IN THE MATTER OF THE CHIEF JUSTICE

OF TRINIDAD AND TOBAGO

O P I N I O N

1. I am asked to advise the Prime Minister in connection with allegations made against the Chief Justice.

Background

2. The allegations were the subject of intense media coverage at the end of 2017 / beginning of 2018 – in particular in the Express Newspapers, whose reporter (Denyse Renne) was responsible for investigating and breaking the story.

3. It is unnecessary to summarise the media coverage. The allegations related to two matters: (a) security arrangements for members of the judiciary, and (b) the provision of housing by the Housing Development Corporation ('the HDC'), as well as (and connected therewith) the Chief Justice's apparently close relationship and involvement with two individuals, both of whom have been convicted of criminal offences – Dillian Johnson and Kern Romero.

4. The press coverage and the lack of any response from the Chief Justice led to a decision by the Council of the Law Association of Trinidad and Tobago to investigate the allegations, which was undertaken by a Committee ('the Committee'). The Committee interviewed Ms Renne (who supplied information, documents and photographs) and made various other inquiries.

5. Having investigated the allegations, the Law Association resolved *'[t]hat the Report of the Committee… be referred to the Honourable Prime Minister for his consideration under section 137 of the Constitution…'* The President of the Law Association has therefore provided its various reports, together with supporting material, to the Prime Minister for him *'to determine whether a representation to her Excellency the President*

under section 137 is warranted.' (See letter dated 13 December 2018.) It is in this connection that the Prime Minister seeks my advice.

Law

6. Section 137 of the Constitution prescribes the procedure by which a judge may be removed from office – there being only two circumstances in which this may be done, namely inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or misbehaviour (section 137(1)).

7. Where the Chief Justice is concerned, the process for which section 137 provides is initiated by a representation by the Prime Minister to the President that the question of the Chief Justice's removal under the section *'ought to be investigated'* (section 137(3)).

8. As is plain from the language of section 137, the Prime Minister is not required to come to any conclusion as to whether the Chief Justice ought or ought not to be removed. Rather, it is implicit in section 137 that he must consider, as a preliminary matter, whether the question of removing the Chief Justice ought to be investigated.

9. As to what exactly is required in this respect, assistance is to be found in Rees v Crane [1994] 2 AC 173. Speaking of what was required of the Judicial and Legal Service Commission – for which must be substituted the Prime Minister in the present context (because the complaint concerns the Chief Justice) – the Judicial Committee observed:

> *'The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings.'* (Emphasis added.)

10. The Prime Minister is, therefore, required to be satisfied of two things: first that one or more of the matters in respect of which the Law Association express concern (they are not formulated as complaints but I shall refer to them as such) has *prima facie* sufficient basis in fact; and, secondly, that such complaint/s is/are sufficiently serious to warrant a representation to the President.

11. The second of these considerations must, it seems to me, require that one or more of the complaints is sufficiently serious that, if substantiated, it might ultimately lead to the Judicial Committee advising the President that the Chief Justice ought to be removed from office (assuming the question were referred to it as a result of a recommendation by the tribunal to the President in that regard pursuant to section 137(3)(b)).

12. See also Wilson v Attorney-General [2011] 1 NZLR 399, in which the High Court considered the statutory test in New Zealand; see paragraphs 31, 44, 68 and 69 in particular. After noting that the function of the Commissioner in New Zealand was broadly analogous to that of the Judicial and Legal Service Commission in Trinidad and Tobago (albeit the statutory procedure is somewhat different), the Court cited the 'test' formulated in Rees v Crane (set out in paragraph 9 above), and held that the Commissioner was required to apply a similar standard.

13. Additionally, of course, the complaint/s must be such as to amount, if substantiated, to one or other (or both) of the two circumstances in which a judge may be removed from office, namely inability (as defined in section 137(1)) or misbehaviour. In this respect, the *Statements of Principle and Guidelines for Judicial Conduct* are of assistance. They were first placed on the Judiciary of Trinidad and Tobago's website in 2011 and were subsequently published by the Judicial Education Institute of Trinidad and Tobago in 2017, with a foreword by the Chief Justice. They incorporate the Bangalore Principles of Judicial Conduct adapted to local conditions and are also shaped by the Canadian Judicial Council's *Ethical Principles for Judges*. They provide important and authoritative guidance, including objective and widely recognised criteria against which judicial conduct can be assessed. The final recital however includes the caution that they are not, and shall not be used as, a code or list of prohibited behaviours defining judicial misconduct under section 137 of the Constitution.

