Constitutional damages, procedural due process and the *Maharaj* legacy: A comparative review of recent Commonwealth decisions (part 2)*

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5 Breach of the principles of procedural fairness

The general attitude of the common law is that a failure to observe the rules of natural justice leading to an administrative decision renders the decision invalid and of no effect. The courts have used terms like 'void', 'nullity'[1] and 'voidable'[2] to describe the outcome of such decisions. In any event, the Privy Council has held that even though such a decision may be void, it would be necessary to have a court to declare it to be so since it was capable of having some effect in law and could be the basis of an appeal to a higher body, administrative or judicial.[3] In most instances, a declaration, and depending on the circumstances, a *mandamus* or a declaratory judgment coupled with a *mandamus*[4] may be the appropriate remedy. The situation may however be different in the case of a holder of public office. Lord Bingham adverted to these issues when, in *McLaughlin v Cayman Islands*,[5] he said:

> It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public

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*Part 1 was published in (2011) 26/1 *SAPL* 256-277.

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[1] *Ridge v Baldwin* [1963] 2 All ER 66, [1963] 2 WLR 935, [1964] AC 40 (HL).

[2] *Durayappah v Fernando* [1967] 2 AC 337 (PC).

[3] *Calvin v Carr* [1980] AC 574 (PC). See also Bradley and Ewing *Constitutional and administrative law* (2007) (14th ed) 751.

[4] See, eg, the Nigerian Supreme Court decision in *Shitta-Bey v Federal Public Service Commission* (1981) 2 PLR 211 (SCN).

[5] [2007] UKPC 50 (23 July 2007).

> authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal. These propositions are vouched by a large body of high authority ...[6]

5.1 The common law approach

Breach of the principles of natural justice or fair procedure or fair hearing is one of the grounds upon which an administrative decision or action can be impugned on an application for judicial review. While the successful applicant can obtain any of the public law remedies, the courts have held that mere failure of natural justice does not constitute a ground upon which damages can be recovered in those proceedings or in a common law action.[7] Thus, Deane J of the High Court of Australia held in *Attorney General of NSW v Quin*[8] that:

> The law has not recognised a cause of action for damages for denial of procedural fairness in the exercise of statutory or prerogative powers. Curial relief, in the case of a denial of procedural fairness, is ordinarily confined to a declaratory order that the relevant exercise of power or authority is invalid and to ancillary relief to prevent effect being given to it.[9]

So, too, the British Columbia Court of Appeal held recently in *Roeder v Lang Michener Lawrence and Shaw*[10] that there was no action in law for damages for breach of the duty of fairness. The remedy for such a breach lies in administrative law by way of judicial review. Typically, the remedy for a breach of the duty of fairness is a rehearing, but the court has the right to refuse relief if no substantial

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[6][2007] UKPC 50 para 14 citing *Wood v Woad* (1874) 9 Ex 190 at 198 (Kelly CB) and 204 (Amphlett B); *Vine v National Dock Labour Board* [1956] 1 QB 658 at 675-676 (Jenkins LJ) and [1957] AC 488 at 500 (Viscount Kilmuir LC), 503-504 (Lord Morton), 506-507 (Lord Cohen); *Ridge v Baldwin* [1964] AC 40 80-81 (Lord Reid), 139-140 (Lord Devlin); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170-171 (Lord Reid), 195-196 (Lord Pearce), 207 (Lord Wilberforce); *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1584 (Lord Reid), 1598-1599 (Lord Wilberforce); *F Hoffmann-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 365 (Lord Diplock); *Calvin v Carr* [1980] AC 574 at 589-590 (Lord Wilberforce); *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, 740 (Viscount Dilhorne); *Boddington v British Transport Police* [1999] 2 AC 143 at 154-156 (Lord Irvine LC); Wade and Forsyth *Administrative law* (2004) (9th ed) 300-301.

[7]*Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 6 SA 13, [2003] 2 All SA 465 (SCA); *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58; *Rowling v Takaro Properties Ltd* [1998] AC 473; *Dunlop v Woollahra Municipal Council* [1982] AC 158.

[8][1990] HCA 21, (1990) 170 CLR 1 (HCA).

[9][1990] HCA 21, (1990) 170 CLR 1 (HCA) 45. See also *Park Oh Ho v Minister for Immigration and Ethnic Affairs* [1989] HCA 54, (1989) 167 CLR 637 at 645; per Grazebrook J, *Brown v Attorney General* [2003] 3 NZLR 335 (HC) paras 50, 127 and 129.

[10](2007) 280 DLR (4th) 294 (BCCA) 307-308 paras 19 and 20.

wrong or miscarriage of justice has occurred. In so holding, Newbury JA affirmed the view[11] generally held by the courts, as illustrated in the Canadian cases of *Monogram Properties Ltd v Etobocoke*[12] and *Mauro v Etobocoke (City).*[13]

The foregoing principle applies *mutatis mutandis* to an action initiated through a constitutional motion seeking redress for breach of a fundamental right. This much appears from the Privy Council decision in *Naidike v Attorney General of Trinidad and Tobago.*[14] It was held that although the administrative decision not to grant a work permit to Dr Naidike was vitiated by procedural impropriety, it did not entitle him to recover damages since he had no substantive right to be granted a work permit.[15] The appellant only had the right to have his application fairly considered and the failure to do so was a matter only for judicial review. The court rejected the argument of the appellant that he was deprived of 'property' by the wrongful refusal to renew his permit since the prospect of further temporary employment, however certain, cannot approximate to a right to property.[16]

5.2 Public officers vested with constitutional security of tenure

Apart from breaches of procedural fairness in the sense of the strict administrative decision-making process, there are instances where damages have been recovered because the wrongful administrative action or decision was rendered invalid for failure to observe the rules of natural justice. One of the exceptions derives from the so-called public office holder of the *Ridge v Baldwin*[17]

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[11] *Partridge v General Medical Council* (1890) 25 QBD 90; *Hlookoff v City of Vancouver* (1968) 67 DLR (2d) 119 (SCC).

[12] (1996) 34 MPLR (2d) 48 (Ont Ct (Gen Div)) para 18.

[13] (1997) 42 MPLR (2d) 132 (Ont Ct (Gen Div)) para 27. Contra *McGillivray v Kimber* [1915] 52 SCR 146 where there was no case of malice or abuse of office but a case of pure administrative incompetence, breach of natural justice. See also *Zamulinski v R* (1957) 10 DLR (2d) 685 where Thorson P of the Exchequer Court held that a civil servant in Canada was entitled to damages where he was denied a hearing before dismissal in violation of regulation 118 of the Civil Service Regulations.

[14] [2005] 1 AC 538 (PC) 549 para 30.

[15] There are two decisions of the High Court of Ireland that were decided differently. Damages were awarded in *Healey v Minister for Defence*, High Court 1994-07-07 (unreported) for a breach of the right to a fair promotion's procedure while in *Gulyas v Minister of Justice, Equality and Law Reform* [2001] IEHC 100, [2001] 3 IR 216 paras 18 and 21, it was found that the refusal of the immigration officers to allow the plaintiff entry into Ireland was based on a mistake of facts and therefore was not a valid decision. There was also procedural unfairness under the Constitution for which the judge held that the plaintiff was entitled to damages amounting to four hundred pounds special damage for her air ticket and general damages of two thousand pounds for disappointment and stress caused by the decision in respect of the constitutional tort of lack of fair procedures. The plaintiff's Irish host was also treated unfairly. Ms Justice Carroll was thus not prepared to say that she too had no claim because *ubi ius ibi remedium*. The trial judge held that her constitutional rights were likewise breached and she was entitled to damages amounting to one thousand pounds for constitutional tort.

