THE SUPREME COURT OF BELIZE, A.D., 2020

CLAIM NO. 435 OF 2020

BETWEEN

THE VILLAGE COUNCIL OF

COTTON TREE **CLAIMANT**

AND

THE ACTING CHIEF JUSTICE OF

BELIZE **1st DEFENDANT**

THE ATTORNEY GENERAL **2nd DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Decision
16th February, 2021

Appearances:
Mr. Andrew Marshalleck, Counsel for the Claimant.

Mr. Fred Lumore, Counsel for the 1st Defendant.

Mrs. Samantha Matute-Tucker, Counsel for the 2nd Defendant.

KEYWORDS: Constitution - Right to a Fair Trial - Judicial Delay - Judgment not Delivered by Chief Justice who has Demitted Office - Subsequent Delay in Distribution of the Matter by Acting Chief Justice - Application for Acting Chief Justice to be Removed as a Party - Absolute

Exemption or Immunity from Civil Liability - Execution of Judicial Function - Administrative Function - Independence of the Judiciary - Supremacy of the Constitution - Correct Party to be Named - Costs

JUDGMENT

1. This is a decision on an application by the Acting Chief Justice of Belize for removal as a party to this Claim on the ground of judicial immunity from all civil liability for acts done by her in the execution of her judicial function.

2. The substantive Claim concerns a judgment reserved on the 22nd July, 2015, by Chief Justice Kenneth Benjamin, as he then was, who retired and demitted office prior to delivery. The Claim alleges that even after Chief Justice Benjamin demitted office and an acting Chief Justice was appointed, no arrangements were made by either Defendant for a decision to be delivered.

3. The Claimant (The Village Council) seeks relief under the Belizean Constitution for the alleged denial of its right to a fair hearing within a reasonable time as mandated by **section 6(7)**:

> *"(7) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial: and where proceedings for such a determination are institution by any person before such a court or other authority, the cause shall be given a fair hearing within a reasonable time."*

4. The redress claimed includes a declaration *"that the failure of the Chief Justice Benjamin to deliver and the Defendants to make any arrangements whatsoever for the delivery of a decision in Claim No 221 of 2014 is in breach of the Claimant's right to a fair hearing of its civil claim within a reasonable period of time guaranteed by section 6(7) of the Belize Constitution"* along with damages and costs.

5. The Acting Chief Justice prepared and filed a Defence. Subsequently, the present application was made for her removal as a party. She maintains that at all material times she exercised or performed a judicial function and as such is absolutely exempted or immune from all civil liability. This immunity she insists is integral to the independence of the judiciary. That application was stated as being without prejudice to the filing of the Defence.

6. **The Issues:**

    1. Whether judicial immunity from suit extends to protect a judge who is alleged to have breached fundamental rights by way of omission in an administrative capacity?
    2. If any such immunity exists, whether it is waived by the filing of a Defence?
    3. Whether the Acting Chief Justice is the correct party to this Claim?

Whether judicial immunity from suit extends to protect a judge who is alleged to have breached fundamental rights by way of omission in an administrative capacity:

The Applicant's Submissions:

7. The Applicant assures the Court of its jurisdiction to consider the application in accordance with **Supreme Court Civil Procedure Rules (CPR) 19.3**:

> *"19.3 (1) The court may add, substitute or remove a party on, or without an, application.*
> *(2) An application for permission to add, substitute or remove a party may be made by –*
> *(a) an existing party;*
> *...*
> *(6) where the court makes an order for the removal addition or substitution of a party, it must consider whether to give consequential directions..."*

8. Senior Counsel for the Applicant also relied on **CPR 56.12(2)(b)**:

> *"(1) Wherever practicable, any procedural application during a claim for an administrative order must be made to the judge who dealt with the first hearing unless that judge orders otherwise.*
> *(2) Without limiting the generality of Rule 56.12 (1), that Rule applies in respect of proceedings –*
> *...*
> *(b) to take preliminary objections on any matter."*

9. Finally, he sought, if necessary, to invoke the Court's inherent jurisdiction; a power which he accepted was to be used sparingly and only in clear cases. He relied on the definition of this extraordinary power in **Montreal Trust Co. et al v Churchill Forest Industries Manitoba Ltd (1971) 21 DLR (3D) 75** at page 81 *"... as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

10. The reason for judicial immunity was then highlighted. He discussed the doctrine of the separation of powers and that the judiciary, because of its function of adjudicating between the state and individuals, ought to be the most separate and independent. Halsbury's Laws of England 4th ed (Re-issue) Vol 8(2) paragraph 301 states that *"the judiciary comes closest to being separate and independent."* Paragraph 303 confirms that the independence of the judiciary is essential to the rule of law and to the continuance of its own authority and legitimacy.