14. Ultimately, though involving several distinct considerations (see paragraphs 10 and 13 above), the Prime Minister must consider whether, on the material before him, subject to investigation by the tribunal and (if referred to it) the Judicial Committee, there is a reasonable possibility that the complaint/s could lead to removal of the Chief Justice from office.

15. In answering that question, it is not for the Prime Minister to try to resolve conflict or uncertainty in the available evidence; rather, his task is simply to decide whether the question of removing the Chief Justice ought to be investigated. Questions of fact, assessment of the seriousness of any misbehaviour and the ultimate question of removal are matters for the tribunal and/or Judicial Committee. But that is not to say that the Prime Minister should not consider the nature, source and quality of the material relied on in support of the complaints in reaching a conclusion, provided he keeps well in mind the limits of his function. After all some consideration at least of such matters is implicit in what is required of him.

16. Similarly, it is both necessary and appropriate for the Prime Minister, when considering the seriousness of the complaints, to bear in mind that self-evidently not all misconduct, even if reprehensible, will amount to misbehaviour or inability requiring removal. Ultimately, any assessment of misbehaviour or ability involves questions of fact and degree which, in the event of a representation to the President, are matters for the tribunal and, if referred to it by the President, the Judicial Committee. But again it is implicit in what is required of the Prime Minister that he consider the seriousness of the alleged conduct, since it *'must be sufficiently serious to warrant representation to the President'* (per Rees v Crane). What he must guard against is substituting his own assessment for that of the tribunal and Judicial Committee, bearing in mind that he is not the ultimate decision maker; rather, he is making only a 'threshold' assessment.

17. Whilst every case will turn on its own particular facts, a useful general statement as to the standard of behaviour expected of a judge is to be found in the case of Madame Justice Levers (Judge of The Grand Court of the Cayman Islands) [2010] UKPC 24:

> *'The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit – see Therrien v Canada (Minister for Justice) [2001] 2 SCR 3. If a judge, by a course of conduct, demonstrates an inability to behave with due propriety misbehaviour can merge into incapacity.'*

Complaints

18. The complaints reflect some only of the allegations reported in the media, in particular those concerning the HDC. Although the Law Association investigated numerous matters reported in the media, the focus of its interest has narrowed, as is plain both from the Committee's various reports and the Opinion of Dr Francis Alexis QC; although the Opinion of Mr Eamon Courtenay QC ranges more widely.

19. It is clear, for example, that the allegation that the Chief Justice attempted to persuade judges of the Supreme Court to engage the services of a private security firm with which Johnson was concerned is not pursued: see paragraphs 14-17 of the Committee's report dated 23 February 2018 ('the Report') and paragraphs 12-13 of the Executive Summary dated 10 December 2018 ('the Executive Summary').

Complaints relating to judicial security arrangements

20. The only remaining complaints concerning judicial security arrangements relate to: (a) an alleged Whatsapp message from the Chief Justice to Johnson, according to which the Chief Justice updated Johnson in respect of *'the security thing'*, saying: *'Spoke to some judges to change their personal security'*; and (b) Seepersad J's complaint that the Chief Justice discontinued his police escort (the Report refers in paragraph 2 to Rampersad J but this is clearly a mistake).

Alleged Whatsapp communication with Johnson

21. To the extent that the first of these is pursued – despite the complaint that the Chief Justice attempted to persuade judges to engage the services of a private security firm with which Johnson was concerned not being pursued, the Report noted (paragraphs 27 and 51) that the Chief Justice did not deny the Whatsapp exchange. However, in its Addendum Report dated 3 October 2018 ('the Addendum Report'), the Committee quoted a letter dated 14 September 2018 from the Chief Justice's attorneys (Alexander, Jeremie and Company), which stated: *'As for allegedly seeking to influence Judges' private security… Your reference to, and apparent reliance on, fabricated Whatsapp message is (sic) misplaced'*.

22. Although the Committee's letter of 20 January 2018, to which the Chief Justice's attorneys were responding, referred to other Whatsapp messages, in relation to judges'

security it referred only to the alleged Whatsapp message in question. It must therefore have been the alleged Whatsapp message in question to which the Chief Justice's attorneys were alluding when they referred to the *'fabricated Whatsapp message'*. It is therefore clear that the Chief Justice disputes the authenticity of the Whatsapp message, and the suggestion in paragraph 34 of the Executive Summary that he *'has not alleged that this message was not authentic'* must I think be mistaken. (The Chief Justice's pre-action protocol letter to the Sunday Express dated 5 January 2018 also referred to *'electronically doctored'* Whatsapp messages; and the letter dated 31 January 2017 (presumably 2018) to the Law Association referred to *'forged What's App messages'*.)

