attempt to analyse the evidence before him in granting the injunctions. In his letter, Counsel remarked that what happened "borders on the bizarre" and was "a flagrant violation of basic rights". Counsel was at a loss to understand why "due process is being flouted and injustice imposed on a serial basis in his case" in which "the Government [was] being afforded…preferential treatment to the detriment of [his] client".[14]

[14] The Complaint was supported by legal submissions and it was claimed that these matters were incorrectly disregarded when the judge was being considered for elevation to a Justice of Appeal. On that basis, the Appellants said that Mr Justice Awich's appointment to the Court of Appeal was not lawful and he should now be investigated by the BAC.

The JLSC's Consideration of the Complaint

[15] On October 29, 2012, the Commission considered the Complaint and its decision was communicated to the Appellants by its Secretary in a letter dated November 14, 2012.[15] The letter advised that the JLSC had formed the view that:

> "the Complaint was directed to matters relating to the performance of Justice Awich in his previous position of Justice of the Supreme Court and had no relation to his present office of Justice of Appeal, rendering the Complaint misconceived and premature with respect to the office of Justice of Appeal…"

The Commission further stated that, "…the decision to appoint a Justice of Appeal resides with the Prime Minister and the Belize Constitution does not countenance the participation of the Commission or the Bar Association in that

[14] CCJ Record of Appeal, Volume 2, pp 578 – 579.
[15] CCJ Record of Appeal, Volume 10, pp 1072 – 1073.

process." The Commission declined the referral and took the position that the BAC need not be advised of the matter.

[16] There was a minority position in the Commission. This was taken by the President of the Belize Bar Association. In its letter, the JLSC advised the Appellants that:

> "There was presented to and not carried by the Commission, a minority view that the strict categorisation of the Complaint omits to take into account the allegations of unmerited decision-making on the part of Justice Awich potentially linked to his elevation, thereby compromising the high standards of the Judiciary and his moral authority to sit as a Justice of Appeal."

The Supreme Court Decision

[17] In the Supreme Court, the Appellants alleged that they had been prejudiced because of Mr Justice Awich's misbehaviour and/or inability while holding the office of Judge of the Supreme Court and that they had interests in appeals before the Court of Appeal. Reference was also made to the impact on perception, in the Press and by the Bar, in relation to the office and the due administration of justice. There were also claims that Mr Justice Awich repeatedly disregarded his duties as a judge by "violating basic rights of the parties and rules of natural justice, and also administered justice in an inefficient and irrational manner", particularly with respect to two 2009 cases and a 2012 claim in the Supreme Court. There was also an allegation that the judge failed to meet the standards of the Bangalore Principles of Judicial Conduct. The Appellants also placed specific reliance on comments made by the Court of Appeal and Caribbean Court of Justice when determining appeals in which Mr Justice Awich presided as a judge and in which there were significant delays. The Appellants suggested too that Mr Justice Awich's conduct left it open for the judicial office to fall into disrepute which would directly affect his ability to carry out the duties of the post of Justice of Appeal.

[18] In a judgment dated August 22, 2014, Abel J opined that the JLSC's role extends only to an assessment whether the question of removal ought to be *investigated* and not to a consideration of the question itself. This assessment, and any referral to the BAC arising from that assessment, is what "triggers" removal or impeachment proceedings. Adopting the learning in *Rees v Crane*[16] and *Sharma v Brown Antoine*,[17] Abel J found that in deciding whether to refer the matter, the

[16] TT 1994 PC 1; [1994] 2 AC 173.
[17] [2006] UKPC 57.

JLSC must be satisfied "'that the complaint has prima facie sufficient basis in fact and must be sufficiently serious'…and/or that there is potentially credible evidence or material of inability or of serious misconduct, to warrant an investigation…before making a referral." Having considered several other cases,[18] the trial judge concluded that courts have generally taken a wide view of what constitutes 'misbehaviour' and 'inability to perform the functions of office' and that in assessing whether these tests have been met, courts have viewed conduct not associated with the strict performance of duties in the present office as being relevant. The learned judge accepted the submission of Counsel for the Appellants, then claimants, that a failure to consider "significant instances of prior conduct" could result in any decision being irrational. However, relevance of prior conduct depended on the facts of the specific case.