11. Senior Counsel then presented three (3) separate means by which the judiciary ought to be absolutely immune from suit in the discharge of their judicial function.

12. He drew the Court's attention to **section 41 of the Supreme Court of Judicature Act Cap 91**, which details the distribution of court business before the Court by the Chief Justice:

"(1) Subject to the provisions of Part 111, the Chief Justice may determine the distribution of the business before the Court among the judges thereof, and may assign any judicial duty to any judge or judges.

(2) The Registrar shall as early as practicable after the first day of every month, lay before the Chief Magistrate a list of all causes and proceedings whatever pending in the Court."

13. The thrust of his argument seemed to be that the exercise of this particular power was an act done by the post holder in a judicial capacity and hence at common law, it would be immune from civil action. He reminded that such an immunity is provided to secure the very independence of the judiciary. He relied on Halsbury's Laws of England, 4th Ed (Reissue) Vol 8(2) pg 224 para. 304 which informed that *"In order to be sure that judicial officers can discharge their functions impartially and without fear of incurring personal civil liability to anyone aggrieved by the acts, comments or decisions, they are in principle immune at common law from civil action…"*

14. He then quoted what he referred to as Lord Denning's modern concept of judicial immunity from **Sirros v Moore [1974] 3 ALL ER 776** at **785(b)**:

"… As a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure 'that they may be free in thought and independent in judgment', it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?' So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be

ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it."

15. This immunity of judicial officers on the discharge of a judicial function, he postured, was acknowledged by the Privy Council in **Ramesh Lawrence Maharaj v Attorney General of Trinidad and Tobago (No. 2) (1978) 30 WIR 310.** Senior Counsel then quoted Lord Diplock **at 317**: *'Some of the rights and freedoms described in s 1* [sections 3 to 10 inclusive of the Belize Constitution] *are of such a nature that, for contravention of them committed by anyone acting on behalf of the State or some public authority, there was already at the time of the Constitution an existing remedy, whether by statute, by prerogative writ or by an action for tort at common law…'*

16. He then advanced that prior to the promulgation of the Belize Constitution the remedy available to the Village Council at common law would have been the prerogative remedies of certiorari, prohibition, mandamus and habeas corpus and not a personal action or claim against the judicial officer. A judicial officer is not liable to a claim for damages. He offered the position of the law as it was outlined in ***Froylan Gilharry Sr. dba Gilharry's Bus Line v Transport Board and 3 others, Court of Appeal Belize, Civil Appeal No. 32 of 2011, 20th July, 2012 (unreported):***

'[67] Historically, applications for the prerogative remedies of certiorari, prohibition, mandamus and habeas corpus were made on the Crown side of the Queen's Bench Division in England and did not fall to be considered as 'civil proceedings' in ordinary – or statutory – signification of that phrase. That this was also the case in Belize is surely confirmed by the specific exclusion of such proceedings from the definition of 'civil proceedings' in the CP (Crown Proceedings) *Act. This is particularly so, in my view,*

when it is kept in mind that, before and after the passing of the CP Act in 1953, indeed right up to the promulgation of the CPR in 2005, in default of any specific procedure prescribed in the Supreme Court Rules for judicial review proceedings, such proceedings were governed by the practice and procedure in the High Court of Justice in England.

[68] This position remains unaffected, it seems to me, by the inclusion of judicial review under the rubric 'civil proceedings' in the CPR. The framers of the CPR were concerned to make specific provisions in the rules for the first time for judicial review. In these circumstances, it is hardly surprising that, in a code designed to regulate ' all civil proceedings in the civil division of the Supreme Court' (rule 2.2 (1)), it should have been felt necessary to state specifically that 'civil proceedings' for the purposes of that code should include applications for judicial review. But to the extent that the CPR is subsidiary legislation, it is clear that, on general and well established principle, nothing in it can override a clear statutory provision, in this case, section 2(1) of the CP Act.'

