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Judicial security of tenure: the dangers of side-stepping constitutional protections

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ABSTRACT

The Judicial Committee of the Privy Council's decision in *Marcia Ayers-Caesar v The Judicial and Legal Service Commission* (2025) is, on the one hand, an important reiteration of the importance of judicial independence (a key requirement of the rule of law) through the security of tenure enjoyed by judges under the Constitution of Trinidad and Tobago and, on the other, a relatively straightforward matter of constitutional statutory interpretation. It will be argued that this characterisation is deceptive given the differing interpretations as to the ambit of section 137 of the Constitution reached by the Court of Appeal of Trinidad and Tobago and the Privy Council. The case concerned an appeal by the Judicial and Legal Service Commission against the decision of the Court of Appeal of Trinidad and Tobago. The Court of Appeal had held that Marcia Ayers-Caesar (the respondent) had been unlawfully pressured to resign as a judge through the threat of a disciplinary enquiry in the event that she had not tendered her resignation. The Court of Appeal of Trinidad and Tobago and the Privy Council in their decisions were clear that section 137 of the Constitution was the only method available to remove a judge and that the Judicial and Legal Service Commission had sidestepped this important constitutional provision. This article considers the provisions of the Constitution of Trinidad and Tobago that permit the removal of a judge; the broader context of judicial independence; and analyses the decision of the Privy Council.

Keywords: judicial independence; security of tenure; rule of law; Trinidad and Tobago; Judicial Committee of the Privy Council.

INTRODUCTION

The Privy Council's decision in *Marcia Ayers-Caesar v The Judicial and Legal Service Commission* (2025)[1] is, on the one hand, an important reiteration of the importance of judicial independence through the security of tenure enjoyed by judges under the Constitution of Trinidad and Tobago (the Constitution) and, on the other, a relatively straightforward matter of constitutional statutory interpretation. Yet, this is deceptive as, whilst the Privy Council agreed with the Court of Appeal of Trinidad and Tobago that section 137 of the Constitution

1 *Marcia Ayers-Caesar v The Judicial and Legal Service Commission* [2025] UKPC 15.

was the only method available to remove a judge, it disagreed with two of the judges in the Court of Appeal that the misbehaviour required to trigger section 137 had to take place exclusively after the judge's appointment.

The case concerned an appeal by the Judicial and Legal Service Commission (the Commission) against the decision of the Court of Appeal of Trinidad and Tobago. The Court of Appeal had held that Marcia Ayers-Caesar (the respondent) had been unlawfully pressured to resign as a judge through the threat of a disciplinary enquiry in the event that she had not tendered her resignation. The Commission and its chair, the then Chief Justice of Trinidad and Tobago, who had communicated the decision to Ayers-Caesar, were found to have side-stepped the important constitutional protection afforded by the Constitution. This article will first consider the provisions of the Constitution of Trinidad and Tobago that permit the removal of a judge. Second, it will address the broader context of judicial independence in the country before finally offering an analysis of the Privy Council's decision in the present case.

CONSTITUTIONAL FUNDAMENTALS

Judicial independence is a cornerstone of the rule of law. A healthy democracy requires that the judiciary are not controlled by the other branches of government and have the freedom to reach decisions without fear of reprisals by another branch of government. This fear of reprisal is a threat to judicial independence and undermines public confidence in the administration of justice. A pivotal moment in the common law tradition was the statutory protection of judicial independence through the provisions of the Act of Settlement 1701 that guaranteed judicial security of tenure, subject to the good behaviour of office holders. This meant that the monarch (or today the government) would no longer have the discretion to dismiss judges at their pleasure, rather an address from both Houses of Parliament was required. The Act of Settlement did not remove the ability of Parliament to impeach a judge. The independence of judges is not to be taken for granted within democracies. Several examples can be given to illustrate this point. The first is in the United Kingdom (UK) where Robert Jenrick MP, the Shadow Justice Secretary, called for a judge to be sacked.[2] The second is in the United States (US) where President Donald Trump called for the impeachment of a judge whose decision he did not like, which led

2 Eleni Courea, 'MPs' attacks on judges a huge threat to the rule of law, says attorney general' *The Guardian* (London 2 April 2025).

to a rebuke from Chief Justice John Roberts.[3] There is no dispute that in principle judges ought to be accountable, however, there is a need to balance the accountability of judges alongside judicial independence. This is a difficult balancing act, as the former Chief Justice of Australia, Sir Anthony Mason observed, 'a failure to strike the right balance … will result in either an unacceptable weakening of judicial independence or inadequate accountability'.[4]

In Trinidad and Tobago, the Constitution contains a presidential impeachment mechanism and a separate mechanism for the removal of judges. Although the method of removing judges is informally referred to as impeachment, it is not initiated by politicians or undertaken by the legislature (unlike the use of impeachment to remove federal judges in the US).[5]

Section 35 of the Constitution provides for the removal of the President. Paragraphs (a)–(d) set out the grounds on which a president can be removed from office. The grounds are broad and *inter alia* cover incapacity, breaching of the Constitution, misbehaviour and endangering national security. The procedure for removing the President is set out in section 36. Unlike the operation of impeachment under the US Constitution, which only involves the House of Representatives and the Senate in the determination of the process and outcome, section 36 involves the House of Representatives, the Senate and a tribunal constituting the Chief Justice and four other senior judges. The judges' role is not to approve the decision to impeach, but rather to 'investigate the complaint and report on the facts to the House of Representatives'. The decision as to whether to remove the President is that of the legislature and not the judiciary. There is also a mechanism to remove the Prime Minister as section 77 permits the removal of a Prime Minister after a vote of no confidence by a majority of the members of the House of Representatives.