[19] Abel J went on to conclude that it was inappropriate for the Commission to ignore the claims of prior misconduct on the basis that the new judicial appointment constituted a 'new situation' which had to be determined on different considerations. This was so, seeing that the Complaint had now made the issue of Mr Justice Awich's prior conduct a live one within the context of the new appointment and that both positions are similar. The trial judge held that, "it cannot plausibly be said that prior conduct as a Supreme Court Judge, a senior judicial officer, is necessarily irrelevant to future conduct as a Justice of a Court of Appeal (a more senior judicial office)". The former could bear relevance on the future conduct of Justice of Appeal Awich and on his capacity to discharge the new duties as well as serve to undermine public confidence in the performance of this new office. The trial judge also observed that, on the face of it, the observations made in the decisions of the Court of Appeal of Belize and the Caribbean Court of Justice were themselves potentially credible evidence of the allegations of delayed judgments from Mr Justice Awich, which the Commission ought to have considered.

[20] Having regard to the authorities, the law was therefore clear – misconduct need not occur in the course of discharging the duties of an office but must be determined having regard to "the effect of the conduct on the capacity of the

[18] For example, *Therrien v Canada (Minister of Justice) and Another* [2001] 5 LRC 575; *Clark v Vanstone* [2004] FCA 1105; Hearing on the Report of the Chief Justice of Gibraltar [2009] UKPC 43; *Steward v Secretary of State for Scotland* 1996 SC 271; *Steward v Secretary of State for Scotland* 1998 SC (HL) 81; *Da Costa v Minister of National Security* (1986) 38 WIR 1; *The Northern Jamaica Conservation Association v The Jamaica Environment Trust* HCV 3022 of 2005 (SC) and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

person to continue to hold the office".[19] The learned judge went on to hold that the evidence before the Commission was capable of amounting to and could have amounted to misbehaviour and inability to perform the functions of office related to the office of a Justice of the Court of Appeal. Accordingly, the trial judge found that the Commission did not properly exercise its discretionary power and thus erred in law and misdirected itself by failing to take account of Mr Justice Awich's prior conduct in considering the question before it, in acting beyond the scope of its powers by preventing its own consideration and possibly the BAC's investigation of the judge's prior conduct, and in misunderstanding its constitutional role regarding the removal of Justices of Appeal.

[21] Notwithstanding this, Abel J declined to make any findings on the seriousness of the matters complained of or whether the JLSC was irrational in not making the referral to the BAC. He granted an order declaring that Mr Justice Awich's conduct prior to his appointment as Justice of Appeal was relevant to the consideration of 'misbehaviour' and 'inability' in the JLSC's consideration of the Complaint and ought to be entertained and considered. A declaration was also made that the Commission's decision declining to refer the Complaint was unlawful, void and of no effect. Having made these declarations, the judge ordered that the Complaint be referred to the JLSC "for it to reconsider its position in view of the above declarations and in accordance with the law and with a view to further conducting its enquiry and arriving at its own lawful determination". Costs were reserved with liberty to apply.

Judgment of the Court of Appeal

[22] The judgment of the Court of Appeal was delivered on June 16, 2017. The judgment was delivered by Hafiz-Bertram JA. Sosa P and Ducille JA, concurred. The court allowed the Commission's appeal and set aside the decision, declarations and orders of the trial judge. It further declared that the complaints made against Mr Justice Awich as a Supreme Court judge were not relevant to any consideration of his removal from office as a Justice of Appeal under s 102(2) and (3) of the Constitution. Further, the court declared that the Commission's refusal to refer the Complaint to the BAC was lawful and valid. No order was made for costs.

[19] *Clark v Vanstone* [2004] FCA 1105.

[23] In analysing the approach taken by the trial judge in arriving at his decision, the Court of Appeal first highlighted that the Commission possesses a discretionary power under s 102(3) to either dismiss a complaint or to refer it to the BAC for investigation. As such, the Commission was not a mere "conduit for removal of Court of Appeal Judges".[20] It went on to say that, in making findings on the reasons given in the Complaint for misbehaviour and inability to perform the functions of the office of Court of Appeal Judge, the trial judge wrongfully usurped the Commission's functions. The Commission dismissed the Complaint on a preliminary point - that conduct in a past office was not relevant to the present office - and had not itself determined whether the reasons for the complaint amounted to misbehaviour or inability. The court determined that the trial judge ought only to have concerned himself with the declaratory relief sought and not to have made enforcement orders against the Commission. He was wrong as the Commission cannot be ordered by the court in its decision-making. Additionally, it would have been proper for the judge to consider only the relevance of prior conduct as a Supreme Court judge and not delve into the reasons given in the Complaint. The trial judge erred as he had no jurisdiction to consider the factual component of the Complaint or make findings. This error, the Court of Appeal found, was sufficient to set aside the decision in its entirety. The court declined to consider any issues relating to the facts themselves or the test for misbehaviour and the meaning of 'consideration' which were addressed by the trial judge.

