

REPORT OF TRIBUNAL OF INQUIRY

Introduction

1. This Tribunal was established by the Constitutional Appointments Authority (CAA) on 16 April 2018 to enquire into the question whether the Chief Justice, Mathilda Twomey, should be removed from office for misbehaviour in terms of Article 134(2) of the *Constitution of the Republic of Seychelles*.

2. The Constitution provides –

 “134 (1) A justice of Appeal or Judge may be removed from office only –

 (a) for inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause, or for misbehaviour; and

 (b) in accordance with clauses (2) and (3).”

3. Subclause 134(2) empowers the CAA to appoint a Tribunal if it considers that the question of removing a judge from office under clause (1) ought to be investigated. Any Tribunal so appointed is obliged to inquire into the matter, report on the facts thereof to the CAA and recommend to the President whether or not the judge ought to be removed from office. Subclause 134(3) provides that where the Tribunal recommends that a Judge ought to be removed from office, the President shall remove the Judge from office. Subclause 134(4) authorises the President to suspend a Judge from performing the functions of a Judge where the

question of removing the Judge has been referred to a Tribunal under this provision.

The Members of the Tribunal

4. This Tribunal comprised the Hon Michael Adams QC, the Hon Judge John Murphy and Hon. Justice OlufunmilayoOlajumokeAtilade.
5. Mr Adams, a lawyer from New South Wales, Australia is presently the Chief Commissioner of the Law Enforcement Conduct Commission (an oversight and investigative body dealing with allegations of police and other law enforcement misconduct), having recently retired from the NSW Supreme Court after 18 years. He was admitted to practice in 1969, went to the Bar in 1976 and was appointed Queen's Counsel in 1987. He has also served on the Court of Appeal of the Solomon Islands and as a Judge of the United Nations Disputes Tribunal.
6. The Hon Judge Murphy is a South African lawyer admitted to practice in 1984, presently a Judge of the High Court of South Africa and an Acting Judge of Appeal on the Labour Appeal Court. He is also a Judge of the United Nations Appeal Tribunal. He has served on a number of important Government bodies and held other significant international judicial appointments. For some years he was a leading South African academic and has published widely.
7. The Hon. OlufunmilayoOlajumokeAtilade, is a Nigerian lawyer, called to the Nigerian Bar in 1976, and worked in various senior Government positions until her appointment as Senior Magistrate, eventually becoming Chief Magistrate in Apapa, Lagos State in 1993. In 1996, she was appointed to the High Court of the Lagos State where she has served in various divisions. In 2014, the Hon OlufunmilayoAtilade was

appointed Chief Judge of the High Court of Lagos State. She retired in September 2017.

Initiating complaints

8. The CAA received a number of complaints from Judge Durai Karunakaran ("the Judge") alleging misbehaviour by the Chief Justice. These complaints were dated 26 June 2017, 26 July 2017, 15 September 2017, 24 October 2017 and 9 March 2018. The Chief Justice responded to these complaints at the CAA's invitation and the Judge replied to these responses on 7 July 2017, 28 August 2017 and 6 March 2018. Both the Judge and the Chief Justice attached to their correspondence documents in support of their contentions.
9. The CAA considered the complaints and replies, together with other material, at a meeting on 13 April 2018. After deliberation it resolved to appoint the Tribunal to investigate three matters. These matters arose in various ways from an earlier decision made by the CAA (differently constituted to that which appointed this Tribunal) to appoint a Tribunal to enquire into whether a recommendation should be made that the Judge was unable to perform the functions of his office as judge, which recommendation was ultimately made to the President. In order that the matters referred to this Tribunal for consideration can be understood it is useful first to set out a brief history of the prior enquiry.

The prior Inquiry

10. On 7 October 2016 the CAA resolved to appoint a Tribunal of Inquiry to investigate certain complaints of misbehaviour against the Judge which had been made by the Chief Justice. The members of the Tribunal were Mr Justice Frederick Egonda-Ntende, former Chief Justice of the

Seychelles, Mr Justice Niranjit Burhan and Mrs Justice SamiaGovinden, both judges of the Supreme Court of Seychelles.

11. On 10 October 2016, on being informed of the appointment of the Tribunal,(then) PresidentMichel suspended the Judge from performing the functions of a judge until the Tribunal had completed its inquiry. After some delays, the Tribunal convened to hear preliminary submissions on 14 February 2017. Senior Counsel representing the Judge moved for the disqualification of one of the Tribunal members, sought a stay of proceedings and raised a constitutional issue. On 16 February the applications were dismissed. The Tribunal reconvened on 22 May 2017, when an application was made on behalf of the Judge for the disqualification of two of its members. This was dismissed on 23 May 2017 and counsel for the Judge sought to refer a question arising from the dismissal to the Constitutional Court. This was refused on 24 May 2017. Counsel representing the Judge made a short statement to the Tribunal, after which counsel and the Judge left the Inquiry. Neither the Judge nor counsel appearing for him participated further in the proceedings before the Tribunal. The Tribunal concluded its hearings on 5 June 2017.

12. The Tribunal delivered a report to the CAA on 27 August 2017. The Tribunal found a number of allegations against the Judge had not been proved, some had been proved but did not warrant removal from office, and that five allegations had been proved amounting to gross and serious misbehaviour, warranting that the Judge be removed from office. The Tribunal recommended that this occur. The President (who had, in the meantime, taken office) did not publicly disclose the recommendations of the Tribunal, explaining in a press conference that he was awaiting the ruling of the Constitutional Court on the complaint referred to that body by the Judge.

13. The Constitutional Court delivered judgment in the matter on 19 June 2018, dismissing the Judge's claim of irregularity in the process of appointing the Tribunal. The Judge has appealed against this finding and the matter is pending before the Court of Appeal. In the interim, the Judge remains suspended.

The matters referred to the Tribunal

14. The Tribunal convened at National House, Victoria on 5 June 2018. It published Rules of Procedure (set out below). An addendum thereto identified the matters of complaint that were to be considered by the Tribunal pursuant to the resolution of the CAA. The Tribunal indicated that its inquiry would be confined to the issues identified in the addendum. There was no objection to the addendum or the identification of the issues for investigation and recommendation.
15. The issues identified in the addendum were –

“1. *Abuse of Authority of Office*

- (i) At or about 10am on 10 October 2016 an envelope, containing the order of former President James Michel suspending Judge Karunakaran from office was delivered to the Judge whilst sitting in open Court during the hearing of a case;
- (ii) about 20 minutes after the Judge had adjourned the case he had been hearing, he was given by the Registrar of the Court a memo addressed by the Chief Justice to him requesting him 'immediately' to hand over all the files allocated to him and the keys to his office; and
- (iii) with the assistance of the Principal Secretary from the Department of Information, Communication and Technology, bypassing the IT Manager of the

Judiciary, the Judge's access to all his emails was blocked on the day of his suspension;

2. *Destruction of Evidence*

- (i) A written judgement of the Judge in the matter of *Octobre v Government of Seychelles* CS 17/2002 had been delivered to the Chief Justice for pronouncement of his findings in Court but the Judgment was not delivered, having been destroyed by the Chief Justice, who reheard the case and gave judgment to the opposite effect;
- (ii) the Chief Justice gave inconsistent accounts of meeting Mr Octobre; and
- (iii) the reasons for which the Chief Justice took over the case, in particular, whether she had an ulterior motive connected with the Inquiry into the conduct of the Judge.

3. *Making public the Report of the Tribunal of Inquiry into the conduct of Judge Karunakaran*

The Report of the Tribunal of Inquiry concerning the conduct of the Judge was presented to the President on 28 August 2017. On 11 September 2017 but before the President made any pronouncement under Art 134(2)(b) of the Constitution on the matter, The Report of the Tribunal was placed by the Chief Justice on the SeyLII website.

- (i) The Report was still under 'review' by the President;
- (ii) the matter was *sub-judice* because of the case filed by the Judge in the Constitutional Court to quash the institution of the Tribunal;
- (iii) the Chief Justice publicly blamed the President for delay;

- (iii) in publicising the Tribunal's findings and recommendations, the functions of the President under Art 134(3) were usurped; and
- (iv) the conduct of the Chief Justice exceeded her authority and powers under the Constitution in violation of the constitutional principles of the separation of powers.

4. *The institution of the Tribunal of Inquiry*

- (i) The Chief Justice communicated with a senior official of the Commonwealth Secretariat and the former Chairperson of the Constitutional Appointments Authority concerning complaints she considered were to be made by her in respect of certain conduct of the Judge and the institution and membership of a Tribunal of Inquiry to consider them; *and*
- (ii) Following the institution of a Tribunal of Inquiry and the suspension of the Judge from office, the Chief Justice, on or about 10 October 2016, communicated to the then Chairperson of the Constitutional Appointments Authority the suggested terms of a press release to be issued following the suspension of the Judge.”

The Tribunal's hearings

16. The Tribunal commenced its work on 5 and 6 June, 2018 by considering written applications by and hearing oral submissions from a number of persons who sought leave to appear in the enquiry as interested persons within the meaning of the Rules of Procedure. In the result, none of those applicants qualified as interested persons and leave for them to appear was refused. In substance, the matters which they wished to raise did not fall within those which had been specified by the CAA for determination by the Tribunal; most comprised attempts to appeal from judgments of the Chief Justice with which the applicants disagreed. The

Chief Justice was, of course, given leave to appear as her conduct was the subject of the Tribunal's enquiry. Although the Judge's complaints had instigated the CAA's decision to appoint the Tribunal, he did not seek leave to appear and it was accordingly unnecessary for the Tribunal to consider whether he should have leave to appear. (It should be noted, however, that the Judge gave evidence to the Tribunal and was present at the entirety of the hearings, together with a legal assistant.) Procedural directions were given and further hearing adjourned to commence on 28 July, 2018. The Tribunal, in the result, heard evidence on 30 and 31 July 2018 and 1 and 2 August 2018.

17. The Tribunal heard evidence from the Judge, Mr Francois Octobre, Ms Juliana Esticot, Ms Lena Pragassen, Mr Benjamin Choppy, Mrs Marie-Ange Houareau and Chief Justice Twomey. In each case the oral evidence of the witness was led by Mr Redding SC, Counsel Assisting the Tribunal, and tested both by him and members of the Tribunal; opportunity was also given to counsel representing the Chief Justice to question the witnesses. In the case of the Chief Justice, her representatives were asked to lead her evidence.
18. The Tribunal accordingly had an opportunity to question each of the witnesses and interrogate the complaints against the Chief Justice in order to investigate the facts and circumstances relevant to the matters identified as having been referred by the CAA for enquiry. In this regard, it is convenient to deal with each matter and record the Tribunal's findings in respect of it.
19. Also forming part of the evidence to be considered by the Tribunal was a substantial quantity of documents comprising substantially what was placed before the CAA together with statements taken from various witnesses, Court transcripts and files. The significant documents were

referred to, one way or another, during the hearing and in this Report. They have been retained as part of the records of the Tribunal.