17. Senior Counsel concluded that under the law in force when the Constitution came into effect no *"... action would have lain against the judge himself for anything he had done unlawfully while purporting to discharge judicial functions..."* Privy Council in **Maharaj No. 2 at 319.***"*

18. It is noteworthy that although Senior Counsel did not include it, the judgement continues with this very next sentence "*But ss1 and 2* (of the Bill of Rights) *are concerned with rights, not with remedies for their contravention."* This is a distinction which we cannot overlook. The Canadian Court of Appeal in **Carl R Rahey v Her Majesty the Queen [1987] 1 SCR 588 at 621** (discussed below) made a very similar observation.

19. Having dealt with common law immunity, Senior Counsel moved on to statutory immunity. He presented the **Crown Proceedings Act Cap 167**, which provides at **section 4(5)** that the Crown shall not be liable for any tortious acts done by persons while in the discharge of any responsibilities of a judicial nature vested in him or any responsibilities which he has in connection with the execution of judicial process. This he said did not change the common law position.

20. In fact, Senior Counsel in his Submissions in reply informed that this judicial immunity was far wider than the scope of common law immunity. He quoted Hardie Boys J when construing **section 6(5)** of **New Zealand's own Crown Proceedings Act** in the well-known New Zealand Court of Appeal case of **Simpson v Attorney-General [Baigent's Case] [1994] 3 LRC 202 at 229 - 230**:

> *"I do not read s 6 (5) as referring solely to the exercise of judicial power. The expression 'responsibilities of a judicial nature' is of wider scope, apt to include all those functions which are to be performed judicially.*

21. He also sought support in the New Zealand Court of Appeal case of **Gazley v Lord Cook of Thorndon & ors. [2000] 3 LRC 50 at pp. 64-65** which cited **Sirros v Moore [1974] 3 All ER 776 at 783** (Lord Denning MR) with approval.

> *'And (at 784):*
>
> *What is the test upon which the judges of the superior courts are thus immune from liability for damages even though they are acting without jurisdiction? Several expressions are to be found. A judge of a superior court is not liable for anything done by him while he is 'acting as a judge' or 'doing a judicial act' or 'acting judicially' or 'in the execution of his office' or 'quatenus a judge'. What do all these mean? They are much wider than the expression 'when he is acting within his jurisdiction'. I think each of the expressions means that a judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, though he may be mistaken in that belief and may not in truth have any jurisdiction. No matter that his mistake is not one of fact but of law (as in Bushell's Case (1671) Vaughan 135), nevertheless he is protected if he in good faith believes that he has jurisdiction to do what he does…'*

22. At page 65 (c) of **Gazley** the Court stated:

'The High Court constitutes the sole arbiter (though subject to correction on appeal) as to what matters fall within its own jurisdiction. In my judgment, it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court. He enjoys no such immunity, however, in respect of any act not done in his capacity as a judge.'

Senior Counsel concluded that judicial immunity *"therefore does not exclude 'administrative' functions if it is a judicial duty vested in the Judge. The redress sought by the Claimant is not limited to assignment of cases which is, in any case, a judicial duty or function imposed on the Judge by the Supreme Court of Judicature Act, Cap 91."*

23. Counsel then went on to quote from **Nahkla v McCarthy[1978] 1 NZLR 291**, **Anderson v Gorrie & Ors [1895] 1 QB 668 at p.671** which all confirmed absolute judicial immunity from suit to be a public right designed to ensure that the administration of justice remains untrammeled. The Court notes here that none of these jurisdictions have a Supreme Constitution.

24. In dealing with whether the common law immunity is trumped by a written Constitution, Senior Counsel relied on a quotation from **Bigent's Case (ibid)** which seemed simply to discuss the findings in the **Maharaj No. 2** case and did not *"address"* the issue at hand. Particularly because **Maharaj No. 2** itself states quite definitively at **page 321** that *"no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a* ***judicial capacity.****"* (Emphasis mine). Because the Claim for redress was a claim against the state for what the judge had done in the exercise of the judicial power of the state.