[24] In addressing the specific question of the relevance of prior conduct as a Supreme Court Judge, the Court of Appeal looked to the law enunciated in *Therrien v Canada (Minister of Justice) and Another*,[21] which the trial judge used to determine the issue. Hafiz-Bertram JA concluded that *Therrien* was distinguishable from the case before her, considering the facts and the reason for the removal of the former judge.[22] In *Therrien*, it was the fact of the judge's non-disclosure to the selection committee of a criminal conviction for an offence committed when he was a law student (although he was eventually pardoned years before his appointment) and not the fact of the conviction itself that was cause for the judge's removal. The non-disclosure arose from the committee's specific inquiry to the judge of, "Have you ever been in trouble with the law…?" In making

[20] *The Judicial and Legal Services Commission v Dean Boyce* Civil Appeal No 24 of 2014 *and The Judicial and Legal Services Commission v British Caribbean Bank Limited and Lord Michael Ashcroft KCMG* Civil Appeal No 24 of 2014 (Court of Appeal of Belize, 16 June 2017) at [23].
[21] [2001] 5 LRC 575.
[22] Ibid at [143].

the distinction between that case and the one at bar, the court observed that there is no allegation of a failure to disclose a criminal record prior to Mr Justice Awich's appointment as a Supreme Court Judge. Further, there is no evidence that his appointment to the Supreme Court had been impugned.

[25] Hafiz-Bertram JA also noted that no removal proceedings under section 98 of the Constitution were initiated while Mr Justice Awich was a Supreme Court Judge or even while he acted as Chief Justice. Given that he no longer held the office of a Judge of the Supreme Court, such removal did not arise. In that context, there had been "no proven misbehaviour or inability to perform the functions of a Supreme Court Judge". Accordingly, Mr Justice Awich's past conduct was irrelevant to his appointment as Justice of Appeal having regard to the Constitutional provisions in section 98.[23] The court then stated that the Complaint was misconceived as the allegations could not be considered as proof of wrongdoing since section 98 was never triggered. There was therefore no "proven misbehaviour" while he was a Justice of the Supreme Court that "can be used as past conduct to impugn his appointment and removal from the Court of Appeal" under s 102(2) of the Constitution.[24]

Appeal to the CCJ

[26] The Appellants have appealed to this Court seeking to challenge the decision of the Court of Appeal on four (4) substantive grounds. They also challenge the Court of Appeal's refusal to award costs. By way of relief, the Appellants have asked this Court to grant an order setting aside the Court of Appeal's Judgment, an order referring the Complaint to the JLSC for investigation and an order for costs in this Court and those below.

[27] Before us Counsel for the Appellants maintained that the grievances outlined in the Complaint related to both Justice Awich's alleged misbehaviour and inability. It was also contended that the Commission, based on its finding that the Complaint was premature, failed to even weigh the evidence of the conduct complained of. This, in the Appellants' view, was an improper exercise of discretion by the Commission whose sole task was to determine whether the matters complained of were sufficiently serious as to warrant a referral to the BAC for investigation.

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[23] *The Judicial and Legal Services Commission v Dean Boyce* Civil Appeal No 24 of 2014 *and The Judicial and Legal Services Commission v British Caribbean Bank Limited and Lord Michael Ashcroft KCMG* Civil Appeal No 24 of 2014 (Court of Appeal of Belize, 16 June 2017) at [48].
[24] Ibid.

