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*Privy Council Appeal No. 9 of 2003*

**George Meerabux** *Appellant*

*v.*

**The Attorney General of Belize** *Respondent*

FROM

**THE COURT OF APPEAL OF BELIZE**

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 23rd March 2005

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*Present at the hearing:-*

Lord Hoffmann
Lord Slynn of Hadley
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Lord Carswell

*[Delivered by **Lord Hope of Craighead**]*

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1. The appellant is a former justice of the Supreme Court of Belize. On 18 September 2001 following complaints of misbehaviour filed by the Bar Association of Belize and by an attorney at law, Mrs Lois Young Barrow, SC, he was removed from office by the Governor-General on the advice of the Belize Advisory Council ("the BAC"). On 29 October 2001 he filed a notice of motion under section 20 of the Belize Constitution in which he claimed that his rights under sections 3(a), 6(1) and 6(8) of the Constitution had been infringed and asked the court to make declarations to that effect and to award him damages. On 27 February 2002 Blackman J refused the reliefs sought and declared that the appellant stood removed from office. On 26 June 2002, for reasons which were given on 17 October 2002, the Court of Appeal of Belize (Rowe P, Mottley and Carey JJA) dismissed his appeal against the decision of Blackman J. The appellant has now appealed, with the leave of the Court of Appeal, to their Lordships' Board.

2. The appellant's case is that the decision of the BAC that he misbehaved while performing his duties as a judge and its advice to the Governor-General that he should be removed from office were fundamentally flawed for two reasons. The first is that Mr Ellis Arnold, who presided over the proceedings in his capacity as the Chairman of the BAC, was also a member of the Bar Association of Belize by which the majority of the complaints of misbehaviour had been made. It is said that he was automatically disqualified from taking any part in these proceedings by reason of his membership of the Bar Association, or alternatively that a fair-minded and informed observer would have concluded that there was a real possibility that he was biased. The second is that the hearing into the allegations of misbehaviour took place in private. It is said that that this was a breach of the appellant's right under section 6(8) of the Constitution, as it required that the proceedings for the determination of the question whether he should be removed from his office as a justice of the Supreme Court should be heard in public.

The proceedings before the BAC

3. The complaints of misbehaviour by the Bar Association were made in a letter to the Governor-General dated 30 January 2001. The opening paragraphs of the letter, which was signed by the President, Vice-President and Secretary of the Bar Association and by two members of the Bar Committee, were as follows:

> "I write as President of the Bar Association of Belize along with the Bar Committee of the Association seeking to move your Excellency to invoke the powers conferred by section 98(4) of the Belize Constitution upon the Governor General, in respect of Mr Justice Meerabux, a Justice of the Supreme Court of Belize.
>
> As your Excellency may be aware, the Bar Association of Belize did on the 25th day of February 1999 pass a resolution against the continued tenure of Mr Justice Meerabux as a judge of the Supreme Court of Belize. The resolution was as follows:
>
> > 'Be it resolved that the Bar Association of Belize respectfully requests the Government to invite the Honourable Mr Justice Meerabux to resign his office as a Judge of the Supreme Court.'
>
> In addition to this resolution the Bar Committee of the Association has received a number of affidavits from persons containing assertions which now form the basis of the complaint of the Bar Association of Belize against Mr Justice George Meerabux."

After giving details of these affidavits, and noting that the Bar Committee had also been informed of complaints that had been lodged with the Governor-General by Mrs Lois Young Barrow, SC, on 16 and 30 October 2000, the letter concluded as follows:

> "Relying upon the assertions contained in the affidavits delivered to the Bar Committee, the Bar Association of Belize hereby charges Mr Justice George Meerabux with misbehaviour in the office of a judge of the Supreme Court in that he has behaved in a manner which in the public and common perception shows that:
>
> (a) he used his office corruptly for private gain and allowed his integrity to be called into question.
>
> (b) he has demeaned his office and engaged in a conduct that is immoral and reprehensible so as to render him unfit to hold the office of a judge of the Supreme Court of Belize.
>
> The Bar Association of Belize hereby invites your Excellency to consider the matters alleged in the accompanying affidavits and pray [sic] your Excellency to proceed upon the complaint as provided for in section 98(4) of the Belize Constitution."