The removal of judges is provided for under section 137. It is important to note that the sole way of removing a judge is section 137, and there are no alternative provisions which can be used. Section 137(1) states that a judge can only be removed from office for two reasons, which are 'for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour'. The section is explicit that a judge cannot be removed 'except in accordance with the provisions of this

3 Kayla Epstein, 'Top US Supreme Court justice rebukes Trump's call to impeach judge' (*BBC News* 18 March 2025).

4 David Simmons, 'Aspects of judicial independence and accountability – lessons for the Commonwealth Caribbean?' (2007) 33(4) Commonwealth Law Bulletin 657–670.

5 See 'Impeachment of federal judges' (Federal Justice Centre nd).

section'. There are clear checks and balances built into section 137 that prevent inappropriate use of the provision. The final decision as to whether a judge should be removed under section 137(2) is made by the Privy Council. In order to get to this stage, the President must make a referral to the Privy Council, and only upon the advice of the Privy Council can the judge by dismissed by the President. Crucially, for the purposes of the present appeal, it is the Commission that will make the representation to the President that there needs to be an investigation into the judge's conduct under section 137(3) where the judge in question is not the Chief Justice. As the Privy Council noted, the Commission was 'a body whose membership is designed to ensure its independence'.[6]

Safety valves are further built into section 137(3) where, upon a referral by the Commission, the President is required to 'appoint a tribunal which shall consist of a chairman and not less than two other members'. For judges under investigation (other than the Chief Justice) the President must appoint the tribunal 'in accordance with the advice' of the Prime Minister 'after consultation with the Judicial and Legal Service Commission'. The members of the tribunal must be judges. The President can only make a referral to the Privy Council where the tribunal recommends this. Significantly, the determination at all stages is conducted by judicial office holders and the Commission, and the President's role is to act as a conduit to make a referral. In the event that the Privy Council advises that the judge should be dismissed, the wording of section 137(2) is clear that the President must do so.

THE BROADER CONTEXT OF JUDICIAL INDEPENDENCE

As Douglas Mendes SC observes, '[u]nder the Constitution of Trinidad and Tobago, the judiciary enjoys a high degree of protection from outside influence'.[7] The removal process 'is cumbersome but more importantly is insulated from executive influence'.[8] Trinidad and Tobago's retention of the referral process to the Privy Council was not the norm for Commonwealth member states:

> The provision of external scrutiny has not been constant in Commonwealth jurisdictions since independence … At the time of independence, it was standard practice for new Commonwealth member states which had adopted the *ad hoc* tribunal system to provide that any tribunal decision which recommended the removal of a judge should automatically be referred to the Privy Council for confirmation.

6 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 6.

7 Douglas Mendes, 'Judicial independence and the administration of judiciary in Trinidad and Tobago' (2000) 6 (3/4) Caribbean Dialogue 89–98, 92.

8 Ibid 92.

> As these states withdrew from the appellate jurisdiction of the Privy Council, they also abolished this referral procedure. Five independent Commonwealth jurisdictions still retain this referral jurisdiction … In all other jurisdictions the *ad hoc* tribunal effectively became the final decision-maker. Although the cutting of ties with the Privy Council explains why that court no longer has a role in those jurisdictions, it does not justify the decision to abandon any appellate check.[9]

As the Privy Council is the final appellate court, there has been criticism that Trinidad and Tobago has not fully decolonised as it retains vestiges of colonialism. Sir Dennis Byron, the President of the Caribbean Court of Justice, put this in stark terms: 'Trinidad and Tobago was once a colony. Today, it is an independent republic. But its independence does not include judicial independence as the final appellate court is still the colonial Privy Council.'[10] Byron added, '[s]peaking for myself it is a bit embarrassing'.[11] This colonial vestige is controversial among academics.[12] Trinidad and Tobago's decision not to accept the appellate jurisdiction of the Caribbean Court of Justice is despite the role it played in funding the creation of the court and the fact that the court is located in Trinidad and Tobago.[13]

The Law Association of Trinidad and Tobago noted that the security of tenure enjoyed under the Constitution meant that it was difficult to hold judges accountable for their performance (given the requirement of misbehaviour):

> It is significant however, that apart from infirmity, the only ground for termination is misbehaviour. Short of overtly criminal conduct such as bribery, the misconduct must be so serious as to undermine public trust in the Judiciary and the rule of law. The bar for removal is, understandably, quite high. What this means is that issues such as persistent delays in delivering judgments or ethical breaches which might exercise the minds of the public are unlikely to lead to termination if the judge is in fact impeached on those grounds. Moreover, it is difficult

9 'The appointment, tenure and removal of judges under Commonwealth Principles: a compendium and analysis of best practice' (Bingham Centre for the Rule of Law 2015) 101.

10 Right Honourable Sir Dennis Byron, President of the Caribbean Court of Justice, 'Restoring public confidence in the independence of the judiciary' (Speech given at Trinidad and Tobago Transparency Institute Annual Fundraising Dinner 16 November 2015) 2.

11 Ibid 3.

12 See, for example, Richard Albert, 'Constitutional reform in the Caribbean' (2017) 216 Election Law Journal 263–276.

13 See Derek O'Brien, 'The end of the Caribbean Court of Justice? On failed constitutional referendums in Grenada, and Antigua and Barbuda' (*Constitutionnet* 26 November 2018).