[28] Counsel for the Respondent, however, submitted that the conduct complained of tended towards inability as regards Mr Justice Awich's previous office as a Judge of the Supreme Court, and not misbehaviour. No complaint was made while he was a Judge of the Supreme Court or any attempt made to remove him from that office in accordance with section 98 of the Constitution. The Complaint was therefore too late as regards the office of Supreme Court Judge and too early as regards his current office. It also appears that the JLSC's contention was that inability related to the specific duties to be performed in the (current) post. In any event, the JLSC suggested that the conduct complained of could not be categorized as misbehaviour and, even if it could, it was not of such gravity that it warranted removal. On this point, and in specific relation to the matter of delays, the JLSC relied on the case of *Matter of Greenfield*[25] in which the Commission on Judicial Conduct determined that a judge's "failure to promptly dispose of pending matters generally does not warrant judicial discipline but rather administrative correction" and that "ordinarily delays do not constitute misconduct".[26] Counsel for the Respondent also submitted that the JLSC did in fact consider and assess the Complaint and, having done so, it determined that the Complaint fell short of what was required and so dismissed it. The underpinning argument therefore was, whatever reasoning is accepted by this Court, the matters complained of did not amount to misbehaviour or inability and further bore no relevance to the question of Mr Justice Awich's removal from the office of Justice of Appeal.

[29] Both sides agreed that in relation to the role of the Commission in the removal process, the cases of *Meerabux v The Attorney General of Belize and The Bar Association of Belize*[27] and *Rees v Crane*[28]were applicable. The arguments canvassed before us were that the JLSC is not a "conduit" for the transferral of complaints to the Council but is tasked with ensuring that claims are not "fanciful or of the crack-pot variety or hopelessly groundless".[29] In doing so, the Commission need "not establish the validity of the allegations" but must assess the complaint "to see if it is sufficiently serious to warrant referral".[30] Before the Commission decides to refer, it must "be satisfied that the complaint has prima

[25] 76 N.Y.2d 293 (1990).
[26] Ibid, 297 (references omitted).
[27] Action No 65 (Supreme Court of Belize, 12 March 2001) (*Conteh CJ*).
[28] [1994] 2 AC 173.
[29] *Meerabux v The Attorney General of Belize and The Bar Association of Belize* Action No 65 (Supreme Court of Belize, 12 March 2001) (*Conteh CJ*).
[30] Ibid.

facie sufficient basis in fact".[31] The Appellants suggested, however, that at the stage of the Commission's enquiry, the threshold would be low.[32]

Discussion

[30] As we have already stated in paragraph [1], the scope of this appeal is quite narrow. It is whether Mr Justice Awich's conduct while he was a judge of the Supreme Court of Belize and prior to his elevation to the Court of Appeal, is or may be relevant to the question of his removal from office as a Justice of Appeal under s. 102 of the Constitution.

The power to appoint to and remove from the office of Justice of Appeal

[31] Section 101 of the Constitution of Belize makes provision for the appointment of Justices of Appeal. This power resides with the Governor General who acts in accordance with the Prime Minister's advice, such advice being given after consultation with the Leader of the Opposition. Similarly, it is the Governor General who is vested with the power to remove a Justice of the Court of Appeal.[33] The Constitution, however, sanctions removal only for a Justice of Appeal's inability to perform the functions of the office or misbehaviour.[34] Section 102(2)-(3) provides that:

> "(2) A Justice of Appeal may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
>
> (3) A Justice of the Court of Appeal may be removed from office if the question of his removal from office for inability to perform the functions of his office or for misbehaviour has been referred to the Judicial and Legal Services Commission in writing and the Judicial and Legal Services Commission, after considering the matter, recommends in writing to the Belize Advisory Council that the question of removal ought to be investigated."

[32] Under section 102(3) – (7), a specific and robust procedure is set out for removing a Justice of Appeal. First, the question of the Justice's removal must be referred in writing to the Commission. Second, the Commission must consider the matter

[31] *Rees v Crane* [1994] 2 AC 173, 193.
[32] *Wilson v Attorney General* [2011] 1 NZLR 399 at [44].
[33] Constitution of Belize CAP 4, s 102(7).
[34] See Constitution of Belize CAP 4, s 102(2) and (7).

and determine whether to recommend the complaint to the BAC for investigation. Third, the BAC must enquire into the matter and report on the facts to the Governor-General and advise the Governor-General as to whether the Justice should be removed. If the matter is referred to the BAC, the Governor-General may suspend the Justice of Appeal in question. The Governor-General is duty bound to notify the Justice of Appeal of the advice received from the BAC.

