[2012] UKPC 39
Privy Council Appeal No 0071 of 2012

JUDGMENT

Chief Justice of the Cayman Island (Appellant) *v* The Governor (First Respondent) and The Judicial and Legal Services Commission (Second Respondent)

REFERRAL UNDER SECTION 4 OF THE JUDICIAL COMMITTEE ACT 1833

before

Lord Neuberger
Lord Hope
Lord Mance

JUDGMENT DELIVERED BY
Lord Neuberger

ON

15 November 2012

Heard on 16 October 2012

Appellant	*Respondent*
Lord Falconer QC	Lord Pannick QC Sir Jeffrey Jowell QC Naina Patel
(Instructed by Gibson Dunn & Crutcher LLP)	(Instructed by Treasury Solicitors)

LORD NEUBERGER:

1. This is a preliminary issue on a petition brought by the Chief Justice of the Cayman Islands ('the Chief Justice'), which has been referred by Her Majesty to the Judicial Committee of the Privy Council ('the Judicial Committee'). It raises a point of some general importance as to whether it is open to the Judicial Committee to decline to rule on issues raised in a petition referred to it by the monarch and, if so, the circumstances in which it would be appropriate for it to do so.

The Cayman Islands Constitution

2. Part V of the Constitution of the Cayman Islands as set out in Schedule 2 to the Cayman Islands Constitution Order 2009 (SI 2009 No 1379) ('the Constitution') is concerned with 'The Judicature'. Section 94 provides for the Grand Court for the Cayman Islands as a 'superior Court of Record'.

3. Section 95 deals with the 'Composition of the Grand Court', and states in subsection (6) that 'The Chief Justice shall be the head of the judiciary of the Cayman Islands'. The following subsection bestows on the Chief Justice 'responsibility for and management of all matters arising in judicature, including responsibility' for certain specified aspects. These aspects include '(a) … representing the views of the judiciary to the Government and the Legislative Assembly', and '(c) … the maintenance of appropriate arrangements for the deployment of the judiciary and the allocation of work within courts'.

4. Section 96 of the Constitution is concerned with '[t]enure of office of judges of the Grand Court'. Subject to certain exceptions (e.g. the Governor's power under subsection (3) to remove a judge from office when 'the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability … or misbehaviour'), subsection (1) requires a judge of the Grand Court to 'vacate his or her office when he or she attains the age of 65 years'. However, in paragraph (a) of that subsection, it is provided that 'the Governor [of the Cayman Islands] may permit a judge who attains the age of 65 years to continue in office until he or she has attained such later age, not exceeding the age of 70 years', as agreed between the judge concerned and the Governor, 'following the recommendation of the Judicial and Legal Services Commission' ('the Commission').

5. Section 97(2) of the Constitution empowers the Governor 'acting in accordance with section 106' to appoint acting judges of the Grand Court.

6. Sections 99 to 102 of the Constitution contain roughly similar provisions in relation to the Court of Appeal for the Cayman Islands ('the Court of Appeal') as are contained in sections 94 to 97 in relation to the Grand Court although, rather than providing for a mandatory retirement age, section 101(1) provides that judges of the Court of Appeal are 'appointed for such period as may be specified in their respective instruments of appointment'.

7. Section 106(1) states that the Governor has the '[p]ower to make appointments to [the Grand Court and Court of Appeal]… and to remove and to exercise disciplinary control over [judges of the Grand Court and the Court of Appeal]'. These powers are to be exercised by the Governor 'acting in accordance with the advice of the … Commission', unless the Governor 'determines that compliance with that advice would prejudice Her Majesty's service'.

The background facts

8. Two issues are raised by the instant petition. The first concerns the extension of a Grand Court Justice's appointment, and the second concerns some judicial disciplinary regulations. Both sets of facts can be explained quite shortly for present purposes.

9. The first issue. Justice Henderson was appointed a judge of the Grand Court in May 2003 for a term expiring on 30 June 2011 (which was after he was 65, the appointment having preceded the coming into force of the Constitution). In December 2010, he asked the Governor for an extension of his term, so that it expired the day before he attained the age of 70, namely 4 November 2014. The Governor sought the advice of the Commission, who gave him their view in a letter dated 5 April 2011. In very summary terms, that letter stated that (i) there was good reason for the Justice to remain in office until March, or even June, 2012 so that a successor could be identified and start sitting, but (ii) there was 'no basis upon which it is necessary in the interests of the administration of justice that Justice Henderson should continue in office until 4 November, 2014'.