23. Apart from the Chief Justice's denial of the alleged Whatsapp message, Ms Renee (though she claimed to be confident of the authenticity of the various Whatsapp messages in her possession) was not prepared to reveal the identity of her source. Thus, as the Committee put it (paragraph 50 of the Report), *'[s]hort of interviewing Johnson ourselves and obtaining a statement from him, we are therefore reliant entirely on Ms Renee's report of what she was told by her source and Mr. Johnson'* – Johnson having verified the message, according to Ms Renee. Even if Johnson, who is said to have left the country in dramatic circumstances (paragraph 9 of the Report), could be interviewed the reliability of his evidence would clearly be doubtful. Apart from anything else, he has evidently been convicted of an offence of forging the signature of a judicial officer.

24. There must, therefore, it seems to me, be very considerable doubt as to whether the complaint relating to the disputed Whatsapp exchange between the Chief Justice and Johnson could be substantiated. The Prime Minister is, I think, entitled to, and indeed should, take both the paucity and poor quality of the evidence in this regard into account in considering whether there is a reasonable possibility that the complaint could lead to removal of the Chief Justice from office.

25. There is also the question whether the alleged communication between the Chief Justice and Johnson regarding security, even if proved, could be considered serious misbehaviour, sufficient to lead to removal from office. Although (if proved) it would evidence both that *some* discussion had taken place between the Chief Justice and Johnson and the Chief Justice and some judges, it is doubtful in my view whether,

without more (and there is no other evidence), this would be considered serious enough to require removal from office.

26. It is also worth noting in this respect (as the Report acknowledges) that what Johnson is reported to have told Ms Renee did not advance the inference which the Committee suggested could be drawn from the Whatsapp message, namely that *'Johnson may have been seeking out security opportunities… and the Chief Justice was facilitating that by speaking to judges about changing their security'*: see paragraphs 46-48 of the Report. Thus, even if Johnson could be interviewed, quite apart from the reliability of his evidence, there must also be doubt as to whether he would add anything that might assist in relation to the alleged Whatsapp communication.

27. I bear in mind that *if* the matter was investigated and the Chief Justice's denial of the communication (assuming it was maintained) was rejected, that would potentially be an important consideration. This speculative possibility does not however seem to me a sufficient reason for concluding that the allegation should be investigated by a tribunal. In all the circumstances, I do not therefore consider that the alleged Whatsapp communication provides a sufficient basis for concluding that the question of the Chief Justice's removal ought to be investigated.

Seepersad J's police escort

28. As regards the complaint that the Chief Justice cancelled Seepersad J's police escort, it would appear that the Chief Justice instructed the police to discontinue the police escort the day after the judge wrote to him, informing of concerns he had for his safety and that of his family, and noting that the police escort which had previously been discontinued had been reinstated.

29. It is difficult to know what to make of this complaint. On the one hand, the Chief Justice, through Ms Pierre, informed Seepersad J that the Senior Superintendent, Special Branch, had confirmed that the police escort was requested by the judge and instituted at his insistence, and that a draft risk assessment submitted to the Commissioner of Police for his approval did not recommend a police escort. It is difficult to conceive of the Chief Justice communicating this information to Seepersad J unless he had been so

informed by the police. And there is no allegation that the Chief Justice fabricated this account.

30. On the other hand, according to an undated document which appears to be a communication from Seepersad J (possibly an email, though to whom is unclear), and which refers to *'my letter to the Commissioner'*, not only was Seepersad J never provided with the risk assessment, but both the Commissioner and Inspector Knutt (possibly Knott) had *'indicated that there was no interim report'*. There is a letter from Seepersad J to the Commissioner dated 29 May 2017 regarding the cancellation of the police escort and risk assessment in the papers provided to me but no reply from the Commissioner.

31. It is clear also from what appears to be an email from Seepersad J to his fellow judges that he had a number of other concerns apart from security. None of these, however, are the subject of any complaint by the Law Association about the Chief Justice. No broader complaint, for example relating to the Chief Justice's conduct towards or treatment more generally of Seepersad J is made. Nor is the complaint said to be connected in any way with the complaint relating to the alleged Whatsapp communication with Johnson.