[33] The section makes clear that the JLSC's role in the removal process is neither that of a mere conduit for complaints nor the decider on the merits of the complaint. The role of the Commission is to consider and recommend while the BAC's role is to investigate and advise. The JLSC considers whether there is sufficient evidence of inability and/or misbehaviour to justify referring matters to the BAC; if referred, the BAC investigates and evaluates the merits of the evidence presented to it before reporting its findings and advice to the Governor-General. *Meerabux* and *Rees* are at one on this point. In *Meerabux,* which involved the question of the removal of a Supreme Court Judge under section 98 of the Constitution (which is similar in terms to section 102), Conteh CJ opined that the "validity, veracity or otherwise of the allegations is for the Belize Advisory Council…the fact-finding and reporting body charged with the responsibility of establishing the veracity or otherwise of the allegations by an enquiry into them".[35] That being said, Conteh CJ, referring to the role of the Governor-General (now assumed by the Commission) in terms of the referral process, opined that:

> "…there must be present some indicia of investigation by the Governor-General into allegations leveled against a judge. It may not be the full-blown battle royale of the adversarial process or one involving the forensic skills of a sleuth, but in the process of considering whether the question of the removal of a judge ought to be investigated by referral to the Belize Advisory Council, the Governor-General must surely do some probing, some investigating to establish that the allegations are not merely fanciful or hopelessly groundless. In this process, the Governor-General must, in consonance with natural justice and fair play, hear from the judge or give him an opportunity to put his own side or version of whatever the allegations may be about. This requirement would be fulfilled if the Governor-General writes to or informs the judge about the allegations. This act itself is, in my opinion, investigatory.
>
> But in my view, this investigation by the Governor-General at the consideration stage of the question of the removal of a judge is not to establish the validity of the allegations, but I think to ensure that they are not fanciful or of the crack-pot variety or hopelessly groundless."[36]

[35] *Meerabux v The Attorney General of Belize and The Bar Association of Belize* Action No 65 (Supreme Court of Belize, 12 March 2001) (*Conteh CJ*).
[36] Ibid.

[34] We agree with these observations. The comments made by the Privy Council in the case of *Rees* as to the requirement for representation by the Judicial and Legal Service Commission to the President of the Republic of Trinidad and Tobago of the question of removal are also apt. There their Lordships' Board stated,

> "The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings."[37]

[35] The Board also opined that the decision by the commission to recommend the impeachment of a judge "must be made…only upon allegations which have substance and require public airing, rather than…alternative and sensitive resolution."[38] Their Lordships also outlined the distinct stages of removal under section 137 of the Constitution of Trinidad and Tobago, the terms of which are similar in context to the removal provisions in Belize. The Privy Council stated that:

> "The procedure for removing a judge from office under section 137 has three separate and distinct stages. (1) The commission sits in private to examine and evaluate the complaints and the evidence before deciding whether to impeach the judge. It must be in a position to reject frivolous or misconceived complaints, and to decide, where the complaints are justified but not sufficiently grave to justify impeachment, whether lesser alternative courses of action are feasible. (2) The tribunal sits in public, takes evidence on oath and inquires into the matter referred to it by the President. After conducting public hearings the tribunal must submit a report containing its findings of fact, and express an opinion as to whether those findings should be submitted to the Judicial Committee for its opinion on whether the judge ought to be removed."[39]

[36] In making the determination as to whether to refer, there is a low threshold in establishing the existence of a prima facie case. In *Wilson v Attorney General,*[40] a case from New Zealand, the High Court considered in part the role of the Judicial Conduct Commissioner who was mandated by statute to *inter alia* receive complaints about judges, conduct preliminary examinations of such complaints and, where appropriate, recommend the appointment of a Panel to make inquiries into any matter or matters concerning the judge's conduct. The relevant statute requires the Commissioner to "form an opinion as to whether…the subject matter

[37] *Rees v Crane* [1994] 2 AC 173, 193.
[38] Ibid at 179.
[39] *Rees v Crane* [1994] 2 AC 173, 181.
[40] [2011] 1 NZLR 399.

of the complaint, if substantiated, could warrant consideration of the removal of the Judge from office; or…there are any grounds for dismissing the complaint…"[41] Once the Commissioner forms an opinion, he or she may dismiss the complaint, refer it to the Head of Bench or recommend that the Attorney-General appoint a Judicial Conduct Panel to inquire into the judge's conduct. In relation to the Commissioner's role as existed at the time of the legislation, the court found that:

> "…the Commissioner must form an opinion on the information that he has available to him following his preliminary examination. That opinion may result in the complaint being dismissed…
>
> An opinion must be honestly held, reasonably open on the facts available, and based on the correct legal standard. In this case the opinion must be that there is sufficient substance to the complaint to warrant the appointment of a Panel; the Commissioner must believe both that the facts alleged in the complaint are sufficiently plausible to justify further investigation and that the conduct, if established, may be serious enough to warrant consideration of removal rather than referral to Head of Bench. It is a low threshold…but a definite one….
>
> …it is the Commissioner who must identify the matter or matters concerning the judge's conduct that warrant a Panel inquiry…
>
> The matters about conduct that are thought to warrant further inquiry must be identified in the Commissioner's recommendation, which determines the initial scope of the Panel inquiry…"[42]

Given the similarity in mandate between the New Zealand Commissioner and the Belize JLSC, we are of the view that the commentary of the High Court of New Zealand is instructive in this appeal.

[37] The authorities discussed are all *ad idem* as to the role and function of the Commission. Once a complaint is lodged with the Commission, its consideration process must be triggered. Put differently, once it receives a complaint, the JLSC must consider and assess whether the grievances outlined are of such gravity and are sufficiently established on the facts before it, that a referral for investigation is warranted so that the Council can then evaluate whether there actually is sufficient evidence to justify taking the matter further. The Commission is not a mere channel for transmitting complaints to the Council; it has an independent discretion to exercise. However, whereas there is a discretion as to whether the

[41] Ibid at [28].
[42] *Wilson v Attorney General* [2011] 1 NZLR 399 at [44], [46] and [47].

question of removal should be referred to the BAC for investigation; there is none as it relates to the requirement for proper consideration.

Relevance of past conduct

[38] It requires no great stretch of the imagination to fathom that a judicial officer's past conduct could bear relevance on the question of whether the matter of his removal for inability or misbehaviour should be referred for investigation. Past events or conduct have been held to be relevant upon a consideration of whether a judicial officer's actions amount to misbehaviour. For example, in *Therrien v Canada (Minister of Justice) and Another,*[43] it was held that the non-disclosure by a judge to the selection committee of a criminal conviction for an offence committed when he was a law student (although he was eventually pardoned years before his appointment) when he was asked, "Have you ever been in trouble with the law…?" amounted to misbehaviour requiring removal. It is to be noted here that it was the fact of the non-disclosure and not the fact of the conviction itself that was cause for the judge's removal.[44]

[39] Similarly, the Canadian Judicial Council recommended the removal from office of a Federal Judge in a 2017 matter.[45] Federal Appeal Judge, Justice Robin Camp, was investigated by the Canadian Judicial Council after he was elevated to the Federal Court for conduct that took place while he was a Provincial Judge in Alberta. During a trial in the Provincial court, Justice Camp, "made comments or asked questions evidencing an antipathy toward laws designed to protect vulnerable witnesses, promote equality, and bring integrity to sexual assault trials. It also found that the Judge relied on discredited myths and stereotypes about women and victim-blaming during the trial and in his Reasons for Judgment."[46] The impugned conduct included:

> "…asking the complainant, a vulnerable l9 year old woman, 'why didn't [she] just sink [her] bottom down into the basin so he couldn't penetrate [her]' and 'why couldn't [she] just keep [her] knees together,' that 'sex and pain sometimes go together [...] - that's not necessarily a bad thing' and suggesting to Crown Counsel 'if she [the complainant] skews her pelvis slightly she can avoid him.'"[47]

[43] [2001] 5 LRC 575.
[44] Ibid at [143].
[45] Canadian Judicial Council, *Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (8 March 2017).
[46] Ibid at [10].
[47] Canadian Judicial Council, *Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice* (8 March 2017) at [17].