4. The Governor-General offered the appellant an opportunity to give him reasons why he ought not to refer the complaints which he had received to the BAC. After considering the appellant's representations, he concluded that the question whether the appellant should be removed from office for misbehaviour ought to be investigated. On 29 March 2001 he referred the matter to the BAC pursuant to section 98(4) of the Constitution. The appellant was suspended from office on the same date.

5. Following the receipt of the letter from the Governor-General, the secretary of the BAC wrote to the appellant on 4 May 2001 informing him that in accordance with section 98(5) of the Constitution the BAC would convene as a tribunal on 14 May 2001 to inquire into the complaints against him. He was also notified in the same letter of the rules that the BAC was to adopt at the hearing. Among other things he was told that the Chairman of the BAC was to preside and that the proceedings were to be held in camera. He was also told that the complainants were to have the right to retain the services of counsel to conduct the proceedings, that he was to have the right to retain counsel to represent him, that the proceedings and notes of evidence were to be recorded verbatim, that the witnesses were to give evidence in chief and to be cross-

examined and re-examined as counsel saw fit and that after the testimonies of the witnesses for the complainants the appellant was to be allowed to testify before the tribunal and thereafter call witnesses on his behalf as he saw fit.

6. On the opening day of the hearing on 14 May 2001 Mrs Lois Young Barrow, SC, and the Bar Association of Belize appeared and were represented by counsel. The appellant too was present with his attorneys. The tribunal announced that it would hear and deal with the complaints by Mrs Barrow and by the Bar Association separately. Objection was taken on the appellant's behalf at the outset to the decision of the tribunal that it should sit in camera. The tribunal delivered the following ruling orally in response to this objection:

> "The Council have listened to the submissions and the Council have decided that for these proceedings the provision of section 6(8) [of the Constitution] does not apply. The relevant provision is that of section 54(13) and we have decided to regulate our own procedure. We have decided to proceed in camera and that is the Council's decision."

The tribunal confirmed this decision in an undated written ruling in which it again stated that it had power to hold the proceedings in camera in accordance with the provisions of section 54(13) of the Constitution. Mr Arnold explained in an affidavit dated 12 December 2001 in the proceedings before Blackman J that when it was making its ruling the tribunal had regard to section 6(9)(a) of the Constitution which, as he put it,

> "[empowers] the tribunal as an administrative authority to direct the proceedings to be held in camera in circumstances where, among other things, publicity would prejudice the interests of justice or in order to protect the private lives of persons concerned in the proceedings."

7. The tribunal then proceeded to hear the complaint by Mrs Lois Young Barrow. No objection was taken to the membership of the tribunal at that stage. But at the outset of its hearing of the complaint by the Bar Association objection was taken on the appellant's behalf to the presence on the tribunal of its Chairman, Mr Arnold, and one of its members, Mr Philip Zuniga, because both were members of the Bar Association. On 4 June 2001 the tribunal delivered its ruling on this objection in these terms:

> "The issue is whether the Chairman of this tribunal, and Mr Philip Zuniga, one of the members of the tribunal, should

recuse themselves on the basis that they are both members of the Bar Association of Belize, the complainant.

This tribunal has considered the various submissions made, perused all the authorities cited, and concluded that the principles of natural justice must be adhered to in its investigations. Accordingly, in an effort to ensure that justice is not only but also manifestly appears to be done, the Tribunal has decided ex abundante cautela, that Mr Zuniga should recuse himself.

In respect to the Chairman, the Tribunal has concluded that based on the provisions of section 54(11) of the Constitution and the proviso thereto, it is mandatory for the Chairman to preside over these proceedings.

This Tribunal sits and functions because the Governor General has referred to it for investigation the question of removing Mr Justice George Meerabux a Justice of the Supreme Court from office for misbehaviour. There is no other Tribunal competent to carry out the said investigation. The Chairman must remain ex necessitate since, if he were to recuse himself he would thereby abdicate from his duty under the Constitution, and this Tribunal could not proceed leading to a failure of justice."

8. Mr Arnold subsequently confirmed in an affidavit dated 13 December 2001 in the proceedings before Blackman J that he was a member of the Belize Bar Association. But he stated in the same affidavit that he did not attend or participate at any Bar Association meeting where a resolution was passed against the appellant's continued tenure as a judge of the Supreme Court of Belize or where complaints were made against his continued tenure of that office. He also stated that the first time he knew of the specifics of the allegations made against the appellant was when the question of the inquiry into his removal pursuant to section 98(5) of the constitution was referred to the BAC by the Governor-General.

