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Gibraltar: constitutional law

Re Chief Justice of Gibraltar[1]
[2010] 2 LRC 450
[2009] UKPC 43
Gibraltar: Privy Council
15–18 June, 12 November 2009

Constitutional law – Judiciary – Chief Justice – Removal – Inability to discharge functions – Misbehaviour – Senior lawyers formally notifying Governor of loss of confidence in Chief Justice – Constitution prescribing procedure to determine question of removal of Chief Justice – Governor on advice of Judicial Service Commission appointing judicial tribunal to inquire into question of removing Chief Justice – Question of removal referred to Privy Council on advice of tribunal – Principles to be applied – Appropriate test – Relevant considerations – Standard of proof applicable – Whether Chief Justice to be removed from office – Bangalore Principles of Judicial Conduct (2002) – Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003) – Guide to Judicial Conduct (2004) – Gibraltar Constitution Order 2006, s 64.

Facts

On 17 April 2007 all the Queen's Counsel in Gibraltar, except for the Speaker in the House of Assembly, were among the signatories to a memorandum to the Governor which expressed 'deep concern at a state of affairs which has developed seriously affecting the administration of justice and the reputational image of Gibraltar' and stated that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office. At the Governor's request they submitted a supplementary memorandum setting out in detail the reasons for their dissatisfaction with the Chief Justice. Copies of the memoranda were supplied to the Chief Justice and his solicitors sent a preliminary response to the Governor. In accordance with the prescribed constitutional procedure, all those documents were considered by the Judicial Service Commission, which advised the Governor to appoint a tribunal under s 64(4) of the Gibraltar Constitution Order 2006. The Governor did so on 14 September 2007 and on 17 September he suspended the Chief Justice, under s 64(6). The tribunal of three senior judges sat in July 2008 to hear evidence of fact from 18 witnesses who gave oral evidence and 11 others who submitted written statements. In its report, dated

[1]A full report appears in Law Reports of the Commonwealth: [2010] 2 LRC 450.

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12 November 2008, the tribunal made findings of fact in relation to each of 23 episodes, criticising the conduct of the Chief Justice in relation to all but one of them. Although the tribunal found no single instance of misbehaviour which showed that the Chief Justice was unfit to hold office, it concluded that his conduct had directly affected the way in which he discharged part of the responsibilities of his office, such as his relations with the Governor and the government and with representatives of the Bar; in the context of Gibraltar as a small jurisdiction the significance of public perception was inevitably magnified and the Chief Justice's conduct was held to have polarised public opinion in a way which was damaging to the reputation of his office and the interests of good governance and to have antagonised a large number of those practising before him. The tribunal therefore concluded that the Chief Justice was unable to discharge the functions of his office and that this inability warranted his removal from office. Under s 64(4) of the Constitution Order, acting on the advice of the tribunal, the Governor requested that the question of the removal of the Chief Justice be referred to the Judicial Committee of the Privy Council.

HELD: (Lord Hope, Lord Rodger and Lady Hale dissenting) The Chief Justice should be removed from office.

Holding

Per Lord Phillips, Lord Brown, Lord Judge and Lord Clarke.

(i) There was considerable jurisprudence on the test of both 'misbehaviour' and 'inability' in the context of the removal from office of a judge or public official, demonstrating a degree of overlap between the two. Applying authoritative guidance recently given by the Board, four questions were to be considered in determining whether a judge's conduct could be characterised as 'misbehaviour' for the purposes of removal from office. (a) Had the judge's conduct directly affected his ability to carry out the duties and discharge the functions of his office? (b) Had that conduct adversely affected the perception of others as to the judge's ability to carry out those duties and discharge those functions? (c) Would it be perceived as inimical to the due administration of justice if the judge remained in office? (d) Had the judge's conduct brought his office into disrepute? 'Inability' in s 64(2) was to be given the wide meaning which the word naturally bore and was not to be restricted to unfitness through illness but extended to unfitness through a defect in character. If for whatever reason a judge became unable properly to perform his judicial function it was desirable in the public interest that there should be power to remove him, provided always that the decision was taken by an appropriate and impartial tribunal. It was therefore open to the tribunal to proceed on the basis that defect of character and the effects of conduct reflecting that defect, including incidents of misbehaviour, were cumulatively capable of amounting to 'inability to discharge the functions of his office' within s 64(2). The issue of standard of proof was not an easy one because judicial independence was of cardinal importance. However, the tribunal had correctly held that, as the instant proceedings were not concerned with disci-