20. The Tribunal provided a copy of its draft Report to each of the Chief Justice and the Judge to enable them to make submissions on its conclusions should they wish to do so, the Chief Justice as she was the subject of the inquiry and the Judge because a number of criticisms were made of his conduct. The Chief Justice did not seek to make any submissions on the draft Report. Although the Judge did not take issue with the conclusions of the Tribunal as to Matters 1, 2 or 3 (except in the general sense that he maintains the evidence inevitably required the conclusion that, in those respects, the Chief Justice's misbehaviour was proved), he made a submission in respect of Matter 4 that dealt in detail with some of the evidence. The submission as to Matters 1, 2 and 3 adds nothing to what he has previously alleged, which we had carefully considered and, as will be seen, dismissed. As to Matter 4, we deal briefly with his arguments at the appropriate part of this Report.
21. Although the Judge's complaints instigated the appointment by the CAA of this Tribunal and raised the issues which were considered to justify inquiry, he is in no sense a party to these proceedings. Except as to adverse findings affecting his reputation (which he has not sought to specifically address) he has no relevant interest in the outcome of the Inquiry. He is a mere informant, bringing matters to the attention of the CAA. As already noted, he did not seek to appear before the Tribunal as an interested party.
22. Whilst dealing with this issue, it is convenient to deal with a submission that undergirds much of the Judge's argument concerning the Chief Justice's role in instigating the proceedings against him. In effect, the Judge submits that the Chief Justice was acting judicially or quasi-

judicially when she raised his fitness with the CAA and interacted with its Chair in respect of the institution of a Tribunal of Inquiry and was therefore bound by certain rules, including those relating to conflicts of interest. This is a complete misstatement of the legal position. The Judge's invocation of the rule *nemo iudex in causa sua* (no-one should be a judge in their own cause) is quite misplaced and indicates a fundamental failure to appreciate the actual legal status of the process instigated by the Chief Justice and undertaken by the CAA.

23. The first and most important point is that the rule applies only to a decision maker. In substance, it expresses one of the principles of natural justice (or procedural fairness) that a decision-maker must not have an interest in the outcome of the decision or, more generally, must not be biased in favour of one or other of the protagonists who might be affected by the decision. In the judicial context, the appearance of bias, as well as the fact of bias, is prohibited. The decisions required by the Constitutional process were: first, whether the information provided to the CAA raised a question about the Judge's fitness which required investigation by a Tribunal of Inquiry; and, second, whether the Tribunal should recommend the Judge's removal. The Chief Justice has responsibility for maintaining the reputation and efficient functioning of the judiciary and, accordingly, if a judge's fitness for office came into question, of bringing the matter to the attention of the CAA for it to consider whether a Tribunal of Inquiry should be constituted. What might properly be done in that event we discuss in some detail below, when dealing with Matter 4. Raising the matter with the CAA in no sense rendered the Chief Justice a party to any proceeding, in particular that undertaken by the CAA to determine whether to constitute a Tribunal of Inquiry. She was no more than a reporter of what she thought to be the relevant matters requiring consideration and, if a Tribunal were appointed, inquiry. The process of the CAA in considering whether to

institute a Tribunal of Inquiry was administrative only. It was not a litigation. Neither the Chief Justice nor the Judge were parties. The Chief Justice had no personal interest in any legal sense in the proceedings or their outcome. More important, and decisive for the disposition of the Judge's submission on this matter, is the point that the Chief Justice was not a relevant decision-maker.

24. The other significant aspect of the matter is that the Chief Justice was not acting judicially. Her role was purely administrative or ministerial. She was entitled to inform herself of all relevant matters and bring into account her personal knowledge of events and make a determination as to whether the Judge's conduct should be referred to the CAA. In doing so, she did not exercise any statutory or Constitutional jurisdiction.

25. Certainly, the CAA was exercising a Constitutional power and was bound to do so properly. This Tribunal, however, is not considering whether the CAA process went awry, despite the fact that the Judge called in aid of his complaints about the Chief Justice what he claims to be shortcomings in that process. The question before us is whether the Chief Justice acted improperly in her dealings with the CAA. (Furthermore, the Tribunal's process is to some extent the subject of present litigation brought by the Judge and it is inappropriate that this Tribunal should enter into that question except to the extent that it is strictly necessary to do so in order to discharge our Constitutional obligations.) We have concluded that the evidence does not support any such conclusion and that she acted properly. The reasoning which explains this conclusion is set out in the section of this Report dealing with Matter 4.

Matter 1: Abuse of Authority of Office

26. The President suspended the Judge at about 9am on the morning of 10 October 2016 “with immediate effect”. This suspension was authorised under Article 134(4) of the Constitution. The President communicated the suspension by letter of the same date addressed to the Judge, in an envelope also addressed to him and delivered by messenger to the Palais de Justice, Ile du Port. Copies of the suspension letter were also provided at about the same time to the Chief Justice, the Chair of the CAA, the President of the Tribunal of Inquiry, and the Attorney General.
27. The Judge testified that he was in court hearing a civil case when it came to his attention that an envelope had been delivered for his immediate attention. The messenger had given it to the Court orderly to take to the Judge. She did so, taking with her the receipt book for the Judge to sign. The Judge stopped the case and, opening the envelope which had been addressed to him, saw the President’s letter. He mentioned to the parties before him that he had been suspended and could no longer continue with the matter and adjourned his court.
28. The Judge said that he retired to his chambers to consider the letter. He recalled that, some twenty minutes later, he received a memorandum addressed by the Chief Justice to him requesting him to hand over all the files allocated to him immediately, and also to surrender the keys to his office.
29. The Chief Justice testified that the first she knew of the suspension was when she received the copy of the President’s letter. She then called the Registrar, Ms Esticot, and asked her to go to the Judge’s chambers to find out if he had been informed of the suspension and to collect his keys and begin the handover process. Ms Esticot returned shortly afterwards and stated that the Judge had said that the Chief Justice should come herself.

To avoid a confrontation, the Chief Justice wrote the memorandum directing him to hand over the files and office keys.

30. Ms Esticot's account of the sequence of events differed somewhat in a number of respects from that of the Judge and the Chief Justice but these are not important, as they do not go to the substance of the charge of abuse of authority. Nor, given the surprising circumstances and the lack of any contemporaneous record, do they reflect significantly on the credibility of the witnesses. We accept Ms Esticot's evidence that she had been requested to go to the Judge's office as requested by the Chief Justice and also to the effect that, when she had asked the Judge about handing over the keys and allocated files he had instructed her to tell the Chief Justice to come to his chambers herself to collect them. We note that, in effect, the Judge denies this. He has no recollection of the Registrar coming to his chambers and making the request.
31. As mentioned, it is unnecessary for us to determine precisely what occurred since, even on the Judge's account, nothing that the Chief Justice did with respect to the communication of his suspension, his occupation of his Chambers or the removal of the files allocated to him could amount to an abuse of the Chief Justice's authority. The Chief Justice was fully entitled to request Judge to hand over his keys and files upon his suspension, since the effect of his immediate suspension was to relieve him of his rights and duties as an active judge. It was obviously important to the administration of justice that steps were taken to attend to the matters allocated to him and, for this purpose, his files had to be collected immediately, since it was necessary to ascertain as soon as possible the extent of any impending requirements concerning the conduct of those cases. Similarly, the suspension had the obvious effect that the Judge could no longer continue to occupy his work space – his chambers – for the duration of his suspension, as he could not in that

period undertake any judicial tasks and the chambers were not provided for personal convenience. He was obliged therefore to vacate them. The Judge never complained of actually being inconvenienced (any more than by being required to remove his personal items) and did not make any request for access after he departed.

32. As the person responsible for the administration of the judiciary, it was both lawful and appropriate that the Chief Justice took possession both of the files and of the keys to the Judge's chambers. The precise manner in which this happened to have been done is not material. Her actions, even if regarded as somewhat discourteous (which we doubt but do not need to decide), did not constitute and could not reasonably be regarded as having constituted an abuse of authority.
33. The Judge also complained that, on the same day, access to his courtcomputer and, consequently, his access to his personal emails was blocked. He believed that the instruction to block this access came from the Chief Justice. He believed that her purpose was a sinister one. It was to deny him access to information that he could possibly have used in the defence of any complaints against him. This is an additional ground for his claim of abuse of authority.
34. In considering this aspect of the matter, it is important to bear in mind that, since shortly after the Chief Justice's appointment, there had been exchanges of emails between her and the Judge raising many matters of complaint about his conduct (later forming, in large part, the complaints made by the Chief Justice about the Judge to the CAA). Furthermore, it was reasonable to expect that the computer would contain a record of the Judge's work documents. It is obvious that it was important to preserve all these records for the purpose of the impending Inquiry, since it was reasonable to expect that the Tribunal might need access to them. At this

point, the Chief Justice was not (and could not have been) aware precisely what matters would be referred by the CAA to the Tribunal or of the course of the investigation which might ultimately need to be undertaken.

35. Mr Benjamin Choppy, the Principal Secretary of the Department of Information, Communication and Technology (DICT) testified that, on the morning of 10 October 2016, he received a call from the Chief Justice. She informed him that the Judge had been suspended from his duties and she was concerned that he might remove or delete emails from his mailbox, which could be a source of evidence. In order to mitigate this risk, access to the Judge's account had to be removed. The Chief Justice requested that this be done and Mr Choppy instructed his Head of Server Operations and Cyber Security to this effect. This was carried out on the same day.
36. On 12 October 2016, Mr Choppy said, the Chief Justice informed him that the Judge needed access to his emails and computer for the preparation of his defence. He was asked to restore the Judge's access. After ensuring that the content of the computer's memory was backed up, he instructed his staff to ensure that access was given to the Judge. A new access code was generated and the details of this were handed on to the Chief Justice, to be given to the Judge, so that he could have access to his email account.
37. At no point did the Chief Justice seek access to the backup memory and, even if she had done so, Mr Choppy would not have allowed it.
38. It is a common incident of suspension that an employer or authority restricts the continuing access of an employee to the employee's workplace and activities. It is also common that employers preserve the

information created or received by an employee or official in the course of their work upon suspension. The preservation of information is not exceptional or unreasonable.