[16] See also *Marks v Minister of Home Affairs (Bermuda)* (1984) 35 WIR 106 (Bermuda CA); *R v Assistant Commissioner of Police for the Metropolis, Ex p Howell* [1986] RTR 52.

[17] [1963] 2 All ER 66, [1963] 2 WLR 935, [1964] AC 40 (HL).

category.[18] The other is where an employment relationship, public or private, is regulated by statute within the context of *Malloch v Aberdeen Corporation*.[19] Neither of these categories is of immediate concern here. The focus in the present context is with those breaches of procedural due process traceable to the Constitution, expressly or by necessary implication, where the breach can be ventilated by way of constitutional motion.[20] For instance, in *Thomas v Attorney General of Trinidad and Tobago,*[21] a case involving the removal from office of a police officer, Lord Diplock emphasised the constitutional importance of autonomous commissions established under the Constitutions following the Westminster model with powers of discipline and removal relating to specific officers. His Lordship held that the provision of security of tenure for police officers entails that in order to 'remove' an officer from the police force embraces every means by which a police officer's contract of employment (not being a contract for a fixed term) is determined against the officer's will, by whatever euphemism the termination may be described, such appellant in that case was required to take an early retirement. Accordingly, the Constitution protects this category of public office holders thereby fortifying their

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[18] In that case, Lord Reid ([1964] AC 40 at 66) drew attention to three categories of employment for the purposes of the application of the *audi alteram partem* rule. Where the relationship was based on the common law concept of master and servant there was no question of an employee being heard before dismissal whether for cause or for none. That relationship was simply based on contract in which the right to be heard was not implied. In the second category, where the employee held his/her appointment at the pleasure, usually of the Crown, neither the principles of ordinary contractual relationship nor of the common law principle of the right to be heard were applicable. It was in the third category, apparently created by the House of Lords, when in *that* case was there any reason to call on the employee in question to answer to charges made against him. This is the category into which the Chief Constable of Brighton in that case fell: the category of public officer holder. Modern labour legislation has since dealt with the employer-employee relationships and although modern Constitutions and statutes have radically modified the relationship of the Crown/State with its employees, but the dismissal at pleasure concept has continued to 'raise its ugly head in our public law' (see Chuks Okpaluba 'Dismissal at pleasure: The persistence of an anachronism' (1977) *Anglo American LR* 284. For more recent cases see, eg, *Dunsmuir v New Brunswick* 2008 SCC 9 (CanLII); *McLaughlin v Governor of Cayman Islands* [2007] UKPC 50; *Jurratt v Commissioner of Police for New South Wales* [2005] HCA 50, (2005) 221 ALR 95; *Jhagroo v Teaching Service Commission (Trinidad and Tobago)* [2002] UKPC 63; *Wells v Newfoundland* 1999 SCC 657, [1999] 3 SCR 199. See further, Chuks Okpaluba *The right to a fair hearing in Nigeria* (1990) (2nd ed) ch 6.

[19] [1971] 2 All ER 1278 (HL).

[20] Contra *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 (PC) where it held that it was not every failure by an organ of government or a public authority or public officer to comply with the law that necessarily entails the contravention of some human right of the individual within the contemplation of Ch I of the Constitution or for which the constitutional motion could be invoked.

[21] [1982] AC 113 (PC) 120C-D, 124C-G and 126C-D. Indeed, Lord Diplock said in that case that:

> The whole purpose of Chapter VIII of the Constitution which bears the rubric "The Public Service" is to insulate members of the civil service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service. These autonomous commissions, although public authorities, are excluded by section 105(4)(c) from forming part of the civil service of the Crown.

security of tenure.[22] In particular, the Constitution prescribes the procedure to be followed before a judge can be removed from office. An understanding of when such procedure has been contravened and thus to render the removal process

[22]Consider the case of the South African spy chief – *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 (1) SA 566 (CC) – where both the Constitution and the statute were silent on the issue of a hearing before termination for cause. In contemporary South Africa, an employee is entitled to procedural fairness, firstly, in terms of the Labour Relations Act 66 of 1995 (as amended) and schedule 8 on Code of Good Practice: Dismissal, before dismissal from employment. However, the type of employment as that held by the plaintiff in *Masetlha* was expressly excluded from the application of that Act. Secondly, s 33(1) of the Constitution guarantees the right to a fair administrative action that is procedurally fair. Here, again, an act or the conduct of the executive is not categorised as administrative action by the Promotion of Administrative Justice Act 3 of 2000. None of these sources was of assistance to the applicant for, earlier in the life of the new constitutional dispensation, the Constitutional Court had held that the acts of the President could not be impugned by way of review under the administrative justice clause in the Constitution. The court however pointed out that the President would be subject to the general principles of legality and constitutionality. The majority of the court in the present case reiterated that the executive powers or functions of the President in s 85(2)(e) and the presidential decisions taken under that subsection were not susceptible to administrative review under PAJA (para 76 per Moseneke DCJ, Langa CJ and five other members of the Court concurring). The applicant was the Director General and head of the National Intelligence Agency, appointed by the President of the Republic of South Africa in terms of s 209(2) of the Constitution and s 3(3)(a) of the Intelligence Services Act 65 of 2002 read with s 3B(1)(a) of the Public Service Act 103 of 1994 for a period of 3 years. The President dismissed him from that position without assigning reasons or asking the applicant for an explanation in respect of any allegations of misconduct that might have been made against him. Among other contentions, the applicant argued that his dismissal stood to be reviewed on grounds of procedural unfairness. The question turned on, given the 'special legal relationship' and given the fact that the applicant was in a 'special category of appointment', whether the President's power to dismiss him which was inherent in his power to appoint, was constrained by the requirement of procedural fairness as was held in the public service employment cases such as *Administrator, Transvaal v Zenzile* 1991 1 SA 21 (A). See also *Minister of Health KZN v Ntozakhe* 1993 1 SA 442 (A); *Administrator, Natal v Sibiya* 1992 4 SA 532 (A); *Administrator, Transvaal v Traub* 1989 4 SA 731 (A); *Van Coller v Administrator, Transvaal* 1960 1 SA 110 (T)]. Although the court had in several instances held that the President was bound to exercise his powers in accordance with the doctrine of legality and was bound by the law to observe the requirements of procedural fairness, it pointed out in the *Premier of Mpumalanga* case that it was not appropriate to constrain executive conduct by the administrative law principle of fairness in such a manner as to impede the 'ability of the Executive to act efficiently and promptly'. (See *Premier of Mpumalanga v Executive Committee, State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 41). The court bore these distinguishing factors in mind and held, in the present case, that it would not be appropriate to constrain the power of the President to dismiss in this special category of appointments, with the requirement of procedural fairness as in the case of review of administrative action. 'These powers to appoint and to dismiss', held (paras 77 and 78) Moseneke DCJ, 'are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security'. Furthermore, as much as the authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution, procedural requirement is not such a requirement. The reason is that the authority in s 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil the executive functions and should not be constrained any more than through the principle of legality and rationality.

invalid is the jurisprudential dividing line between *Rees v Crane*[23] and *Meerabux v Attorney General of Belize*.[24] It follows that the rest of the ensuing discussion concentrates on the procedural guarantees entrenched in the Constitution and designed to protect judicial officers.