plining a judge for misconduct, when the criminal standard of proof would have been applicable, it was appropriate to apply the civil standard of proof to determine issues of fact bearing upon the question whether the Chief Justice was fit to perform his office, which itself was not a question of fact subject to a standard of proof but a matter for judicial assessment: most of the primary facts were matters of record and not disputed (see paras [15]–[17], [201]–[206] of the full report). Dicta of Gray J in *Clark v Vanstone* [2004] FCA 1105, (2004) 211 ALR 412 at [85], of Lord Scott of Foscote in *Lawrence v A-G* [2007] UKPC 18, [2007] 5 LRC 255 at [23], [25] and *Stewart v Secretary of State for Scotland* 1998 SC(HL) 81 applied.

(ii) The actions of the Chief Justice and his wife had rendered his position untenable and the Board would therefore advise that he should be removed from office. The conduct of the Chief Justice had brought him and his office into disrepute. A number of incidents that qualified as misbehaviour were incidents in a course of conduct that had resulted in an inability on his part to discharge the functions of his office. This conduct infringed almost every one of the relevant principles cited from the Bangalore Principles of Judicial Conduct (2002) and the *Guide to Judicial Conduct* (2004) of the Judges' Council of England and Wales. The Chief Minister had realistically said that the terminal process had begun with Mrs Schofield's publicised statements to the Bar Council and to the Kenyan Jurists that the Chief Minister was trying to hound her husband out of office and ended when the Chief Justice brought judicial review proceedings in which he publicly adopted that allegation. With regard to the second question (b) posed in (i) above, the tribunal had before it an abundance of evidence, including the lawyers' memoranda, of the perception of others as to the consequences of the Chief Justice's conduct: although that conduct had polarised the legal profession, with some lawyers at times supporting the Chief Justice, the large number who had signed the memoranda portrayed the fairly held views of a significant proportion of the legal practitioners. Those views reflected the conclusion of the majority of the Board that the Chief Justice was seen as supporting his wife's public utterances, having failed to dissociate himself from them. As to the effect that perceptions of bias caused by the Chief Justice's conduct would have on his ability fairly to try cases, he had himself accepted that he would have problems sitting on any case involving the government in which the Chief Minister was involved, either as a witness or because a government policy for which he was responsible was in issue: the tribunal had rightly observed that these were likely to be among the most important of such cases, so far as concerned their impact on the public, although it had queried the practicability of identifying cases involving the government which did not involve the Chief Minister. However, the majority did not endorse the tribunal finding that the Chief Justice's allegation that the Attorney-General had been involved in an attempt to remove him in 1999 could give rise to any appearance of bias 10 years later, although there would be a risk of applications to recuse himself in hearings involving the Attorney-General. Moreover, while there would be a risk that the Chief Justice would be perceived as favouring those lawyers who had supported him and his wife, as opposed to

those who had subscribed to the memoranda, it would not be right in principle to consider as a ground for removal of a judge an appearance of bias based on resentment that the judge might be thought to feel towards advocates who had sought his removal; were this not so, an application to a judge to recuse himself might be self-fulfilling. Nevertheless, while not accepting all the allegations of apparent bias that would arise if the Chief Justice continued to sit, those that were accepted were significant: a Chief Justice unable to sit on cases involving the government would be substantially disabled from performing his judicial function. With regard to the linked third and fourth questions set out in (i) above, no question had ever been raised as to the Chief Justice's judicial ability to resolve issues of fact and law; however, the question was whether his behaviour had brought himself and his office into such disrepute that it would damage the administration of justice if he continued to serve as Chief Justice, his conduct having shown repeated and serious shortcomings and misjudgements in his public behaviour. The office of Chief Justice carried demands well beyond those placed upon ordinary judges, however senior, and the tribunal had rightly criticised his conduct in that office in relation to twelve episodes which demonstrated defects of personality and attitude; two of those also resulted in an inability to preside over hearings involving the Chief Minister because of the appearance of bias (see paras [214]–[229] of the full report).

Per Lord Hope (Lord Rodger and Lady Hale concurring) (dissenting).

