Neutral Citation Number: [2024] CA (Bda) 19 Civ

Civil Appeal No. 13 of 2023

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

Before:
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
JUSTICE OF APPEAL ELIZABETH GLOSTER
and

JUSTICE OF APPEAL CHARLES-ETTA SIMMONS

- -

Between:

LEYONI JUNOS
(Civil Justice Advocacy Group)[1]

Appellant

- and -

THE GOVERNOR FOR BERMUDA

Respondent

Application taken on written submissions from:
Ms Leyoni Junos (Civil Justice Advocacy Group) as Litigant in Person

[1] The Applicant notes at the end of the Addendum to her Notice of Motion for Leave to Appeal to the Judicial Committee of the Privy Council, that the statement by this Court in its Judgment (on the first page, in the first paragraph) that she said that she acts as McKenzie Friend on behalf of the Civil Justice Advocacy Group, is not true. She asserts that she never said this and that the Court has misconstrued the fact that, at its prompting, the Applicant had said that she had acted as a McKenzie Friend (who had been granted audience by the Supreme Court) to a homeless person in a related matter. The Applicant asserts that she is the co-administrator of the Civil Justice Advocacy Group and therefore brought this action in her personal name, since the group is unincorporated and has no legal personality.

Ms Lauren Sandler-Best of the Attorney General's Chambers on behalf of the Respondent

Date of Judgment: 5 November 2024

- -

JUDGMENT

SMELLIE JA:

Background

1. The Applicant seeks leave to appeal to the Judicial Committee of the Privy Council (the "**JCPC"**), against the decision of this Court as expressed in its judgment of 24 January 2024 (the "**Judgment**"). By the Judgment, even while accepting certain of her arguments, the Court dismissed substantively the Applicant's appeal against the decision of the Supreme Court (per Wolffe J), by which that judge refused her application for leave to apply for judicial review of a decision of the Governor (the "**Wolffe J Ruling**").

2. The decision in question was in the form of a direction from the Governor, advising the Applicant to resubmit to the Judicial and Legal Services Committee (the "**JLSC**"), a complaint alleging judicial misconduct[2] which the Applicant had lodged with the Governor's Office, seeking to invoke the Governor's disciplinary remit of enquiry under section 74 of the Constitution.

3. As noted in the Judgment, the JLSC was first convened in November 2013 by then incumbent Governor George Ferguson, as a standing committee to advise the Governors of Bermuda on their constitutional responsibilities in relation to the judiciary, including the power to appoint judges and magistrates and to make decisions concerning complaints about judicial conduct (other than issues relating to judgments which should or could be considered further in the courts). The JLSC comprises eight (8) persons including the President of the Court of Appeal as chairperson, the Chief Justice, two overseas judges, the President of the Bermuda Bar Association and three prominent lay members from the Bermuda Community.

4. The decision in question was communicated to the Applicant via the Governor's Executive Officer by email in the following terms:

[2] Against Chief Justice Hargun who has subsequently retired from that post.

> "*Dear Sir/Madam, Thank you for your email dated 4th February 2019 in which you attach a petition and supporting document for an investigation of the Chief Justice. I take this opportunity to advise you that complaints of this nature are ordinarily handled by the Judicial and Legal Services Committee. Please find below a link to the Complaints Protocol for your reference. If you wish to proceed with a complaint I would urge you to refer to the procedure as detailed in the protocol*"[3]

5. The Applicant refused to follow the direction. This is said to have been on the basis of her concern that the JLSC was an unconstitutional body, having no standing in law and which was therefore unauthorised to deal with her complaint. Submitting her complaint to the JLSC was, in her view and regardless of how it might have been dealt with by the JLSC, an improper and unlawful thing to do; it followed that, as she had been so directed by the Governor, his decision was unlawful and unreasonable within the meaning of the *Wednesbury* principles[4] and susceptible to judicial review on those bases.