39. Regrettably, the Judge was unable to view with any degree of objectivity the true significance of the actions of the Chief Justice described above. Indeed, it is fair to say that his complaints about her conduct were typically expressed in immoderate terms, making serious allegations on the slightest evidence which, when examined, did not at all justify the language he chose to use. Although it may be a partial explanation for this extraordinary lack of moderation that he was emotionally engaged in the matters set out in his complaints, we observe that it was most ill becoming in any judicial officer, still less a Judge of the Supreme Court of the Seychelles, that he should describe events and express his opinions in this way. This unfortunate and pervasive lack of objectivity makes it difficult to accept, without independent supporting evidence, any of the Judge's assertions of disputable facts. To demonstrate this point we set out below part of what the Judge had to say to the CAA concerning what happened on the day of his suspension –

These despotic, inhumane, and uncivilised acts of immediate, arbitrary eviction, from my Chambers, where I had kept all my personal effects and the immediate blocking of access to my personal email account are prejudicial to my fundamental Constitutional right to be treated with dignity. Undoubtedly, these arbitrary acts, which the Chief Justice has done or committed, or directed to be done or committed by others in abuse of the authority of her office has been prejudicial to my rights. This in my view, constitutes a gross abuse of authority. Since she has committed these prejudicial acts for the purpose of gaining power and control over me, her colleague, the most senior Judge of the Supreme Court, it is to my mind, of the gravest nature in the abuse of authority.

40. When questioned in the Tribunal, the Judge eventually conceded, as was inevitable, that no abuse of office by the Chief Justice was involved.
41. The Tribunal accepts the evidence of the Chief Justice that she acted for the purpose of preserving the information which was contained on the Judge's computer, in particular, his email account. That action was not unusual in respect of an employee or official who was suspended. It could and did not constitute an invasion of privacy since, at no point, did the Chief Justice attempt to access either the computer or the judge's email account. At all events, officials and employees in the position of the Judge do not have a blanket protection from scrutiny of content of their work computers, let alone of their work-related emails.
42. The action taken by the Chief Justice to ensure that the Judge's computer contents were preserved was therefore not only not an abuse of power but a conventional and appropriate exercise of administrative or managerial prerogative in the circumstances surrounding the Judge's suspension.
43. There was a further issue that was raised by the Judge. In his complaint to the CAA of 26 June, 2017 the Judge alleged that the Chief Justice "caused the destruction of two emails", addressed to him by her dated 19 September, 2016 timed at 8.57 am and (in response to the Judge's email replying to the earlier message) at 10.51 am. He said that a few days later, though he could not recall when, "these emails showed up as blank emails, and the copy of her emails appended to my response, in my Sent Items folder, was erased". The Judge stated his belief that the Chief Justice made use of DICT personnel, with the complicity of a technical person, to "cause the destruction of these specific emails which was tangible evidence of false and defamatory allegations she had made against me". In his evidence before the Tribunal, the Judge repeated

several times the allegation that the missing email content contained highly defamatory allegations against him. He said he noticed removal of the text on 9 September, the day before his suspension and that he called Mr Payet, the Court's IT officer to see if it could be fixed, but this was unsuccessful.

44. In her response of 7 July, 2017 to the Judge's allegations, which had been forwarded to her by the CAA, the Chief Justice attached copies of the "empty" emails, reproduced from her email Sent file. The first stated –

Dear Judge Karunakaran, I see you have fixed 11 am to see me this morning in relation to your case clearance and statistics. I also see that you have a long outstanding case to complete please under no circumstances should you adjourn your case for the meeting with me. Priority should be given to finishing this matter. We shall then reschedule your meeting if necessary.

Dr Mathilda Twomey.

The second email simply stated, "Of course".

45. When the content of these emails was brought to his attention during his evidence by Judge Murphy, he accepted that they were not at all defamatory but then asserted that this (innocuous) content could have been inserted. Judge Murphy then reminded him of what he had said in reply to this part of the Chief Justice's response, which was as follows –

The respondent has now produced a copy of the emails MT 5A revealing certain contents in them that were previously missing in the emails of my account as evinced in the documents ... attached to my complaint. If the respondent has the methods of technical knowhow to retrieve the missing contents from my emails, there are a few other emails such as the emails of 27 September 2016 that would be of use to the CAA, which can also be retrieved."

46. It will be seen that the Judge in this passage in substance accepted the authenticity of the emails produced by the Chief Justice and made no suggestion that they had been fabricated. He suggested that the defamatory material may have been contained in other blank emails of 27 September, 2016. Those three emails have now been provided –

Dear Judge Karunakaran,

I am so glad you are addressing the issue of your backlog.

May I point out that proceedings [i.e. transcripts] are brought to your office by your orderly. She has assured me that these are handed to you but remain in your office unsigned and that she cannot therefore put them in the case file. I assume you may not have [had] time to read them, hence your case files are not updated.

We had agreed at our Judges meeting at the proceedings would in any case be placed on the court file. As the integrity of proceedings and case files are within the remit of the Registrar, she will in the future sign off on proceedings and the same will be placed in case files immediately.

Please note that judges are also expected to familiarise themselves with the Shared Folder on their desktops where they may peruse all proceedings and print the same off should they be missing from court files. In that way judges have access to all proceedings and should be cognizant of them before hearings.

If you are having difficulties accessing the Shared Folder please notify IT, specifically James Mkuwa, so that training can be arranged for you.

Dr Mathilda Twomey

Chief Justice

Supreme Court

47. At 8.31 am the Judge emailed, by way of response –

Honourable Chief Justice,

Thank you very much for your prompt action.

Let us work together for the betterment of our country and people by strengthening unity in the Judiciary and weakening our focus on petty issues.

Have a good day!

Warm regards,

Karuna J.

Kind Regards

It is quite obvious that that this email, though ironic, was not in response to a defamatory communication from the Chief Justice. She responded at 8.42 am –

Thank you for your prompt reply. Case management and court administration are the most serious matters that I will continue to prioritise and monitor. I still expect your plan as to how this will be resolved by the date agreed.

The betterment of our country does depend on a strong judiciary especially where justice is dispatched professionally, speedily and efficiently.

I look forward to your plans.

Dr Mathilda Twomey,

Chief Justice

In no sense could any of the Chief Justice's emails be characterised as defamatory, let alone highly defamatory. We accept that the content of

the missing emails was indeed that which is now disclosed in the material tendered by the Chief Justice. It follows that the allegation that they contained defamatory, let alone highly defamatory, accusations is untrue, despite the Judge's repeated assertions to the contrary and his evidence of having a "vivid" memory of them.

48. The Chief Justice has denied ever accessing the Judge's emails. It is obvious (and it must have been obvious to the Judge) that she had no motive for removing the content of the emails identified by the Judge, since their content was innocuous. Indeed, even if they had been defamatory, given the Judge's own evidence that they did not more than repeat earlier communications, there was no motive for their removal even on his account. The reasoning of the Judge around this issue is so irrational that it is difficult to accept that he actually believes it. If he does, then it calls into serious question his judgment in any matters concerning the Chief Justice; if he does not, then he is dishonest. If he is guessing because he just doesn't know how the emails came to lose their content (which is, perhaps, for him the most favourable construction the facts bear), then the allegation is made with irresponsible recklessness unbecoming the character of a Judge.
49. The allegation of the Judge about this matter should be rejected and the Chief Justice's assertion that she played no role in the removal of the content of these emails should be accepted.
50. We add that significant additional information has been obtained by the Tribunal about the matter. The Tribunal raised the issue of the missing content with Mr Choppy, who caused the Judge's email account which had been backed up to be examined. He requested assistance from Microsoft, the provider of the email application in respect of the empty emails. He was informed, and the Tribunal accepts, that Microsoft have

been aware for some time of a “bug” related to the interaction between an anti-virus software and the Microsoft Outlook programme which causes the body of certain emails to be deleted. It is virtually certain that the removal of the content of the Judge’s emails was due to a “bug” in the computer system used by the Seychelles judiciary (which obviously needs some attention).

51. In our view there was no abuse of power by the Chief Justice in relation to her memorandum requesting the Judge to hand over his files and keys to his chambers or restricting the Judge’s access to his email account. Further, the removal of content in certain emails between the Judge and the Chief Justice was not occasioned by the Chief Justice at all, but occurred because of a glitch in the operating systems used by the Judiciary. Nor in this regard was there any rational basis for the Judge’s allegations against the Chief Justice.
52. We therefore find that, in respect of the first matter, so far from the Chief Justice misconducting herself or engaging in any conduct which could be construed as misbehaviour, she acted both lawfully and appropriately, and well within her responsibilities as Chief Justice.

Matter 2: Destruction of evidence

53. The matter to be investigated under this head concerns what had happened to what the Judge asserted was a written judgment which he had prepared in the case of *Octobre v Government of Seychelles CS17/2002* and was ready to deliver before he was suspended, but which the Chief Justice discarded and, obtaining the consent of the parties to consider the case, issued a judgment of her own, differing from that of the Judge. It is also suggested that the Chief Justice had an improper motive in taking over the case, which was to favour Mr Octobre in anticipation

that he might testify against the Judge in the 2017 Tribunal proceedings (and, by extension, for the Chief Justice, who was the complainant). Before dealing with the so-called “written judgment” it is necessary to set out some background so that the legal status of this document can be determined.

54. Mr Octobre’s case was not complicated. He had suffered an injury to his leg which required hospitalisation. He alleged that the medical treatment afforded to him not only did not heal his injury but made it substantially worse. Both the factual and medical issues were straightforward, although the legal question involved was not altogether simple. The action was commenced in 2002 and it is clear enough that a failure of appropriate judicial management substantially contributed to delays in its finalisation, although significant responsibility must also be laid at the feet of the lawyers who were involved. For most, though not all, of the time that the matter was in the court, it was in the Judge’s list of cases.

55. The final witness had given evidence on 16 June 2016 and the matter adjourned for written submissions to be filed on 7 September 2016 and. On that date, the case was mentioned before the Judge. The parties were represented by counsel. Mr Esparon, for the defendant noted that the matter was in the list that day for the purpose of filing submissions. However, these could not be prepared, since the transcript of the evidence of the doctor (said to be crucial for the defendant) was not available. The Judge commented that this was probably because it had not yet been typed and suggested that the case be mentioned on 5 October 2016. Mr Esparon, with the agreement of Mr Ferley (standing in for Mr Derjacques) for the plaintiff, submitted that 19 October, 2016 was an appropriate date. The transcript notes the following –

Court: the case is to be mentioned on 19 October, 2016 at 9.30 am. In the meantime, I direct the Registrar of the Supreme Court to ensure that all proceedings [ie, transcripts] are typed and complete on record.