25. It is also important to note here that following the discussion of **Maharaj No. 2 at pg 235**, Hardie Boy J went on to discuss the Indian case of **Nilabati Behera v State of Orissa [1994] 2LRC 99** where the Supreme Court awarded damages to a mother whose son had been beaten to death by the police. The Court was swift to explain, as stated by Hardie Boy J, *"this was not a remedy in tort but one in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply."*

26. Senior Counsel also invited the Court to consider the Law Commission of New Zealand May 1997 Report No. 37 captioned Crown Liability and Judicial Immunity A response to **Baigent's case** and **Harvey v Derrick**. This report recommended that an Act of Parliament be passed to remove redress against unlawful acts of the judicial arm of the state (the Maharaj redress) since it undermines the doctrine of judicial immunity. The commission explained at paragraph 139:

> *"… But that immunity is in no sense a private right which might be regarded as having been conferred upon him and which he then might be said to enjoy. He is merely the repository of a public right which is designed to ensure that the administration of justice will be untrammeled by the collateral attacks of disappointed or disaffected litigants. That simple concept is gladly accepted, we believe, by the citizen and lawyer alike. And its strength extends to preventing civil proceedings against the judge in respect of his exercise of jurisdiction even though he may act with gross carelessness or be moved by reasons of actual malice or even hatred…"*

27. That the Commission has seen it necessary to make this recommendation means that the issue had not been addressed in **Baigent's Case**. Unable, in my humble opinion, to find true help in **Baigent's case**, Senior Counsel turned to the American Court of Appeal case of **Stump v Sparkman 435 US 349 (1978)** which affirmed the doctrine of judicial immunity in suits under **section 1** of the **Civil Rights Act of 1871**. The Court is aware that these actions are

treated as a private law action in tort so that their being subject to immunities may not be at all surprising.

28. Senior Counsel then moved on to what he considered the relevant question: Against whom are the protections granted where there may have been some contravention of a right in section 3 to 19 (both inclusive)?

29. The Privy Council in **Maharaj No.2 (ibid)**, he urged, provided the answer at pg 317:

> *"..... In his dissenting judgment (Ramesh Lawrence Maharaj v Attorney General of Trinidad and Tobago No. 2 (1977) 29 WIR 325, Trinidad and Tobago CA) Phillips JA said ((1977) 29 WIR at 363): 'The combined effect of these sections [ie ss 1, 2 and 3],* [3 to 19 Belize] *in my judgment, gives rise to the necessary implication that the primary objective of Chapter 1* [Chapter 11 Belize] *of the Constitution is to prohibit the contravention by the State of any of the fundamental rights or freedoms declared and recognised by s 1'."*
>
> *"Read in the light of the recognition that each of the highly diversified rights and freedoms of the individual described in s 1 already existed, it is their Lordships' clear view that the protection afforded was, against contravention of those rights or freedoms by the State or by some other public authority endowed by law with coercive powers. The chapter* [Chapter 11] *is concerned with public law not private law. ..."*

30. Senior Counsel opined that since the redress sought by the Claimant is redress from the State powers, for a contravention of its constitutional rights, by the judicial arm of the state, and **section 42(5)** provides that legal proceedings shall be instituted against the Attorney General then there could really be no issue.

The Respondent's Submissions:

31. Senior Counsel opened his discussion on judicial immunity at common law with the principles stated in **Sirros v Moore (ibid)** as already quoted above.

He explained that this immunity was described and confined to damages in respect of decisions taken in judicial proceedings before the Court. He then turned to Salmond on Torts (10th Ed) where the doctrine is in somewhat wider terms: *"A judge of the superior courts is absolutely exempt from all civil liability for acts done in the execution of his judicial functions. So long as the jurisdiction of the court is not exceeded, his exemption for civil liability is absolute, extending not merely to errors of law and fact, but to malicious, corrupt or oppressive exercise of judicial powers."*

32. He explained that the rationale generally espoused to support judicial immunity at common law is that judges should not be concerned, when deciding cases, with whether or not they will be sued for what they decide. However, since judges are not engaged in deciding any case when performing administrative functions that rationale could not properly apply.