6. She therefore instead applied for leave to bring an application for judicial review of the Governor's decision, seeking *inter alia*, a declaration that the JLSC has no legal authority to carry out its stated functions and an order for mandamus directing the Governor to appoint a tribunal under section 74(4) of the Constitution, for the investigation of her complaint. Her application was considered on the papers, following an inordinately long administrative delay of some three years, by Acting Justice Duncan. It was refused by him in a written ruling in July 2022 in which he opined, inter alia, that the application was premature because no decision had been taken on the complaint, the Applicant having chosen not to file it with the JLSC. The application subsequently heard by Wolffe J was therefore a renewed application. It was heard by him and dismissed on 10 March 2023 in the Wolffe J Ruling. After a detailed examination of the Complaints Protocol, Wolffe J concluded that the JLSC had only an advisory role which it could properly undertake without transgression of the constitutional role of the Governor. He expressed his conclusions in the following terms:

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

[3] Then followed the link as below which when accessed gave instructions for the filing of complaints with the JLSC: https://www.gov.bm/sites/default/files/JLSC-Convening-Note-and-Complaints-Protocol.pdf.

[4] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233, [1947] EWCA Civ.

7. On appeal, the Judgment, after consideration of the Applicant's criticisms of the Wolffe J Ruling, concluded as follows:

> "*54.* (i) *While it is common ground that the JLSC has no constitutional or other statutory existence, there is no basis for doubting the validity of its existence as a standing body of advisors convened to advise the Governor on disciplinary matters involving the judiciary. It follows that while the Governor's decision, in redirecting the Applicant to lodge her complaint with the JLSC, may be regarded as unhelpful, it was not unlawful. We say "unhelpful" because the complaint could, and in light of the Applicant's concerns, should have been accepted by the Governor's Office even while making it clear that the complaint would be referred to the JLSC for advice*[5]*. It follows that we refuse the Applicant's argument that the Governor's decision could properly be described as irrational or unreasonable in the Wednesbury sense.*
>
> *(ii) While we accept that in law the only body authorised to investigate and advise the Governor as to whether a judge's conduct justifies removal from office, is the tribunal contemplated by section 74 of the Constitution, the Governor is entitled, in the exercise of discretion, to seek advice from the JLSC (or any other suitable person) as to whether, in the first place, a tribunal should be convened. It will be a matter for the Governor to consider whether such advice is required and so there can be no question now of ordering, by way of mandamus, [(as the Applicant submits)] or otherwise, the convening of a section 74 Tribunal. The mere fact that the Governor was prepared to refer the complaint to the JLSC did not ground a legitimate expectation in favour of the Applicant that he should convene a Tribunal [(as she also argues)].*
>
> *(iii) It follows from the foregoing, that while the Protocol itself is not strictly "unlawful" [(again as the Applicant argues)], it requires re-drafting, as discussed above, in order to remove and/or amend as appropriate the provisions relating to the purported "summary dismissal of complaints" by the Complaints (filtering) Sub-committee and to confirm the purely advisory role of the JLSC.*
>
> *(iv) The Applicant's appeal [for which this Court had granted her leave to bring] is therefore dismissed….*
>
> *(v) We recognize nonetheless that the Applicant had reasonable concerns about the role of the JLSC and how that might have affected the treatment of*

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

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

8. The provisions which were found to require redrafting in order to confirm the purely advisory role of the JLSC, related to the purported "*summary dismissal of complaints*". Those were in [11], [12] and [23] of the Protocol which purported to allow the Sub-committee to decide whether complaints "*are unmeritorious on their face*" and if so dismiss them summarily, while giving written reasons for so doing. As explained at [13], [14] and [51] –[53] of the Judgment, that went beyond a purely advisory role for the JLSC and was therefore impermissible.