32. It is not for the Prime Minister to attempt to resolve the conflicting evidence in relation to this complaint, although it would be open to him to seek clarification. Whatever the merits of the complaint, however, it is difficult in my view to see how it could justify removal from office. Other than summarising the evidence and chronology (see paragraphs 102-108 of the Report), surmising that presumably the information given by Ms Pierre to Seepersad J was the explanation for the discontinuance of the police escort (paragraph 105), and noting that an attempt by Seepersad J and some of his fellow judges to arrange a meeting with Chief Justice was unsuccessful (paragraph 108), the Committee draws no conclusions and makes no specific allegation or complaint in the Report.

33. Further, in the Executive Summary, the Committee states merely (paragraph 57) that *'[the] security detail was discontinued unilaterally by the Chief Justice without discussion or consultation with the judge.'* Potentially, the Chief Justice might be

criticised in this respect (although Seepersad J's letter of 26 May 2017 does refer to a call received by him from the Chief Justice's Administrative Secretary informing him of the decision). It is very difficult, however, to see how this could amount to such serious misbehaviour as to require removal from office. I conclude that this complaint does not require investigation of the question of removing the Chief justice from office.

HDC housing complaints

34. I turn, therefore, to the complaints relating to HDC housing. They are essentially three:
    (a) that the Chief Justice contacted the Prime Minister by Whatsapp, recommending Dylan Huggins, Carol Williams and Felicia Pierre (presumably not the Ms Pierre referred to above) for HDC housing, or seeking the Prime Minister's assistance in obtaining HDC housing for them, because Romero, with whom he was personally involved, asked him to;
    (b) that similarly the Chief Justice recommended a number of other (unidentified) people for HDC housing because Romero asked him to;
    (c) that the Chief Justice contacted a senior HDC manager and made recommendations for housing, and asked that they be 'fast-tracked'.

35. The evidence on which these complaints depend is different, but the gravamen of the first two is the same, namely that the Chief Justice acted at the behest of Romero, regardless of the merits of the applications; in other words, that he made the recommendations merely because Romero asked him to. Additionally, he asked that various applications be fast-tracked.

36. Paragraph 3.12 of the *Statements of Principle and Guidelines* provides: *'A judge shall not use or lend the prestige of the judicial office to advance his private interests or those of a member of the judge's family or of anyone else, nor shall a judge permit others to convey the impression that anyone is in a special position to influence the judge in the performance of his duties.'*

37. Despite the evidence that Romero used his relationship with the Chief Justice (and apparently photographs of the Chief Justice) in connection with his fraudulent scheme, there is no suggestion that the Chief Justice permitted Romero to convey to any of his victims the impression that he (Romero) was in a special position to influence the Chief

Justice. Nor is there any evidence that the Chief Justice was aware of Romero's fraudulent activities, at any rate when any recommendations were made. Alexander, Jeremie and Company's letter of 14 September 2018 stated: *'As for Kern Romero, it was the Chief Justice's actions that triggered the police involvement that resulted in Mr, Romero's eventual conviction. Thus, at no time did the Chief Justice countenance the improper use of his name in connection with any fraud.'*

The Chief Justice's involvement with Romero and Johnson

38. It is convenient to touch on the Chief Justice's association with Romero and Johnson at this point. The lack of any evidence that the Chief Justice was aware of the criminal proclivities of either Romero or Johnson (and therefore knowingly associated with persons engaged in criminal activities) rules out any allegation that he associated, or developed close personal relationships, with persons engaged in criminal activities, such as is set out in paragraph 3(iii) of the Executive Summary. There is no such allegation in the Report; although it is possible that the redacted third allegation in paragraph 2 of the Report was in similar terms.

39. This to my mind disposes of the suggestion by Dr Alexis (paragraph 7.13 of his Opinion) that the Chief justice must expect to have to answer in respect of his association with Romero and Johnson. The Addendum Report acknowledges that if the Chief Justice was unaware of their criminal proclivities, there would be no basis for concern that, in forming close personal relationships with them, he had shown a lack of judgment. (See also paragraph 29 of the Executive Summary.) A judge must of course be circumspect about those with whom he chooses to associate, and in his close personal relationships. But even if, despite the Chief Justice's lack of knowledge of the criminal proclivities of Romero and Johnson, there was other evidence suggestive of a lack of judgment on his part in this respect (which there is not and for which care must be taken not to substitute hindsight), it is far from certain that it would suffice to justify his removal.