> to conceive of any sanctions which could effectively influence a judge's performance which do not trigger the Section 137 procedures.[14]

The consequence was that as 'it is virtually impossible to remove a judge … it means that the appointment of judges takes on heightened significance. There should be little room for error in selection since, if mistakes are made, they would be very difficult to correct.'[15] We can see this concern played out in the strategy adopted by the Commission in regards to how to find a practical solution to the part-heard cases of *Ayers-Caesar*.

Commenting on the removal procedure (which was similar to Jamaica's), Derek O'Brien noted that the procedure was intended to ensure that this:

> would cause the Prime Minister to give very serious consideration at the outset before recommending that the question of a judge's removal should be investigated by a tribunal, and would discourage the tribunal from making unmeritorious recommendations for the removal of a judge.[16]

As the former Chief Justice of Barbados, David Simmons argued, 'the Constitutions of Commonwealth Caribbean States provide ample security of tenure for the senior judiciary … Removal of a judge is not a light undertaking. So, the Constitutions embody an elaborate procedure to secure fairness for the judge.'[17]

In its assessment of Trinidad and Tobago's judicial system, the International Commission of Jurists stated that:

> In practice, the Trinidadian judiciary fiercely safeguards its independence and attempts to give full effect to the constitutional rights of accused persons in both civil and criminal proceedings. Unfortunately, judicial vigilance often leads the courts into direct conflict with authoritarian executive and legislative tendencies.[18]

The International Commission of Jurists was critical of the executive, as by questioning the 'legitimacy of the judiciary's work … [it] has effectively pitted authoritarian political party and racial group interests against the activities of an independent adjudicative system, which hinders the latter's ability to render substantive justice.'[19]

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14 'Report of the Committee on Judicial Appointments' (Law Association of Trinidad and Tobago June 2018) 31.

15 Ibid 32–33.

16 Derek O'Brien, 'The Commonwealth Caribbean and the Westminster model' in Richard Albert, Derek O'Brien and Se-shauna Wheatle (eds), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press 2020) 152.

17 Simmons (n 4 above) 661.

18 'Trinidad and Tobago – attacks on justice' (International Commission of Jurists 2002) 358.

19 Ibid 358–359.

Race plays a significant factor in how Trinidad and Tobago functions given the tensions existing largely between Afro-Caribbean and Indo-Caribbean sections of the population.[20] As Se-shauna Wheatle observes, '[t]hese historical tensions … are now reflected in the divide between major parties and political factions, which primarily run along racial, rather than ideological lines.'[21] As illustrative of this, Terrence W Farrell gives the example of the disciplinary enquiry into Chief Justice Satnarine Sharma after the Chief Magistrate had made allegations against him.[22] The tribunal that investigated this matter (including Lord Mustill as the Chair) was extremely critical of what had happened:

> The picture presented to this Tribunal almost defies belief. … The air was full of rumour, innuendo and gossip, around and across deep political (and, we are forced to say, ethnic) divides. At least within this narrow field of view, the concept of the separation of powers seems to have been ignored. We need not go on. The picture is 'troubling' indeed, both for the Tribunal and for the peoples of Trinidad and Tobago.[23]

Kate Malleson argues that '[t]he fact that the President felt the need to appoint a UK Law Lord to chair the tribunal so as to ensure that there would be no allegations of bias in its findings is in itself indicative of the deep-seated politicisation within the legal system in Trinidad'.[24] This need was justified, given that the tribunal's report 'left no doubt about the political motivation behind much of the behaviour of the leading legal figures involved'.[25]

Farrell argued that the public have low trust in the judiciary of Trinidad and Tobago,[26] citing research by Selwyn Ryan, surveys carried out in March 2000 had 56 per cent of respondents stating that they had no trust in the judiciary.[27] Farrell showed that low public trust was a regular feature, as:

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20 Se-shauna Wheatle, 'Constitutional principles: forging Caribbean constitutionalism' in Albert et al (n 16 above) 81.

21 Ibid 82

22 Terrence W Farrell, 'Judicial conduct in the Caribbean' (2021, paper originally delivered on 31 October 2019 at Caribbean Association of Judicial Officers, Belize) 18.

23 Sir Vincent Floissac, Mr C Dennis Morrison QC and Lord Mustill, 'In the Matter of an Enquiry Under Section 137 of the Constitution of Trinidad and Tobago, Report of the Tribunal' (14 December 2007).

24 Kate Malleson, 'Promoting judicial independence in the international courts: lessons from the Caribbean' (2009) 58 International and Comparative Law Quarterly 671–687, 676.

25 Ibid.

26 Farrell (n 22 above) 3–4.

27 Ibid 3.

> [i]n 2010, the World Values Survey asked respondents in Trinidad and Tobago whether they had confidence in various institutions. In respect of the 'courts', 31.2% of respondents had 'quite a lot' or 'a great deal' of confidence, while 44.5% had 'not very much' and 16.7% had 'none at all'.