10. Two weeks later, on 21 April 2011, the Governor sent an e-mail to the Chief Justice, apologising for the delay, attaching the Commission's recommendation, and stating that he was 'content to go along with that advice'.

11. The second issue. In early 2012, the Commission published a Code of Conduct for the Cayman Islands judiciary, and a Complaints Procedure in relation to the Cayman Islands judiciary. Paragraph 7 of the Complaints Procedure was concerned with the role of the Commission after it had investigated a complaint. Sub-paragraph (i) states that the Commission can advise the Governor that '(a) … no disciplinary action is required', '(b) …. the case can properly be disposed of by a lesser sanction than removal', or '(c) … the case does call for the exercise of such powers of disciplinary control short of removal from office as may be conferred by section 106(1) of the Constitution or otherwise'.

12. The Chief Justice complained to the Commission and the Governor about these provisions on the ground that the Constitution did not permit the Governor to impose 'disciplinary sanctions short of removal'. The Commission replied on 9 March 2012, explaining that they were 'not seeking to pre-judge the question whether or not the Governor has powers of disciplinary control short of removal', and that the Complaints Procedure was, in this connection, 'intended to leave those questions open to resolution in the future'.

The petition in this case

13. On 1 May 2012, the Chief Justice presented a petition ('the Petition') to Her Majesty naming the Governor as the First Respondent and the Commission as the Second Respondent. The Petition asks Her Majesty to 'refer the two matters in dispute to the Judicial Committee of the Privy Council for advice pursuant to section 4 of the Judicial Committee Act 1833'. The two issues are clearly identified in the Petition, which also includes full and detailed legal argument as to the Chief Justice's case on those issues.

14. The first issue concerns the basis upon which the Commission made its recommendation (accepted by the Governor) not to extend Justice Henderson's appointment beyond mid-2012. It involves the interpretation of section 96(1)(a) of the Constitution. In a nutshell, the Chief Justice's case on this issue is that (i) the Commission approached the question on the basis that it required 'exceptional circumstances' before an extension could be granted, and (ii) such an approach involves an incorrect interpretation of section 96(1)(a) of the Constitution, bearing in mind the way in which the section is expressed and the need to preserve judicial independence so that Grand Court Justices enjoy security of tenure free from discretionary incursion by the Executive.

15. The second issue relates to paragraph 7 of the Complaints Procedure. It involves the interpretation of section 106(1) of the Constitution. In summary,

the Chief Justice's case is that, particularly bearing in mind the need to preserve judicial independence, section 106(1) of the Constitution should not be interpreted as conferring a power on the Governor to impose disciplinary sanctions short of removal on a judge.

16. On 25 June 2012, Her Majesty's Deputy Private Secretary wrote to Lord Falconer of Thoroton, who had signed the Petition together with Mr Daniel Barnett, informing him that '[t]he Queen has agreed that this petition should be referred to the Judicial Committee' and that the then President of the Supreme Court had been informed of this.

The instant application

17. The Second Respondent, the Commission, has played no part so far in relation to the Petition. The First Respondent, the Governor, has applied to the Judicial Committee inviting us 'to advise Her Majesty that it would not be appropriate to give substantive advice on the merits of the two matters raised by the Petitioner'. The primary ground for the Governor's application is that the two issues which the Chief Justice seeks to raise should not be brought straight to the Judicial Committee, but should be resolved, at any rate initially, in the Grand Court by way of judicial review proceedings. The Governor also contends that the second issue is moot, and should not be determined by any court unless and until the Governor proposes to impose on a judge a sanction short of removal.

18. The application is met by two arguments from the Chief Justice. The first is that, now that the Queen has referred the two issues raised by the Petition to the Judicial Committee, it is not open to the Judicial Committee to refuse to resolve those issues. If that argument is rejected, the Chief Justice's second argument is that, even if the Judicial Committee has power to advise Her Majesty to refuse to give substantive advice on the two issues, it is, in the circumstances of this case, appropriate for us to deal with the issues and give such substantive advice.