9. As the Judgment also explains at [15], a further implication of [3] and [10] to [13] of Part 1 of the Protocol (the Convening Note), was that the Governor had an assumed power, not recognised by section 74 of the Constitution, to discipline judges in respect of matters which could not result in removal from office. This assumption was adopted and approved by the Wolffe J Ruling but examined and disapproved for the reasons explained in the Judgment. The Judgment also explains why it was therefore necessary for the Protocol to be also amended to allow for a proper advisory role in the JLSC to advise the Governor on the difference between those complaints which fell within his remit under section 74 of the Constitution and those which could not and so would need to be left for internal judicial oversight by the Chief Justice (in the case of judges) or by the President of the Court of Appeal (in respect of judges of the Court of Appeal). A further category – judicial officers below the level of Supreme Court judges – was identified as being subject to oversight by the Governor after consultation with the Chief Justice, pursuant to section 89 of the Constitution.

The Applicant's grounds and arguments for leave to appeal

10. These may be summarised as follows from her Notice of Motion:

    (i) The Court of Appeal erred in its analysis of unreasonableness in saying that the Governor's decision was merely "unhelpful" but not "unlawful". This was wrong because the Governor was immediately delegating the "consideration" of the Complaint to the JLSC and that was clearly unreasonable in the *Wednesbury* sense, if not immoral; it was not for the Governor to refuse even to consider a complaint if the complainant did not resend the complaint to an unconstitutional, non-statutory body of persons who were clearly not "merely advisory".

(ii) There was an implied duty of the Governor to consider whether a complaint coming to his attention might involve a remedy as serious as the removal of a person from office. There was no lawful authority to delegate that consideration to anyone, even an advisor. The failure of the Governor to consider the nature of the complaint at all, and its import, bordered on a dereliction of constitutional duty.

(iii) The Court of Appeal erred in that – having made a [correct] finding that "the Governor cannot delegate a power that is not vested in the Governor", the Court nonetheless supported the *de facto* position that the JLSC had the power to investigate complaints that it deemed to be valid, to the extent that the JLSC could come to a conclusion to make a recommendation as to whether the behaviour complained about rose to the level of removal from office. This was a direct usurpation of the lawful provisions in the Bermuda Constitution Order 1968.

(iv) The Court of Appeal erred in their finding that "the Protocol itself is not strictly "unlawful""

(a) The evidence in the Protocol itself proved its unlawfulness. It delegated both discretionary and constitutional powers to the JLSC.

(b) The irrefutable evidence provided by the Appellant herself of what was happening *de facto* with complaints proved the unlawfulness of the whole process. The Court of Appeal erred in not referring to that evidence in the Judgment, which was a matter of important public interest and which had been legitimately obtained through a PATI request.

(c) The Court also erred in their finding that there was only one version of the Protocol that was operable at the time of the Appellant's complaint- which was not confirmed by Government House as erroneously stated in the Judgment. Once again, the Appellant's evidence to the contrary was ignored by the Court in the written judgment.

11. I interpose here to note that this reference to other complaints being considered by the Court is entirely misplaced. No enquiry of the kind mentioned by the Applicant here was engaged before the Court. There was reference by her to a PATI[6] disclosure of a case which she described as "having made it past the sifting process of the JLSC" and as evidence that "the JLSC is able to dismiss a case summarily without the Governor's consideration of the complaint at all". While this was noted by the Court, it formed no basis for a finding of an already existing wide-spread practice of the kind suggested here by the Applicant. These observations are also pertinent to the further submissions of the Applicant in this regard, as set out below at [13](v).

12. Also contrary to the Applicant's suggestion, there was no confusion over the operative version of the Protocol. After consultation by Ms Sadler-Best on behalf of the Court with the Governor's Office, the latter confirmed that the version published on the Courts' website was indeed the operative version and that which was before the Court.