A note was put on the file cover sheet that the matter was set down for mention.

56. In his letter of 26 July 2017 the Judge said “there is nothing on record... [In the transcript] to show that I had agreed to accept submissions from counsel” and asserted that the reason for his adjourning the matter to 19 October was to give ample time, “so that I could compile the judgment in good time and deliver it on the 19 October, 2016”. The first of these categorisations of what transpired on 7 September is false. The making of submissions and the reasons for their delay took up the whole of the subject matter of the proceedings on that day except for discussions about a date which should be fixed for the purpose of filing submissions. The order shows beyond question that the Judge had indeed agreed to delay filing of submissions, accepting that the reason for the delay was that the transcript had not been completed. The reason now given by the Judge for the adjournment, namely for the opportunity to compile his judgment, was not stated at any point during the hearing, let alone hinted at or implied in the order he ultimately made. The unambiguous language of the court record leaves no room for uncertainty, let alone mistake. It must follow that the Judge’s statement to the CAA of what transpired in that hearing of at 7 September 2016 was intentionally or, at best, recklessly misleading, with corresponding adverse consequences for the assessment of his credibility as a witness.
57. The Judge pointed out in his letter that *Octobre* was referred to in a status report provided to the Chief Justice on 3 October 2016 with its status being, “Judgment to be delivered on 19/10/16”, making no mention of the

need for submissions. It appears that he had asked his orderly to contact the parties to let them know that he intended to deliver judgment but, it is clear that her attempts to do so at not succeeded by 10 October 2016.

58. In his letter to the CAA, the Judge asserted that he “compiled and typed the judgment myself ... in mid- September 2016”. This, however, was not quite the case. The President of the Tribunal, with the approval of the other Members arranged for a technical examination by staff of the NSW Law Enforcement Conduct Commission (of which he is the Chief Commissioner) of an electronic copy of the judgment that was provided by the Judge. This showed that the document was created on 27 September, 2016 and last saved on 30 September 2016. The file shows that written submissions from the defendant, dated 17 September 2016 had been received on 29 September 2016 but no submissions had been received on behalf of the plaintiff. Despite this and knowing (on his own account) that the plaintiff’s lawyers had not filed the submissions and, inevitably in our view, also that they expected that they would not have to do so until 19 October, the Judge completed what he thought was or would be his judgment which, he said, he placed on the file for delivery. Indeed, according to Ms Dufresne (his court orderly), sometime before he was suspended he told her to inform Mr Derjacques and Mr Esparon that the judgment was ready and, if they had any case in the court to come to see him so he could read (ie, deliver) the judgment. Such a direction, of course, necessarily implied that submissions would not be considered, even if they were filed. Ms Dufresne she said she was unable to contact Mr Derjacques. She said that, at this time, she noticed that the Judge had signed the judgment. This, however, is inconsistent with the evidence of the Judge before the Tribunal that he signed the judgment after he was suspended (this is covered below).

59. (Although, as will become clear in due course, the Tribunal has concluded that what the judge refers to as his “judgment” was, as a matter of law, no more than a draft or proposed judgment, for ease of reading we have not troubled in what follows to make this distinction and mostly refer to the document as a “judgment”. We trust that this will not give rise to any confusion.)
60. The fact that the Judge had not considered and did not intend to consider any or, at least the plaintiff’s submissions, is made clear, not only because none had been received from the plaintiff at this point but because of his description of his own process as follows –

In my judgment, after appreciating all the evidence and pleadings that had been adduced during the trial stage, I had dismissed the plaint. I signed a printed copy, and filed it on record to form part of the case records ... The file was kept in my possession in chambers with the judgment filed in it. This was ready to be delivered on 19 October 2016.

In his evidence, furthermore, the Judge averred that, even if the plaintiff’s submissions had been filed before the date on which he intended to deliver the judgment but after he had signed it, he would have disregarded them, even though he was of the opinion that he was able to amend his judgment, even after it had been signed, at any time before it was delivered. (We return below to disputed evidence about the appropriate procedures.) The completed written judgment was, he said, placed inside the file prior to his suspension on 10 October 2016. The Judge’s account in his letter to the CAA said that he had “signed a printed copy and filed it on record to form part of the case records”. The Chief Justice had said in her letter to the CAA of 30 June 2017 that he “had not completed the case when she received the file following my suspension”. The Judge responded –

“The Respondent’s statement that I had not completed the case, when she received the file following my suspension, is again another falsity, in light of both my case backlog report, and my completed and signed the judgment in the case ... All judicial functions, including the compilation of judgment in this case, were completed prior to the date of my suspension.”

The clear implication of these accounts is that the *signed* judgment had been placed on the file before his suspension. (It should be noted that the matter referred to by the Chief Justice as demonstrating that the case “had not yet reached completion” was that “submissions were still outstanding”. This point was not addressed by the Judge.) However, in his evidence before the Tribunal, the Judge asserted several times that he signed the judgment *following* his suspension. Signing a judgment is intended to convey that (at least as at that point in time) the judgment which was hitherto a draft is regarded by the Judge as representing his concluded opinion. That this is also the Judge’s view is plainly indicated by the above passages. So considered, his signing the draft judgment after suspension was a purportedly judicial act performed at a time when he was unable to exercise any judicial function of any kind. Accordingly, the Judge’s statements to the CAA, set out above, were (to say the least) misleading: on his present account, he had *not* completed his judgment before his suspension.

61. There are several other obvious problems (which should have been appreciated by the Judge or, indeed, any judge) with the argument that the only appropriate course was for the Chief Justice or some other judge to deliver the judgment he had written. We discuss those problems below, following a brief summary of the evidence about what happened to the file when it was taken from the Judge’s chambers.
62. The Judge testified that, after his suspension, the files in respect of his outstanding cases were sent to the Chief Justice. He stated that he had

placed a yellow “post it” sticker on the file indicating that the judgment had been completed and was simply awaiting delivery on 19 October 2016. He expected the judgment, which was in favour of the defendant, to be delivered on that date. The Judge was unable to say, of his own knowledge, what happened to the file when it was removed from his chambers. There is no doubt the Registrar, Ms Esticot, took it with a large number of other files to the Chief Justice’s chambers. The Registrar, who needed to inspect the file to ascertain whether the case was listed within the next week and therefore required urgent attention, said that no judgment was on the file.

63. The Chief Justice’s evidence, in substance, was that the files brought to her chambers were in disarray and she directed Ms Dufresne to take them and put them in order, in particular by obtaining missing transcripts and placing them in the relevant file. She said that, during this process, which took some time, Ms Dufresne brought a document to her chambers and said, “This is the judgment from Judge Karunakaran in the Octobre case”, to which she responded, “I cannot accept this”. According to the Chief Justice, Ms Dufresne then took the document away. She could not recall where the Octobre file was at this time. Ms Dufresne stated in her evidence that, whilst in the Chief Justice’s chambers, she had drawn her attention to the file and the judgment prepared by the Judge. She said that the judgment was signed. She said that the Chief Justice had told her that she was to leave the file with her and she would attend to it.
64. It is unnecessary for present purposes to attempt to reconcile the differences between the accounts of the Chief Justice and Ms Dufresne. Both agree that, one way or another, the Judge’s judgment came to the Chief Justice’s attention at the instigation of Ms Dufresne. Whether it was signed at that point, we do not need to determine. We accept, however, the evidence of the Chief Justice that at no relevant time was the

judgment in her possession and that she only saw a copy it long after the Octobre case was completed. It follows that we reject the suggestion that she destroyed the Judge's judgment.

65. Whenever the Judge's draft was signed, it could no longer be delivered after he had been suspended. The Chief Justice's view was that, because the Judge had been suspended, the judgment had no legal status as it had not been delivered. She believed, accordingly, that it would have been inappropriate to have regard to the judgment or to deliver it. An additional problem was that submissions had not been received on the part of the plaintiff, so that the judgment would have been delivered in breach of the fundamental rules of procedural fairness.
66. In the result, the Chief Justice took over the file and, when it was mentioned on 19 October 2016, presented the parties with two options: either to conduct the trial on the basis of the evidence already given and deliver judgment herself, or arrange for the case to begin again before another judge. The parties chose the former course on the basis of tendering and admitting the transcribed record. The Chief Justice delivered judgment on 25 November 2016 with a verdict in favour of the plaintiff, Mr Octobre. She found that the defendant was liable to Mr Octobre for his injury and awarded him damages in the sum of SR500,000. The Government did not appeal this judgment.
67. An additional complaint made by the Judge is that the Chief Justice's "illegal" judgment in favour of Mr Octobre was contrary to authority, "obviously to allure the plaintiff with a huge award in this matter" [into giving evidence in support of her complaint to the Tribunal]. If true, this would have constituted gross criminal misconduct. Such an allegation would require convincing evidence to support it. So far from pointing to such evidence, the Judge neither produced nor pointed to any evidence

that could rationally justify his allegation, let alone establish its truth. Contrary to his assertion about the Chief Justice's judgment, it is a careful and convincing discussion of relevant authorities leading to a reasonable conclusion. (This is in marked contrast to his own judgment which, for breach of procedural fairness alone, must have been overturned on appeal.) Nor was Mr Octobre's evidence likely to be controversial in any impending Tribunal of Inquiry, since it concerned only the inordinate delay in the hearing of his case, a fact which was overwhelmingly established by the record and not capable of disputation. Indeed, we note that the Judge made no criticism of the Mr Octobre's evidence in the Tribunal that considered his conduct. There was no possible motive for any "allurement". In light of these facts, which must have been well understood by the Judge, this allegation was malicious, improper and irresponsible in the highest degree. We unhesitatingly reject it.

68. The issue raised by the Octobre case involves two related but distinct questions: the first is whether the Judge's judgment was legally effective; and the second, if it were ineffective, whether the procedure adopted by the Chief Justice to deal with the case was jurisdictionally valid.
69. The first question is easily answered. Unless legislation or Rules of Court provide otherwise, a judgment is only final when it is delivered in open court. No such provisions apply in the present case. Exceptions are prescribed in civil cases for judgments by consent or by default, when filing in the Court registry will suffice. Aside from the exercise of particular legislative jurisdictions (not relevant here) orders disposing of litigation must be made in open court and, until this occurs, the judicial function in respect of the case has not concluded. It is fundamental also to the administration of justice that a court must give an explanation which adequately informs both the public and the parties why it has made

the order which has been pronounced. For this reason the term “judgment” is often used both for the ultimate order and the reasons for it.