33. Further, while there could be an appeal of a judge's decision in a case, no such opportunity exists for redress of an administrative omission such as the Acting Chief Justices' failure to take steps to prevent the undermining of the entire judicial process. Logically, therefore, common law immunity cannot extend to cover a constitutional challenge to administrative omissions by a judge of a superior Court.

34. More importantly, a constitutional motion for redress under a written Constitution is not a proceeding known to common law and so could not have been in contemplation when the scope of that immunity was being defined.

35. Further, the Applicant's contention that the correct approach to challenge administrative misconduct by a judge is through one of the prerogative writs

is a plain recognition that these are not civil proceedings at common law and therefore fall outside the scope of judicial immunity at common law.

36. It follows that so too would the right to pursue the stronger public law remedy for redress by constitutional motion for breach of a fundamental right by a judge acting in an administrative capacity.

37. Relying on the Canadian Court of Appeal case **Carl R. Rahey v Her Majesty The Queen (ibid)** he reminded the Court that the availability of the prerogative writs do not preclude the granting of constitutional relief nor preclude the right to pursue such relief in any way. He quoted, *" Nor do I think that the Appellant's capacity to seek a Charter remedy from a superior court ought to have been limited by the fact that the injury of which he complained might also have been redressed by an order for mandamus against a trial judge. In general, there is no reason why an accused should be barred from appropriate constitutional relief by the existence of a prerogative writ. Mandamus is by definition a limited remedy, and therefore too narrow a recourse for a person who believes that his Charter rights have been infringed and that he is accordingly entitled to the full range of remedies provided by s. 24 (1). Furthermore if, as I have indicated, the accused's rights had arguably been infringed to such a degree that they could only be remedied by dismissal of the charges, mandamus would not only be an overly narrow remedy, but an inappropriate one."*

38. He continued that mandamus was in any event an inappropriate remedy in the present circumstances since owing to the passage of time there was no longer any possibility of a trial within a reasonable time. Hence, there was no point in seeking an order to compel the delivery of the long outstanding decision because the delivery would be unconstitutional.

39. Senior Counsel then quoted extensively from **Maharaj No. 2 (ibid)** while insisting that the common law immunity did not extend to protection against a claim for damages against the state under Trinidad and Tobago's written Constitution:

> *"It has been urged on their Lordships that to so decide would be to subvert the long-established rule of public policy that a judge cannot be made personally liable in court proceedings for anything done by him in the exercise (or purported exercise) of his judicial functions. It was this consideration which weighed heavily with Sir Isaac Hyatali CJ and Corbin JA in reaching their conclusion that the appellant's claim for redress should fail. Their Lordships, however, think that these fears are exaggerated.*
>
> *In the first place, no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1 (a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event.*
>
> *In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on an appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under s 6 (1), with a further right of appeal to the Court of Appeal under s 6 (4). The High Court, however, has ample powers, both inherent and under s 6 (2), to prevent its process under s 6(1) until an appeal against the judgment or order complained of had been disposed of.*

Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 where the contravention of the claimant's constitutional rights consist of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what, in a case of tort, would be called 'exemplary' or 'punitive' damages.

This makes it unnecessary to express any view whether money compensation by way of redress under s 6 (1) can ever include an exemplary or punitive award.

For these reasons the appeal must be allowed and the case remitted to the High Court with a direction to assess the amount of monetary compensation to which the appellant is entitled. The respondent must pay the costs of this appeal and of the proceedings in both courts below."

40. He submitted that it is therefore clear that *"judicial immunity at common law does not extend to protect against a claim in public law under a written constitution for damages against the state for breach of a fundamental right guaranteed by the constitution. Such types of claims are considered sui generis and were entirely outside the contemplation of English common law (given that there exists no such type of claim in the UK because of the absence of a written constitution) and therefore outside the scope of judicial immunity at common law.*

41. For the very reasons, founding the decision of the Privy Council in **Maharaj No. 2**, he postured; there could be no judicial immunity to a Claim under a written Constitution for a declaration against a judge for an administrative omission resulting in the infringement of a constitutionally guaranteed right. He sought support for this notion through the decision by the Court of Appeal of Canada in **Carl R. Rahey v Her Majesty The Queen (ibid).**