Judicial independence and the HDC

40. Before considering the specific HDC complaints, I would make one further, more general, observation. Whilst no complaint is made simply of the fact that the Chief Justice recommended people for HDC housing, there is potentially scope for criticism

of him on this basis, bearing in mind the importance of the independence of the Judiciary and its separation from the Executive, which underpins the Constitution and is inherent more generally in the separation of powers. See also paragraphs 1.1 and 1.4 of the *Statements of Principle and Guidelines.* Potentially, there is a risk that a judge who nominates someone for State housing (however deserving the person), and in particular if the judge requests that the application be fast-tracked, may be perceived to be beholden to the Executive, not least because the discretionary grant of housing in special cases / emergencies appears to depend on the recommendation of the Housing Minister (see paragraph 76 of the Report). I note that Martin Daly SC is reported to have voiced a similar concern in the press.

41. Based on the material provided to me, it is clear, however, that the policy of the HDC (which evidently has Cabinet approval) accommodated recommendations from the Chief Justice, as well as other members of the judiciary – see the letter from Brent Lyons, Managing Director of the HDC, dated 9 January 2018. And I do not suggest that merely recommending someone for housing would of itself be regarded as misbehaviour, let alone misbehaviour requiring removal from office. Questions can, however, legitimately be asked both about a policy which permits this and, in particular, whether it is sensible for a judge to make any such recommendation and/or ask that an application be fast-tracked.

Specific complaints

42. Turning to the specific complaints (set out in paragraph 34 above), the first point to make is that in his press release dated 15 December 2017, the Chief Justice stated that, in 2015, he *'did forward the names of some needy and deserving persons to the [HDC] for such consideration as might be appropriate.'* He denied, however, recommending Johnson for housing. It is therefore beyond doubt that the Chief Justice put forward *some* people at least for HDC housing.

First HDC complaint

43. The first HDC complaint is that the Chief Justice contacted the Prime Minister by Whatsapp, recommending Dylan Huggins, Carol Williams and Felicia Pierre for HDC housing, or seeking his assistance in obtaining HDC housing for them (see paragraphs 53, 54 & 99-101 of the Report).

44. According to the Report (paragraph 53), Ms Renne told the Committee that she had seen a Whatsapp message from the Chief Justice to the Prime Minister recommending HDC housing for three individuals, namely Dylan Huggins, Carol Williams and Felicia Pierre.

45. The Committee suggests that *'[i]f true, it can be inferred that the Chief Justice sought the Prime Minister's assistance because Romero, a person with whom he was personally involved, asked him to do so'* (paragraph 54 of the Report). The Committee relies for this on (a) the connection between the Chief Justice and Romero, and (b) the connection between two of the individuals and Romero, on the basis that they were victims of his fraud.

46. Ms Renne told the Committee that she did not have a copy of the message and she did not disclose her source. She said that although she had communicated with the Prime Minister (also by Whatsapp), asking him to confirm or deny that the Chief Justice had sought his assistance, she had received no reply. (I understand that the Prime Minister decided not to respond because he was conscious that he was potentially both a witness and the arbiter at the first stage of the section 137 process.)

47. The complaint therefore depends on Ms Renne's claim to have seen a Whatsapp message (the content of which she related to the Committee), the connection between the Chief Justice and Romero and, as regards the connection between the three individuals (or at least two of them) and Romero, the statement given by Huggins to the police.

48. According to the typed note of the Committee's interview with Ms Renee, *'[t]he three names in the message were Dylan Huggins, Carol Williams and Casey Edwards.'* The name Casey Edwards is of course different to the third name given in the Report – Felicia Pierre. The explanation for this is unclear.

49. Further, as noted, the inference the Committee suggests can be drawn depends on establishing that the persons named in the alleged Whatsapp message (or at any rate two of them) were victims of Romero's fraudulent scheme. For this the Committee rely on the statement given by Huggins (see paragraph 52 of the Report). In his statement,

however, Huggins mentions his aunt, whose name he gives as Carol Rivers (not Williams), and Felicia Pierre. He says that he told his aunt and Ms Pierre about Romero's 'offer' but only mentions his aunt doing a deal with Romero. (The Committee also refers to the fact that, according to Ms Renne, Huggins identified the Chief Justice as Romero's contact; but Huggins does not name the Chief Justice in his statement.)