70. It has long been the law that a judge is entitled to amend or even reverse his or her decision at anytime before the order is delivered. In some jurisdictions amendment is even possible after the order has been delivered but it is not necessary to deal with those circumstances for present purposes. As it happens, each of the members of the Tribunal have had the experience in their judicial capacity of thinking that a draft judgment and consequential orders have been finalised but, before delivery, significantly changing one or other of these elements. In fact, such a practice is commonplace, as agreed by the Judge in his evidence before the Tribunal. It follows that what the Judge described as a “judgment” was, at best, *adraft orproposed* judgment, having no legal effect, which could have been amended by him at any time before pronouncement of the ultimate order disposing of the case. Because he was suspended, the Judge was unable to deliver any judgment or make any orders and no other judge could deliver a judgment which was not his (or hers) or make orders in a case over which he or she had not presided.
71. This situation is entirely different from that which might arise when a judge has completed a hearing but is unable to deliver a finalised judgment,for example, because of physical absence or even because it was convenient, for some reason or another, for another judge to deliver the judgment. As a matter of law, the judge delivering the judgment stands in the place of the judge who heard the case, exercising the jurisdiction of the Court. But if the judge who heard the casehas not delivered judgmentbecause he or she no longer has thejurisdiction to do so, say by retirement, or has died, then the second judge has no jurisdiction to do so either. The same must be the case where the judge has been suspended from his or her judicial functions before judgment

has been delivered. Communicating a proposed judgment for another judge to deliver is, in that case, to attempt to perform a judicial function which cannot, because of the suspension, be undertaken. The Judge accepted in his evidence that he could not himself deliver judgment and make any order following his suspension. By parity of reasoning he could not, in effect, do so by passing on that task to another judge.

72. The Chief Justice, accordingly, was not only correct to disregard the fact that the proposed judgment had been brought into existence by the Judge but was legally bound to do so. This decision was incapable of constituting misbehaviour.
73. What then was the Chief Justice to do? The only way the case could be decided was to conduct a new trial. Both in fact and law this is precisely what the Chief Justice did. The distinction between the procedure adopted by her and that of a conventional case was that, rather than rehearing the witnesses, the parties consented to the Chief Justice conducting the trial by admitting into evidence the transcript of the proceedings before the Judge and allowing counsel to make submissions as to the law and the facts.
74. Although it is true, as a general proposition, that assessing the credibility of witnesses usually requires their evidence to be given in the courtroom so the judge can evaluate it, this need not always be the case. The law of evidence makes provision for the admission of statements of an unavailable witness in certain circumstances. Furthermore, if the parties agree that the matter is to be decided on the transcript of evidence taken in another hearing or proceeding or, for example, the question is a purely legal one capable of being determined on unquestioned documentary material, so that credibility is not in issue, there will be no need to assess

the truthfulness or reliability of a witness. A criminal case, of course, raises significantly different issues, but this was a civil case.

75. The discussion in *Petrousse v Gregoretti* (unreported, Seychelles Court of Appeal, 25 April 2008), which is relied on by the Judge to support his argument that the Chief Justice's conduct of the *Octobre* case was unlawful, and the authorities referred to in that judgment concerning this aspect all involved cases where the court which ultimately determined the case was differently constituted to the court which had earlier taken the evidence and where the parties had not consented to the tender of the earlier evidence in the continued proceedings, or otherwise were criminal trials. They were thus cases in which some or all of the evidence had already been heard and then the trial *continued* before a differently constituted court on the basis, in part or in whole, of that earlier evidence. As mentioned above, this is not what happened in *Octobre*. In point of law, the case *started again* before the Chief Justice with the transcript of the earlier evidence being admitted as evidence in the new trial by consent of the parties. It is, perhaps, worth noting that Mr *Octobre*'s credibility was not in issue, as is obvious not only from the Chief Justice's judgment but also from the Judge's proposed judgment; furthermore, an admission to this effect was necessarily implied by the defendant's acceptance of the proposal that the case proceed on the basis of the transcript.
76. As referred to above, the Judge's proposed judgment was at all events incomplete, given his evidence that it had not been signed until after his suspension. Although this fact might well, of itself, have prevented giving any legal effect to the proposed judgment, it is not necessary for us to determine this additional point.

77. It follows that the conduct and disposal of *Octobre v The Government of the Seychelles* by the Chief Justice was well within the jurisdiction of the Supreme Court and an entirely appropriate exercise of that jurisdiction. This could not amount to misbehaviour.
78. The additional reason given by the Chief Justice for not being prepared simply to deliver the Judge's proposed judgment was that this would have constituted a fundamental breach of procedural fairness, because it had been finalised by 10 October 2016 (perhaps by 29 September 2016) without having notice to the parties of varying the existing order or bringing forward the date specified for the filing of submissions by 19 October. In short, had the Chief Justice delivered the Judge's judgment as proposed by the Judge, the plaintiff would, in effect, have been ambushed. It could not be expected that the Chief Justice would be a party to such patent injustice.
79. It is necessary, however, to deal with the suggestion of the Judge that it was not necessary to inform the plaintiff's legal advisers of his intention to deliver judgment on 19 October without considering any submissions they might wish to make, even if they were filed on that date in compliance with his extant order.
80. When confronted with the fact that no submission from Mr Derjacques on behalf of Mr Octobre was on the file, the judge said –

“Actually the Practice Direction – according to the Chief Justice, you fix the date. If there is no written submissions, you proceed with the judgment. That was the practice direction given. Though I was not happy – this is the area where we had some difference of opinion – and then she insisted I should proceed with the judgment.”

We point out that, of course, 19 October 2016 was explicitly fixed for mention and *not* for judgment. His later evidence was to the effect that, in a number of earlier cases, counsel had been informed that, if submissions were not filed within a specified period, the court would proceed to give judgment “because of the direction given by the Chief Justice”. The basis for the assertion that the Chief Justice had issued a Practice Direction was a letter of 20 June 2016 written to the Judge by the Chief Justice in relation to the “inordinate delay” in the case of *Didon v Roucou Constructions*. Such a private letter could not, of course, amount to a Practice Direction, which is a statement issued by the Chief Justice generally to the profession about procedures to be adopted in the Court. No such Practice Direction was made or published.

81. The evidence of the Chief Justice was that she had a discussion with the judge about the delay in the Didon case and that she explained to him that, in the absence of submissions being filed, he could very well proceed to judgment after having warned counsel about it. The Chief Justice added that, in judges meetings, she had emphasised the importance of not delaying cases because submissions were not forthcoming but had never said that judgments could be delivered in the absence of giving notice to the parties that the failure to file submission in accordance with direction could result in judgment been given in their absence.
82. We do not accept that the Chief Justice ever directed the Judge (or any judge), either in the context of a particular case or generally, that it was appropriate for judgment to be delivered without submissions where the parties had not been informed that this could be the consequence of a failure to file submissions as ordered. It is most unlikely that the Chief Justice would give such a direction, so contrary (as the Judge agreed) to well-known and universally accepted rules of procedural fairness. The

Chief Justice's evidence that no such direction was given should be accepted.

83. The Judge also alleged to the CAA that what he asserted to be inconsistent accounts given by the Chief Justice in relation to meeting with Mr Octobre and the admission (as he considered it to be) that she had in fact met him demonstrated misconduct on the Chief Justice's part. In the Chief Justice's letter of 7 July 2017 to the CAA, she stated that the only contact that Mr Octobre had with her office was with her personal assistant and the Registrar and that she had no personal contact with him at all. In the transcript of evidence of 25 May 2017 before the earlier Tribunal, the Chief Justice is recorded as having stated, "He [Mr Octobre] came regularly to me to complain that he was awaiting judgment in this case and could I do anything for him". The transcript of 31 May 2017, records that Mr Octobre was asked –

"Q: Did you have any occasion to visit the current Chief Justice to make a complaint about this case?

A: Yes."

84. Both Mr Octobre and the Chief Justice gave evidence to this Tribunal about this matter. Mr Octobre stated that he had indeed sought to complain about his case, in particular that he had failed to receive the money awarded by the court as damages. He said that these complaints had not been addressed to the Chief Justice directly, but to her office. At no stage had he spoken directly with the Chief Justice. He had only ever seen her in court.
85. The Chief Justice stated in evidence that she had no personal contact with Mr Octobre. She explained that the answer she gave in the previous Tribunal was to explain that she was aware that Mr Octobre had come to

her office to complain about his case. The statement that he had “come regularly to me” was intended to convey that he had come to her office, rather than to her personally. She had used the expression loosely.

86. We accept the explanation of the Chief Justice. It would be highly unusual for the Chief Justice to see a litigant personally, though this might not necessarily be improper, depending on the circumstances. In a very exceptional case, a litigant might personally approach the judge hearing his or her case but, at the very least, such a contact would have to be notified to the other party and placed on the public record with an explanation of the circumstances. There is, however, nothing to suggest that Mr Octobre had any contact with the Chief Justice, either personally or with her staff when she became the trial judge for his case. Mr Octobre’s denials that he had ever seen the Chief Justice personally, as distinct from in court, were credible. In the absence of any further evidence suggesting otherwise, we accept the Chief Justice’s explanation for the loose use of words in the Tribunal and that she intended to convey that Mr Octobre had complained to her office, rather than herself. We should add, in fairness, that it would have been perfectly reasonable for Mr Octobre to have approached the Chief Justice (had he in fact done so) to complain about the unacceptable delays in the hearing of his case and even to have done so in person, providing she was not then presiding over his case.
87. We therefore conclude that the Chief Justice is not guilty of the destruction of evidence in relation to the “judgment” of the Judge in the Octobre case. Furthermore, there is no evidence which supports an allegation that the Chief Justice met Mr Octobre personally or had any motive to influence Mr Octobre to assist her in her complaint against the Judge.

88. We therefore find that the Chief Justice is innocent of any misbehaviour in relation to this matter.

Matter 3: Making public the report of the Tribunal of Inquiry into the conduct of Judge Karunakaran

89. The report of the Tribunal into the Judge's conduct was made available and presented to the President on 28 August 2017. It is not disputed that the President did not act upon the report after receiving it. The Chief Justice testified that she received a copy of the findings of the Tribunal on 25 August 2017 from the members of the Tribunal. She was not informed that the findings were confidential and should not be disclosed. The Tribunal had conducted its proceedings in public and she had no reason to believe that it was not in the public interest that they should be published.
90. The Chief Justice said that she considered that publication of the Tribunal's report met the criteria for publication on the SeyLII site, since it published matters of legal interest from courts and tribunals in the Seychelles. She sought the advice of her executive legal assistant, Ms Joelle Barnes, who chaired the working group of SeyLII. Ms Barnes agreed that the report should be published, particularly as there was widespread speculation about the contents of the report. The members of the Tribunal had no objection to the publication of the report. It was therefore uploaded onto the SeyLII website on 11 September 2017.
91. Later that day, the Chief Justice testified, her office was contacted by the Seychelles Broadcasting Corporation to interview her concerning the report. Her interview was broadcast by the television station. In the course of the interview she referred to the fact that the President had not

yet made the report public. This was a factual assertion and did not imply a criticism of the President.