42. In that case, the Court of Appeal of Canada considered the relief to be given under the Canadian Charter for breach of the right to a trial within a reasonable time where a trial judge had delayed in delivering a decision in criminal proceedings for an inordinate period. The Court after recognizing that it was the presiding judge who was alleged to be the cause of a violation

of the appellants rights guaranteed by the Charter, explained, inter alia, that:

> *'Quite Apart from what may be gleaned from a parsing of the language of s 11. (b) and analogous provisions, however, its seems obvious to me that the courts, as custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administration of their duties. In my view, the fact that the delay in this case was caused by the judge himself makes it all the more unacceptable both to the accused and to society in general. It would be cold comfort to an accused to be brought promptly to trial if the trial itself might be indefinitely prolonged by the judge. The question of the delay must be open to assessment at all stages of a criminal proceeding, from the laying of the charge to the rendering of judgment at trial. It was quite proper, therefore, for Glude C.J.T.D. to consider whether Judge Mc.Intyre's decision was given within a reasonable time. It is not necessary to say anything here about pre-charge delay or delay on appeal.'"*

43. This, Senior Counsel says, makes it pellucid that the Acting Chief Justice is subject to constitutional scrutiny in the administration of her duties as a judge. The guarantee of the fundamental right to a fair trial within a reasonable time imposes a corresponding obligation on the judiciary as an independent organ of state to provide the required trial in accordance with the Constitution. The judiciary must be accountable to the public under the Constitution for having failed to meet its constitutional obligation.

44. While he agrees that the judge cannot be held personally liable in damages, he urged that the Court can fashion an appropriate remedy in the form of a declaration as to the breach as was actually being sought against the Acting Chief Justice now.

45. He proposed that since the Acting Chief Justice has a real interest in objecting to a potentially prejudicial declaration of this sort she should have the full opportunity to oppose it. Naming her as a Defendant ensures her the full

opportunity to present any argument she wishes to make rather than merely relying on any position the Attorney General may wish to take.

46. Moreover, having already acknowledged service and filed an affidavit in Defence, she has joined issue with the Claimant. In order to file a Defence. the Acting Chief Justice must have appreciated the legal implications and must have voluntarily waived any objection to the jurisdiction of the Court to hear the matter, including any assertion of an immunity from suit.

Discussion:

47. The Belizean Constitution guarantees through **section 6.-(1)** that *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."* It then guarantees at **6(7)** that *"Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."*

48. In order to guarantee these rights the Constitution offers redress for their breach at **section 20.-(1)** *"If **any person alleges that any of the provisions** of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, **without prejudice to any other action** with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.*

*(2) The Supreme Court shall have original jurisdiction, (a) to hear and determine **any application made by any person** in pursuance of subsection (1) of this section; and (b) to determine **any question arising** in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such declarations and orders, issue such writs and give such*

directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution.(3) ....." (Emphasis mine)

49. In Changing Caribbean Constitutions Second ed., Francis Alexis at paragraph 9.48 discussed what *"measures and their makers are amenable to the redress afforded by the redress clause which does not expressly exclude any measure, or maker, from their purview."* He concluded that no measure and no maker escaped the reach and I am minded to agree.

50. At paragraph 9.54, he explained that the Supreme Court's *"duty of being the Guardian of the Constitution as to the Bill of Rights is to be carried out, as the Judicial Oath requires, without fear or favor, affection or ill will."* As judges, we are bound to do no less.

51. The author then turned his attention to the organs of the state in paragraph 9.61. Referring to **Jaundoo v AG (1968) 12 WIR 221 at 251C-D,E, 254H**, he stated:

> *"Cummings JA observed that the existence in the Constitution of guaranteed fundamental rights, and reasoned that '[t]he existence of such a guarantee precludes any organ of the State – executive, legislative, or judicial – from acting in contravention of such rights, and any purported State act which is repugnant to them must be void'. The authority under the Constitution to pronounce 'a law or other State act invalid' for such contravention is, Cummings JA said, 'the court'. When the Court is alerted to a threatened or actual violation of a fundamental right, its immediate reaction would be Cummings JA stated: "**Now, whoever or whatever you are, show cause why!**"* (Emphasis mine)

52. Democracy is based on three (3) pillars: the Legislature, the Judiciary and the Executive. Each has a distinct and protected role. Through the supremacy of

the Constitution, the higher judiciary has powers of control over every organ. That includes the judiciary itself. We must therefore take care lest we now confuse (as one author styled it) questioning a judge with questioning justice.