19. These two arguments will be taken in turn.

Can we advise that the issues should not be substantively considered?

20. The instant application was made under section 4 of the 1833 Act, which, in its present form, provides as follows:

> "It shall be lawful for his Majesty to refer to the … judicial committee for hearing or consideration any such other matters whatsoever as his Majesty shall think fit; and such committee shall thereupon hear or consider the same, and shall advise his Majesty thereon in manner aforesaid."

The closing three words of this section refer back to the preceding section, which are 'as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his privy council or a committee thereof …'.

21. Lord Falconer's contention is that it is clear from the language of section 4 of the 1833 Act that, once an issue is referred by Her Majesty to the Judicial Committee, the Committee must answer it, and that, in the present instance, the issues raised by the Petition have been referred to us, and therefore we must answer them.

22. This argument raises a point on the meaning of section 4 of the 1833 Act, which has never been directly addressed by the Judicial Committee, as far as we can see. Now that the point has been fully argued, and although the Chief Justice's case was engagingly advanced by Lord Falconer, the Board has reached the clear conclusion that it would be open in principle to it to advise Her Majesty that it is inappropriate to provide substantive answers to the two issues referred by the Petition, if it considered that that is the right course to take.

23. It would, in the Board's view, require clear words in section 4, or a clear previous decision of the Judicial Committee on the point, before it would be appropriate to conclude that the Judicial Committee was precluded from tendering to Her Majesty the advice which it considered to be correct as a matter of law. First, it is obviously unattractive if a tribunal is precluded by law from answering a question referred to it in terms which it considers to be right. Secondly, unless it is clear in a particular case that Her Majesty has decided that the Judicial Committee should deal substantively with any issues raised in a petition, it appears very unlikely that section 4 of the 1833 Act can have been intended to preclude the Committee considering that very issue.

24. Section 4 is by no means expressed in terms which clearly support the Chief Justice's argument on this point. The Judicial Committee is required to 'advise … thereon' – i.e. to advise on the 'matter' which Her Majesty has referred. Even assuming that what was referred in this case was the two issues raised in the Petition, the Board does not consider that advice that those issues

should not be addressed substantively (at any rate at this stage under a section 4 procedure) would be outside the scope of those words.

25. In fact, it seems to the Board that what Her Majesty has done in this case is to refer the Petition, rather than the two issues, to the Judicial Committee, and it therefore thinks that it is even clearer that it is open to it to advise her that the Petition should be dismissed on the grounds raised by the Governor (should the Board so decide on the merits). However, it is right to add for future guidance, that, even if the two issues had been specifically referred, the Board would have been of the view that its role is to tender advice to Her Majesty which the Board considers to be correct as a matter of law or which, on the facts before it, the Board considers to be appropriate.

26. The conclusion the Board has reached is supported by what is stated by Professor Arthur Keith in *The Dominions as Sovereign States* (1938), pp 398-9, where he says in relation to section 4 of the 1833 Act that '[t]he King may refer to it any matter at his discretion, though of course the Council might point out that the subject matter was not suited to such treatment'. It is fair to say that this statement is unsupported by any decision of the Judicial Committee, but it is in a book written by an expert on the subject.

27. The Board was referred by Lord Pannick QC, for the Governor, to the *Case of the Army of the Deccan* (1833) 2 Knapp 103 as a decision of the Judicial Committee which supported the notion that it could advise Her Majesty that an issue referred for decision should not in fact be determined. However, there is force in Lord Falconer's point that the issue referred to the Judicial Committee in that case was whether it, or some other body, should determine the substantive issue – i.e. the very issue referred to it was whether it should determine a dispute.

28. Lord Falconer relied on the reasoning of the Judicial Committee in *Re Schlumberger* (1853) 9 Moo PCC 1 as clear authority to the effect that the Judicial Committee is affirmatively bound to consider any question referred to it by the Crown under section 4 of the 1833 Act. It is true that the Judicial Committee said in that case 'that there is enough in this reference not merely to justify, but absolutely to require them to proceed … and … they must entertain the prayer of this Petition, and hear it'. However, the Board agrees with Lord Pannick's submission that the Judicial Committee was there concerned with an argument as to the jurisdiction of the monarch to refer a case under section 4 of the 1833 Act, rather than the issue in the present case.