5.2.1 Judicial office holder

Once appointed, a judge enjoys a security of tenure in accordance with the principle of judicial independence. By this principle is meant that an incumbent judge does not get removed from office except for cause[25] and in accordance with laid down procedure. Modern Constitutions make stringent provisions for the removal of judges.[26] There are two such provisions that require attention in the present context. For instance, section 49J(2) and (4) of the Constitution of the Cayman Islands 1972 provides:

> (2) A judge of the Grand Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour …
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> (4) If the Governor considers that the question of removing a judge of the Grand Court from office for inability as aforesaid or for misbehaviour ought to be investigated then –

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[23][1994] 2 WLR 476, [1994] 1 All ER 833, [1994] 2 AC 173, [1994] 1 LRC 57 (PC).

[24][2005] UKPC 12, [2005] 2 WLR 1307, [2005] 2 AC 513.

[25]In *Anya v Attorney General, Borno State of Nigeria* (1984) 5 NCLR 225 FCA where the Federal Court of Appeal of Nigeria held that it was improper and contrary to the principle of separation of powers for a State House of Assembly to seek the removal of a judge by resolution instead of the elaborate procedure laid down in s 256 of the 1979 Constitution of Nigeria which would have involved all the arms of government. It was further held that the allegations against the judge must be proved in a court of law and that it was not for a State House of Assembly to attempt to exercise judicial functions by investigating and making a finding of guilt in respect of the powers conferred on them by s 256 notwithstanding s 120 of the Constitution.

[26]See, eg, art 84, Constitution of Namibia 1990; s 122(5), Constitution of Lesotho 1993; s 177, Constitution of South Africa 1996. In the absence of a written Constitution, the procedure to be followed in New Zealand is laid down in the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. Section 4 of this Act (a) provides a robust process to enable informed decisions to be made about the removal of Judges from office; (b) establishes an office (Judicial Conduct Commissioner) for the receipt and assessment of complaints about the conduct of Judges; (c) provides a fair process that recognises and protects the requirements of judicial independence and natural justice. It is after the processes laid down in this Act have run their course and the Attorney General in exercise of his discretion decides to take steps to initiate the removal of a judge from office that s 23 of the Constitution Act 1986 comes into play. That section provides that: 'A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or that Judge's incapacity to discharge the functions of that Judge's office'. These provisions were thoroughly canvassed in *Wilson v Attorney General* [2010] NZHC 1678 (Wild, Miller and Lang JJ) where the High Court set aside the recommendation of the Commissioner, the acceptance of that recommendation by the Acting Attorney and the appointment of a Judicial Conduct Panel to inquire into the alleged conduct.

(a) the Governor shall appoint a tribunal, which shall consist of a Chairman and not less than two other members selected by the Governor from among persons who hold or have held high judicial office.
(b) the tribunal shall inquire into the matter and report on the facts thereof to the Governor and advise the Governor whether he should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee.

In the same vein, but in slightly differently-worded terms, section 137 of the Constitution of Trinidad and Tobago provides:

(1) A judge may be removed from office only for inability to perform the functions of his office, (whether arising from infirmity of mind or body or any other cause), or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
(2) A judge shall be removed from office by the President where the question of removal of that judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the judge ought to be removed from office for such inability or for misbehaviour.
(3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a judge, other than the Chief Justice, represents to the President that the question of removing a judge under this section ought to be investigated, then –
    (a) the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, selected by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a judge, 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 appeals from any such court;
    (b) the tribunal shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether he should refer the question of removal of that judge from office to the Judicial Committee; and
    (c) where the tribunal so recommends, the President shall refer the question accordingly.

The basic principles guiding the office of a judge was crisply put by Lord Phillips delivering the opinion of the Judicial Committee of the Privy Council in *Madam Justice Levers* case when he said:[27]

> The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed

[27] *Madam Justice Levers, Hearing on the Report of the Tribunal to The Governor of The Cayman Islands* [2010] UKPC 24 (PC Cayman Islands) (*Madam Justice Levers*).

> for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit.[28] If a judge, by a course of conduct,[29] demonstrates an inability to behave with due propriety misbehaviour can merge into incapacity.[30]

5.2.1.1 Removal of Justice Meerabux

Prior to his removal from office for misbehaviour by the Governor General on the advice of the Belize Advisory Council, the appellant was a Judge of the Supreme Court of Belize. The appellant filed a notice of motion under section 20 of the Belize Constitution in which he claimed that his rights under section 3(a)[31] and sections 6(1) and 6(8)[32] of the Constitution had been infringed. He asked the court to make declarations to that effect and to award him damages. The appellant did not complain about any breach in the procedure laid down in section 98(3)-(7) of the Constitution

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[28]See *Therrien v Canada (Minister for Justice)* [2001] 2 SCR 3.

[29]The courts in the Commonwealth have in recent times engaged in determining the standard of conduct that can be described as misconduct or that may constitute incapacity as to justify the removal of a judge. See, eg, Canada – *HM The Queen v Moreau-Berube* [2002] 1 SCR 249 in which a judge of the New Brunswick Provincial Court was removed from office for comments she made in the course of sentencing a defendant even though she made a public apology three days later. See also *Valente v R* [1985] 2 SCR 673; *Therrien v Canada (Minister for Justice)* [2001] 2 SCR 3; Canadian Judicial Council: *Majority Reasons of the Canadian Judicial Council in the matter of an inquiry into the conduct of the Honourable P Theodore Matlow* (2008-12-03). Australia – *Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy: Ruling on Meaning of 'Misbehaviour'* (1986) 2 *Australian Bar Rev* 203; *Bruce v Cole* (1998) 45 NSWLR 163; Gibraltar – *Hearing on the Report of the Chief Justice of Gibraltar, Re* [2009] UKPC 43; Cayman Islands – *Hearing on the Report of the Tribunal to the Governor of the Cayman Islands – Madam Justice Levers* (*Judge of the Grand Court of The Cayman Islands*) [2010] UKPC 24; New Zealand – *Wilson v Attorney General* [2010] NZHC 1678.

[30]*Madam Justice Levers* case para 50. The Privy Council recommended in this case that Levers J was guilty of completely inexcusable conduct in court that gave the appearance of racism, bias against foreigners and bias in favour of the defence in criminal cases. Their Lordships found no evidence of her having been unfairly victimised even where it was clear from the evidence that the Chief Justice called her attention to a number of her actions and utterances in and out of court and gave her ample opportunity to mend her ways. She was openly critical of the Chief Justice and other members of the Judiciary. She was quoted as describing the Chief Justice as 'spineless, lacking backbone and having no balls'. Having found no procedural or substantive breach of the constitutional provisions in the handling of the Tribunal proceedings, the Judicial Committee recommended that Madam Justice Levers be removed from office on the ground of misbehaviour.