9. Having made its ruling that the Chairman had to preside over the proceedings, the tribunal proceeded with its inquiry in accordance with the rules that had been notified to the appellant in the letter of 4 May 2001. The Bar Association led evidence in support of its complaints. Four matters in particular were raised: (i) an allegation that the appellant had colluded with Mr Gian Gandhi, then the Solicitor General of Belize, in preparing his judgment in a case in which Mr Gandhi had appeared on behalf of the Attorney General; (ii) an allegation that the appellant was willing to interfere

improperly with the functions of the justice system, in that he met Mr Orlando de la Fuente, who was a party to a child custody case before another judge, and informed him that if he had known about the matter he would have transferred the case into his own court and awarded him custody of the child; (iii) an allegation that the appellant entered into an intimate relationship with Miss Ruth Guerra while she was a defendant in criminal proceedings, in the course of which he varied her bail conditions on at least two occasions without there having been any formal applications to that effect; and (iv) an allegation that on two occasions he had received gifts or money from litigants appearing before him and that he had held himself out as willing to use his office for improper gains.

10. The witnesses for the Bar Association gave evidence in chief in support of these allegations, and they were cross-examined and re-examined. The appellant, who was present and represented throughout, was afforded the opportunity to give evidence on his own behalf. But at the conclusion of the Bar Association's evidence his attorneys informed the tribunal that he had decided not to testify.

11. On 12 September 2001 the BAC submitted the report of the tribunal to the Governor-General together with its advice as to whether the appellant should be removed from office under section 98(5)(b) of the Constitution. In its findings the tribunal stated that it had concluded, based upon proof beyond reasonable doubt, that the appellant had conducted himself in a manner that was not becoming a person who held the office of justice of the Supreme Court. It found that all four complaints that the Bar Association had made against him had been proved. Its advice to the Governor-General was in these terms:

> "The Tribunal having inquired into the matter and having reported on the facts thereof hereby advice [sic] His Excellency The Governor General that Mr Justice George Meerabux should be removed from office in accordance with the said section 98(5)(b) of the Constitution of Belize."

12. Among the declarations which the appellant sought in his notice of motion (as amended on 30 November 2001) was a declaration that the decision to recommend his removal from office for misbehaviour was unreasonable having regard to the evidence presented to the tribunal during its inquiry into the allegations against him. But this challenge to the findings by the BAC was abandoned at an early stage in the proceedings before Blackman J, and it has not been renewed.

13. It will have been appreciated from this account of the facts that the provisions of the Belize Constitution relating to the issues before the Board can be divided into two groups: (a) the protection of fundamental rights and freedoms relied on by the appellant in support of his application for constitutional relief ("the constitutional protections"), and (b) the provisions relating to the procedure to be followed where a question is raised of the removal from office of a justice of the Supreme Court that were relied on by the BAC when it was ruling on the objections ("the constitutional procedure").

The constitutional protections

14. The appellant relies on the protections in sections 3(a), 6(1) and 6(8) of the Constitution. Section 3(a) states that among the fundamental rights and freedoms to which every person in Belize is entitled are "life, liberty, security of the person, and the protection of the law".

15. Section 6 of the Constitution describes the means by which the protection of the law is to be afforded, subject to limitations designed to ensure that the enjoyment of the rights and freedoms that it describes does not prejudice the rights and freedoms of others or the public interest. It contains these provisions, among others:

> "(1) All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
> …
>
> (8) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.
>
> (9) Nothing in subsection (8) of this section shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and the legal practitioners representing them to such extent as the court or other authority –
>
> (a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

(b) may by law be empowered or required to do in the interest of defence, public safety or public order."

The constitutional procedure

16. Chapter VII of the Constitution provides for the establishment for Belize of a Supreme Court of Judicature and a Court of Appeal. Among its provisions is section 98, which deals with the tenure of justices of the Supreme Court. Subsections (3) to (7) of that section are in these terms:

> "98. … (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.
>
> (4) A justice of the Supreme Court shall be removed from office by the Governor-General if the question of the removal of that justice from office has been referred to the Belize Advisory Council in accordance with the next following subsection and the Belize Advisory Council has advised the Governor-General that that justice ought to be removed from office for inability as aforesaid or for misbehaviour.
>
> (5) If the Governor-General considers that the question of removing a justice of the Supreme Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then –
>
> (a) the Governor-General shall refer the matter to the Belize Advisory Council which shall sit as a tribunal in the manner provided in section 54 of this Constitution; and
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> (b) the Belize Advisory Council shall enquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether that justice should be removed under this section.
>
> (6) If the question of removing a justice of the Supreme Court from office has been referred to the Belize Advisory Council under the preceding subsection, the Governor-General may suspend the justice from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General and shall in any case cease to have effect if the Belize Advisory Council

advises the Governor-General that the justice should not be removed from office.