29. Lord Falconer was disposed to accept that, if the Judicial Committee simply could not deal with the issue raised by a petition (e.g. because it required facts to be found, where there is a dispute as to certain crucial facts), then the Judicial Committee could refuse to do so. That concession was, in the Board's view, quite correct, but with respect to him, it raises an obvious difficulty for his case on the first issue. If it is possible in some circumstances for the Judicial Committee to refuse to deal with the substantive issues in a petition, it is hard to see how it can be wrong in principle to take the same course in other circumstances. In taking such a course, the Judicial Committee is not, contrary to Lord Falconer's suggestion, adopting a 'filter role'. Rather, the Judicial Committee is simply, and humbly, advising Her Majesty as to the appropriateness of the provision of substantive answers on the issues referred to it.

30. For these reasons, the Board rejects the first argument raised by the Chief Justice, which therefore requires it to determine whether or not it is appropriate for the Judicial Committee to consider substantively the issues raised by the Petition.

Ought we advise that the issues should not be substantively considered?

31. As explained above, the nub of the Governor's argument is that the two issues raised in the Petition are fit to be tried at first instance in the Grand Court, by way of judicial review, and it would be undesirable for the Judicial Committee to rule on them. Although there was some suggestion to the contrary in the written submissions, Lord Falconer realistically accepted that the two issues could be brought before the Grand Court by the Chief Justice.

32. Subject to any arguments to the contrary based on the facts of the particular case, it appears to the Board that it would be inappropriate for the Judicial Committee substantively to consider issues raised in a petition under section 4 of the 1833 Act, when those issues can be raised by way of ordinary proceedings in the first instance courts of the territory in which the issues arise.

33. Accordingly, the Board concludes that, if an issue relating to the Cayman Islands can properly be determined by the Grand Court, with a right (qualified or not) of appeal to the Court of Appeal and then to the Privy Council, it would be wrong as a matter of principle, in the absence of special factors, for the Judicial Committee to consider that issue under a section 4 petition, and thereby to act as what Lord Pannick described as 'a court of first and last resort'.

34. There are a number of reasons which justify this conclusion. First, section 4 of the 1833 Act is not intended to provide a mechanism for bringing any issues before the Judicial Committee which a petitioner wants determined by the Committee: it is intended to be limited to issues which cannot be determined through the ordinary judicial process. Secondly, where there is a well established process for the determination of an issue by the courts, only special circumstances will justify a by-passing of that ordinary process. Thirdly, in a tiered court system, the conclusions and reasoning of a higher tier court will be likely to be better than that of a lower tier court, because the arguments of the parties tend to become refined and improved as the case progresses up the system, and because the judges in a higher tier court benefit from the reasoning of the judge or judges in the lower tier courts. Fourthly, in a case such as this, it is normally appropriate that the courts in the territory concerned should express a view before the Privy Council is seised of the case. Fifthly, although it is a point which does not seem to apply in this case, the more senior courts are much less well equipped to receive and deal with oral evidence and fact-finding.

35. This conclusion is also supported by Professor Keith in *The Dominions as Sovereign States* (op cit), p 399, where he said that the section 4 'procedure is not available when the issue is one which properly could be made the subject of ordinary judicial proceedings'. To the same effect, Sir Kenneth Roberts-Wray in *Commonwealth and Colonial Law* (1966), p 436 stated that '[t]he Judicial Committee would … be reluctant to grant special leave, save in exceptional circumstances, if local remedies have not been exhausted'. He continues: '[s]hort circuiting has been deprecated'. The same point was made by Lord Hailsham of St Marylebone, when Lord Chancellor, in a debate in the House of Lords concerning a potential reference under section 4 of the 1833 Act, namely that a reference under the section 'is a convenient method of ascertaining the law when no other jurisdiction is available' – Hansard (HL Debates), 21 April 1971, col 769.