[6] Acronym for the Public Access to Information Act 2010

13. By the Addendum to her Notice of Motion for Leave to Appeal to the Privy Council[7] filed on 14 February 2024, the Appellant seeks to add to her grounds or arguments for appeal as follows:

> "(v) The decision of the Court of Appeal was against the weight of the evidence as laid out in Ground 6 [(iv) above] of the original notice of motion. In its judgment the Court gave no weight to the fresh evidence provided by the Appellant- which showed that there was no accountability or oversight as to what the JLSC was actually doing; and that de facto decisions or rulings were being issued directly to complainants; not just at the vetting stage.
>
> (vi) The conclusion or decision of the Court was perverse, in that it went against the Court's own findings.
>
> (a) The Court accepted that the JLSC was an unconstitutional, non-statutory body.
>
> (b) The Court found that the JLSC was not conducting itself as an advisory body and the Protocol itself gave the JLSC de facto delegated powers which were not examined in the court below, making the findings of Justice Wolffe "pro tanto falsified"[8] or "pro tanto incorrect[9]".
>
> (c) The Court found that the summary dismissal of complaints by the JLSC at the vetting stage – endorsed within the Protocol itself – was clearly more than "advisory", and was not lawful, and that the Respondent's submissions on this point were "plainly untenable and wrong.[10]"
>
> (d) The inescapable conclusion of these two findings alone, is that the Governor and the JLSC have been acting unlawfully since the inception of the Protocol in 2014 and that every complaint that has been summarily dismissed by the JLSC has been done so unlawfully.
>
> (e) It is a perverse finding of the Court that, under these circumstances, the Protocol merely "requires redrafting"[11] and we can just carry on.
>
> (f) At the time of the Applicant's submitted complaint about the Chief Justice to the Governor – and up to the present time – the JLSC was unlawfully empowered by the Governor and the Protocol to vet, investigate and hear complaints against

[7] Stated by the Applicant to be filed out of time with leave of the Court on 6 March 2024. Ms Sadler-Best objects to the Addendum on the basis that it was filed outside of the statutory time limit of 21 days prescribed by section 3 of the Appeals Act 1911. We proceed on the basis that leave was granted as asserted by the Applicant, without contradiction by Ms Sadler-Best.

[8] As described in the unapproved draft version of the Judgment which was erroneously released to the Appellant.

[9] As described in the final approved Judgment at page 13, para 14.

[10] Judgment page 27 para 51

[11] Page 29 para 54(iii)

> judges; and therefore the applicant's requested relief for a declaration that " *the Judicial and Legal Services Committee (JLSC) is an unconstitutional body which has no statutory existence and therefore has no legal authority to vet, investigate or hear complaints against judges and/or the judiciary*" should have been granted."

14. The Applicant then enumerated further grounds of appeal to the effect that the Applicant should be entitled to what, would in effect, be a *de novo* review by the JCPC of the entire process of her application for judicial review before the Courts of Bermuda, viz:

> *"(vii) After the Appellant's renewal hearing was refused by Justice Wolffe, the Appellant was subjected to multiple hearings for leave over the course of a full year… these multiple applications for leave to appeal run contrary to judicial review practice in the UK as originally provided by Order 53 (RSC). The Appellant believes the practice in Bermuda is flawed.*
>
> *(viii) The protracted, stalled and potentially unlawful process of the Appellant's original application for leave to apply for judicial review violated her fundamental right under section 6(8) of the Bermuda Constitution."*

15. In this passage the Applicant cited her understandable concerns about the inordinate delay between the filing of her application for leave to bring judicial review proceedings on 17 May 2019 until it was considered on the papers by Acting Justice Duncan and addressed in a judgment of 8 July 2022 and (on her renewed application) heard by Justice Wolffe in early 2023. I note however, that while the delay was inordinate, and one might even say inexcusable, an enquiry into the delay was not the subject of the appeal.

16. The Appellant concluded her Addendum with the following observations:

> "In the final sentence of the judgment, the Court acknowledges that the Appellant's application has raised issues of "**significant public interest**." The Appellant submits that the judgment illustrates that her application also raises issues of constitutional importance that need further clarification. On this basis, the Appellant respectfully submits that her application for leave [to appeal] to the Privy Council [should] be granted."

17. It is apparent from the foregoing, especially from ground (vi)(f) above, that the gravamen of the Appellant's concern, is that she was entitled to, and so should have been granted, the declaratory relief she sought that the JLSC is an unconstitutional and unlawful body and that the Governor's decision directing her to submit her complaint to the JLSC was therefore unlawful and unreasonable in the *Wednesbury* sense.