50. Whilst, therefore, the Committee voices particular concern that neither the Chief Justice nor the Prime Minister have responded to this allegation, there are clear uncertainties in the evidence. The discrepancies in the names to which I have drawn attention may or may not be significant.

51. More importantly, however, the Prime Minister has confirmed that there was no Whatsapp communication, or indeed any communication, between the Chief Justice and him regarding HDC housing. Notwithstanding his involvement in the section 137 process, the Prime Minister cannot ignore this very important fact, which (assuming it to be correct) must it seems to me dispose of this complaint. It would be wholly artificial, and unfair to the Chief Justice, to require the issue to be investigated just because of the Prime Minister's involvement as a witness.

Second HDC complaint

52. The second HDC complaint is that that the Chief Justice recommended a number of other (unidentified) people for HDC housing because Romero asked him to. This complaint depends on (a) an alleged internal HDC email from Siama Fonrose to Lauren-Ann Legall, dated 5 August 2015, with the subject heading *'Chief Justice'*, seeking an update in respect of *'names forwarded by the Chief Justice'* set out in a table; and (b) information provided to the Committee by Ms Renne that she had spoken to some of the individuals and that they were *'clients'* of Romero, who had been successful in obtaining housing. Again, the Committee suggest, that the inference to be drawn is that the Chief Justice merely acted on Romero's request. See paragraphs 57-59, 64, 99 & 100 of the Report.

53. The evidential basis for this complaint is likewise problematic. First the authenticity of the email is uncertain, see paragraph 65 of the Report. Ms Renne has said that she was provided with the email by *'her source at the HDC'* but has not identified the source

(see the Committee's letter to the Chief Justice's attorneys dated 5 September 2018). Mr Brent Lyons, the Managing Director of HDC, noted *'stark inconsistencies in the print layout of the email which does not match prints from our email server'*, and stated that HDC was therefore *'unable to verify the authenticity of the email'*.

54. Additionally, Mr Lyons informed the Committee that, other than two recommendations made in 2013, HDC had not been able to find any record of recommendations (or of any attempt by the Chief Justice to fast-track applications), or to identify any current officer or employee who had communicated with the Chief Justice in relation to housing. Ms Legall no longer worked for the HDC, but Ms Fonrose, to whom the alleged email was shown, had no recollection of it, but accepted that it was possible that she sent *'such an email'*. She however denied having ever spoken with the Chief Justice.

55. The Committee tentatively suggest (paragraph 67 of the Report) that, since one would not expect a recommendation by the Chief Justice to be readily forgotten, the fact that Ms Fonrose did not deny sending the email, together with her acceptance that she might have sent such an email, provides some support at least for the Chief Justice having submitted the names in the email for consideration. Whilst not an unreasonable suggestion, it is doubtful in my view how much weight should be given to it, bearing in mind the large number of recommendations received by the HDC from 'officials' according to Ms Jearlean John, its former Managing Director (see her letter dated 12 January 2018).

56. Bearing in mind the inquiries made by the Committee and the investigation carried out by Mr Lyons / HDC in order to respond to the Committee, it must it seems to me be doubtful whether, in the event of an investigation by a tribunal, the evidential position in respect of the alleged email or HDC's records would change.

57. The second problem with the evidence in support of this complaint is that, whilst Ms Renne told the Committee that she had spoken to some of the applicants named in the alleged email and that they were 'clients' of Romero, she said that she was not at liberty to reveal their identity. The link between some unidentified applicants (the number also being unclear) and Romero depends therefore entirely on the non-specific hearsay

evidence of Ms Renne. And whilst the individuals named in the alleged email (for whom contact telephone numbers are given) could be contacted in the event of a tribunal being appointed, clearly there is a very real possibility (if not likelihood) that none would be prepared to confirm their involvement with Romero.

58. Whilst, therefore, I bear in mind that the Chief Justice has not denied the specific allegations put to him by the Committee in respect of the first and second complaints (see paragraphs 4(ii) and (ix) of the Committee's letter dated 20 January 2018), or indeed as reported in the press, the evidence in respect of each complaint is problematic. And certainly if, as I understand to be the position, there was no Whatsapp message to the Prime Minister, the case against the Chief Justice is considerably weaker it seems to me, bearing in mind the doubtful status of the alleged email and the non-specific hearsay evidence on which the second complaint depends.