(7) Except as otherwise provided in this section, the functions of the Governor-General under this section shall be exercised by him in his own deliberate judgment."

17. The provisions of the Constitution which provide for the constitution of the Belize Advisory Council and the manner in which inquiries under section 98(4) are to be conducted are set out in section 54, which forms part of Chapter V relating to the Executive. The relevant provisions of section 54 are as follows:

"(1) There shall be a Belize Advisory Council (hereinafter referred to as 'the Council') which shall consist of a Chairman who shall be a person who holds, or has held, or is qualified to hold, office as a judge of a superior court of record, and not less than six other members who shall be persons of integrity and high national standing of whom at least two shall be persons who hold or have held any office referred to in section 107 of this Constitution and at least one shall be a member of a recognised profession in Belize:

Provided that no public officer other than a judge of a superior court of record shall be appointed as Chairman.

(2) Two members of the Council shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister given with the concurrence of the Leader of the Opposition, and the other members, including the Chairman of the Council, shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition:

Provided that in the process of consultation with the Leader of the Opposition for the appointment of the Chairman, the Prime Minister shall use his best endeavours to secure the agreement of the Leader of the Opposition.

…

(4) Members of the Belize Advisory Council shall be appointed for a period of ten years or such shorter period as may be specified in their respective instruments of appointment.

…

(7) The functions of the Belize Advisory Council shall be –

(a) to advise the Governor-General in the exercise of his powers under section 52 of this Constitution [the prerogative of mercy];

(b) to perform such other tasks and duties as are conferred on it by this Constitution or any other law.

…

(8) In the exercise of its functions the Belize Advisory Council shall not be subject to the direction or control of any other person or authority.

…

(11) The Chairman and in his absence, the Senior Member, shall preside at all meetings of the Council, and in the absence of both the Chairman and the Senior Member, the member of the Council elected by a majority of the members attending the meeting shall preside at that meeting:

Provided that in any case where the Council is convened to discharge its duties under sections 88, 98, 102, 105, 108 or 109 of this Constitution, or where the Council is convened to hear an appeal from an officer to whom section 106 or section 107 of the Constitution applies, the Chairman shall preside at that meeting:
Provided further that where the Council is convened to consider the removal of the Chairman, some other person who holds or has held office as a Judge of a superior court of record appointed by the Governor-General on the advice of the Prime Minister given after consultation with the Leader of the Opposition, shall act as Chairman for that purpose.

…

(13) The Belize Advisory Council shall regulate its own procedure."

<u>The first ground of appeal: bias</u>

18. Blackman J said that the question on this issue might well be, what would be the opinion of the average citizen of Belize, assembled in Battlefield Park, if asked whether he thought that it was likely that Mr Arnold might be biased against the appellant. Applying that test he held that there was a real danger or reasonable apprehension of bias because Mr Arnold, a member of the Bar Association, continued to act as Chairman during the hearing of the

Bar Association's complaints: para 21. But he declined to make a declaration that the appellant had been deprived of his right to the protection of the law under section 3(a) of the Constitution because the first proviso to section 54(11) of the Constitution made it necessary for the Chairman to preside.

19. The Court of Appeal disagreed with Blackman J on the first point. Rowe P said that in his view the issue of bias did not properly arise because the Bar Association was not acting as a complainant, prosecutor or judge in the matter and the proceedings before the BAC were not adversarial: para 28. Carey JA said that he regarded it as unthinkable that an informed observer would think that the Chairman was other than fair and impartial as he would be aware of the fact that all members of the Bar are automatically members of the Bar Association, that Mr Arnold held no position of authority within that association and that he was not a party to the resolution which sought to impeach the appellant: para 11. But both judges, with whom Mottley JA agreed, said that in any event Mr Arnold was required by the first proviso to section 54(11) to preside. So there was, as Carey JA put it, no occasion for the apprehension of bias to arise: para 19.