18. It is also apparent from her arguments that she also asserts a legitimate expectation that the Governor should establish a tribunal under section 74 of the Constitution to investigate her complaint and that this Court was therefore obliged to grant an order for mandamus directing the Governor so to do.

19. The significance of her own refusal to submit her complaint to the JLSC as directed, thereby rendering moot the question of how it might have been dealt with by the JLSC, has been entirely overlooked in her arguments. By this approach to the matter, the Applicant has also failed to recognise the difference between any question of the reasonableness or unlawfulness of the Governor's decision to refer her complaint to the JLSC, and any question as to the permissible basis upon which the JLSC might have been able to deal with her complaint, had she placed it before the JSLC. The former question arose to be answered on her appeal. The latter question required a hypothetical examination of the proper role of the JLSC and the validity of its decision, had it taken a decision.

20. As the Judgment seeks to explain, it is entirely permissible for the Governor to establish a standing body of suitably qualified and experienced persons, such as the JLSC, to advise him or her on disciplinary complaints involving the judiciary. This conclusion is based upon the highest judicial authority. See, as cited in the Judgment at [47], the decision of the Privy Council in the *Justice Levers* case[12]. It is therefore a misconception on the part of the Applicant, as she asserts at [8] a. of her Addendum, that *"(this) Court accepted that the JLSC was an unconstitutional, non-statutory body*". Here she confuses the notion of unconstitutionality with the Court's acceptance that the JLSC was neither established under the Constitution nor by statute; the point made in the Judgment being that the existence of the JLSC is in no sense a transgression of the Constitution nor unlawful, simply by virtue of the ad hoc nature of its establishment.

21. There was therefore no basis for a conclusion that the Governor acted unlawfully or unreasonably by reason only of his decision to direct the referral of the complaint to the JLSC. It might have been permissible for the JLSC to advise the Governor as to whether or not the complaint warranted the establishment of a Tribunal under section 74 of the Constitution. What would not have been permissible was for the JLSC in the exercise of delegated authority, as purportedly allowed in the Protocol, to decide finally in respect of the complaint. Any such decision would have been ultra vires the JLSC, but that question has been rendered moot by the Applicant's refusal to follow the Governor's direction. It is in this sense that Acting Justice Duncan properly described her earlier application for judicial review as "pre-mature." It is also apparent from her argument as set out at [10](iii) above, that the Applicant continues to fail either to accept

[12] See also as this Court held in *Tucker v Public Service Commission* [202] CA (Bda) 8 at [60]: "*The principle that a decision-maker or tribunal is allowed to determine its own fair procedure in the absence of one prescribed by the applicable statute is long settled in the case law."*

or understand, the crucial distinction mentioned here, about what the JLSC properly could or could not have done.

22. The Judgment accordingly goes on to explain that, with suitable amendments to clarify the roles, the Protocol could allow the JLSC properly to advise the Governor in respect of Supreme Court judges on: (a) whether a complaint was serious enough to warrant the establishment of a Tribunal under section 74 of the Constitution; (b) if not, whether the complaint justified reference to the Chief Justice (if not himself the subject of the complaint) for internal intervention, including such as might lead to a kind of intermediate sanction; or (c) whether the complaint was so meritless or misconceived (for instance because it involved a complaint about a judgment which should instead be pursued by way of appeal) as to require the Governor to dismiss it summarily.

23. With the advisory role of the JLSC thus clarified by the Judgment, the Appellant could have re-submitted her complaint to the Governor in the expectation that it would have been dealt with properly in keeping with the constitutional mandate of the Governor and without undue interference with that mandate by the JLSC.

24. She has chosen instead to seek to pursue the matter by way of further appeal to the JCPC. Thus, the question arises for this Court as to whether she has a right, or should be given leave, so to do.