92. (We note that, during the SBC broadcast of 11 September, 2017, the reporter stated –

In a press conference, the Chairman of the Tribunal, Judge Frederick EgondaNtende said that, with the completion of the Tribunal's task, it was up to President Faure to reveal the contents and announce a decision.

The Chief Justice's evidence to this Tribunal was that, because of the daily enquiries from the Press, members of the Bar and other persons as to the contents of the report, she sought the advice of the members of the Tribunal as to whether she could publish it. Permission for publication was given both orally and in a confirming email. This has been confirmed by an affidavit of the Hon Judge Ntende.)

93. We must consider whether the publication of the report on the website and through the interview with SBC was improper or unlawful or otherwise constituted misbehaviour by the Chief Justice. It was suggested that it was improper for the Chief Justice to publish or discuss the report because the matter was *sub judice*, as the Judge's case to quash the Tribunal and its proceedings was still pending before the Constitutional Court. The *sub judice* principle provides that it is a contempt of court for anyone to attempt to influence, by words or otherwise, the decision of a legal tribunal or court which has yet to finally consider a dispute brought before it. The question is therefore whether publication of the report was an attempt to influence the Constitutional Court in its consideration of the case brought before it by Judge.

94. There appears to us to be no basis for any suggestion that the publication of the Tribunal's report would or even could have had any influence on the consideration of the case by the Constitutional Court. The Judge had asked the Constitutional Court to consider the question whether he had been denied procedural fairness to which he was legally entitled because he had been given no opportunity to make representations to the CAA before it made its decision to establish the Tribunal of Inquiry in 2016.
95. There is nothing in the report of the Tribunal or its disclosure which could either have been relevant to or have been taken into account in its the consideration by the Constitutional Court of the dispute referred to it. The content of the report had nothing to do with whether or not it was appropriate for the CAA to give the Judge an opportunity to respond to the proposal to refer his conduct to a Tribunal of Inquiry, let alone whether there was any legal obligation on the CAA to provide him with that opportunity.
96. The publication of the report therefore did not offend against the *sub judice* principle. It is important to understand, furthermore, that the *sub judice* principle will only rarely apply to make discussion of matters in the public arena illegal, simply because proceedings are current in a court or legal tribunal which might involve them, providing the discussion is not intended or calculated to prejudge the proceedings. While any attempt to do so may well amount to contempt of court, it is also to be implicitly accepted as fundamental to the administration of justice and the constitutional position of the judiciary that judges will not be influenced except by the evidence adduced in and submissions made to the court.
97. The further question is whether the Chief Justice exceeded her authority and violated the principle of the separation of powers in making the report public. The Chief Justice was both the "complainant" in respect of the

matters under consideration by the Tribunal and was also, as Chief Justice, the head and chief administrator of the judiciary. It is manifest that she had a legitimate interest in receiving the report and appropriate standing for disclosing to the public what it said.

98. It is difficult to understand how the publication of the report before any action was taken by the President raised any issue concerning the separation of powers. Article 134(3) of the Constitution simply requires the President, where there is a recommendation to that effect, to remove the relevant judge from office. That provision says nothing about making any pronouncement, public or otherwise; neither does it mention publication of the report of the Tribunal of Inquiry.
99. It is fair to say that no specific role is given to the Chief Justice about this matter either. The respective responsibilities concerning publication of the report must therefore be a matter of implication. The question of the misbehaviour or otherwise of a judge and the possibility of his or her removal is a matter of constitutional importance and considerable public interest, certainly of direct interest to the President but also to the Chief Justice, since both of them have Constitutional responsibilities in relation to the matter, though in different respects. The Constitution, it must be noted, does not give the President a discretion whether to remove a judge after a recommendation to that effect by a Tribunal of Inquiry. If the Tribunal of Inquiry makes such a recommendation, the President is constitutionally mandated to carry the recommendation out.
100. The question of acting contrary to the separation of powers contained within or implied by the Constitution cannot be considered abstractly. Each suggested breach must be examined in light of the way in which specific powers are entrusted to the particular Constitutional organ in question and removed from others. Essentially, there must be a

usurpation or attempted usurpation by one body or authority of the role given by the Constitution to another body or authority before there can be a breach of the Constitutional separation of powers. Depending on the circumstances, such a breach might or might not have legal consequences. At most, if the only matter at issue is the breach itself, the action may be found to have been undertaken without legal authority and therefore to be legally void. In this context, it is important to remember that, merely because a particular task is entrusted to one Constitutional organ does not necessarily mean that the task cannot be undertaken by someone else. There can be no doubt that, in the present case, the President was impliedly authorised to make the report of the Tribunal public. It does not follow that the Chief Justice was, therefore, not legally able to do so. To the contrary, the maintenance of public confidence in the judiciary is a public interest of a very high order and part of the functions of a Chief Justice. It was a matter for her to determine whether publication of the report, which was given to her in her official capacity, was in the public interest or otherwise. In this respect she was entitled, indeed bound, to act upon her independent judgment about what she should do with regard to publication of the report. In exercising this responsibility, she was not directing the President as to how he should exercise his constitutional duty.

101. In the circumstances, we do not find that the publication by the Chief Justice was wrong, or exceeded her authority or powers or constituted an infringement of the doctrine of the separation of powers between the judiciary and the executive. Indeed, it was appropriate that the report should be published expeditiously in the light of the constitutional implications and public interest concerning the matter itself and the judiciary in general.

102. This matter concerns communications between the Chief Justice and the Chair of the CAA and with a senior official of the Commonwealth Secretariat concerning complaints potentially to be made by her in respect of the conduct of the Judge and the appointment and membership of a Tribunal of Inquiry to consider the complaints. The underlying suggestion is that the Chief Justice improperly influenced the establishment of the Tribunal of Inquiry and its membership.
103. It is useful to start with relevant emails from the Chief Justice and a press release suggested by the Chief Justice about the proposed inquiry into the Judge's conduct. The relevant email correspondence is set out below in chronological order.

2 October 2017

From the Chief Justice to Mark Guthrie, Legal Advisor, Justice Section, Rule of Law Division, Commonwealth Secretariat –

“We met in Seychelles this year on your visit with Pauline Campbell. We discussed, among other things, my difficulty with having judges removed or suspended for their incompetence or misbehaviour. Things have come to a head and I have written to the judge concerned with a copy to the Constitutional Appointments Authority (CAA). After discussion with the Authority I have now prepared a file asking that Judge Karunakaran be removed both for misbehaviour and incompetence.

They have contacted the previous Chief Justice, Frederick Egonda-Ntende who is willing to chair the Tribunal. Another local judge, a woman for gender neutrality has also accepted to sit on the Inquiry.

They have asked me to contact you to see if you would be willing to sit on the three member Tribunal. If you are not able to do so I wonder if the Commonwealth can assist in any way with another nomination to help us out. It will be a historic first for Seychelles

to have such an Inquiry but I don't believe that I can progress the Judiciary until this issue is dealt with once and for all. Given your work on this issue I think your assistance and participation is all the more vital.

I attach the initial letter sent to Judge Karunakaran (but there is much more evidence in the file re his incompetence and misbehaviour). I also attach the relevant constitutional provisions.

I am afraid I need an urgent answer from you as the present President steps down on 16th October 2016 and we want to have the Tribunal established before then.

I am in any case indebted to you for your guidance and I look forward to your reply."

3 October 2016

From Mr Guthrie to the Chief Justice –

"...Whilst I am most sorry to read of the circumstances which have given cause for the constitution of a Tribunal of this kind, I am honoured to be invited to serve on it.

However I will need to discuss the invitation with my director and ultimately the decision whether I can accept the invitation will be that of the Commonwealth Secretary General.

I note the time constraints which you are under and I will do everything to give you a reply within your deadline."

3 October 2016 5:56am

From the Chief Justice to Marie-Ange Houraeau (then Chair of the CAA)

"I know I have to act quickly but as you can see I am making sure that everything is in place. If we get Mark Guthrie it will give the Tribunal a lot of credit as he has been initiating measures all over the Commonwealth in terms of the proper appointment and removal of Judges. He is an eminent barrister and would qualify

under our Constitution as a Tribunal member. As soon as he gets back to me with permission from the secretariat I will move with the formal letter and file of evidence to you.

In this way my decision to bring the matter to you will be seen as less political and more because of judicial incompetence and misbehaviour.

Please bear with me.”

At 11:41am Mrs Houraeau asked the secretary to the CAA, Lina Pragassen to print out the email correspondence from the Chief Justice and put it on file in respect of what was called the “Tribunal case”.

5 October 2016

From Mr Guthrie to the Chief Justice –

“I have discussed the request that I serve on the proposed disciplinary tribunal with my superiors.

However, the view of the Secretariat is that it would be preferable if we were to suggest names of those who you might approach to assist with this task.

Therefore, might I propose the following retired judges (in no particular order) whom you might approach:

1. The Hon. Margaret Wilson QC. Ms Wilson is a retired judge of the Supreme Court of Queensland. In addition she currently serves on the Court of Appeal of the Solomon Islands...
2. His Honour Peter Beaumont CBE QC. Mr Beaumont retired as Recorder of London in 2013. In this capacity he was the senior resident judge of the central criminal court in London. ... he currently serves as an appeal court judge in Jersey.

If you would like further recommendations, please let me know and I will endeavour to assist further.

The provisions of the Commonwealth model law on judicial service commission in relation to the procedures of a judicial disciplinary tribunal may be of use to the Tribunal to be constituted. Whilst I know you already have a copy of this I attach a further copy for your kind attention.”

6 October 2016

From the Chief Justice to Mrs Houraeau –

“As it is no longer appropriate that I involve myself in the choosing of the Tribunal panel I forward Mr Guthrie’s response for your action. You may decide to approach one of the candidates proposed or chose another with the Attorney General’s advice, given the time constraints.”

10 October 2016

From the Chief Justice to Mrs Houraeau –

“We spoke. See Press Release attached that you might issue.”