20. Mr Havers QC for the appellant advanced two alternative arguments in support of his proposition that Mr Arnold should have recused himself. The first was that he was automatically disqualified on the ground of apparent bias because he was a member of the Belize Bar Association. This argument relied on the way the principle of automatic disqualification was applied to the facts described in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119. The second was that his membership of the Bar Association gave rise to a reasonable suspicion that he was biased. This argument was based on the test for apparent bias which was identified in *Porter v Magill* [2002] 2 AC 357, 494, para 103. He also submitted that the doctrine of necessity had no application in this case, as the first proviso to section 54(11) which required the Chairman to preside had to be construed subject to the protections set out in sections 3(a) and 6(1) of the Constitution.

21. The decision of the House of Lords in the *Pinochet (No.2)* case to apply the rule which automatically disqualifies a judge from sitting in a case in which he has an interest to the situation in which Lord Hoffmann found himself appears, in retrospect, to have been a highly technical one. There was, of course, ample precedent for the proposition that the rule that no one may be a judge in his own cause is not confined to cases where the judge is a party to the

proceedings. It extends to cases where it can be demonstrated that he has a personal or pecuniary interest in the outcome, however small: *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; *Sellar v Highland Railway Co*, 1919 SC (HL) 19. The extension of the rule was taken one step further when Lord Hoffmann was held to have been disqualified automatically by reason of his directorship of a charitable company. That company was not a party to the appeal, nor had it done anything to associate itself with those proceedings. But the company of which he was a director was controlled by Amnesty International, which was a party and which was actively seeking to promote the case for the extradition and trial of Senator Pinochet on charges of torture. Lord Browne-Wilkinson said that there was no room for fine distinctions in this area of the law if the absolute impartiality of the judiciary was to be maintained: p 135E-F.

22. One of the undercurrents in that case, which can be seen from comparing the speeches of Lord Browne-Wilkinson at p 136 and Lord Hope of Craighead at pp 141-142, was whether the test of apparent bias laid down in *R v Gough* [1993] AC 646 needed to be reviewed in the light of subsequent decisions in Canada, Australia and New Zealand to bring it into line with the test which, following earlier English authority, had been applied in Scotland. The House found it unnecessary to conduct this review in the *Pinochet* case, as it felt able to apply the automatic disqualification rule to its circumstances which were, as Lord Browne-Wilkinson acknowledged at p 134C, striking and unusual. But the review which was so obviously needed was not long in coming. The Court of Appeal took the opportunity which presented itself in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to consider the whole question of apparent bias and how its presence was to be tested. The adjustment of the test in *R v Gough* which was described by Lord Phillips of Worth Matravers MR at pp 726-727 laid the basis for the final stage in the formulation of the objective test which is set out in *Porter v Magill*, para 103: whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. As Lord Steyn said in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, para 14, public perception of the possibility of unconscious bias is the key. If the House of Lords had felt able to apply this test in the *Pinochet* case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule.

23. Turning to the facts of the present case, it has not been suggested that Mr Arnold had any personal or pecuniary interest in the outcome of these proceedings. He was not a member of the Bar Committee of the Bar Association on whose initiative the complaints in the name of the Bar Association had been brought to the attention of the Governor-General. He did not attend any of the meetings in which the complaints were discussed and resolutions passed which led to this action being taken. He was a member of the Bar Association simply because, as he was an attorney-at-law, membership of the Association was in his case compulsory. Section 43(1) of the Legal Profession Act (Cap 320) provides that every person qualified for admission as an attorney-at-law must pay a subscription to the Bar Association and shall become a member of the Association without election or appointment. Section 43(3) requires an attorney-at-law's annual subscription to be renewed on each occasion on which a practising certificate is issued to him.