25. The starting point is to clarify that the only matter in respect of which her application for leave might properly be engaged, is the matter which came before the Court of Appeal on leave to appeal, i.e., the Wolffe J Ruling. No enquiry in respect of any other complaint mentioned by her was properly before the Court and so her citation of such others in support of her application, is misconceived and must be ignored.

26. Ms Sadler-Best very helpfully summarises the applicable law in her written submissions. Section 2 of the Appeal Act 1911 provides for an appeal from the Court of Appeal for Bermuda to His Majesty in Council as follows:

> *"(a) as of right, from a final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of $12000 or upwards or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $12000 or upward; or*
>
> *(b) as of right, from the final determination of the Court of an appeal from any final determination of any application or question by the Supreme Court under section 15 of the Constitution;*

> *(c) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to (His) Majesty in Council for decision.*"

27. The language of section 2 of the Appeals Act 1911 is very familiar. It reflects language which has been the subject of many Orders-in-Council governing appeals to the JCPC and the subject of judicial pronouncements from around the Commonwealth of Nations including Bermuda, since 1833 when the JCPC was first established.

28. It is clear that the Applicant does not have an appeal "*as of right*" as her intended appeal does not come within either of subsections 2 (a) or (b). The intended appeal does not involve any sums of money or any claim to property to which the stated monetary value could be ascribed. This Court's decision did not determine a claim to property or any question respecting property. It dealt with the question of the reasonableness and lawfulness of the Governor's decision.

29. Nor did the appeal involve a final determination by this Court of an appeal from a final determination of an application or question by the Supreme Court under section 15 of the Constitution. The Wolffe J Ruling dealt with the Applicant's application for judicial review on the basis of the common law principles described above. No reliance was, or could properly have been, placed upon section 15 of the Constitution, which provides the recourse for personal enforcement of the fundamental rights.

30. The Applicant, being a lay person, although without expressly citing subsection 2(c) of the 1911 Act, might be regarded as seeking implicitly to rely on it by her concluding argument that her application raised issues of "*significant public interest*" and that it also raises issues of constitutional importance that need further clarification.

31. She adopts the expression "*significant public interest*" from the conclusion in the Judgment itself, where it was used by this Court to explain its reasons for not awarding the costs of the appeal to the Governor as respondent, notwithstanding that her appeal was unsuccessful. As there explained, the case served to bring to light the need for clarification and amendment of the Protocol and that served not only the Applicant's own interest, but also the public interest. The expression was not intended to characterise the issues raised by her appeal as having the quality required by subsection 2(c); viz. of being of such "*great general or public importance, or otherwise*" as "*ought to be submitted to His Majesty in Council for decision.*"

32. The legal principles applicable to the questions raised by her appeal and the remedies they provide - whether the Governor's decision was unlawful, unreasonable in the

Wednesbury sense, or should be rectified by an order of mandamus – are very well-known and settled. In this case, there was no question of a lack of understanding of the principles or of the remedies, by this Court or the Court below. At issue has been whether, on the basis of the facts and circumstances of the case, the principles should have been applied differently so as to have granted the Applicant the declaratory and mandatory remedies for which she contends. In other words, the case concerned the application of settled principles in the area of Bermuda public and administrative law and their application to the facts of the case.

33. That being so, we conclude that her application cannot be regarded as coming within subsection 2 (c) on the grounds that it is of "*great general or public importance*." The meaning of that term is also a matter of settled law as explained by this Court most recently in *Hong Kong and Shanghai Banking Corp Limited v New Ocean Energy Holdings Limited [2021] CA (Bda) 21 Civ, at [11*] per Clarke P, citing the earlier decision in *Imran Siddiqui v Athene [2019] CA (Bda) 2*[13]*:*

> *"Where there is no dispute on the applicable principles of law underlying the question which the appellant wishes to pursue on his or her appeal [(to the Privy Council)], a question of great general public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled in the sense that there are differing views or conflicting dicta, or there are some genuine uncertainties surrounding the principle itself, or if it is considered to be far-reaching in its effect, or given to harsh consequences or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordship's Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance."*

34. It follows, as was also stated in *Siddiqui,* that leave should not be granted "*where there is, on proper analysis, no genuine dispute as to the applicable principles of law*" but where what there really is, is a "*dispute as to the applicability of settled principles of law to the facts of the case in dispute*". That is the situation here.