[31]By s 3(a) of the Constitution, every person in Belize is entitled to the right to 'life, liberty, security of the person, and the protection of the law'.

[32]By s 6(1), 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law' whereas subs (8) thereof provides that: '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'.

for the removal of a judge. However, he based his challenge over his removal on two breaches of the rules of natural justice. First, that the Chairperson of the Belize Advisory Council (BAC) was also a member of the Belize Bar Association by which the majority of the complaints of misbehaviour had been made. He was therefore automatically disqualified from taking part in these proceedings by reason of his membership of the Bar Association. Alternatively, a fair-minded and informed observer would have concluded that there was a real possibility that he was biased. Secondly, the hearing into the allegations of misconduct took place in private. It was argued that this was a breach of the appellant's right under section 6(8) of the Constitution, which required that the proceedings for the determination of the question as to whether he should be removed from his office as a Justice of the Supreme Court should be heard in public.

On the question of whether the BAC Chairperson's mere membership of the Bar Association which had brought the proceedings against the appellant should disqualify the Chairperson, the Privy Council held that it could not in the absence of his active involvement in the institution of this particular proceeding.[33] Further, in the absence of any evidence that the Chairperson: (a) was a member of the Bar Committee of the Bar Association on whose initiative the complaints in the name of the Association had been brought to the attention of the Governor General; (b) had any personal or pecuniary interest in the outcome of the proceedings, the Chairperson could not have been said to have been a judge in his own cause hence the automatic disqualification principle was inapplicable. The Chairperson's membership of the Bar Association was a compulsory requirement of statute imposed upon every attorney-at-law.

There was no doubt that the common law rule that the removal proceedings under section 98(5) of the Constitution of Belize must be fair was applicable. However, in the context of the common law an oral hearing for the resolution of disputes was not a mandatory requirement. It was held that fairness does not always require such proceedings to be held in public. Indeed, Lord Hope stated that:

> 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.[34]

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[33][2005] UKPC 12, [2005] 2 WLR 1307, [2005] 2 AC 513 para 24. See also *Leeson v Council of Medical Education and Registration* [1889] 43 Ch D 366; *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; Shetreet *Judges on trial* (1976) 310; Feldman *English public law* (2004) para 15-76.

[34]*Meerabux v Attorney General of Belize* [2005] UKPC 12; [2005] 2 WLR 1307, [2005] 2 AC 513 (PC) para 39.

In conclusion, their Lordships held that where all the essential requirements of the right to a fair hearing at common law has been complied with and the appellant has been accorded all the recognised procedural decencies in the proceedings, the removal of the judge thereafter cannot be successfully impeached on a constitutional motion on the ground that the hearing was not held in public. What is required by section 98(5) of the Constitution of Belize is that the disciplinary process must be fair. The fairness contemplated was not required to include oral or public hearing, neither of which is a mandatory common law *sine qua non* of fair hearing.[35]

5.2.1.2 Suspension of Judge Crane

Although the cause of action in *Crane v Rees*[36] did not directly emanate from judicial error in the strict *Maharaj* sense, it arose from acts and omissions of the Chief Justice, the Judicial Service Commission and the President of the Republic of Trinidad and Tobago. The appellant, a senior judge of the High Court of Trinidad and Tobago, was left out of the roster of judges by the Chief Justice with the approval of members of the Judicial and Legal Services Commission on the ground that the appellant was not fit to carry out his duties. A letter was sent to the appellant stating that the Commission, having considered complaints about his performance in court and having doubts about his current health, had decided that he should cease to preside in court until further notice. Thereafter the Commission met to discuss the question of the judge's ability to perform his duties and after reviewing the material placed before it resolved to recommend to the President that the question of the appellant's removal from office be investigated pursuant to section 137 of the Constitution of Trinidad and Tobago.

The appellant was not informed of the nature or of the statistics and records given to the Commission concerning the allegations nor was he given the opportunity to be heard on the said allegations before the Commission decided to make the representation to the President. Shortly afterwards, the President appointed a tribunal to inquire into the question but, before making the appointment, orally informed the appellant of his intention to do so. However, before the appellant received written notification, news of the appointment of the tribunal was broadcast over national television. Subsequently he was suspended from office by the President on the basis of bodily infirmity and misbehaviour. The instrument suspending him was handed to him on a street corner by a policeman. All these actions caused the appellant severe embarrassment. He brought proceedings against members of the tribunal, the Chief Justice, members of the Judicial and Legal Services Commission and the Attorney General of Trinidad and Tobago. His action was first filed by way of judicial review (before his suspension and the appointment of the tribunal) on the ground that the

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[35][2005] UKPC 12, [2005] 2 WLR 1307, [2005] 2 AC 513 (PC) paras 40 and 41.
[36][1994] 2 WLR 476, [1994] 1 All ER 833, [1994] 2 AC 173, [1994] 1 LRC 57 (PC).

decision of the Chief Justice and/or the Commission to remove him from the roster was *ultra vires.* Secondly, he approached the court via a constitutional motion alleging that the respondents had infringed his constitutional right to the protection of the law, namely the right to be heard before taking steps to suspend him from sitting as a judge and representing to the President that a tribunal be set up to investigate whether he should be removed from office.

It was held that by removing the applicant Judge from the roster with no indication that he would ever sit and determine cases in the future, the Chief Justice had unlawfully suspended the Judge indefinitely, something the Chief Justice had no constitutional authority to do. The subsequent order of the President suspending the Judge through the recommendation of the Judicial Service Commission could not retrospectively cure the *ultra vires* nature of these acts. Furthermore, there was a breach of the applicant's right to be heard[37] before the Commission took such a vital decision as to the Judge's suspension from office. It had therefore not acted fairly towards the applicant in failing to inform him at that preliminary stage of the allegations made against him or to give him a chance to reply to them in an appropriate way. Accordingly, the Commission acted in breach of the fundamental principle of natural justice[38] and contravened the Judge's right to protection of the law,

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[37] Is a complainant desirous of laying a complaint or complaints of misconduct against a judge to the Judicial Service Commission required to give the judge against whom the complaint is being made a right to be heard? Would the answer be any different if the complainant is another judge? In other words, does the 1996 Constitution of South Africa which sets the guidelines for removal of a judge (s 177) or the common law require the observance of the *audi alteram partem* rule before complaints are made to the Judicial Service Commission against a judge? These questions arose in *Langa CJ v Hlophe* 2009 4 SA 382 (SCA) where the Chief Justice and other Judges of the Constitutional Court had laid a complaint of judicial misconduct against the respondent, the Judge President of the Western Cape Provincial Division with the Judicial Service Commission. A majority of the Full Court of the South Gauteng High Court held that the publication of the information through the media violated the judge's right to a fair hearing – *Hlophe v Constitutional Court of South Africa* [2008] ZAGPHC 289, [2009] 2 All SA 72 (GSJ). The Supreme Court of Appeal held [paras 34, 40, 41, 46-47] that the duty to hear a person was at common law always limited to judicial or some administrative organs. A person acting in a private capacity has never had such a duty. The Constitution was no different. The constitutional origins of fair hearing insofar as administrative actions and civil proceedings are concerned stem from: (a) s 33 which deals with just administrative action; and (b) s 34 which concerns a fair public hearing before courts. Since the Constitutional Court Judges were not, in the circumstances, acting either as a court or in an administrative capacity, neither provision applied to the respondent's case. There was no right on the part of a judge to be heard by complainants generally before they laid complaints before the Judicial Service Commission. There was no authority whether in decided cases or in judicial protocols anywhere in the world, that obliged a complainant to invite a judge to be heard before laying the complaint. A rule to this effect would be absurd since it would altogether undermine the process of investigating complaints. The instances where the right to a fair hearing have been held to apply is where the complaint has gone beyond the 'trigger' stage; that is, in the actual investigation of the complaint. See, eg, *Barnwell v Attorney General of Guyana* [1994] 3 LRC 30 (Guyana CA).