Third HDC complaint

59. The third HDC complaint is that the Chief Justice contacted a senior HDC manager and made recommendations for housing, and asked that they be 'fast-tracked'.

60. This allegation also relies, in part, on Whatsapp messages, which Ms Renne claims to have seen (but has not provided) from the Chief Justice to a senior HDC manager. Additionally, Ms Renne told the Committee that she had spoken with the senior HDC manager who confirmed that the Chief Justice had sent Whatsapp messages to him/her and also telephoned him/her with a view to applications being fast-tracked. The source of the alleged Whatsapp messages is unclear, and Ms Renne has declined to identify the manager. The Committee was left with the impression that it was Ms John, which is clearly possible; but even if it was her, the extent to which she would be prepared to provide any further information 'on the record' must be very doubtful. See paragraphs 57, 61, 81, 91 & 95 of the Report. I would add that if (and it is a big if) Ms John was the source of the alleged internal email, clearly that would raise further questions, since she told the Committee that she was denied access to all HDC records after being removed as Managing Director in December 2015, and has both said and reiterated that *'all documentation in this matter concerning your request would lie in the records of the [HDC]'* (see her letter of 12 January 2018 and email of 16 February 2018).

61. The President of the Committee also spoke by telephone with another unidentified former officer of HDC, who told him that he was in Ms John's presence on an occasion when the Chief Justice telephoned her, and from what he heard of the conversation it was about certain applications for HDC housing. He provided no further detail however. (See paragraphs 11, 82 & 95 of the Report.)

62. Additionally, according to the Report, a third unidentified former senior HDC employee told the Committee that Colin Edwards, whom he knew to be a friend of the Chief Justice, had contacted him in 2015 and asked him to intervene / seek favourable consideration on behalf of two applicants for HDC housing (paragraphs 12, 84 & 95 of the Report). There is a note of a meeting between the Committee and this former senior HDC employee (whose name can in fact be made out despite the apparent redaction), which suggests that Colin Edwards was a colleague of his and does not say that he was a friend of the Chief Justice. According to the note, the source told the Committee: *'I think Colin told me that [the two people seeking HDC housing] may have been working with the CJ and possibly at his house though I cannot expressly recall.'* If true, this would tend to suggest that the Chief Justice knew the two people personally. He also asked: *'One of the things I wanted to ask you about was whether it was all so unethical? If he wanted to help somebody… is that so wrong?'* Evidently he thought not.

63. On the strength of this evidence the Committee was *'satisfied that there is substance in the allegation that the Chief Justice was an active advocate on behalf of a number of applicants for HDC housing'* (paragraph 97 of the Report).

64. Clearly there is evidence to suggest *some* contact at least between the Chief Justice and the HDC, as indeed the Chief Justice accepts there was. And even if the hearsay information provided by Ms Renne of the alleged Whatsapp messages and her contact with a senior HDC manager is ignored, it would seem that by enlisting the assistance of Edwards to intervene / seek favourable consideration on behalf of two applicants, the Chief Justice may have gone further than merely putting forward names for consideration – assuming the evidence given to the Committee in that respect to be true.

65. But if so, it does not necessarily follow that it went further than the Chief Justice suggested in his press release, or indeed that it was inappropriate. The Cabinet approved

HDC policy evidently provides for 25% of available housing to be allocated on the recommendation of the Minister in special cases / emergencies. No doubt the HDC / Minister applies criteria of some sort to decide allocation in such cases. Nevertheless, clearly it would not necessarily be inappropriate, when recommending an applicant believed to be deserving of special or urgent consideration, to go further than merely putting forward the person's name. It could hardly be objectionable to seek to make the case for special or urgent treatment, at any rate up to a point. Any communications there may have been by the Chief Justice might well be justified on this basis. In his press release he referred specifically to forwarding the names of *'needy and deserving persons'*.

66. Be that as it may, even if the Chief Justice went further than he ought to have done in support of any applicant, it is unlikely in my view that it could justify removal from office, at any rate if he did not do so merely at the behest of Romero. He could in such circumstances be criticised for displaying a lack of judgment, in particular bearing in mind the considerations discussed in paragraphs 40 and 41 above; but that is not in my view to be equated with such serious misbehaviour as to require removal. It therefore seems to me that the third HDC complaint stands or falls with the first and second complaints.

Conclusions

67. The question that I have suggested the Prime Minister must ask himself (paragraph 14 above) is whether, on the material before him, subject to investigation by the tribunal and (if referred to it) the Judicial Committee, there is a reasonable possibility that the complaints could lead to removal of the Chief Justice from office.