24. The question is whether it can be said, simply because of his membership of the Bar Association, that Mr Arnold could be identified in some way with the prosecution of the complaints that the Association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause. Only if that proposition could be made good could it be said, on this highly technical ground, that he was automatically disqualified. Their Lordships are not persuaded that the facts lead to this conclusion. Leaving the bare fact of his membership on one side, it is clear that Mr Arnold's detachment from the cause that the Bar Association was seeking to promote was complete. He had taken no part in the decisions which had led to the making of the complaints, and he had no power to influence the decision either way as to whether or not they should be brought. In that situation his membership of the Bar Association was in reality of no consequence. It did not connect him in any substantial or meaningful way with the issues that the tribunal had to decide. As Professor David Feldman has observed, the normal approach to automatic disqualification is that mere membership of an association by which proceedings are brought does not disqualify, but active involvement in the institution of the particular proceedings does: *English Public Law* (2004), para 15-76, citing *Leeson v Council of Medical Education and Registration* (1889) 43 Ch D 366 where mere membership of the Medical Defence Union was held not to be sufficient to disqualify and *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 where mere ex officio membership of the committee of the Medical Defence Union too was held to be insufficient. The same contrast between active involvement in the affairs of an association and mere membership is drawn by *Shetreet,*

*Judges on Trial* (1976), p 310. Their Lordships are of the opinion that the principle of automatic disqualification does not apply in this case.

25. The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the *Porter v Magill* test. The question is what the fair-minded and informed observer would think. The man in the street, or those assembled on Battlefield Park to adopt Blackman J's analogy, must be assumed to possess these qualities. The observer would of course consider all the facts which put Mr Arnold's membership of the Bar Association into its proper context. But the facts which he would take into account go further than those described in the previous paragraph. They include the nature and composition of the tribunal, the qualifications which a person must possess to be appointed Chairman, the fact that the first proviso to section 54(11) of the Constitution directs the Chairman to preside where the BAC is convened to discharge its duties under section 98 and the fact that this direction is subject only to the special provision which the second proviso makes for what is to happen if the BAC is convened to consider the Chairman's removal. Their Lordships are inclined to agree with Carey JA that, if he had taken these facts into account, the fair-minded and informed observer would not have concluded that Mr Arnold was biased. But they also agree with the Court of Appeal that there is another answer to this complaint.

26. Mr Starmer QC submitted that the answer could be found in the doctrine of necessity. This was on the view that the first proviso to section 54(11) left the Chairman with no alternative but to sit and to preside in a case where the BAC was convened to discharge its duties under section 98. On this view there could be no circumstances whatever in which the Chairman could recuse himself except where the BAC had convened to consider his removal as provided for in the second proviso.

27. Section 54(1) provides that the Chairman of the BAC must hold, or have held, or is qualified to hold, office as a judge of a superior court of record. Section 95(3) provides that the Supreme Court of Belize is a superior court of record, and section 97(3) provides that a person shall not be qualified to be appointed as a justice of the Supreme Court unless he is qualified to practise as an attorney-at-law in a court in Belize or as an advocate in a court in any other part of the Commonwealth having unlimited jurisdiction

either in civil or in criminal causes or matters. In the case of persons qualified to practise as an attorney-at-law in Belize membership of the Bar Association is compulsory.

28. These provisions indicate that it must be taken to have been within the contemplation of the framers of the Constitution that the Chairman who was directed by the first proviso to section 54(11) to preside over an inquiry into the question whether a judge of the Supreme Court should be removed for inability or misbehaviour would be a member of the Bar Association. Section 40(3) of the Legal Profession Act provides that the objects of the Bar Association include representing the Bar in matters concerning the profession in relation to the courts and promoting the proper administration of justice: paras (d) and (e). So it must also have been appreciated that complaints alleging inability or misbehaviour on the part of a justice of the Supreme Court would be a matter of concern to the Bar Association, and that it would be likely to be involved in the presentation of such complaints to any tribunal that was convened to inquire into the matter under section 98(5)(b). This is a powerful, and in their Lordships' opinion a conclusive, indication that in this context mere membership of the Association is not to be taken, in itself, as a ground of disqualification in the case of the Chairman.

29. Their Lordships do not go so far as to say that it is impossible to envisage an extreme case falling within the jurisdiction of the BAC where it could truly be said that the Chairman was being required to act as a judge in his own cause. They are inclined to think that, if that event were to arise, the answer to the problem will be found in the proposition that Parliament could not have contemplated that a Chairman who according to the well-established principles would be automatically disqualified should sit in such circumstances, and that his place should be taken by some other person appointed in the manner described in the second proviso to section 54(11). But that is not this case. So it is not necessary for their Lordships to express a concluded view on this point.

