25 June 2015

PRESS SUMMARY

Misick and others (Appellants) v The Queen (Respondent) (Turks and Caicos) [2015] UKPC 31

From the Court of Appeal of the Turks and Caicos Islands

JUSTICES: Lord Neuberger, Lade Hale, Lord Mance, Lord Kerr, Lord Reed, Lord Hughes and Lord Toulson

BACKGROUND TO THE APPEAL

From 2008 to 2009 there was a constitutional crisis in the Turks and Caicos Islands, a British Overseas Territory with a population of approximately 30,000, then self-governing under a Constitution of 2006. Following concerns about the administration of the Turks and Caicos Islands, a Commission of Inquiry was appointed "*into possible corruption or other serious dishonesty in relation to past and present elected members of the Legislature in recent years"*. The Commissioner, Sir Robin Auld, published a report (the "Report*")* recommending, amongst other things, the partial suspension of the 2006 Constitution, the creation of a special prosecution team to investigate evidence of corruption and dishonesty and the suspension of the absolute right to trial by jury.

The 2006 Constitution had provided for government by a Governor, acting on the advice of the Premier and his cabinet. However, following the Report and the effect given to the Report by the UK government, temporary direct rule by the Governor was instituted. The legislature was dissolved, the cabinet ceased to exist and the principal offices of government and legislature, such as the Premier and Speaker of the Assembly, were declared vacant.

After two years, self-government was restored and a new 2011 Constitution inaugurated. Similar to the 2006 Constitution, Section 6(1) of the 2011 Constitution affords those charged with a criminal offence the right to "*a fair hearing within a reasonable time by an independent and impartial court established by law"*. Unlike the 2006 Constitution, however, the 2011 Constitution does not contain an unqualified right to jury trial upon a criminal charge. Even though trial by jury is the norm, section 4 of the Trials Without a Jury Ordinance 2010 ("TWAJO") allows a trial to be heard by a judge alone "*if the interests of justice so require*".

A Special Investigation Team was created and it was this body that brought charges of conspiracy to accept bribes in public office, conspiracy to defraud and associated money laundering against the Premier, other government ministers and their associates (the "Appellants"). Harrison J, an experienced judge in his mid-seventies from Jamaica, was appointed on 26 February 2015 for the specific purpose of presiding over these cases. The appointment was made for a fixed period of three years. Pursuant to section 4 of TWAJO, Harrison J directed that the interests of justice required trial by himself without a jury.

The Appellants challenged the lawfulness of their proposed trial on the grounds that: (1) contrary to section 6(1) of the 2011 Constitution, Harrison J did not have sufficient security of tenure and, thus, was not independent; and, (2) Harrison J failed to ask whether there was *no reasonable doubt* (the criminal standard of proof) that the interests of justice required a trial without jury before deciding so. The Appellants' claim was rejected by Harrison J himself and, subsequently, by the Court of Appeal.

JUDGMENT

The Board (with Lord Hughes giving its judgment) dismisses the appeal.

REASONS FOR THE JUDGMENT

On the first ground, Lord Hughes recalls that in the present case: (a) the Constitutional guarantee of judicial independence, remuneration, allowances and terms of service apply to Harrison J as they do to any other judge; (b) Harrison J has been appointed on the recommendation of the independent Judicial Service Commission; and, (c) Harrison J is guaranteed security of tenure during his appointment, except in the case of cause shown to this Board **[27]**.

As for the limited term of his appointment, no objective observer would fear that Harrison J would entertain any sense of lack of independence in trials which he has been specifically asked to take on, outside his home territory and in his retirement. Far from a danger of lack of independence, his appointment has been made precisely to bring to locally highly controversial cases an independent outsider **[28].**

The Board does not need to decide whether other Supreme Court judges in the Turks and Caicos Islands lack sufficient security of tenure and has insufficient evidence of practice to do so - they are routinely appointed for an initial period of three years subject to renewal by agreement, but appointments are subject to the independent Judicial Service Commission. Whatever may be the practice as to their situation, it cannot affect Harrison J. He has been brought in *ad hoc* from outside and there is no sensible prospect that a judge who enjoys sufficient security of tenure to maintain his independence might lose it on the grounds that others lack his advantages **[31-32]**.

On the second ground, not every decision which has to be made by a judge during or in preparation for a criminal trial is susceptible to analysis in terms of burden and standard of proof **[38].** Here, there is no doubt that the decision required by TWAJO – where, in relation to predictive conditions, a judge is required to weigh different factors and make a judgment as to necessity – is not susceptible of analysis in terms of proof or the standard of it **[51].** This applies to both the finding of facts and the evaluation of the interests of justice in light of those findings**.** Indeed, in this case there were no significant disputed primary facts according to Harrison J **[52]**.

Harrison J recalled the fundamental importance of jury trials before working through the factors relevant to the interests of justice test. He was entitled to come to the conclusion he did **[54]**. This was particularly the case in light of: (a) the complexity of the trial issues; (b) the impracticability of finding jurors with no prior knowledge or opinions on the issues at stake given the very small pool (of approximately 6000) to choose from; and, (c) the inevitability that such jurors would be exposed to extra-evidential opinions and information, which had led the Appellants to submit forcefully to Sir Robin Auld that trial by jury could not be fair to them **[55-56].** In any event, even if Harrison J ought to have applied the criminal standard of proof, he could not realistically have reached any conclusion other than the one he did **[57].**

References in square brackets are to paragraphs in the judgment