Attached press release:

“The Constitutional Appointments Authority wish to state that they have decided to set up a Tribunal of Inquiry to look into the ability of Judge Karunakaran to perform the functions of his office following complaints made to it. Such a decision was made pursuant to Article 134 of the Constitution. We have also been informed that Judge Karunakaran has been suspended by President Michel effective immediately, from performing the functions of a judge pending the decision of the Tribunal. The chair of this Tribunal is the former Chief Justice Egonda-Ntende.

We have been assured by Chief Justice Mathilda Twomey that the court is making immediate arrangements to ensure minimal delays in case proceedings and to reduce the impact it has on any and all cases currently before the court.

Further as the matter is now before the Tribunals of Inquiry and the matter is under investigation it would be inappropriate for the Authority to make any further comments.”

104. In her evidence, the Chief Justice stated that she considered that her actions were a fulfilment of her obligations as Chief Justice in respect of the administration of the judiciary. The CAA is the body concerned in respect of any process of instigating inquiries into the conduct of judges.
105. The Chief Justice indicated (and this was confirmed by Mrs Houraeau), that the CAA and Mrs Houraeau were inexperienced in relation to issues such as the investigation of a judge, as this had never happened before. The Chief Justice felt it appropriate to suggest what steps ought to be taken in this regard and to assist the CAA, particularly in the light of the fact that she had met Mr Guthrie when he had visited the Seychelles and was aware of his expertise in relation to judicial conduct in the Commonwealth.
106. (It was alleged by the Judge that the Chief Justice’s email of 6 October 2016 was a fabrication, relying upon the lack of address particulars in a copy of the email forming part of material annexed to an affidavit in the litigation in the Constitutional Court. The Tribunal, through Counsel Assisting, has verified the authenticity of the email and has no hesitation in rejecting the Judge’s suggestion.)
107. It is our view that the approach taken by the Chief Justice was in no way inappropriate. In order for the CAA to exercise its Constitutional role in respect of members of the judiciary whose conduct should be subject to enquiry under Art 134 of the Constitution, it is of course necessary that relevant information be brought to its attention. There is no category of person prescribed by the Constitution as responsible for undertaking or able to undertake this role. No doubt, complaints can be made by any

citizen. At the same time, given the position of the Chief Justice, it is clear that where circumstances come to the Chief Justice's attention which reflect on a judge's suitability for office it is necessary for the Chief Justice to give careful consideration to whether the Constitutional process for possible removal should be commenced. There is no bright line dividing conduct which is merely difficult to manage on the one hand and that which renders a judge liable for removal on the other.

108. It is no part of the Chief Justice's responsibilities to determine suitability but, in our view, where a serious question arises as to fitness for office the Chief Justice has a duty to bring it to the attention of the CAA. It is then the responsibility of the CAA to consider whether the conduct merits referral to a Tribunal of Inquiry. In the nature of things, a Chief Justice's responsibilities in these matters cannot be deflected if, as it happens, some of the impugned conduct is directed personally to him or her. (Perhaps the information brought to the attention of the CAA for the purpose of its exercising its function is better categorised as information rather than a complaint and the person bringing the information forward be described as an informant rather than a complainant. In the case of the Chief Justice, this would help to depersonalise what should be an institutional approach, rather than a personal one.)

109. Adopting the suggested terminology, the mere fact that the information provided to the CAA by the Chief Justice concerned in part the Judge's conduct towards her, did not make it inappropriate that the Chief Justice should bring all the conduct reflecting on his suitability to the attention of the CAA. She was acting no less in her official role of Chief Justice in fulfilment of her duty to bring all that information to the CAA. Furthermore, it was not inappropriate for the Chief Justice to assist the CAA in the exercise of its functions although, of course, it was important that there be no attempt to exercise any power of direction. It was

reasonable, also, that (given her position) she should advise the CAA as to persons who might be suitable for appointment to the Tribunal although, again, without usurping the independent exercise by the CAA of its power of appointment.

110. The Chief Justice, exercising an administrative function, was not only entitled to put forward to the CAA her own conclusions about the fitness or otherwise of the Judge to remain in office but it was also sensible for her to do, as they could assist the CAA in its evaluation of the issues. She was entitled to express her views strongly and, given the public interest in resolving the question of what was to be done, if anything, to deal with the problem presented by the Judge's conduct, to attempt to persuade the CAA that appointment of a Tribunal to inquire into the matter was appropriate. This followed from her responsibility for the judiciary as Chief Justice. (Of course, any citizen can also make a complaint to the CAA, just as the Judge did in the present case.) In a sense, the Chief Justice had an interest in whether the CAA would refer the matter to a Tribunal, since she had formed the opinion that the Judge was not fit to hold office. As, however, she was not in a position to make any decision determinant of either referral to a Tribunal or whether a recommendation should be made to the President for the Judge's removal, there was simply no possibility that she was in or had placed herself in any conflict of interest.

111. The Judge has submitted that it was not appropriate for the Chief Justice to give advice to the CAA as to how they might proceed, because the CAA had legal assistance available to it. Even if legal advice were available, it could not make the provision of advice or assistance by the Chief Justice inappropriate. However, the only evidence of the availability of legal assistance cited by the Judge is that, in litigation which involved the CAA in 2012, 2014 and 2016, it was represented by counsel. This is

a very long way short of establishing the argument he seeks to make. One would need to know, at the very least, the budgetary position of the CAA at the relevant times, what instrumentality actually paid the legal fees incurred and the budgetary position of the CAA at the relevant time of the complaint against the Judge. But, even if the CAA had available to it the funds to retain counsel, it was entirely a matter for it to manage its resources and it cannot be criticised, at least in any way that might entail legal consequences, because it decided that counsel would not be retained. There was no impropriety, let alone illegality, involved in the CAA consulting the Chief Justice about the practical steps necessary to be taken to consider the matter of the Judge's fitness. Nor was the Chief Justice under either a legal or ethical duty to refrain from giving the assistance which she provided, essentially as to the character of the complaints about the Judge and the membership of the proposed Tribunal.

112. The then Chair of the CAA, Mrs Houraeau, gave evidence to the Tribunal about her communications with the Chief Justice about the proposed enquiry and the Tribunal has examined the relevant correspondence. It is not intended to set out that evidence in this report. It is sufficient to say that there is nothing to support a suggestion that the Chief Justice exercised improper or inappropriate influence over the Chair or the CAA in respect of her or its considering what to do about the information it was given concerning the Judge. In substance, she made reasonable suggestions and these were adopted.

113. The then President was also Minister for Legal Affairs and had been kept informed about the process being undertaken. Both the Chief Justice and the Chair were anxious to have the matter go to the President before his (impending) retirement because his proposed successor, Mr Faure, was unaware of the details. Moreover, as the Chief Justice mentioned in her

evidence, the Judge had some time earlier given a decision (she thought, inappropriately) in a politically sensitive case and wanted to avoid any suggestion that the incoming President might have been influenced by that in making a decision following the institution of the Tribunal of Inquiry. At all events, the matter was rightly regarded as so serious as to require urgent attention. The Judge was in office and his history of misbehaviour such that it was open to them to consider that he presented a continuing risk to the reputation of the judiciary, as well as to the litigants in his court. That they did not want an unnecessary delay arising from the changeover of Presidential responsibility was reasonable. In our view, it was proper to move the matter forward in an expeditious manner and we accept the evidence of the Chief Justice and Mrs Houraeau about their wish to refer the matter to a Tribunal of Inquiry before President Michel retired. There is no evidence that suggests that this was motivated by any political considerations. We do not see that there was anything inappropriate either with the conduct of the Chief Justice for the Chair of the CAA in relation to this matter.

114. Some particular additional issues raised by the Judge should be dealt with. In the email of 2 October 2016, set out above, the Chief Justice stated to Mr Guthrie, "After discussion with the Authority I have now prepared a file asking that Judge Karunakaran be removed both for misbehaviour and incompetence". The Judge points to the use of *removed* as distinct from *investigated*, and submitted that this meant that she had already decided the grounds upon which he was to be removed, even before filing any complaint with the CAA and the CAA had considered whether the question of removal ought to be investigated. Accepting that this point is correct, it does not suggest impropriety of any kind. The Chief Justice was entitled to have formed a concluded opinion about the Judge's fitness for office and entitled to express that view to the

CAA in connection with its consideration of the decision whether to refer the Judge's fitness to a Tribunal.

115. In the context of the email to Mr Guthrie, the Chief Justice's observation simply placed him in the picture to explain her approach to him. This could not be regarded as any inappropriate pre-judgement since it merely expressed the opinion which drove her to request the CAA to undertake the Constitutional steps which, if the Tribunal of Inquiry formed the same opinion, would lead to the recommendation (indeed, ultimately made) that the Judge should be removed from office. At all events, the fact that the Chief Justice had the view that he should be removed and the reasons for that view would, if the CAA accepted that it was appropriate to point a Tribunal of Inquiry, inevitably come to the attention of the Tribunal. It cannot be a just criticism that the Chief Justice's complaint was comprehensive and persuasive. In short, it was not improper for the Chief Justice to express the view that the Judge should be removed.

116. In her email of 3 October 2016 to the Chair of the CAA, the Chief Justice expressed the hope that, if Mr Guthrie were to be a member of the Tribunal, this would "give the Tribunal a lot of credit" because of his role in the Commonwealth initiating measures concerning the appointment and removal of Judges. Her email concluded –

"In this way my decision to bring the matter to you will be seen as less political and more because of judicial incompetence and misbehaviour."

117. The Judge has submitted that this proves that the Chief Justice's motivation was, in truth, political and not actually because of any judicial incompetence or misbehaviour on his part.

118. We do not accept this submission. First, there is nothing in the exchanges between the Chief Justice and the Judge leading up to her approach to the CAA which hints at any political issue, nor has there any evidence otherwise. Secondly, the matters identified by the Chief Justice as justifying an Inquiry all go to competence and are supported by documentary corroboration of various kinds. Thirdly, the Tribunal concludes, looking at the evidence as a whole, that this was merely an expression of the desire to appoint to the Tribunal, if possible, a patently independent and internationally highly regarded lawyer who specialised in the field of judicial ethics, whose decision would demonstrably be unaffected by any political considerations. Of course, there could be no escaping the fact that a Constitutional proceeding in respect of the judge's fitness for office with the potential consequence that the judge might be removed would be, in a general sense, politically sensitive and, perhaps, politically controversial. The applicable Constitutional arrangements were designed to avoid, at least, political decision-making. The more demonstrably independent of local pressures the Tribunal membership was the better, for obvious reasons. In the context, both generally and in respect of the email to Mr Guthrie, the Chief Justice's remark should be understood as expressing a desire to achieve this outcome in respect of membership of the Tribunal if it were possible

119. Accordingly, the Tribunal rejects the submission of the Judge that the Chief Justice's motivation in preferring her complaint against him to the CAA was political.