53. A judge's immunity from civil suit undoubtedly protects the independence of the judiciary. But it must always be remembered that immunity is for the benefit of the public, whose interests are best protected by a fully independent judiciary. It is not an endowment to a judge.

54. Immunity is by no means the only protector of the judiciary's independence. We also rely on our own accountability which engenders full public confidence in the ability of the judiciary to function independently.

55. As sentinels or guardians of the Constitution, judges are vested with the original jurisdiction to hear and determine allegations of contravention of the Bill of Rights. A boundless immunity, such as Senior Counsel for the Applicant claims, would do nothing towards protecting the interest of the public. Rather, it would send a fairly disturbing message that there is no protection from the guards themselves and I can think of nothing which would faster erode public confidence.

56. In effect, the judiciary would be allowed to use a judge made rule of law, a doctrine or a statute to limit a constitutional right. What then has become of constitutional supremacy! Should the Constitution not say in plain words that the judiciary, as an arm of government is absolutely immune? Especially where the redress offered by **section 20** is vast and varied and goes well beyond a claim for damages. A section which empowers and encourages the

Court to tailor a remedy as befits the circumstances of the particular breach.

57. When we consider that the Constitution protects the independence of the judiciary quite well through its placement as part of the fundamental right to protection of the law. We must also consider that that very same **section 6(7)** speaks to a fair trial within a reasonable time. It allows what is considered an absolute right, one which can suffer no exception. It cannot be gainsaid that judicial independence holds no stronger position that a party's right to a fair trial. A fair trial can exist only where there is an independent judiciary and judicial independence exists so that a fair trial could be guaranteed. They are indispensable to each other.

58. To my mind, if the Constitution had contemplated placing the judiciary entirely outside the ambit of **section 20**, it would have ensured and protected that desire similarly. With respect, I am not convinced that a judge is absolutely immune.

59. It also appears that the Supremacy Clause in the Constitution would nullify Common law principles if they prove to be inconsistent with due process. **Section 2.-(1)** states, *"This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."*

60. The Basic Principles on the Independence of the Judiciary, 1985 were unanimously endorsed by the United Nations General Assembly. They are the yardstick universally used to measure the independence of a judiciary. The Court considers Principle 16, which states under the caption Professional secrecy and immunity *"Without prejudice to any disciplinary procedure or to any right*

of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."

61. In any event, the Chief Justice's power to assign matters must be accepted as nothing other than an administrative function. That the holder derives the power from the Judicature Act is not determinative. Neither is the fact that the position is that of (Acting) Chief Justice.

62. While the assignment of matters may concern some consideration of a judge's ability to handle exceedingly complex, protracted or widely publicized cases or even a judge's own specialization, perhaps, the determination and assignment itself is no exercise of judicial discretion or judgment. Thus, lack of immunity for such acts poses no threat to the judicial decision making process. Consequently, there could be no threat to the independence of the judiciary.

63. Under the heading 'Conditions of service and tenure', Principle 14 of the Basic Principles on the Independence of the Judiciary, 1985, the assignment of cases to judges was considered as *"an internal matter of judicial administration"*. If there had existed any doubt in my mind that Principle has fully dispelled it.

64. Senior Counsel for the 1st Defendant urged that immunity does not exclude administrative functions if it is a judicial duty vested in the Judge. The Stump test, which he advocates is not without controversy and problems of application. Its ambit has been eroded with the passing of time and the many exceptions which have been recognised.