68. As regards the complaints concerning judicial security arrangements (see paragraph 20 above), for the reasons I have given, I consider the answer to this question to be 'no'. I do not, therefore, consider that those complaints require the Prime Minister to represent to the President that the question of the Chief Justice's removal from office ought to be investigated.

69. As regards the HDC complaints, does the evidence in support of them amount to a *'prima facie sufficient basis in fact'* (per Rees v Crane) that the Chief Justice acted at the behest of Romero in making recommendations, i.e. effectively that he used his office to promote applications to which he gave no independent consideration?

70. If so, the HDC complaints could in my opinion *potentially* be serious enough to warrant removal, and therefore warrant investigation, albeit I incline to the view that even then, absent knowledge on the Chief Justice's part of Romero's fraudulent scheme (of which there is no evidence), they would probably be 'on the border line'.

71. The alleged Whatsapp communication with the Prime Minister is important in my view. If, as I understand it, there was no such message from the Chief Justice to the Prime Minister, the case against the Chief Justice is (as I have said) considerably weaker, bearing in mind the doubtful status of the alleged HDC email and the non-specific hearsay evidence on which the second HDC complaint depends. The fact that the alleged Whatapp communication shown to Ms Renne appears to have been a fabrication also raises the distinct possibility that someone sought falsely to implicate the Chief Justice.

72. Both for this reason and generally, the Prime Minister may, I think, justifiably have regard to the conspicuous weakness and non-specific hearsay nature of the evidence touching on the second complaint, as to which see paragraphs 53-57 above. I bear in mind, of course, that it is not for the Prime Minister to try to resolve conflict or uncertainty in the available evidence; rather, his task is simply to decide whether the question of removing the Chief Justice ought to be investigated. Paucity and weakness of evidence, and very real uncertainty as to the prospects of specific non-hearsay evidence being forthcoming, are however matters to which the Prime Minister can properly have regard in my view. These problems feature in connection with the second HDC complaint in particular.

73. Whilst it is not for the Prime Minister to try to resolve evidential issues, where matters have already been investigated (as in this case by the Committee), consideration both of the evidence that has emerged from that investigation and of what more might be forthcoming in the event of a representation to the President is, I think, entirely

reasonable, provided the Prime Minister keeps well in mind, as I have said, that his is a threshold decision – as to whether the complaints ought to be investigated – not a fact finding exercise.

74. There is also a further consideration, namely that there is no direct evidence that the Chief Justice recommended anyone merely because Romero asked him to; rather (and in some ways unsurprisingly) the case in that respect depends entirely on inference. The inference does not however necessarily follow, even if the Chief Justice *was* asked by Romero to make recommendations; rather it is only a possible inference. He might, for example, have considered what Romero told him about prospective applicants before making any recommendation. The inference that he simply acted, without any consideration, at Romero's behest is no more likely than this alternative in my view. And not too much weight can be attached to the Chief Justice's failure to answer this specific allegation, since he may very well not have wanted to draw attention to his apparent relationship with Romero. Though, again, ultimately a matter for any tribunal, the uncertainty in this respect is I think a further relevant consideration, which the Prime Minister may properly bear in mind, given the other evidential weaknesses to which I have referred.

75. The conclusion I reach in all the circumstances is that the HDC complaints have an insufficient basis in fact to warrant a representation by the Prime Minister to the President that the Chief Justice's removal ought to be investigated. Or put another way (in response to the question I have suggested the Prime Minister must ask himself, see paragraph 67 above), there is not in my view a reasonable possibility (as distinct from a bare or remote possibility) that the complaints could lead to removal of the Chief Justice.

76. If, however, there was a Whatsapp communication between the Chief Justice and the Prime Minister, my advice could differ. If, therefore, contrary to my understanding, there was such a communication, I would want to consider matters further.

77. I should add two things for completeness. First, if the Prime Minister decides not to make a representation to the President, I would be pleased to discuss with those instructing me what should be said to the Law Association, Chief Justice and/or others

in that regard. Secondly, if, on the other hand, despite the conclusions I have reached, the Prime Minister were to be of the view that he should make a representation to the President, the Chief Justice should in my view (notwithstanding the Committee's investigation) first be given an opportunity to respond to the complaints and material considered by the Prime Minister.

HOWARD STEVENS QC

25 April 2019