[38] See, eg, dicta of Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (CA); Lord Morris in *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679 (PC). Contra *Wiseman v Borneman* [1971] AC 297 (HL); *Lewis v Heffer* [1978] 1 WLR 1061 (CA).

including the right to natural justice, afforded by section 4(b) of the Constitution. The Privy Council, in a unanimous judgment delivered by Lord Slynn affirmed not only the correctness of the judgment of the Trinidad and Tobago Court of Appeal in quashing the decision of the Commission but also the majority decision of that Court that the applicant was entitled to damages. It was accordingly ordered that the case be remitted to the High Court to consider the question of damages in accordance with the Court of Appeal's order.[39]

5.2.2 Magistrates

The appointments and removal of Magistrates and other judicial officers in the Commonwealth Caribbean are subject to constitutional safeguards. The security of tenure of these officers is entrenched in the respective Island Constitution by stipulating the procedure that must be followed before such an officer could be removed from office. Clearly, where the procedure has been complied with and no constitutional breach has occurred, it stands to reason that a constitutional motion would be raising no issue of law craving protection, and an application for judicial review in such circumstances will be an exercise in futility.

5.2.2.1 Indefinite suspension of a Magistrate

Having held in the first *Durity*[40] case that the limitation of action legislation does not bar a constitutional cause of action, the Privy Council held in the second *Durity* litigation[41] that the suspension of a judicial officer for alleged misconduct was a serious matter affecting the independence of the judiciary and likely to damage the character and reputation of the judicial officer concerned. The appellant, a magistrate, was placed on suspension for over seven years without the Judicial and Legal Services Commission doing anything to finalise the disciplinary proceedings against him contrary to the Commission's Regulations for handling such matters. Lord Hope held that the 'longer the suspension lasts the greater and more sustained this damage will be'. He made it clear that the constitutional right to the protection of the law and the principles of natural justice demand that particular attention must be paid to the need for fairness in the investigation.[42]

It was held that the Magistrate was not deprived of his protection of the law because the Judicial and Legal Services Commission took the initial step to set up an investigation into whether he exceeded his jurisdiction in relation to a bail controversy since it was open to him to challenge the legality of the decision immediately by means of judicial review. However, the independence of the

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[39] *Rees v Crane* [1994] 2 AC 173, [1994] 2 WLR 476 (PC) at 493H-494A.
[40] *Durity v Attorney General of Trinidad and Tobago* [2002] UKPC 20, [2003] 1 LRC 210 (PC).
[41] *Durity v Attorney General of Trinidad and Tobago* [2008] UKPC 59 (PC).
[42] Per Lord Hope, [2008] UKPC 59 (PC) para 29. See also *Rees v Crane* [1994] 2 AC 173, [1994] 2 WLR 476 (PC).

judiciary demands that a judicial officer cannot be suspended from his duties indefinitely without good cause being shown. The power to suspend will be abused if the suspension is allowed to continue for an unreasonably and unnecessarily long period of time without appointing an investigating officer. Fairness includes having the allegation investigated promptly and determined as quickly as possible, especially if the judicial officer has been suspended.[43] On the submission that the appellant should have challenged the delay in judicial review proceedings, it was held that the responsibility for appointing an investigating officer forthwith lay entirely with the Commission, it was not for the appellant to take the initiative. It was for the Commission to adhere to the standard laid down in its Regulations. It was however doubtful whether judicial review could have afforded adequate relief for a past and irreversible event such as the alleged unlawful continuation of a suspension.[44] Lord Hope concluded this aspect of his judgment by holding that:

> The *Harrikissoon* principle on which Mr Dingemans relies to defeat the appellant's constitutional motion is based on the assumption that there was another procedure for obtaining a sufficient judicial remedy for the unlawful administrative action of which the person complains. If there was, he ought to have invoked it. For the reasons just given, however, that cannot be said to be the situation in this case. The appellant is not to be criticised for not resorting to the uncertain procedure of judicial review as a means of enforcing the Commission's obligation to deal with his case promptly. It was for the Commission to ensure that it adhered to that standard, not for the appellant to prompt it to do so.[45]

In the circumstances, their Lordships concluded that there was a breach of the appellant's right to due process – the essence of his right to the protection of the law under the procedure which Regulation 90 lays down. The appellant was therefore entitled to relief by invoking the constitutional remedy.[46]

5.2.2.2 Unconstitutional procedure upon removal from office

As in the case of Judge Crane, the problem in *Fraser v Judicial and Legal Services Commission*[47] involved a failure to follow proper procedure before taking any action that would adversely affect the office of a judicial officer. The plaintiff sought constitutional relief against both the Commission and the Attorney General representing the government of St Lucia alleging that his removal as a magistrate was in contravention of section 91 of the Constitution of St Lucia. The trial judge gave judgment in favour of the plaintiff declaring that both the Commission and the

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[43][2008] UKPC 59 (PC) para 29.
[44][2008] UKPC 59 (PC) para 31. See also *Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871 (PC) para 39.
[45][2008] UKPC 59 (PC) para 32.
[46][2008] UKPC 59 (PC) para 32.
[47][2008] UKPC 25 (PC).

Government had contravened section 91 in that they had neither followed the constitutionally laid down procedure nor shown reasonable cause why the contract of the appellant should not continue to run from year to year. The Judicial Committee of the Privy Council held that the trial judge was correct in holding that section 91 of the Constitution of St Lucia had been breached by the Commission's letter of 5 January 2004. Their Lordships confirmed that since there was no reasonable cause for the Commission to recommend the removal of the magistrate, both the Commission and the Government were correctly held by the trial judge to have jointly breached their constitutional responsibilities hence damages were properly awarded against them.