[40] The conduct, although a matter of public knowledge, had not been fully ventilated or investigated (while he was still a Judge of the Provincial Court). The Council however concluded that Justice Camp's conduct in a trial "was so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the Judge incapable of executing the judicial office".[48]

[41] Accordingly, past conduct may, having regard to the specific facts of the complaint and the gravity of those facts, adversely affect public confidence in the due administration of justice. The public, quite understandably and reasonably, has certain expectations of the qualities to be exhibited by all judges, whatever the tier of the judicial ladder on which the judge sits. Behaviour that diminishes public confidence, if it is sufficiently serious, cannot be ignored and the slate wiped clean by a mere promotion. It appears to us, from the language used by the Commission in its decision, that the Commission precluded itself from any consideration of the matters placed before it on the basis that these matters related to past conduct. In stipulating the Complaint was "misconceived and premature with respect to the office of Justice of Appeal" the Commission instituted a procedural bar to its consideration on the simple basis that Mr Justice Awich had been newly appointed to the Court of Appeal and that the conduct complained of by the Appellants had arisen while he sat on the Supreme Court Bench. This in our view, was an artificial hurdle instituted by the JLSC of its own volition to fetter the exercise of its discretion and its execution of the constitutional mandate given to it under section 102. The JLSC was wrong to adopt that approach.

[42] Given a) the length of time that has elapsed since the Complaint was made and b) the different responsibilities of the judge on the Court of Appeal, it cannot realistically be excluded that the Appellants may seek to update their Complaint. In our view, this would not necessarily be objectionable, and depending on the circumstances it may even be proper and necessary for the JLSC to consider such an up to date assessment of the performance and conduct of the judge in deciding whether a sufficient case has been made out for referral.

[43] It must be clearly stated that we do not offer any view as to whether any conduct outlined in the Complaint (whether updated or not) amounts to, or is capable of amounting to, either inability and/or misbehaviour. Such a determination rests

[48] Ibid at [53].

within the remit of the Commission and it would be improper for us to dictate to them at this stage how to use their discretion in this delicate matter.

[44] Although we could end here, we find it useful to briefly comment on the concepts of 'inability' and 'misbehaviour' given the manner in which the appeal has been argued and that general guidance may be appropriate.

Inability and Misbehaviour

[45] The constitutional provisions governing the removal from office of judges of the Supreme Court and justices of appeal are to be found in sections 98 (3) and 102 (2) respectively. In both cases the grounds for removal are inability to perform the functions of the respective office or misbehaviour. The wording is, *mutatis mutandis*, identical. Section 98 (3) provides:

> "(3) A justice of the Supreme Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section."

Section 102 (2) provides:

> "(2) A Justice of Appeal may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section."

[46] No definition is provided for either inability or misbehaviour in either subsection. There is the constitutional provision that inability may arise "from infirmity of body or mind or any other cause" but nothing is said about misbehaviour. Accordingly, to ascertain what exactly constitutes 'inability' and 'misbehaviour', one must, in the first instance, look to the relevant case law. *Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)*[49] accepted that there is a certain amount of overlap between the two concepts. There, their Lordships' Board relied on the case of *Stewart v Secretary of State for Scotland*[50] as authority for what constitutes inability. In *Stewart*, the House of Lords upheld the Court of Session's finding that 'inability' "was not to be restricted to unfitness through illness but extended to unfitness

[49] [2009] UKPC 43 at [201].
[50] 1998 SC (HL) 81.

through a defect in character".[51] In adopting this position, the Privy Council also accepted that the term 'inability' was not to be accorded a narrow meaning but was to be given a sufficiently wide meaning as is warranted by the natural connotation of the word.[52]

[47] It is interesting to note that in *Chief Justice of Gibraltar* the Board accepted that inability had been made out having regard to the "defect of character and the effects of conduct reflecting that defect, including incidents of misbehaviour, [which] were cumulatively capable of amounting to 'inability to discharge the functions of his office'".[53] The Board went on to note, however, that such character defect or "quirk of behaviour not amounting to mental illness" must render the judicial officer "'wholly unfitted to perform judicial functions'".[54] In this sense, 'inability', according to the Board, "sets a high standard".[55]

[48] The case of *Lawrence v Attorney General of Grenada*[56] provides guidance on the concept of 'misbehaviour'. That case involved the removal from office of the Grenadian Director of Audit under provisions akin to section 102. The impugned conduct involved the Director sending an inflammatory letter to the Finance Minister, who was also the Prime Minister, with copies to Clerk of Parliament and the Speaker of the House of Representatives. The letter accused the Minister of tampering with the Director's report prior to it being laid before Parliament. The Judicial Committee of the Privy Council determined that the meaning to be ascribed to misbehaviour must necessarily be drawn from the context of its use.[57] The Board cited *Clark v Vanstone*[58] where the Court opined 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 persons, or the organisation, for whose benefit the

[51] See *Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)* [2009] UKPC 43 at [204].
[52] Ibid and at [205].
[53] *Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)* [2009] UKPC 43 at [206].
[54] *Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)* [2009] UKPC 43 at [265] and [266].
[55] *Hearing on the Report of the Chief Justice of Gibraltar (Referral under s 4 of the Judicial Committee Act 1833)* [2009] UKPC 43 at [266].
[56] [2007] UKPC 18.
[57] Ibid at [23].
[58] [2004] FCA 1105.