However, Farrell noted that respondents might have conflated the judicial system to include other organisations such as the police.[28] In terms of what may cause this low level of trust, Farrell pointed to the problem of judicial conduct, as '[t]he Caribbean, especially Trinidad and Tobago, has produced a disproportionate number of the cases involving controversial judicial conduct'.[29] The Law Association of Trinidad and Tobago in 2018 noted that '[i]n the period after Independence, the Judiciary has experienced its share of difficulties and conflict which became public and arguably impacted the public's perception of the Judiciary and its confidence in the administration of justice'.[30] It noted that the evidence suggested that, 'the approval rating had been declining over successive surveys from 2012 to 2016'.[31]

Furthermore, Caribbean courts are notoriously slow and Farrell gives an example of the *Sookar* case that was heard in 2000 and the judgment only delivered in 2012.[32] In his judgment Justice Ricky Rahim said that this:

> was highly unsatisfactory and unacceptable having regard to the continuing duty of judges and the judiciary as a whole to ensure that decisions are given in a timely manner so as not to impose injustice on litigants … [it] erodes public confidence in the system of justice to which the nation subscribes and in the judiciary as an independent institution.[33]

It is within this context that Farrell referred to the present case involving Ayers-Caesar and the impact that her appointment to the High Court has had on her previous cases.[34]

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28 Ibid 4.
29 Ibid 13.
30 'Report of the Committee on Judicial Appointments' (n 14 above) 10.
31 Ibid 11.
32 Farrell (n 22 above) 13.
33 *Sookar v The Attorney General* CV 2010-04777 (unreported).
34 Farrell (n 22 above) 13.

THE CASE: *MARCIA AYERS-CAESAR v THE JUDICIAL AND LEGAL SERVICE COMMISSION*

The appeal before the Privy Council concerned the lawfulness of the request for Ayers-Caesar (the respondent) to resign as a High Court judge. Ayers-Caesar had served as the Chief Magistrate of Trinidad and Tobago from 2010 to 2017 before her appointment to the High Court on 12 April 2017. Prior to being appointed as Chief Magistrate she had joined the magistracy in 1992.[35] The Chief Magistrate was responsible for the Courts of Summary Criminal Jurisdiction and Petty Civil Courts and reported to the Chief Justice.[36] Ayers-Caesar resigned from the High Court on 27 April 2017, after just 15 days. The decision of the Privy Council related to the circumstances that led Ayers-Caesar to tender her resignation.

As a judge, Ayers-Caesar was appointed by the President.[37] As discussed above, judges enjoy security of tenure and can only be removed pursuant to section 137 of the Constitution. Any other attempt to remove a judge will be unlawful. As the Privy Council observed:

> The limited grounds on which judges can be removed from office under section 137, and the nature of the procedure laid down in that section, reflect the Constitution's recognition of the importance of protecting judicial independence from the executive, as a vital aspect of governance in accordance with the rule of law.[38]

Ayers-Caesar could only have been dismissed in the event of her inability to carry out her functions or her misbehaviour and this would require the Privy Council to recommend her dismissal to the President. The Privy Council's role gives judges the protection of an independent court based outside of the region, as the Privy Council is the arbiter of whether she could be dismissed. This presents a strong model of the separation of powers, with the legislature having no role, and the executive's role limited to following the procedure and having no discretion as whether to follow the Privy Council's recommendation.[39] This was recognised by the Privy Council:

> section 137 addresses the need to protect the judiciary against the threat to judicial independence, and therefore to the impartial application of the law, which would arise if the removal process could be used by the

35 *Marcia Ayers-Caesar v The Judicial and Legal Service Commission; The Attorney General of Trinidad and Tobago* [2023], Civil Appeal No S241 of 2021, para 1 (per Mendonça JA).

36 See Judiciary Trinidad and Tobago.

37 Constitution of Trinidad and Tobago, s 104(1).

38 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 5.

39 Constitution of Trinidad and Tobago, section 137(2) states that a judge 'shall be removed' by the President where the Privy Council advises that the judge should be removed. The language is clear that the President has no discretion.

> executive to penalise or intimidate judges. It achieves that objective by ensuring that the critical decisions are taken by bodies which are independent of the executive.[40]

It is necessary now to consider why Ayers-Caesar resigned as a High Court judge on 27 April 2017. The crucial matter here related to Ayers-Caesar's previous role as Chief Magistrate. Ayers-Caesar's appointment to the High Court meant that she would no longer be available to carry out her previous role, which could affect any ongoing matters for which she was personally responsible. As the Privy Council observed, 'there were some expressions of concern over the number and nature of the part-heard matters which she would leave behind in the Magistrates' Court.'[41] In response to these concerns, the Chief Justice contacted Ayers-Caesar on 10 April and enquired about this. Ayers-Caesar stated that the majority of the ongoing part-heard work 'could be re-listed before another magistrate without causing undue delay'.[42] Having received Ayers-Caesar's explanation, the Chief Justice requested a list, which Ayers-Caesar sent to him on 11 April. There were 28 cases on the list and, importantly, 'there was no indication that oral evidence had already been heard in any of the cases'.[43] The Chief Justice offered the opportunity for Ayers-Caesar to deal with the part-heard matters before being appointed to the High Court. This offer was declined.

However, on 20 April 2017, the press reported that:

> prosecuting counsel [in a case Ayers-Caesar had not included in the list] expressed concern that cases part-heard by [Ayers-Caesar] and close to completion would have to start again before another magistrate, with the result that public money would be wasted and defendants would have to spend longer in custody awaiting trial.[44]

A new list was prepared independently of Ayers-Caesar which contained 52 part-heard cases. Unlike Ayers-Caesar's description of the earlier list, here '[w]itnesses had been cross-examined in most of the cases. In some of them, the prosecution had closed its case'.[45] Ayers-Caesar had met with the Chief Justice on 25 and 26 April to discuss the matter. It would appear that the events of 26 April were pivotal, as 'there was a fracas at a Magistrates' Court involving several accused in custody, when they protested about the adjournment of their cases, which had been part-heard by the claimant', and the Law Association of Trinidad

40 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 6.
41 Ibid para 9.
42 Ibid.
43 Ibid.
44 Ibid para 10.
45 Ibid para 12.

and Tobago was concerned about the impact Ayers-Caesar's departure as Chief Magistrate would have.[46]

Clearly, the circumstances around Ayers-Caesar's departure were unfortunate and had consequences for the part-heard cases that she left outstanding. At this point, the offer of the Chief Justice on 11 April 2017, had it been accepted, would have avoided the negative public perception.