The second ground of appeal: public hearing

30. Blackman J held that the proceedings ought to have been held in public. He said that the suggestion that it was out of consideration for the well-being of the appellant that the tribunal decided to hold the proceedings in camera could only be described as sanctimonious humbug. He thought that the submission that the tribunal was minded to avoid the keen gaze and possible censure and criticism by the public if the proceedings had been in public might have more than a kernel of truth in it: para 45. But he

declined to make a declaration that the appellant had been deprived of his right to a public hearing under section 6(8) of the Constitution. The appellant had abandoned his request for a declaration that the decision of the BAC to recommend that he be removed from office was unreasonable. So he felt constrained to conclude that the appellant accepted that the conclusion of the tribunal was correct and that the BAC would have come to the same conclusion notwithstanding its error in holding the hearing in camera: para 49 and 50.

31. The Court of Appeal agreed in the result, but for different reasons. The principal reason that it gave for its decision was that section 6(8) did not apply in this case. This was because the BAC was conducting an inquiry under section 98(5)(a) of the Constitution, not determining any civil right or obligation. But it also held that the tribunal was entitled to have regard to how proceedings in public would affect the private lives of those involved and that, as Rowe P put it, there was ample factual material on which the tribunal could make its decision to hold the inquiry in camera: para 18.

32. The crucial question on this part of the appeal is whether section 6(8) of the Constitution applies to the proceedings where the BAC is sitting as a tribunal under section 54 to discharge its duties under section 98(5). Their Lordships are not impressed by the argument that, if the constitutional guarantee in section 6(8) that all proceedings of every court or other authority shall be held in public applied in this case, there were grounds for exercising the power to exclude the public under section 6(9)(a). The decision that the whole proceedings were to be held in camera was taken at the outset when the rules for the enquiry were being laid down. Mr Arnold's suggestion in his affidavit of 12 December 2001 that it was taken under section 6(9)(a) on the ground that publicity would prejudice the interests of justice and to protect the private lives of persons concerned in the proceedings is difficult to reconcile with the facts. The appellant, who had the primary interest, wished the proceedings to be in public. It does not appear that the private lives of any of the witnesses who gave evidence was in need of protection by conducting the proceedings in private. If that had been the case, the proper course would have been to identify those witnesses who were in need of protection and to exclude the public while they were giving evidence. The fact that the matter was not handled in this way indicates that, whatever the true reason was, it lay outside the limits set by section 6(9)(a).

33. So the question is whether section 6(8) applies where the BAC is convened to discharge its duties under section 98. Their Lordships consider that the answer to it is to be found in the fact that the subsection cannot be divorced from its context. Section 2 of the Constitution provides that the Constitution is the supreme law of Belize. But it is the Constitution as a whole that is the supreme law, and the Constitution must be read as a whole. No part of it has any pre-eminence over the other unless the Constitution itself so provides. Section 6(8) is designed to reinforce the fundamental guarantee in section 6(1) that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. But it must be assumed that the framers of the Constitution had that fundamental guarantee in mind when they were addressing themselves to the composition and powers of the BAC and the functions that it was to perform. It must also be assumed that they had it in mind when they were devising the procedure that should be followed for the removal from office of a justice of the Supreme Court. They had the opportunity, if they were so minded, to make it clear that the guarantee in section 6(8) applied to these proceedings.

34. The provisions which deal with these matters in sections 54 and 98 of the Constitution contain no hint that they must be read subject to the provisions of section 6(8). On the contrary, section 98(5)(a) provides that, if the Governor-General refers the question of removing a justice of the Supreme Court to the BAC, the BAC shall sit as a tribunal in the manner provided in section 54. Section 54(8) provides that in the exercise of its functions the BAC shall not be subject to the direction or control of any other person or authority, and section 54(13) provides that it shall regulate its own procedure. These provisions are stated in the clearest terms and they contain no ambiguity. They are unsurprising when read in the light of the provisions elsewhere in section 54 which define the qualifications of the Chairman and members of the BAC and the manner and period of their appointment.

35. Reading these provisions as a whole, it is clear that the primary function of the BAC is to control the exercise of its powers under the Constitution by the Executive. The BAC is not part of the Judiciary. It is an independent body, uniquely constituted as part of the executive. The functions that are conferred on it are not judicial functions of the kind contemplated by section 6(8). It is, of course, self evident that it is not a "court" within the meaning of that subsection. But it is also clear that from the nature of its composition and the functions that it performs that when it is conducting inquiries of the kind listed in section 54(11) it is not

engaged upon the determination of the existence or extent of any civil right or obligation within the meaning of section 6(8).

