Clayton Comments

Richard Clayton QC

TRANSFORMING JUDICIAL SELECTION PROCEDURES: PRIVY COUNCIL REQUIRES TRANSFORS TRINIDAD HIGH COURT SELECTION PROCEDURE

In *A-G of Trinidad v Maharaj* the High Court and Court of Appeal in Trinidad decided that the Judicial and Legal Services Commission (which appoints High Court judges) should comprise just judges and ex judges. However, in an important new judgment delivered on 11 February 2019 the Privy Council reversed the Trinidad courts and significantly altered the process for selecting judges- by extending the membership of the Commission to non-lawyers.

The Privy Council did not explain the controversial background to the appeal at any length. However, 2. In April 2016 the Commission announced a number of High Court vacancies. On 15 March 2017 the Commission announced the appointment of a number of new High Court Judges including Marcia Ayers-Caesar, the former Chief Magistrate. Commission stated that, in respect of its recruitment interviews, candidates are routinely asked when, should they be successful, they would be in a position to assume duty, having regard to their outstanding professional commitments. It then transpired that the number of the list of outstanding matters Ms Ayers-Caesar had to decide was much larger than that she initially disclosed to the Commission. This failure generated considerable controversy in Trinidad and on 27 April 2017, she resigned from her High Court appointment.

Two new High Court appointments were made 5 June 2017 and a public interest constitutional motion was brought- making two complaints: first, that the Commission had comprised only four (rather than 5 members) in the preceding 14 months, and secondly, that the Commission could not solely consist of judges and ex-judges. An injunction was granted by the first instance judge, which the Court of Appeal reversed the following day, holding that the Commission might comprise only 4 members and that it was lawful for its members to comprise only judges and ex-judges. The applicant then appealed the decision to the Privy Council.

The issues for the Privy Council to decide

The appeal turned on the proper construction of s 110(3) of the Trinidad constitution which defines the composition of the Commission, and states:

> *(1) There shall be a Judicial and Legal Service Commission for Trinidad and Tobago.*
>
> *(2) The members of the Judicial and Legal Service Commission shall be—*
>
> > *(a) the Chief Justice, who shall be Chairman;*
> > *(b) the Chairman of the Public Service Commission;*
> > *(c) such other members (hereinafter called "the appointed members") as may be appointed in accordance with subsection (3).*
>
> *(3) The appointed members shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition as follows:*

> *(a) one from among persons who hold or have held office as a Judge of a Court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeal [sic] from any such Court;*
> *(b) two from among persons with legal qualifications at least one of whom is not in active practice as such, after the President has consulted with such organisations, if any, as he thinks fit.*

The arguments before the Board

Both parties to the appeal agreed before the Privy Council that the Commission must comprise five members including one judge in accordance with s 110(3). The debate, therefore, focused on whether more than one judge could be appointed to the Commission under s 110(3).

The appellant argued that s 110(3)(a) and (b) establishes two mutually exclusive categories of members. He said that the reference, in each of the two sub-paragraphs, to appointment "*from among persons*", demonstrates that two separate pools are being defined. He also submitted that the language of section 110(3)(b) was not designed for judges. It is unusual to speak of a judge being in "*active p*ractice"; a judge is an "*office-holder*", as reflected in the wording of section 110(3)(a). Furthermore, the idea of a judge returning to practice would have been alien to those drafting the 1976 Constitution. When a judge retired from the Bench in 1981 and returned to private practice, it was sufficiently controversial for the Chief Justice to seek views on whether it was proper, and to call for legislation to regulate the position.

Thirdly, the appellant submits that there are sound reasons why judicial appointments commissions should include some non-judicial members, as is said to occur in a majority of Commonwealth countries: see *Commonwealth (Latimer House) Principles in the Three Branches of Government* (2004), §II.I and endnote 3; Venice Commission, *Report on Judicial Appointments,* §§27-30 (2007); *European Network of Council's for the Judiciary, Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary* (2012), §II.2; van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law) (2015), §1.6.16. Furthermore, an active practitioner may have better insights into the realities of practice, and the practicalities of proposed appointments, than a retired judge and might have anticipated the problems that surrounded the appointment made in March 2017.

By contrast, the State emphasised that the starting point for interpretation was the wording of the provision, itself, and cautioned against paying inappropriate attention to other considerations such as context and purpose. It contended that the plain and unambiguous meaning of section 110(3)(b) is that two people who have legal qualifications must be appointed (which can plainly include a judge or retired judge) and at least one of them must not be in active practice. Nothing in s 110(3)(a), or in s 110 as a whole, required a different reading. It was therefore argued that the two parts of section 110(3) overlapped, that there were said to be obvious practical benefits in having more than one retired judge on the Commission.

The approach of the Privy Council

It took the view that the key issue was the proper interpretation of s 110, an issue which Lady Black described as "*not without difficulty*". The Board did not find the legislative history helpful and could not adopt a purposive interpretation- it was unable to identify a legislative purpose for s 110. Nevertheless, the Board acknowledged that the 1976 Constitution was drafted at a time when judges were not expected to return to practice as lawyers when they retired from the Bench, an issue which was key to construing s 110(3)(b).

The Board took the view that the precise words of s 110(3)(b), itself, were critical, and that the sub-paragraph must be considered in conjunction with the rest of s 110(3), and in the context of s 110 as a whole. The Board focused on the s 110(3)'s structure: the legislature took the trouble of separating the candidates for appointment to the Commission into two distinct and separately described pools in both s 110(3)(a) and s 110(3)(b), and stipulated the number of appointments to be made from each pool.

Nevertheless, the Privy Council took the view that the scope of the s 110(3)(b) pool "*is not easy to discern ... the meaning of the provision must be assembled from a series of indicators*". Section 110(3)(b) dictated that at least one of the pool appointments is not to be "*in active practice* [as a person with legal qualifications]". The Board felt that it is an awkward use of language to speak of someone being in "*active practice*" as a person with "legal qualifications".

But the problem was at its most stark in relation to the position of a serving judge- if, as the Attorney General contended, a serving judge could be appointed under s 110(3)(b). Did the serving judge fit into the s 110(3)(a) pool or the s 110(3)(b) pool? The Board answered the case by deciding that only s 110(3)(a) deals with judges and retired judges, so that they are not also be within the scope of section 110(3)(b).

The upshot is that the Commission must now include member who are not judges. The Board also confirmed that the Commission must comprise five members (which had become an issue in the Court of Appeal) and made a declaration to that effect.

Richard Clayton QC acted for the appellant.

April 2019