On 27 April 2017, the Chief Justice met with the Commission 'to discuss the course of action that had to be taken with respect to Mrs Marcia Ayers-Caesar's appointment'.[47] The minutes of the meeting record that 'the chairman [the Chief Justice] was of the view that Mrs Ayers-Caesar's position had become untenable, however he wanted the Commission's views as to the course of action that would be warranted'.[48] The meeting discussed what had happened and whether Ayers-Caesar had misled the Chief Justice and Commission about the extent and nature of her unfinished work.[49] Crucially, the minutes recorded the Commission's conclusion that Ayers-Caesar, as a consequence of her actions, could face a disciplinary enquiry.[50] The decision of the Commission was that:

> Mrs Ayers-Caesar be given the option of withdrawing from the High Court bench and returning to the magistracy to discharge her professional responsibilities; and in the event she refuses to withdraw, the Commission would consider instituting disciplinary action in accordance with section 137 of the Constitution of Trinidad and Tobago.[51]

This was put to Ayers-Caesar by the Chief Justice in the afternoon and, as a consequence, Ayers-Caesar resigned.[52] The approach of the Commission (which included the Chief Justice as its Chair) was to find a practical solution to the part-heard cases. By declaring that it believed the threshold had been met to trigger an enquiry under section 137, the Commission effectively presented Ayers-Caesar with no option but to resign or to face a disciplinary enquiry.

This solution may have been attractive to the Commission given the fact there were so many outstanding part-heard cases. However, the communication to Ayers-Caesar that the alternative to her resignation was a disciplinary enquiry was a threat, and one that succeeded in achieving its objective. Ayers-Caesar resigned without the need

46 Ibid para 13.
47 Ibid para 14.
48 Ibid.
49 Ibid para 15.
50 Ibid para 16.
51 Ibid 16.
52 Ibid para 17.

to follow the procedure under section 137, which, even if there has been an enquiry, this does not guarantee that the outcome would be a recommendation by the Privy Council that she should be dismissed. However, despite the immediate attractiveness of the solution, the reality was that the Commission had sidestepped section 137 and the protection it offered by way of security of tenure and undermined this important constitutional safeguard. In the Court of Appeal, Mendonça JA addressed the motivation of the Commission, finding that it was not due to 'any malice or malicious intent', but rather to offer an 'urgent solution' and 'without perhaps taking the time to properly assess the full consequences'.[53] Bereaux JA was critical of the Commission, noting that from the Commission's perspective '[t]here was need for a "quick fix"', but that 'section 137 is not about "quick fixes" … However well intended'.[54]

Imagine for a moment a different set of facts, and that Ayers-Caesar had disagreed with colleagues who were critical of her decisions as a High Court judge, or if her judging was found to be too deferential or activist, then a solution offered by the Commission in a similar vein looks even more stark as a way to circumvent the protection afforded by section 137. On the present facts, it is apparent that the Commission had found a solution that would benefit the administration of justice and prevent further delays. But, as the Privy Council found, this is not the correct approach.

THE COURT OF APPEAL'S DECISION

The Court of Appeal of the Republic of Trinidad and Tobago in *Marcia Ayers-Caeser v The Judicial and Legal Service Commission; The Attorney General of Trinidad and Tobago* (2023)[55] was comprised of Mendonça JA, Yorke-Soo Hon JA and Bereaux JA. The Court held that the Commission had unlawfully used coercion and threats to induce the resignation of Ayers-Caesar and had circumvented section 137. The Court of Appeal reached a different decision to Harris J who heard the case in the High Court and had found against Ayers-Caesar. In his judgment, Mendonça JA was clear that the Commission's role 'in the removal of a Judge is limited', as it initiates the process under section 137 but 'does not recommend the revocation of the Judge's appointment. It makes no decision or determination in that regard.'[56] The Commission's role in initiating the disciplinary enquiry was not merely to respond to complaints by making the representation to begin

53 *Marcia Ayers-Caeser* (CA) (n 35 above) para 65.
54 Ibid para 156.
55 Ibid.
56 Ibid para 15.

an enquiry, as the Commission 'must satisfy itself that the complaint against the Judge is sufficiently serious to warrant representation to the President. In that process the [Commission] must act fairly.'[57] Mendonça JA accepted that the trial judge had been wrong not to take into account Ayer-Caesar's evidence as to what had happened at the meeting with the Chief Justice on 27 April 2017. Accepting Ayers-Caesar's evidence (through contemporaneous WhatsApp messages and the evidence of her husband), Mendonça JA held 'in my view [the evidence] support[s] the Appellant's case that at the time of her resignation she was acting under threat or pressure and that caused her to resign'.[58] The option of resigning or facing a possible disciplinary enquiry, 'points to a threat made to or pressure or coercion put on her to resign'.[59] In Ayers-Caesar's affidavit of 19 July 2017, she had recounted that:

> I was horrified by what I was hearing since it was clear to me from what the Chief Justice said that a decision had already been made by the JLSC and that I had no choice but to resign as a High Court Judge or have my appointment as a High Court Judge revoked by the President. The Chief Justice also told me that he was under pressure from the President and that an appointment had already been sought for me to go to President's House later that day to deliver my resignation to the President … I was distraught and felt that I had no real choice but to sign the letter of resignation and the media release and to accede to resigning since it was clear to me that my resignation had already been orchestrated and that this was a done deal.[60]

Mendonça JA held that the Commission had given its authority to the Chief Justice in order to communicate its decision, which was designed to pressure and coerce Ayers-Caesar to resign.[61] It was apparent that the Commission had reached the decision that the 'threshold' of triggering section 137 had been met and, presumably, it would refer the matter to the President if Ayers-Caesar did not resign. Mendonça JA was critical of the Commission, as it went beyond its remit and had sought Ayers-Caesar's resignation using threats and 'unlawful pressure', rather than relying on section 137.[62] The criticism was stark: '[t]hey bypass the constitutional safeguards for securing judicial independence, a vital element in our democracy'.[63]

Having regard to section 137, even if the Commission had referred the matter to the President, then this would not automatically result

57 Ibid para 16.
58 Ibid para 44. See also para 55.
59 Ibid para 44.
60 Ibid para 28.
61 Ibid paras 63–64.
62 Ibid paras 64 and 69.
63 Ibid para 64.

in Ayers-Caesar's dismissal. Mendonça JA accepted that Ayers-Caesar had reason to believe that the Chief Justice would advise the President to dismiss her, and that it was believable that Ayers-Caesar, as a new judge, would not have a thorough understanding of section 137.[64] This approach is sensible, since it would be unreasonable to expect Ayers-Caesar to have fully understood the removal procedure and arguably what happened would have realistically precluded her from finding out more. Notwithstanding the extent of her knowledge of section 137, there was still a threat that the Commission would refer the matter to the President (even if he could not then just dismiss her) and Mendonça JA observed that no judge would want to endure disciplinary proceedings.[65] Considerable emphasis was placed on the consequences for judicial security of tenure, as the Commission had deprived Ayers-Caesar of the protections accorded to her under section 137.[66] This eroded 'a critical safeguard in securing judicial independence which is a vital element in any modern democratic constitution such as ours. It is the role of this Court to uphold the rule of law.'[67]

In her judgment, Yorke-Soo Hon JA was critical of the Commission's 'lack of due diligence'.[68] In any event, Yorke-Soo Hon JA held that section 137 did not apply as the conduct took place before Ayers-Caesar's appointment.[69] This was also the view of Bereaux JA, who held that misbehaviour 'could only be misbehaviour while holding the office of judge' which would mean that the complaint about her part-heard cases and misleading the Chief Justice related to her conduct before becoming a judge. Importantly, if section 137 would not have applied, then 'the threat of disciplinary action was an empty one. That it was sufficient to coerce Ayers-Caesar J into resigning her office, makes the breach of section 137 all the more egregious.'[70]

In his judgment, Bereaux JA held that, '[t]he threat of "considering" disciplinary action was intended to pressure Ayers-Caesar J into resigning (however euphemistically described)'.[71] This was because the Commission had determined that the threshold had been met and it was possible that disciplinary action would be initiated.[72] The Commission had acted unlawfully when giving its 'ultimatum'.[73] It

64 Ibid para 78.
65 Ibid para 79.
66 Ibid para 86.
67 Ibid para 87.
68 Ibid para 91.
69 Ibid para 93.
70 Ibid para 160.
71 Ibid para 139.
72 Ibid.
73 Ibid para 141.

was contrary to the Constitution as '[a] forced resignation using the threat of initiation of disciplinary proceedings to pressure a judge into resignation is an arbitrary removal from judicial office. It bypasses the constitutional process with all the protections that are accorded the judge.'[74] Bereaux JA held that Ayers-Caesar's faced a real threat of disciplinary action and had this happened it would have damaged her reputation, especially given the size of Trinidad and Tobago, which meant that there was an incentive to resign in order to avoid 'the odium likely to accompany the public revelation that such a process has been started'.[75]

THE PRIVY COUNCIL'S DECISION

The Privy Council was comprised of Lord Reed, Lord Hodge, Lord Stephens, Lady Rose and Lady Simler. Lord Reed delivered the judgment on behalf of the Board. The Privy Council had to answer four key questions of law. The first of these questions was whether Ayers-Caesar's conduct fell within the ambit of section 137.[76] The Board noted, although importantly disagreed, with the view of Yorke-Soo Hon JA and Bereaux JA that the conduct complained about took place prior to her appointment and therefore was not within the scope of section 137.[77] This meant that Ayers-Caesar's conduct could be investigated, even if the Privy Council declined to comment on whether the concerns relating to Ayers-Caesar had been proven.[78]

The Privy Council then proceeded to explain its reasoning and why it had interpreted the temporal occurrence of misconduct differently than the Court of Appeal. Making reference to previous decisions of the Privy Council in *Lawrence v Attorney General of Grenada* (2007)[79] and *Hearing on the Report of the Chief Justice of Gibraltar* (2009)[80] that concerned the meaning of inability and misbehaviour when addressing the ability of a judge to carry out their judicial function, the Privy Council concluded that one could look at the impact where it had an immediate effect or related to the public perception of the judge's conduct.[81] The Privy Council explained that:

> there is nothing in the analysis in those cases which would logically confine its ambit to conduct occurring during the term of office. Nor

74 Ibid para 146.
75 Ibid para 158.
76 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 18.
77 Ibid para 22.
78 Ibid paras 22–23.
79 *Lawrence v Attorney General of Grenada* [2007] UKPC 18; [2007] 1 WLR 1474.
80 *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43.
81 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 33.