(i) Careful attention had to be given to the meaning of 'inability to discharge the functions of his office' and 'misbehaviour', as the only grounds specified in s 64(2) of the 2006 Order for the removal of judges, and to the application of that meaning to the facts of the case. Those expressions were not to be read narrowly. The principle of judicial independence was protected by the procedure prescribed, placing responsibility upon the Board, but also by the principle that judicial officers should be removed only in circumstances where the integrity of the judicial function itself had been compromised. The authorities offered little guidance as to how the circumstances of the case should be approached. The word 'misbehaviour' took its meaning from the statutory context: if the conduct was such as to bring the office itself into disrepute it could properly be characterised as misbehaviour but the question would remain whether it was conduct of such gravity that the judge should be removed from office. The conduct had to be so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its judicial system, would be undermined, rendering the judge incapable of performing the duties of his office (see paras [262]–[263], of the full report). Dicta of Gonthier J in *Therrien v Minister of Justice* 2001 SCC 35, [2001] 5 LRC 575 at [147], of Gray J in *Clark v Vanstone* (2004) 211 ALR 412 at [85] and *Lawrence v A-G* [2007] 5 LRC 255 applied.

(ii) The case against the Chief Justice had not been made out and he should not be removed from office. The case had been treated by the tribunal and

by the majority of the Board as one of inability: they had both held that, while no single one of several instances of misbehaviour showed that the Chief Justice was unfit for office, his conduct overall showed that he was unable to discharge the functions of his office. The phrase 'wholly unfitted to perform judicial functions' captured the essence of the meaning of 'inability' in this context, rightly setting a high standard to protect judicial independence against allegations which did not reach that standard. The majority held that certain of the episodes identified by the tribunal demonstrated defects of personality. However, the Chief Justice's attitude to his wife's behaviour could not be regarded as a defect in his character or personality, because there was no sound basis to allege that he was guilty by association with her activities or that he had endorsed her behaviour by his own remarks: she and the Chief Justice were distinct individuals, leading separate lives. Therefore the conclusion of the majority that his wife's behaviour was one of the circumstances that rendered his position untenable could not be supported: his ability to perform his functions had to be judged by his own actions alone, not those of his wife. It was difficult to find anything in the Bangalore Principles or in the *Guide to Judicial Conduct* telling the judge what to do in the unusual circumstances of this case. To suggest that the Chief Justice's pre-occupation with the principle of judicial independence was a defect of personality ventured into very dangerous territory: the importance of that principle was not in doubt, nor were there any reasons to doubt his good faith in seeking to do all he could to uphold it. A Chief Justice had to be given some latitude in performing his important duty to preserve and uphold that principle. Moreover, the Chief Justice was not without some justification for his suspicions in his dealings with the government. Although there were instances where his conduct showed a lack of judgment, there had been no criticism of the Chief Justice's ability to perform his judicial functions and for most of the time he fulfilled his other duties without criticism. As the tribunal was not prepared to say that the events of the concluding period amounted to misbehaviour of such gravity as to justify removal, the case had to stand or fall on the issue of inability. Taking the whole progress of events in the round, including the absence of criticism of his conduct on the bench and the Chief Minister's acceptance that there were long periods of harmonious relationship between the Chief Justice and the executive, it had not been shown that the Chief Justice's conduct demonstrated inability to perform the functions of his office, in the sense that he was wholly unfitted to perform them. However, the Chief Justice having been suspended from office for more than two years and exposed to a long and bruising inquiry which had hardened attitudes on each side, it was probably unrealistic to think that he could resume his functions; he should therefore be given the opportunity to resign and, if he did so, no adverse inferences of any kind should be drawn against him (see paras [237], [254]–[260], [264]–[270] of the full report). *Stewart v Secretary of State for Scotland* 1996 SC 271; *aff'd* 1998 SC(HL) 81 applied. Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003) considered.

Judges

Lord Phillips, Lord Hope, Lord Rodger, Lady Hale, Lord Brown, Lord Judge and Lord Clarke

Cases referred to in judgment

Applied: *Clark v Vanstone* [2004] FCA 1105, (2004) 211 ALR 412 at [85], *Lawrence v A-G* [2007] UKPC 18, [2007] 5 LRC 255 at [23], [25] *Stewart v Secretary of State for Scotland* 1998 SC(HL) 81, *Therrien v Minister of Justice* 2001 SCC 35, [2001] 5 LRC 575 at [147], *Clark v Vanstone* (2004) 211 ALR 412 at [85] and *Lawrence v A-G* [2007] 5 LRC 255, *Stewart v Secretary of State for Scotland* 1996 SC 271; *aff'd* 1998 SC(HL) 81.

Legislation referred to in judgment

Gibraltar Constitution Order 2006, s 64