65. An article written by J. Randolph Block Assistant Professor, DePaul University College of Law. A.B. 1974, graduate of Princeton University, entitled **Stump V Sparkman** and the History of Judicial Immunity which appeared in the Duke Law Journal in November of 1980 states; *"No doubt the Court intended to affirm the validity of the doctrine of judicial immunity, but the most apparent effect of the Sparkman decision has been to reduce the stature of the doctrine and to call into question the integrity of the judiciary and of the judicial process……attacking the decision as an example of the worst sort of self- dealing by the judiciary and arguing that judicial immunity as it now stands cannot find its justification in public policy."*

66. The first of two (2) limbs of the Stump test is whether the act is normally performed by a judge. However, even with that test the assignment of matters is not a duty usually exercised by judges. It is exercised in Belize by the Chief Justice only. In many other jurisdictions, matters are randomly assigned by computers or otherwise under the jurisdiction of the Court office or Registry. To my mind, this would fail the first limb of the Stump test, if properly applied.

67. Having considered the very able arguments on both sides, this Court finds that there is no common law or blanket judicial immunity which protects judicial officers from a claim in public law under a written Constitution for a declaration against a judge for an administrative omission resulting in the infringement of a constitutionally guaranteed right.

68. With the Court's finding above, Issue 2 falls away.

Whether the Acting Chief Justice is the correct party to this Claim:

69. The Court now shifts focus. The Application is said to have been made pursuant to **Section 42(5) of the Belize Constitution**. The affidavit which supports the application at paragraph 11 (c) states that *"by virtue of section 42(5) of the Belize Constitution the Claimant ought to take proceedings against the state in the name of the Attorney General of Belize and not against the Acting Chief Justice of Belize."*

70. Both parties relied heavily on **Maharaj 2 (ibid)**. In that case, the Claim was made against the Attorney General only. The issue arose as to whether the Attorney General was in fact the proper respondent. The Privy Council wasted no time in addressing this argument stating, at pg 315:

> *"The redress claimed by the appellant under s6 was redress from the Crown (now the State) for the contravention of the appellant's constitutional rights by the judicial arm of the State. By s 19(2) of the State Liability and Proceedings Act 1966 it is provided that proceedings against the Crown (now the State) should be instituted against the Attorney General, now this is not confined to proceedings for tort."*

71. The Court finds this to be of great importance but recognizes and maintains that it has nothing to do with judicial immunity.

72. The Constitution makes it clear that it is the Attorney General who is the correct party to be sued. In these proceedings, the mere fact that a declaration is sought which touches and concerns the Acting Chief Justice is no reason to add the judicial officer as a party. There are circumstances where a declaration may very well be made against a person or an entity who is not a party to the proceedings.

73. In those circumstances, the issue really becomes relevant at the stage of enforcement. In my estimation, if the Claimant proves an entitlement to the declaration, as sought, it may be made even where the Acting Chief Justice is not a party. I am secure in this view particularly because there is no coercive remedy sought against the Acting Chief Justice.

74. Any part of the order sought that may require enforcement must necessarily be made against the State through the Attorney General. There could be no possible issue with enforcement since the Attorney General has already been properly named.

75. The declaration sought is really a statement of the state's infringement of the fundamental right and may be used to bind the state to the proper fulfillment of its duty to the Claimant.

76. The Court has the power pursuant to **Rule 19.**3 to remove a party. For the reasons stated above, it will accordingly be ordered that the Acting Chief Justice be removed as a party to these proceedings. The Claimant will in no way be prejudiced by this since the redress is ultimately claimed from the state.

Cost:

77. I agree with Counsel for the Respondent that the general rule pursuant to **CPR 56.13(6)** is that no order for costs may be made against an Applicant for an administrative order unless the Court considers that he has acted unreasonably in making the application or in the conduct of the application.

78. There has been no allegation or evidence that the Claimant has acted unreasonably. In fact, the Claimant has seen some success on this application. The Court can find no reason to depart from the general rule. There will therefore be no order for costs.

79. The Court takes this opportunity to thank Senior Counsel on both sides for their assistance and thoroughness throughout. It was greatly appreciated by the Court.

Determination

80. It is ordered that:

    1. The application is granted.
    2. The Acting Chief Justice is to be removed as a party to this Claim
    3. The Fixed Date Claim Form is to be amended accordingly and re-served on the remaining Defendant within two weeks of today's date.
    4. No order as to Costs.

SONYA YOUNG
SUPREME COURT JUDGE