35. There remains to be considered whether the application should be regarded, by way of

[13] Which in turn cited with approval the earlier dictum from the *British Virgin Islands Court of Appeal in Renaissance Ventures Ltd v Comodo Holdings* [2018] ESSC J 1008-3. The dictum was also recently adopted and applied by the Cayman Islands Court of Appeal for explaining the similar test in the Cayman Islands Appeals to the Privy Council Order in Council in *Mingshen Vocational Education Company Limited v Leed Education Holding Limited et al* CICA (Civil) Appeal No 0019 of 2023, unreported, 2 September 2024

this Court's exercise of discretion, as giving rise under subsection 2 (c), to issues which "*otherwise, ought to be submitted to His Majesty in Council for decision*". I agree with Ms Sadler-Best that this question should also be answered in the negative. The threshold for the admission of an appeal on this basis, as also explained in *New Ocean* (above)[14] is a high one, per Clarke P, citing Baker P from *Sturgeon:*

> *"17. Further in Sturgeon Baker P, when considering the "or otherwise" provision observed:*
>
> *Whilst there is authority to indicate that the words "or otherwise" are not to be read with the previous provision in the subsection, it is clear not only from the wording of the section, but also from a number of Commonwealth cases that the threshold is a high one, and that there must be truly exceptional circumstances to justify this court in granting leave. In the circumstances therefore, for my part, I would refuse leave. I would do so having said that there were a number of very troubling issues in this case that this Court decided and were resolved in the judgment of Lord Justice of Appeal Clarke. But, none of those issues seem to me to cross the threshold of carrying a sufficient interest, beyond the interests of the parties, to justify this Court in granting leave to appeal. It seems to me that the Privy Council, like the Supreme Court, much prefer to decide which cases they will wish to take on appeal, and in my judgment that matter is better left to them to decide[15]."*

36. In my view this case does not give rise to the kind of "*truly exceptional circumstances*" required for the grant of leave under this limb of subsections 2(c). At its core, the case involves a matter of procedure – what is the proper procedure for the acceptance and consideration by the Governor of complaints against the judiciary? The reality is that, not having been provided with a statutory or constitutional procedure, the Governors have been well advised to establish one. This was done, in largely unexceptionable terms in the form of the Protocol, by Governor Ferguson, then acting upon the advice and draft provided by very eminently qualified persons, including the then incumbent Chief Justice and President of the Court of Appeal. This case has brought to light the need for and manner of its clarification to ensure complete compliance, not only with the responsibilities of the Governor but also with the important precepts of judicial independence and security of tenure. There is no basis for the Applicant's expressed ongoing scepticism about the efficacy and transparency of the process to be followed as advised in the Judgment.

37. I would dismiss the application for leave to appeal. No application has been made by the Governor for costs of and incidental to this application and, in the light of all the circumstances of this case, I consider that the appropriate order is that there should be

[14] Citing the earlier decision of this Court in *Sturgeon Asia Central Balanced Fund Ltd v Capital Partner Securities Co Ltd*, Civ Appeal No 14 of 2017 (unreported)

[15] A reference it seems to section 27 of the Appeals Act 1911 which saves the right of His Majesty to admit an appeal for hearing by the Privy Council, a right which finds expression in the modern Orders in Council, in terms of the right of the Privy Council itself to grant special leave to appeal. See, for instance, the Cayman Islands (Appeals to Privy Council) Order 1984 (as amended in 2009), section 22.

no order as to costs.

38. Gloster JA: I agree.

39. Simmons JA (Actg): I also agree.

40. Smellie JA: The application for leave to appeal is dismissed accordingly, with no order for costs.