120. The Judge also pointed to the Chief Justice's email of 6 October, 2016 withdrawing from further involvement in the process as "no longer appropriate". He submitted that this amounted to an admission that she was "a judge in her own cause". In her evidence, the Chief Justice

expressed some discomfort about being involved in the appointment of the judges on the Tribunal. The evidence was –

“Q. Alright. Why did you consider it to be inappropriate that you shouldn’t take it any further steps?

A. Because I think it would be a, a conflict of interest that the complainant was somehow involved in the actual panel that heard the, the complaints of the complainant.”

The Chief Justice later said –

“And I did realise that it was probably improper to do that and I recorded that in an email which I copied to the Attorney General, and said, ‘Here is Mr Guthrie’s email, it’s inappropriate that I get involved in this process, but these are the names of the people’.

121. We have already explained why we do not think that the judge had a conflict of interest. This is not to say, however, that it would have been wise for the Chief Justice to have been actively involved in the selection of members of the Tribunal. Had she done so, and had her recommendations of been accepted, this might have created the impression that the Tribunal was, as it were, “stacked” with her supporters. This could potentially have undermined public acceptance of the Tribunal’s report and ultimate recommendation. Such an impression might have been created even if there was in fact no attempt at “stacking”.

122. As is often the case, it is necessary to maintain not only actual propriety itself but also the appearance of propriety. One of the obvious difficulties in a small jurisdiction such as the Seychelles, as the Chief Justice mentioned in her evidence, would be the appointment to a Tribunal of Inquiry from a small bench of judges who might well be either friends of or

personally sympathetic to the Chief Justice on the one hand or the Judge on the other. Much the same considerations would apply to senior members of the legal profession. Furthermore, as is obvious, the position of the Chief Justice itself might have the appearance of weighing in the scales. At the same time, a Tribunal was necessary and appointment of its members essential. And any judges who were appointed would simply have to do their duty.

123. It was, for the reasons we have explained, both reasonable and proper for the Chief Justice to have proposed Mr Guthrie for membership of the Tribunal and enquire about his availability. However, it was wise also that she should avoid further involvement in theselection of particular members. (She did provide some assistance by way of contact details but this cannot be criticised.) Her email withdrawing from involvement in this matter was, we note, also sent to the Attorney General.
124. Accordingly, we do not accept that the Chief Justice was legally or ethically bound by the posited conflict of interest to decline to assist the CAA to identify appropriate members of the potential Tribunal. Of course, she should not (and did not) purport to direct the CAA as to any appointment.
125. These matters must be approached in a practical way which takes into account real, as distinct from hypothetical, legal and ethical questions. This is especially so in a jurisdiction, such as in the Seychelles, which has limited judicial and legal resources, together with significant budgetary constraints. In other words, issues of this kind must be considered in the real world and not that of the legal academy. In the end, the question to be asked is whether there was any significant risk that substantial injustice has occurred. We have concluded that no such risk to the integrity of the process occurred.

126. Focusing, therefore, on the substance of the matter, it is clear that the only attempt made by the Chief Justice to influence the appointment of members of the Tribunal related to her recommendation about and communications with Mr Guthrie. This was an appointment which could not have been criticised on any basis. His independence was patent and would have withstood public scrutiny. Even if, therefore, there was a theoretical possibility of an appearance of a conflict of interest, it was inconsequential. There was no risk of injustice nor of any apparent injustice. Furthermore, the hypothetical possibility of a conflict arising from the Chief Justice's recommendation about Mr Guthrie was by no means anywhere near misbehaviour or misconduct which might place in question the Chief Justice's ethical standing or personal or judicial integrity.
127. It follows that the Judge's submission concerning this matter must be rejected.
128. The Judge also submitted that there were unsatisfactory (to use neutral language) features of the CAA's consideration of the question of referral, focusing on what he alleges to be inconsistencies in or demonstrated by its minutes. These matters do not appear to concern the Chief Justice. Mrs Houraeau gave evidence about meetings of the CAA and the way in which the minutes were recorded. Nothing in her evidence raises in our minds any possible impropriety but this is not a matter relevant to our Inquiry. The Judge's submission in this regard appears to be an attempt to litigate by collateral means the issues he seeks to raise in his court proceedings. For that reason as well, the Tribunal should not examine these issues.
129. The final issue under this head concerns a press release published on 10 October, 2016 by the CAA which was to the following effect –

“The Constitutional Appointments Authority wish to state that they have decided to set up a Tribunal of Inquiry to look into the ability of Judge Karunakaran to perform the functions of his office following complaints made to it. Such decision was made pursuant to Article 134 of the Constitution. We have also been informed that Judge Karunakaran has been suspended by President Michel, effective immediately, from performing the functions of a judge pending the decision of the Tribunal. The Chair of this Tribunal is former Chief Justice Egonda-Ntende.

We have been assured by Chief Justice Mathilda Twomey that the Court is making immediate arrangements to ensure minimal delays in case proceedings and to reduce the impact it has on any and all cases currently before the Court.

Further as this matter is now before the Tribunal of Inquiry and the matter is under investigation it would be inappropriate for the Authority to make any further comments.

The evidence of Mrs Houraeau was that she read the proposed press release over the telephone to the Chief Justice and asked her for “input on the Judiciary side”. The Chief Justice suggested an additional paragraph, which was inserted as the second paragraph in the above quotation. This was entirely proper, indeed, appropriate.


Conclusion

130. The overall conclusion of the Tribunal is that the evidence, either taken piecemeal or as a whole, does not disclose any misconduct or inappropriate conduct on the part of the Chief Justice. To the contrary the only conclusion reasonably open on that evidence is that she acted with complete propriety on all the occasions called into question. It follows that no action should be taken by the President under Article 134 of the Constitution in respect of the office of Chief Justice.

The Hon Michael Adams QC (President)

For the Tribunal and as authorised by the Hon Judge John Murphy and
Hon. Chief Judge Emeritus Olufunmilayo O AtiladeMCIArbFCarb

The Tribunal Rules of Procedure

1. The Rules are enacted to ensure that:
 - (a) all persons affected or likely to be affected by the findings (“interested persons”), recommendations or decisions of the Tribunal have full and fair opportunity to be heard; and
 - (b) the proceedings of the Tribunal are  to be conducted as efficiently as practicably possible.
2. Subject to these Rules, the Tribunal shall follow the Seychelles Code of Civil Procedure with such modifications and adaptations as may be necessary.
3. The Inquiry is an inquisitorial process with the object, so far as is reasonably possible, to ascertain the truth about the facts relevantly placed before it for the purpose of reporting on them to the Constitutional Appointments Authority and recommending whether or not a Judge ought be removed from office for his or her inability to perform its functions.
4. The proceedings of the Tribunal shall be open to the public unless the Tribunal decides, in the public interest, that some part of the proceedings shall be in private hearing.
5. The Tribunal is empowered to ascertain the relevant facts and, accordingly:

(a) it has the power to require persons who may have knowledge of those facts to attend to give evidence as to them; and

(b) to require the production of documents (including electronic records) or things that may be relevant.

6. Every person who:

(a) refuses or omits, without sufficient cause, to attend at the time and place mentioned in the summons served on that person,

(b) attends but leaves the Tribunal without the permission of the Tribunal,

(c) refuses to be sworn or to make an affirmation or declaration, as the case may be,

(d) refuses without sufficient cause to answer, or to answer fully and satisfactorily, to the best of his knowledge and belief all questions put by or with the concurrence of the Tribunal,

(e) refuses or omits without sufficient cause to produce any books, plans or documents in his possession or under his control, and mentioned or referred to in the summons served on him,

(f) at any sitting of the Tribunal, wilfully insults any Member, or the secretary, or Counsel Assisting the Tribunal or wilfully and improperly interrupts the proceedings of the Tribunal, or be guilty of any contempt of any Member,

shall be in contempt of the Tribunal and be dealt with according to law provided always that no person giving evidence before the Tribunal shall be compelled to incriminate himself or herself, and every such person shall, in respect of any evidence given by that person before the Tribunal, be entitled to all the privileges and immunities to which a witness giving evidence before the Supreme Court is entitled in respect of evidence given before that Court.

7. Issues shall be determined by at least two of the Members of the Tribunal.

8. Summonses for the attendance of a witness or production of a document or thing shall be in the form prescribed by the Code amended as appropriate, and provided by Counsel Assisting to the President for signature. Service shall be in accordance with the general law of the Republic of Seychelles.

9. The Tribunal is not bound by the laws of evidence and may receive evidence in whatever form it thinks it appropriate, giving the evidence such weight as it considers to be warranted provided that, unless there are good reasons for not doing so, it shall take evidence orally under oath or affirmation, giving interested parties (including, where relevant, Counsel Assisting) a fair opportunity of testing the evidence by cross-examination.

10. Persons interested may, by leave of the Tribunal, be represented by counsel.

11. (1) Persons interested may by leave of the Tribunal seek to have witnesses called before the Tribunal to give relevant evidence.

(2) Where a person interested seeks to have a witness called to give such evidence, (unless otherwise decided by the Tribunal) he or she is to provide a statement, signed by the witness, as to the evidence sought to be adduced to Counsel Assisting who shall apply for a summons for that witness' attendance. A dispute, if any, as to the relevance of the proposed evidence will be determined by the Tribunal.

(3) Where a person interested seeks the production of any document or thing, the procedure specified in paragraph 11(2) is to be utilised, mutatis mutandis.

12. Counsel Assisting the Tribunal shall, unless these Rules otherwise provide or the Tribunal otherwise directs, sign, issue, and receive process for the Tribunal unless otherwise directed by the Tribunal, as well as lead evidence before the Tribunal.

13. (1) Subject to paragraph 13(2), the matters of complaint specified by the Resolution of the Constitutional Appointments Authority and the Consideration Report under which the Tribunal was instituted sufficiently set out the particulars of complaint requiring investigation by the Tribunal.

(2) On application by Counsel Assisting or a person interested, the Tribunal may give further particulars of the matters of complaint, providing that such particulars are consistent with or rationally connected to the substance of the matters determined by the Constitutional Appointments Authority as justifying investigation.

14. The Tribunal may give directions having the effect of a pro tanto amendment of these Rules, if it deems it necessary or desirable to do so and may give directions as to any matter of procedure not provided or not adequately provided for by these Rules.