> 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."[59]

[49] These are useful judicial pronouncements. However, we consider that the scheme of the Belizean constitutional arrangements, by using the two separate terms of 'inability' and 'misbehaviour' and by linking 'inability' (but not misbehaviour) to the discharge of the functions of the office, implies a distinction between those two concepts.

[50] We consider that the concept of inability refers to the lack of capacity to perform the required judicial duties at the requisite level of competence and skill. The judge is simply unable, through no personal moral failing, to perform his judicial duties. Thus, a judge may be removed for inability if, demonstrably, he is technically incompetent to perform such requisite duties as concentrating, deliberating, reasoning and timely writing and delivery of judgments. Inability could also be evidenced by the fact that a significant majority of the judge's decisions are consistently overturned by the appellate courts above him. Evidently, such inability could arise, as section 102 (2) expressly provides, "from the infirmity of the body or mind…" Inability could also arise from "any other cause"; another cause could be a persistently demonstrated lack of the requisite judicial insight or acumen. The critical point is that there is no necessary moral turpitude that attaches to inability; a judge may be unable to perform the functions of the office at one level of the judiciary but be perfectly capable of performing the functions of the office at another level of the judiciary.

[51] We take the view that misbehaviour references character flaws involving personal and volitional culpability that render the judge unfit to hold office. It is instructive that section 102 of the Constitution does not link misbehaviour to the discharge of the functions of the office of justice of appeal. This is consistent with the view that criminal conduct or serious moral failings disqualifies the judge from holding *any* judicial office. Corruption, criminal conduct and certain misrepresentations and nondisclosures, may qualify as misbehaviour. So too may any conduct, whether falling within the categories above or not, which in the view of a wide cross section of reasonable members of the society brings the judiciary into public ridicule or opprobrium. Ultimately what amounts to misbehaviour depends on the

[59] Ibid at [165].

mores and standards accepted by the society and the statutory context. We accept the view expressed in *Wilson v. Attorney General,*[60] by the New Zealand High Court, after examining several cases from Canada, Australia and the Caribbean, that what standard of conduct amounts to misbehaviour warranting removal is one of "fact and degree"[61].

[52] Normally, the allegations in the complaint will make clear whether they go to inability or misbehaviour. In borderline cases it may not be possible to specify with absolute particularity which ground is being relied upon. Failure to write and delivery judgments in a timely manner could be due to incompetence or laziness; to an innate lack of judicial wherewithal or to the spending of too much time on the golf course. Furthermore, the complaint could allege both grounds. Except in these exceptional circumstances, it is always best practice that there be clarity concerning the grounds alleged for removal so that the judge may know the case that he is asked to answer. *Wilson v. Attorney General*[62] could be read as providing some support for this approach which is entirely consistent with basic principles of natural justice.

Conclusion

[53] We hold that prior conduct may, depending on the case, be relevant to an assessment of whether the question of the removal of a judicial officer should be referred to the Belize Advisory Council. It was therefore wrong for the Judicial and Legal Services Commission to fetter the exercise of its discretion by voluntarily imposing an artificial procedural bar when it dismissed the Complaint as being premature, simply because the impugned conduct arose prior to the Justice's elevation. Proper consideration ought to have been given to the Complaint and an assessment made as to whether a prima facie case for referral was made out.

Disposal

[54] In the circumstances, we make the following declarations and orders:

a. The appeal is allowed, and the judgment of the Court of Appeal is set aside;

[60] [2011] 1 NZLR 399.
[61] *Wilson v Attorney General* [2011] 1 NZLR 399 at [59].
[62] [2011] 1 NZLR 399 at paras [46]-[47].

b. The Complaint must be returned to the Judicial and Legal Services Commission for its consideration as to whether the Complaint should be referred to the Belize Advisory Council; and

c. The Appellants are entitled to their costs here and in the courts below, to be taxed if not earlier agreed.

/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

/s/ M. Rajnauth-Lee

The Mme Justice M Rajnauth-Lee