> would the underlying aim of the power of removal for inability or misbehaviour, namely, to protect the due administration of justice, require such a limitation on its ambit.[82]

This approach was supported by the decision of the Supreme Court of Canada in *Therrien v Minister of Justice* (2001).[83] The rationale given by Gonthier J was that the past conduct of a judge was relevant when assessing whether they could perform their judicial functions, so that it could be determined:

> based on that [prior conduct], whether it may reasonably undermine public confidence in the incumbent of the office. In this case, the appellant's actions, though predating his appointment, were alleged to have had that kind of impact on the performance of his functions.[84]

The Privy Council was clear that there was a public policy argument of including past conduct to help determine whether section 137 was satisfied, as the aim of section 137 would not necessitate the exclusion of previous conduct.[85] The Privy Council posed an example of 'where it emerged that the judge had committed a serious criminal offence prior to his or her appointment' and why this would fall within the ambit of section 137.[86] Indeed, it viewed the facts and circumstances of the present case as being capable of being covered by section 137.[87]

The second question considered by the Privy Council was whether the 'Commission's decision that the information before it triggered and met the threshold for disciplinary enquiry' was 'unlawful by reason of procedural unfairness?'[88] The Privy Council referred to the decision in *Rees v Crane* (1994)[89] and the requirement that the Commission owed a judge the duty to act fairly.[90] This would require the judge to be notified of the allegations and be given a right to reply.[91] As the Privy Council noted, Ayers-Caesar might have been able to rebut the allegations and it outlined in detail how she might have done this.[92] In terms of what had actually happened, the Privy Council noted that Ayers-Caesar was not provided with the opportunity to rebut the allegation, nor was she told by the Commission that on 27 April 2017 it had discussed whether

82 Ibid.
83 *Therrien v Minister of Justice* [2001] 2 SCR 3.
84 Ibid para 58 and *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 34.
85 Ibid para 33.
86 Ibid.
87 Ibid para 36.
88 Ibid.
89 *Rees v Crane* [1994] 2 AC 173.
90 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 37.
91 Ibid para 38.
92 Ibid para 39.

to begin the process to remove her.[93] The Commission reached the decision that, based on what it knew (and without having informed Ayers-Caesar or heard her account), section 137 was triggered and 'met the threshold for representing to the President that the question of removing her ought to be investigated'.[94] This was unfair to Ayers-Caesar as the Commission's decision had been reached without her involvement. Therefore, now that the decision was reached, it would be harder for Ayers-Caesar to convince the Commission to reach a different outcome than if she had been given the opportunity to make her representations beforehand.[95]

The third question was whether the option communicated to the respondent by the Chief Justice on behalf of the Commission was unlawful given its inconsistency with what was required by section 137. The Privy Council made reference to *Rees v Crane*, a case on appeal from Trinidad and Tobago,[96] where Lord Slynn of Hadley had stated:

> It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways.[97]

It observed that 'the Commission has a vital but limited role' which was to make a representation to the President that there should be an investigation, and therefore '[i]t is no part of the Commission's role, where it has found that there are circumstances justifying such a representation, to seek to procure the removal of the judge by other means, such as resignation'.[98] Thus, the Commission's decision that Ayers-Caesar should be offered a choice to resign or face a possible disciplinary enquiry was unlawful.[99] The choice it offered Ayers-Caesar was not advice, nor could the fact that the Chief Justice had communicated it to her mean that he was offering advice as he was not undertaking his pastoral role, but rather he was exercising his disciplinary role.[100]

The final question as to whether the Commission brought about Ayers-Caesar's resignation was answered in the affirmative. The Privy Council observed that pressure had been applied on Ayers-Caesar and that '[i]t is unsurprising that she responded by agreeing to resign'.[101]

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93 Ibid para 40.
94 Ibid.
95 Ibid para 43.
96 *Rees v Crane* (n 89 above).
97 Ibid paras 187–188.
98 *Marcia Ayers-Caesar* (UKPC) (n 1 above) para 48.
99 Ibid para 51.
100 Ibid para 50.
101 Ibid para 53.

Although the Board disagreed with Yorke-Soo Hon JA and Bereaux JA on the issues of whether Ayers-Caesar's conduct fell within the ambit of section 137, it nevertheless upheld the Court of Appeal's decision as to the unlawfulness of the Commission's handling of this case. The conduct of the Commission and of its Chair, the Chief Justice, demonstrated the problems of trying to find a quick solution to circumvent the fact that the Constitution afforded judges a high degree of security of tenure. Had the Commission not embarked on the journey that it did which ended with Ayers-Caesar resigning, and rather had it performed its functions lawfully, then it could have made a referral to the President (subject to the requirement of fairness and the need to communicate the allegations to Ayers-Caesar) and this would have led to a disciplinary enquiry. Even if there had been such an enquiry, it is by no means certain what the recommendation of the Tribunal or the Privy Council would have been, if it had indeed got that far. It is likely that Ayers-Caesar would have remained in post, notwithstanding the public concern about the part-heard cases. This would have been a much-needed learning curve for all those involved, with more due diligence needing to be undertaken in the future prior to the appointment of a judge. Furthermore, once it was decided that a judge should be removed, the Chief Justice and the Commission would need to ensure that they followed the Constitution and not what might appear to be an expedient solution. The Court of Appeal had been clear that Ayers-Caesar's conduct should not be relevant to its decision, as the issue was about the lawfulness of the Commission and its compliance with the Constitution. Likewise, the Privy Council had reflected that Ayers-Caesar, had she been given the opportunity to do so, might have been able to rebut the allegations. Having had regard to the background facts and the evidence considered by the Court of Appeal, it is difficult to conclude other than that Ayers-Caesar was given little choice but to resign and that it was clear that everyone expected her to do so.[102]