Lord Mance held that removal, 'whether outright or under a contractual provision, is, in the light of section 91, only permissible if made pursuant to a decision reached by the Commission at the time of removal. Such a decision can only validly be reached if the Commission at that time determines, in accordance with a proper procedure, that reasonable cause exists for the officer's removal'.[48] It was further held that the Commission was in breach of its constitutional duty when in its letter of 5 January 2004 it not only recommended but also demanded immediate action by the Government to remove the appellant when there was no reasonable cause for such removal. His Lordship rejected the submission that under section 91, the Government had no option but to accept the Commission's recommendation, hence it could not itself be in constitutional breach or liable to the plaintiff for doing what it was constitutionally bound to do. According to Lord Mance:

> This analysis would have the consequence that magistrates such as the appellant could be validly removed from office without cause, and their only remedy for the constitutional breach involved would lie against the Commission. They could not refuse to accept their removal and seek to establish their right to remain in office. That would water down the constitutional protection of their office in an unacceptable manner. Again, it is necessary to interpret and read together the Constitution and the contractual arrangements in a way which provides the intended protection. The agreement between the appellant and the Ministry must be read as permitting removal under the agreement only in the event, determined by the Commission that reasonable cause for such removal actually exists. Here, no such reasonable cause was determined to exist. Both the Commission and the Government were therefore rightly held by Shanks J to have been in breach of constitutional duty, and the Court of Appeal was wrong to reverse his decision.[49]

5.2.2.3 Premature termination of fixed-term contract of High Court Registrar

The breaches in *Inniss v Attorney General of Saint Christopher and Nevis*[50] were

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[48][2008] UKPC 25 (PC) para 19.
[49][2008] UKPC 25
[49](PC) para 20.
[50][2008] UKPC 42 (PC).

both procedural and substantive in as much as there were both constitutional and contractual angles to the case. By way of a constitutional motion in the High Court, the appellant sought a declaration that the letter of 20 February 1998 which purported to remove her from office as Registrar of the High Court and Additional Magistrate was null and void as it was in contravention of section 83(3) of the Constitution of Saint Christopher and Nevis. She also sought exemplary damages in vindication of the breach. Here, the Registrar of the High Court and Additional Magistrate was removed some months before the expiry of the duration of her contract without observing the constitutionally laid down procedure for the termination of such appointment.

Lord Hope held that the act of removing the appellant in the manner they did, the Judicial and Legal Services Commission deprived her of the opportunity to satisfy them that there were no grounds for the premature termination of her contract. In these circumstances, it was open to the High Court to grant her such remedy by way of damages as it thought appropriate in addition to the remedy in damages for breach of the contract.[51] The respondent wondered as to whether damages would be appropriate at all in this case whereas a declaration that there had been a contravention of section 83(3) would be sufficient relief for the appellant in the circumstances. Lord Hope held:

> The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate the right. This is likely to be so where the contravention was, as the judge said, calculated to affect the appellant's interests and it did so. On the judge's findings it was a deliberate act in violation of the Constitution to achieve what the time consuming procedures of the Commission could not achieve. He rejected the submission that it was an innocuous administrative act. The desire was to get rid of the appellant quickly, and the contract proved to be an expedient vehicle for achieving this.[52]

Lord Hope held that this case is one clear illustration of that exception enunciated by Lord Nicholls in *Ramanoop* of some feature in a particular case which would indicate that the means of redress otherwise available would not be adequate. There was no doubt that in *Inniss* redress could have been, and was made, but 'the only effective way of ensuring that such a flagrant breach of the Constitution is vindicated is by making an order for the payment of damages for the breach. As Lord Nicholls observed…, a declaration will articulate the fact of the violation but in most cases more will be required than words. This is such a case'.[53]

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[51][2008] UKPC 42 (PC) para 20.
[52][2008] UKPC 42 (PC) para 21.
[53][2008] UKPC 42 (PC) para 22. See also per Lord Nicholls, *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2005] 2 WLR 1324, [2006] 1 AC 328 (PC) para 18.

6 Failure of the judicial process under the (UK) Human Rights Act

When the Human Rights Bill was going through the parliamentary stages, it was thought that when enacted, damages for breach of a right incorporated therein would be more readily available than if a claim was lodged at common law. However, soon after the Human Rights Act (HRA) 1998 was enacted, the House of Lords[54] made it clear that such optimism was grossly misplaced. Anticipating the coming into effect of the Act, their Lordships held in *Wainwright v Home Office*,[55] that as there was no protection in English law for the invasion of the right to privacy so also there would be no relief under the Act even though it is a right guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and incorporated into the Act. There, it was said that the courts cannot provide a remedy 'which distorts the principles of the common law'.[56] Although English courts have provided guidelines on their approach to the award of damages under the Act,[57] the lesson easily discernible from the cases decided by the House of Lords since then is that the Act does not provide claimants an escape route whereby claims that would not succeed at common law become accessible thereby. In effect, the courts' attitude towards the availability of public law damages has not changed whether the claim is for compensation under the Human Rights Act[58] or damages at common law.[59] There

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[54] It is important to draw attention to 2009-10-01, when history was made in the United Kingdom. The House of Lords, which functioned as the highest judicial authority in Great Britain for the last 150 years within the precincts of the British Parliament, and indeed, within a complicated web of political arrangement, sat from 2009-10-01 as the Supreme Court of the United Kingdom. It was not only that the august judicial body underwent a name change, it was also physically moved away from the premises of the Legislature. Although the physical distance moved is not far from where the House of Lords originally functioned, it is a gesture symbolically representative of the actualisation of the separation of the Judiciary from the Executive and the Legislature in theory as well as in practice. The British Constitution is gradually, albeit reluctantly, shading its anachronistic institutions in ways that make it difficult for students of contemporary comparative constitutional law to grasp. Such a student can now refer to the Supreme Court of the United Kingdom along with the Supreme Court of the United States, the Supreme Court of Canada, the Supreme Court of India, the Supreme Court of Nigeria or the Supreme Court of New Zealand. Ironically, the highest judicial body in Australia remains: The High Court of Australia while the State courts are known as Supreme Courts (eg, the Supreme Court of New South Wales).

[55] [2004] 2 AC 406 at 423 para 34. See also *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 (HL). *Fairlie v Perth and Kinross Healthcare NHS Trust* 2004 SLT 1200 at 1209L para 36.

[56] Per Lord Steyn, [2004] 2 AC 406 at 427 paras 51 and 52.

[57] *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 (HL) paras 19; *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124, [2004] 2 WLR 603, [2004] 15 BHLR 1 (CA) paras 52-56; *R (KB) v Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936 para 22.

[58] *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2008] 3 All ER 977, [2008] 3 WLR 593 (HL); *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 2 WLR 481 (HL). *Savage v South Essex Partnership NHS* [2009] UKHL 74, [2009] 2 WLR 115 (HL) where the House of Lords

are, however, three English cases slated for this discussion which directly relate to claims involving the adjudicative process. In line with the observations already made, it is interesting to note that it is only in the trial judgment among the three, where damages were awarded for delays by mental health tribunals in determining the civil rights and obligations of mental health patients.

In *R (KB) v Mental Health Review Tribunal,*[60] Stanley Burnton J was considering a matter where eight claimants, all patients detained under the Mental Health Act 1983, had suffered delays in the hearings of their applications to mental health review tribunals for the review of their respective detentions. On their applications for judicial review in two separate circumstances,[61] the respective trial judges held that the rights of the applicants to a speedy hearing to determine the lawfulness of their detention, protected by article 5(4) of the Convention for the Protection of Human Rights and Fundamental Freedoms, scheduled to the HRA had been infringed. It was further held that the claimants were entitled under section 8(3) of the Act to such damages as were necessary to afford them just satisfaction.