36. Lord Falconer suggests that there are special factors in this case which, particularly when taken together, justify the conclusion that the issues raised by the Petition should be considered substantively by the Judicial Committee. First, he says that no permanent judge of the Grand Court could hear a judicial review application raising the two issues, and in particular the first, raised on the Petition, because they all support the position of the Chief Justice, and besides, they have an interest in the outcome. The Board accepts that, but there would be nothing to prevent the Governor finding a temporary judge under section 97 of the Constitution to hear a judicial review application. Lord Pannick made it clear that, if such an application was made, the Governor would ask the Lord Chief Justice of England and Wales to nominate a

temporary judge for that purpose. There would therefore be no risk of the Governor and the Commission selecting the judge in their own cause.

37. Secondly, Lord Falconer says that there would be difficulties in finding a suitable Court of Appeal panel, if the Grand Court decision was appealed. There is nothing in that point: only the President of the Court of Appeal would be disqualified, as he is an *ex officio* member of the Commission. In any event, such a disqualification would not be exceptional. In any inquiry by the Commission in relation to the removal of a judge, section 106(6) of the Constitution provides that the President of the Court of Appeal and any current Grand Court Justice who is a member of the Commission 'shall not participate in that inquiry other than as a witness'.

38. Thirdly, Lord Falconer says the issues which the Chief Justice wishes to raise are of high constitutional importance, and may affect many other Commonwealth members. The Board does not regard that as a reason for determining the merits of the two issues; indeed, if anything it reinforces some of the arguments as to why the issues should be dealt with, initially at any rate, in the Grand Court.

39. Fourthly, Lord Falconer points out that the Board ought to give weight to the fact that the Chief Justice wishes to pursue the Petition. The Board agrees that the views of the Chief Justice should be accorded considerable respect by this Committee. However, the decision whether to entertain this petition substantively is for the members of the Judicial Committee, not the Chief Justice. And, to the extent that his views should be given weight, that is counterbalanced by the fact that the Governor does not wish the Petition to be ruled on substantively.

40. Fifthly, Lord Falconer says that it would save time and costs if the issues were determined substantively on the Petition, as it will cost significantly more money and cause significant delay if the issues have to be raised by way of a new judicial review application in the Grand Court. That does not impress the Board, as it is an argument which could be raised on any section 4 petition. It is prepared to accept that this point could have force in an extreme case, but this cannot be said to be such a case.

41. The Board should make it clear that it is not going so far as to suggest that none of these arguments have any weight. However, even taken together, it is quite satisfied that they do not enable the Chief Justice to cross the relatively high hurdle which must be crossed before a section 4 petition will be substantively entertained, if the issues it raises are ones which can be

considered by the Grand Court in the normal way. The hurdle is a high one because it will almost always be preferable for matters of constitutional importance, such as those raised in this case, to be argued out at first instance. This enables the facts and issues to be clarified in proceedings that are better suited for that exercise than a tribunal of final appeal. It also has the benefit of providing the Judicial Committee, should the matter come before it on appeal, with the views of the local court to which it will normally wish to have regard when determining constitutional issues which are brought before it from that court's jurisdiction.

42. It is unnecessary, and therefore probably inappropriate, to express any view on the additional point raised by Lord Pannick that the second issue ought not to be entertained substantively by the Judicial Committee because it is moot – i.e. that there is no case where the disciplinary powers complained of by the Chief Justice are currently intended to be exercised. It would not be satisfactory or appropriate for the Board to attempt to address the questions that might be raised by this issue in the abstract. It has concluded, with respect, that the Chief Justice should wait for a case where the point is fairly and squarely in issue and, if and when it is, that it should be the subject of ordinary proceedings in the first instance courts of the territory.

Conclusion

43. In these circumstances, while it fully understands why the Chief Justice has sought to bring these issues before the Judicial Committee through section 4 of the 1833 Act, the Board humbly advises Her Majesty that this Petition should be dismissed.

44. By way of future guidance, the Board is of the opinion that its role is to tender advice which it considers to be correct as a matter of law, and which, on the facts before it, is appropriate. This remains so irrespective of the manner in which Her Majesty refers a petition, or specifically refers the issues in a petition, to the Judicial Committee.

45. The Board invites submissions in writing on costs. But its provisional view is that there should be no order.