The Privy Council relied on jurisprudence from previous Privy Council decisions and the Supreme Court of Canada to interpret section 137 to permit the inclusion of conduct that had occurred prior to appointment. This conclusion is attractive as the judge's ability to carry out their judicial function with public confidence can never be separated from the totality of the judge's career, namely, anything that emerges about the judge's career or personal life prior to their appointment may well have an impact on their ability to do their job. If this conduct was not capable of triggering section 137, then this would be problematic, as the judge could remain in office regardless of public

102 See, for example, the account from Ayers-Caesar in *Marcia Ayers-Caeser* (CA) (n 34 above) para 28.

opinion and losing the confidence of the legal profession. However, is the answer to take the approach adopted by the Privy Council, or rather to read section 137 as the Court of Appeal did? There is merit in limiting inability to perform judicial functions and misbehaviour to events or conduct that occurred post-appointment. Surely a high degree of due diligence and consultation with the legal profession could reveal areas of concern?

The fact was that, in the present case, the Chief Justice was content to accept Ayers-Caesar's account, even where there was enough uncertainty as to require an independent assessment to verify the extent of her outstanding workload. This due diligence and consultation was lacking here and, as a result, Ayers-Caesar was appointed. In light of the relative size of the jurisdiction, it arguably would not have taken much more to have ascertained a more accurate account. Given the difficulties (for good reason) in removing a judge, it is surprising that a more thorough appointment process has not been undertaken. There are lessons to be learnt here for any jurisdiction that accords judges security of tenure as there may be a legitimate reason for regretting a judicial appointment. To avoid a situation such as the present case, more scrutiny would have flagged up the problem prior to appointment.

It is submitted that the Court of Appeal's approach to the scope of section 137 is preferable. This approach places the onus on those appointing judges to undertake the commensurate amount of due diligence as required by the nature of the role. It is readily conceded that there is merit in the Privy Council's reading of section 137, as such an approach helps to remedy a problem and as such offers an expedient solution to an otherwise difficult situation. The Privy Council's approach has clear merits as it removes an unsuitable person from judicial office and restores public confidence in the judiciary, whilst retaining the confidence of the legal profession. Furthermore, the Privy Council's approach arguably does not on the face of it reduce the degree of judicial security of tenure available, as removal for past conduct could only be used in appropriate circumstances.

As discussed above, the Privy Council had provided the example of a judge who has been appointed, but it then emerges that they had committed a criminal offence prior to taking judicial office. This was presented as support for the Privy Council's reading of section 137. Having such a person as a judge is damaging to the reputation of the judiciary and to public confidence in the legal system. Even if you could then rely on section 137 to remove the judge, it would still nevertheless be embarrassing (to say the least) that they were appointed as a judge in the first place. Whether, or not, they can be removed using section 137 will not entirely remedy these consequences. In the present case, Ayers-Caesar's appointment, whilst problematic, was embarrassing in

the sense that there was a lack of due diligence. The irony is that *but for* the circumstances of her appointment and her degree of candour regarding her outstanding workload, she was suitable for judicial office.

To return to the Privy Council's example, even if the judge was found to have committed a serious offence prior to being appointed to the bench, this does not mean that there is no sanction. The judge would be prosecuted by the authorities like any other citizen and if they were subsequently convicted and given a custodial sentence, then section 137 would apply as the judge would be unable to perform the functions of their office. This then would allow the judge to be removed in line with the Court of Appeal's reading of section 137. The fictional judge who has been accused of a serious criminal offence has the same right as any other individual to be presumed innocent until proven guilty, and therefore they should not be removed from the bench (save if the Constitution provides otherwise) unless they are found guilty.

Ultimately, this case highlighted the shortcomings in the judicial appointment system in Trinidad and Tobago. These shortcomings were due to human error and a failure to undertake sufficient due diligence. Whilst the Chief Justice could expect to be told the truth and not to be misled, this level of trust cannot replace due diligence, even if the Chief Justice has no reason to doubt the account he has been given. Judicial independence is key in any democracy and security of tenure is provided as it is a way of ensuring that judges have the freedom of do their job without fear of dismissal. This is required to uphold the rule of law. The Constitution of Trinidad and Tobago offered, on paper, this important protection. The drafters of the Constitution had rightly understood the importance of judicial independence and had provided for a well thought-out and transparent method of investigating a judge and ultimately to remove them from office. As Douglas Mendes SC has argued, it might be difficult to remove a judge, but the result is a strong degree of security of tenure and freedom from interference by the executive.[103] There can be no doubt that the appointment of Ayers-Caesar was regretted, but that was no justification for circumventing the important protection accorded to Ayers-Caesar by the Constitution. The case must serve as a warning to those responsible for judicial discipline (in Trinidad and Tobago and further afield) to follow the law, as the disciplinary and removal procedure is designed to secure the rule of law, and to do otherwise erodes this important constitutional protection.

103 Mendes (n 7 above) 92.