36. Their Lordships do not overlook the fact that section 98(4) provides that a justice of the Supreme Court "shall" be removed from office by the Governor-General if the question of his removal has been referred to the BAC and the BAC has advised the Governor-General that he ought to be removed. But they do not see this as a reason for regarding the issues which the BAC is required to decide as matters of civil right or obligation within the meaning of section 6(8). The effect of this provision is that the question whether the justice is to be removed from office is in the hands of the BAC and not the hands of the Governor-General. It is plain that this provision has been designed to reinforce the independence of the judiciary. The question of the removal of a justice of the Supreme Court on the ground of inability or misbehaviour is to be determined by an independent tribunal, not by the executive.

37. Reference was made in the course of the argument to article 6(1) of the European Convention for the Protection of Fundamental Rights and Freedoms which provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing, and to the decision of the European Court of Human Rights in *Pellegrin v France* (2001) 31 EHRR 26, modifying the approach taken in earlier decisions, that there are excluded from the scope of this article disputes raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities: para 66. Relying on this decision Mr Starmer QC for the respondent submitted that, as disputes about the appointment and removal of public officials are outside the scope of article 6(1), the same approach should be taken to section 6(8) of the Constitution of Belize.

38. But the jurisprudence of the European Court on this issue is based upon a narrow interpretation of the term "civil rights and obligations" which is unfamiliar to an English lawyer, as Lord Hoffmann explained in *R (Alconbury Developments Ltd) and others v Secretary of State for the Environment and the Regions* [2003] 2 AC 295, 327-328, paras 78 and 79. It excludes many rights which English law would treat as part of the civil rights of the individual but which on the European continent are regarded as a matter for the administrative courts. This interpretation is unsuited to a common law system such as that of Belize. Their Lordships

consider that the reason why section 6(8) has no application is not because the appellant had no civil rights in respect of his office but because that subsection applies only to courts and other authorities forming part of the judicial branch of government. The BAC is not such an authority. The appellant has a right that it should act fairly, but he does not have a right that it should comply with all the constitutional duties of a court.

39. There remains then the common law rule that proceedings of the kind contemplated by section 98(5) must be fair. In the context of the common law an oral hearing for the resolution of disputes is not mandatory. Fairness does not always require such proceedings to be held in public. The advantages of subjecting proceedings to public scrutiny are well known. Where grave allegations are made, as was the case here, they ought, unless there are compelling reasons to the contrary, be subjected to the test of public scrutiny. This protects persons against whom allegations are made in secret from misunderstandings based on suspicion and rumour. It makes the proceedings transparent by bringing them out into the open for all to see. It reinforces the need for self-discipline in the conduct of the proceedings by the decision maker and it contributes to public confidence.

40. But the common law does not go so far as to lay this down as a basic rule of procedural fairness. As Professor Feldman, *English Public Law* (2004), para 15.04, has explained, the common law requirements of procedural fairness are essentially two-fold: the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made or implemented, and he has the right to an unbiased tribunal. Moreover publicity may be the very last thing that a judge against whom complaints have been made which he believes to be unfounded and who wishes to return to the bench will want. *Stewart v Secretary of State for Scotland,* 1998 SC (HL) 81, where the inquiry into the sheriff's fitness for office was held in private, was such a case. So there is no absolute rule on this point. The question whether the proceedings are fair must be determined by looking at the proceedings as a whole.

41. In this case the rules which the BAC described in its letter of 4 May 2001 were designed to ensure that the proceedings were conducted in a way that was fair to the appellant. Among other things, the appellant was to be entitled to retain counsel and to be present throughout the entire proceedings, the proceedings were to be recorded verbatim, witnesses in support of the complaint were to give evidence on oath and be open to cross-examination and the

appellant was to be entitled to testify before the tribunal if he wished to do so. No criticism has been made of the way in which the proceedings themselves were conducted. The suggestion that the decision of the tribunal was unreasonable having regard to the evidence that was presented to it during its enquiry has been withdrawn. Mr Havers said that it was impossible to say whether the witnesses would have given the same evidence if they had been subjected to the glare of publicity. That may be so. But their Lordships cannot attach any importance to this point. The appellant did not give or lead any evidence to contradict the allegations that were being made against him. In these circumstances their Lordships consider that it has not been demonstrated that the appellant suffered any unfairness as a result of the tribunal's decision to conduct the proceedings in camera.

Conclusion

42. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal to their Lordships' Board.