In awarding damages to six of the eight claimants, Stanley Burnton J held that by the provisions of section 8(3) of the Act, the awards of damages were only to be made where the court was satisfied that such an award was necessary to afford just satisfaction and that Parliament envisaged that there would be breaches of Convention rights for which an award of damages would not be necessary.[62] The power of the European Court of Human Rights to afford just satisfaction under article 41 of the Convention where only reparation was available from the national authority was co-extensive with the power and duty of the national court to afford just satisfaction under section 8(3). Since, in exercising its powers under article 41, the European Court might decline to award damages on the basis that a finding that there had been an infringement of a Convention right afforded just satisfaction, national courts must have the same power. Again, since the European Court had declined to award damages in cases where there had been an infringement of article 5 it followed that article 5(5), which provided a victim of such an infringement with an enforceable right to compensation, did not compel the award of damages in every case of a breach.[63]

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upheld the Court of Appeal judgment ([2007] EWCA Civ 1375, [2008] 1 WLR 1667 (CA)) allowing the claimant's appeal on the ground that a duty to take steps to prevent a detained mental patient from committing suicide arose if the authorities knew or ought to have known that there was a real or immediate risk of her doing so and in those circumstances the claimant had only to show that the trust had failed to take reasonable steps to avoid that risk.

[59] *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2008] 3 All ER 977, [2008] 3 WLR 593 (HL); *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 (HL); *D v East Berkshire Community Health NHS Trust* [2005] 2 WLR 993 (HL).

[60] [2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936.

[61] See *R (KB) v Mental Health Review Tribunal* (2002) 5 CCLR 458, *R (B) v Mental Health Review Tribunal* [2002] EWHC 1553 (Admin).

[62] [2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936 para 26.

[63] [2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936 paras 28-30.

There was no clear and constant jurisprudence of the European Court on whether damages were recoverable under article 5(5) of the Convention for frustration and distress occasioned by delay in breach of article 5(4) in the absence of a deprivation of liberty. However, damages were recoverable under section 8(3) of the 1998 Act for frustration and distress which was significant and of such intensity that it would in itself justify an award of compensation for non-pecuniary damage.[64] Accordingly, 'an important touchstone of that intensity in cases such as the present will be that the hospital staff considered it to be sufficiently relevant to the mental state of the patient to warrant its mention in the clinical notes'.[65]

In *R (Greenfield) v Secretary of State for the Home Department,*[66] a prisoner serving a two-year sentence of imprisonment was charged with a drug offence under the Prison Rules. The deputy controller who heard the charge had refused a request by the appellant that he be allowed legal representation. He was found guilty and was ordered to serve 21 additional days' imprisonment. The appellant applied for judicial review, contending that his rights under article 6 of the European Convention had been violated in that the hearing had involved the determination of a criminal charge, the deputy controller had not been an independent and impartial tribunal and that he had wrongly been denied the right to be legally represented. He claimed damages for these violations.

The Secretary of State successfully resisted the appellant's contentions in the Divisional Court[67] and the Court of Appeal;[68] accordingly, these courts did not have to consider the damages aspect of the case. However, since the decisions in those courts, the European Court of Human Rights has delivered judgment in *Ezeh and Connors v United Kingdom*.[69] In the light of that judgment the Secretary of State accepted that the proceedings against the appellant did involve the determination of a criminal charge within the meaning of article 6 of the Convention,[70] that the deputy controller was not an independent tribunal and that the appellant was wrongly denied legal representation of his choosing which was available to him. The appeal to the House of Lords was therefore limited to consideration of the appellant's claim for damages.

The House of Lords held that in deciding pursuant to section 8 of the 1998 Act, whether an award of damages was necessary to afford just satisfaction for violations of article 6 and, if so, how much, the British courts had to look to the

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[64][2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936 paras 41-42.
[65][2003] EWHC 193 (Admin), [2003] 2 All ER 209, [2004] QB 936 para 73.
[66][2005] UKHL 14, [2005] 1 WLR 673 (HL).
[67][2001] EWCA Adm. 113, [2001] 1 WLR 1731 (DC).
[68][2001] EWCA Civ 1224, [2002] 1 WLR 545 (CA).
[69](2002) 35 EHRR 691, (2003) 39 EHRR 1.
[70]This is the 'right to a fair trial' provision which states that: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

jurisprudence of the European Court of Human Rights for guidance.[71] The focus of the Convention was the protection of human rights rather than the award of compensation, and that was reflected in the approach of the European Court, which was to treat the finding that article 6 had been violated as in itself affording just satisfaction to the injured party. From its jurisprudence, the European Court would award monetary compensation only where it was satisfied that the loss or damage complained of was actually caused by the violation,[72] although it had on occasion been willing in appropriate cases to make an award if it was of the opinion that the applicant had been deprived of a real chance of a better outcome.[73] Consequently, awards of compensation for anxiety and frustration suffered as a result of an article 6 violation have been made very sparingly and for modest sums.[74] Such awards were not precisely calculated but were such as were judged by the court to be fair and equitable in the particular case.[75]

On the facts of the case, although the deputy controller was not an independent and impartial tribunal as required by article 6 and the prisoner should not have been denied the right to be legally represented, the House of Lords held that he had been vindicated by a finding in his favour at the highest judicial level based on a public concession by the Secretary of State. That, of itself, afforded him just satisfaction without the necessity for an award of damages.[76] The deputy controller appeared to have conducted the adjudication in an exemplary manner, and it was inappropriate to speculate whether a legal representative might have persuaded him or another tribunal to take a different view. Although the prisoner might have suffered anxiety and frustration on the basis that he did not think the charges against him would be fairly tried by the prison authorities, a hearing before a governor or deputy governor was the norm at the time of adjudication so that the prisoner had no expectation of any other procedure and was treated no differently from any other prisoner.[77] Accordingly, the claim for damages failed, having regard to all the circumstances of the case and the fact that there were no special features to warrant an award of damages.[78]

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[71] [2005] UKHL 14, [2005] 1 WLR 673 (HL) para 6.

[72] Indeed, the European Court held in *Kingsley v United Kingdom* (2002) 35 EHRR 177 para 40 that:

> The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible.

[73] [2005] UKHL 14, [2005] 1 WLR 673 (HL) para 14 and the cases cited therein.

[74] See, eg, *Nikolova v Bulgaria* (2001) 31 EHRR 64 para 76.

[75] *Osman v United Kingdom* (1998) 29 EHRR 245 para 164; *Curley v United Kingdom* (2000) 31 EHRR 401 para 46 in respect of art 5.

[76] [2005] UKHL 14, [2005] 1 WLR 673 (HL) para 26.

[77] [2005] UKHL 14, [2005] 1 WLR 673 (HL) para 29.

[78] See also *Boyle v Criminal Cases Review Commission* [2007] EWHC 8 (Admin).

The House of Lords held in *Jain v Trent Health Authority*,[79] that where the preparation for, or the commencement or conduct of, judicial proceedings before a court, or of quasi-judicial proceedings before a tribunal such as a registered homes tribunal, had the potential to cause damage to a party to the proceedings, whether personal damage such as psychiatric injury or economic damage as in the present case, a remedy for the damage could not be obtained via the imposition on the opposing party of a common law duty of care. The protection of the parties to litigation from damage caused to them by the litigation or by orders made in the course of the litigation depended upon the control of the litigation by the court or tribunal in charge of it and the rules and procedures under which the litigation was conducted. There was a lack, in the statutory procedures prescribed for section 30 applications,[80] of reasonable safeguards for the absent respondents against whom those applications could be made and the only safeguard was that the cancellation order had to be made by a magistrate. However, the clear inadequacy of that as a sufficient safeguard did not justify the creation of a duty of care.[81]

Although the events had taken place before the coming into force of the 1998 Act and the issue of its applicability did not arise in arguments in the present case, Lord Scott considered how the case of the claimants would have looked if the Act had been applicable. Lord Scott held that the benefit of registration of the claimants' nursing home under the 1984 Act would qualify as a possession for the purposes of article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[82] Article 6(1) comes into play in maintaining that fair balance which must be struck between the general interest of the community and the requirements of the individual's fundamental rights.[83] Thus, when the right under article 6 to a 'fair and public hearing' becomes very relevant when a judicial or quasi-judicial order has deprived an individual of his possessions, has been made at a hearing of which he was given no notice, is an order that he has no opportunity of resisting until it is too late, and has been made in response to an application by the state that ought not to have been made.[84]

Although the House could not express any concluded opinion on the issues of human rights breach since they were not before their Lordships, Baroness Hale

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[79][2009] UKHL 4, [2009] 1 All ER 957 (HL).
[80]Section 30, Registered Homes Act 1984.
[81]Per Lord Scott, [2009] UKHL 4, [2009] 1 All ER 957 (HL) paras 20, 35 and 37. In so holding, the House found inspiration from the following cases: *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465; *Martine v South East Kent Health Authority* (1993) 30 BMLR 51; *Elguzouli-Daf v Metropolitan Police Commissioner*, *McBrearty v Ministry of Defence* [1995] 1 All ER 833 (CA); *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 2 All ER 489; *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2006] 4 All ER 256.
[82][2009] UKHL 4, [2009] 1 All ER 957 (HL) para 12 citing *Van Merle v Netherlands* (1986) 8 EHRR 483.
[83]*Sporrong v Sweden* (1982) 5 EHRR 35 para 69.
[84][2009] UKHL 4, [2009] 1 All ER 957 (HL) 964 para 13.

had no doubt that the public authority did indeed act incompatibly with two Convention rights, namely, article 6(1) and article 1 of the European Convention. Firstly, the Baroness found that in circumstances where the home was instantly closed down, the residents dispersed and the complainants were ruined, thus causing the sort of irreparable damage which can mean that even interim measures must comply with article 6(1), the closing down of the home would be regarded therefore as the determination of a civil right for the purpose of article 6(1). Secondly, the right not to be deprived of one's peaceful enjoyment of one's possession afforded by article 1 of The Convention was also likely breached. It is more so where the 'general interest' limitations of this right could not mean that it is in the general interest to close down a home and ruin someone's business 'when, as the tribunal found, there was no good reason to do so: still less does it mean that it is in the general interest to descend upon a home with a number of ambulances and nurses to remove 33 elderly mentally infirm residents to other hospitals and nursing homes without any opportunity to prepare for such distressing and potentially damaging disruption to their lives'.[85] In spite of the unlawfulness of the acts of the public authority and the appreciation by their Lordships that 'serious injustice' had been done to the complainants, the House of Lords nonetheless held, in the words of Baroness Hale, that 'it is with the greatest regret that the common law of negligence' could not 'supply' the remedy which this case deserved.[86]

7 Conclusion

It has never been in doubt that a breach of the right to a fair hearing, due process, procedural fairness or the rules of natural justice are recognised and most dependable grounds upon which to launch a judicial review of administrative action at common law. On the other hand, whether the successful applicant for judicial review on that ground should be awarded damages in vindication of such breach is an area that manifests the gravest judicial foot-dragging and reluctance. Any lingering hope by litigants that the *Maharaj* judgment opened the floodgates or reversed the erstwhile negative judicial attitude towards claims for damages arising out of breaches of the principles of natural justice have been rendered an

[85]Per Baroness Hale [2009] UKHL 4, [2009] 1 All ER 957 (HL) 974 para 44.

[86][2009] UKHL 4, [2009] 1 All ER 957 (HL) 973 para 42. Lord Neuberger (para 54) agreeing with Lord Scott and Baroness Hale held that there was considerable force in the notion that the appellants' rights under art 6 of the European Convention for the Protection of Human Rights and Freedoms 1950 (as set out in sch 1 to the HRA 1998) and art 1 of the First Protocol to the Convention have been infringed. Without necessarily expressing 'any concluded view on the point', Lord Neuberger would however add that 'it would seem to give rise to a serious injustice if the appellants were unable to recover proper compensation for the loss they have suffered as a result of what, to put it mildly, was an inappropriate and high-handed implementation of the procedure contained in s 30, and in particular s 30(2), of the Registered Homes Act 1994'.

illusion by the cases decided in the last three decades. Although the *Maharaj* judgment does not ordinarily lend itself to easy understanding, a careful reading of that judgment will indicate, albeit subtly, that inherent in its formulations are safeguards that ensure that claims for constitutional damages do not become a runaway horse or a free-for-all affair. At least, this conclusion eminently derives from the Privy Council's interpretation of the necessary intendments of that judgment in the many cases reviewed in this paper.

In spite of the explanations offered by Lord Diplock, the courts in several jurisdictions have had difficulty in determining whether to apply the *Maharaj* judgment as to how to side-step the established common law immunity of the judge for error in adjudication, or the principle that the State cannot be held vicariously liable for the acts and omissions of the judge. Again, these problems notwithstanding, the *Maharaj* liability of the State for judicial error remains the law in the West Indies and New Zealand. This is notwithstanding that the Privy Council has in recent times restricted the application of its due process liability principle to vanishing point in cases from the West Indies. On the other hand, the New Zealand courts have shown a renewed vigour in holding that damages could be awarded for breach of the procedural fairness provisions of section 27(1) of the New Zealand Bill of Rights Act 1990. But the courts in both jurisdictions agree that the *Maharaj* liability should be confined to circumstances: (a) where there is no other effective remedy; (b) where human dignity or personal integrity or (possibly) the integrity of property are also engaged; and (c) where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse.

It has been shown in this study that the courts have treated differently breaches of procedural fairness where the tenure of office of a judicial officer or the special category of public officers have been interfered with, especially where the unconstitutionality or unlawfulness of the acts of the relevant agency has the effect of ending prematurely the career of the officer concerned. This is because the office of the judge is otherwise secure by the Constitution and the appointment of the public officer is equally protected by the Constitution and/or statute. In these circumstances, the Privy Council has been consistent in awarding damages where the careers of public office holders have been threatened by the same agencies charged with disciplinary matters over them. It has held that where there has been a breach of due process/procedural fairness in these cases damages may be awarded in appropriate circumstances.[87]

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[87] See, eg, *McLaughlin v Cayman Islands* [2007] UKPC 50 (23 July 2007); *Jhagroo v Teaching Service Commission of Trinidad and Tobago* [2002] UKPC 63 (2002-12-04); *Jurratt v Commissioner of Police for New South Wales* [2005] HCA 50, (2005) 221 ALR 95 (HCA).