Tribunal Established pursuant to

Section 74(4) of the Constitution of Bermuda

REPORT OF THE TRIBUNAL INTO THE COMPLAINT AGAINST JUSTICE NICOLE STONEHAM

Introduction

1. We were appointed by Her Excellency Rena Lalgie, then Governor of Bermuda, pursuant to section 74(4)(a) of the Constitution of Bermuda, to inquire into a complaint concerning the alleged conduct of Justice Stoneham ("**the judge**"), a justice of the Supreme Court of Bermuda, and to advise whether the question of the removal of the judge should be referred by His Majesty to the Judicial Committee of the Privy Council. Our terms of reference require us to establish the facts surrounding the complaint which was made by the then Chief Justice of Bermuda on 11 August 2023 and to advise. That complaint followed the judgment of the Court of Appeal in *VSE v. TRT* [2023] CA (Bda) 9 Civ which sets out the background.

2. For reasons set out in our report our advice to the Governor is that this matter should not be referred to the Privy Council. Indeed, we have concluded that the judge was not guilty of any misconduct arising from the matters under complaint. Rather, as she accepts, she made errors of law and judgement which in our view did not amount to misconduct. The threshold for removal is "misbehaviour" which requires serious misconduct sufficient to destroy confidence in a judge's ability properly to perform the judicial function.

Legal Framework

3. Section 74 of the Bermuda Constitution Order 1968 ("**the Constitution**") is concerned with judges of the Supreme Court, including their removal.

> **"Tenure of office of judges of the Supreme Court**
> 74 (1) Subject to the following provisions of this section, a judge of the Supreme Court shall vacate his office when he attains the age of sixty-five years:
>
> Provided that —
>
> (a) the Governor may permit a judge who attains the age of sixty-five years to continue in office until he has attained such later age, not exceeding the age of seventy years, as may have been agreed between the Governor and the judge; and
>
> (b) a judge who has attained the age at which he would otherwise vacate office under this subsection may continue in office for such period as may be necessary to enable him to deliver judgment or to do any other thing in relation to any proceeding commenced before him before he attained that age.

(2) A judge of the Supreme Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of subsection (3) of this section.

(3) A judge of the Supreme Court shall be removed from office by the Governor by instrument under the Public Seal if the question of the removal of that judge from office has, at the request of the Governor, made in pursuance of subsection

(4) of this section, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act 1833 or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or misbehaviour.

(4) If the Governor considers that the question of removing a judge of the Supreme Court from office for inability as aforesaid or misbehaviour ought to be investigated, then—

(a) the Governor shall appoint a tribunal, which shall consist of a Chairman and not less than two other members selected by the Governor from among persons who hold or have held high judicial office;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the Governor and advise the Governor whether he should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee; and

(c) if the tribunal so advises, the Governor shall request that the question should be referred accordingly."

(5) The provisions of the Commissions of Inquiry Act 1935 of Bermuda as in force immediately before coming into operation of this constitution shall, subject to the provisions of this section, apply as nearly as may be in relation to tribunals appointed under subsection (4) of this section or, as the context may require, to the members thereof as they apply in relation to Commissions or Commissioners appointed under the Act.

(6) If the question of removing a judge of the Supreme Court from office has been referred to a tribunal under subsection (4) of this section the Governor may suspend the judge from performing the functions of this office, and any such suspension may at any time be revoked by the Governor, and shall in any case cease to have effect –

(a) If the tribunal advises the Governor that he should not request that the question of the removal of the judge form the

office should be referred by Her Majesty to the Judicial Committee; or

(b) If the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.

(7) The powers conferred upon the Governor by this section shall be exercised by him acting in his discretion."

4. Section 1 of the Commissions of Inquiry Act 1935 provides:

> **"Governor may appoint commissioners of inquiry into matters of public nature**
> (1) The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.
>
> (2) Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public.
>
> (3) In the absence of a direction to the contrary, the inquiry shall be held in public, but the commissioners shall nevertheless be entitled to exclude any person or persons for the preservation of order, for the due conduct of the inquiry, or for any other reason."

5. The term "misbehaviour" is not defined in the Constitution, but the same word appears in the constitutions of many other British Overseas Territories, Crown Dependencies and Commonwealth Realms. As such it has been considered on several occasions by the Privy Council. This case is concerned with possible misbehaviour rather than inability. Very recently, in *Marcia Ayers-Caesar v. The Judicial and Legal Services Commission (Trinidad and Tobago)* [2025] UKPC 15 Lord Reed, giving the judgment of the Privy Council, summarised the position shortly at para [5]. Section 137 is the materially identical provision in the Constitution of Trinidad and Tobago:

"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. In relation to the grounds for removal, section 137 addresses the risk that a judge may become unfit to perform his or her duties or may engage in serious misconduct, by enabling the judge to be removed for inability to perform the functions of his or her office, or for misbehaviour. In limiting the circumstances in which a judge can be removed from office to inability or misbehaviour, the Constitution conforms to article 18 of the United Nations Basic Principles on the Independence of the Judiciary (1985) ("Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties"), and to Guideline VI.1(a)(i) of the Commonwealth (Latimer House) Principles (2003) ("Grounds for removal of a judge should be limited to: (A) inability to perform judicial duties and (B) serious misconduct"). The threshold for removal is high. As the Board said in *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43, para 31:

> "While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function."

6. As will become apparent, the essential facts surrounding the complaint against the judge have not been the subject of significant dispute. That has rendered academic for the purposes of this report the interesting submissions we heard about the standard of proof that we should apply to a factual allegation said to amount to misbehaviour. Had a finding of misbehaviour turned on a specific finding of fact we would have applied the criminal standard of proof, being satisfied so that we were sure that the factual allegation had been made out. In that we would have followed the approach of Lord Mustill in the report of the tribunal of 14 December 2007 into the removal of the Chief Justice of Trinidad and Tobago which was referred to by Lord Phillips of Worth Matravers in In *Re Chief Justice of Gibraltar* [2009] UKPC 43 at para [16]. However, the Gibraltar case was not "concerned with disciplining the Chief Justice for misconduct but with deciding whether he is fit to perform the duties of his office." Lord Phillips concluded that in such cases the civil standard of proof should be applied but emphasised that the advice of the Privy Council was not going to turn on the standard of proof applied to fact finding. Most of the facts were not in issue. Instead, the case turned on judicial assessment.

Procedural Matters

7. Section 1(3) of the Commissions of Inquiry Act 1935 applies "as nearly as may be" to the proceedings of the Tribunal. Our inquiries were carried out substantially through correspondence with various official bodies in Bermuda as well as individuals. Some of those individuals provided formal witness statements. We decided that we would conduct an oral hearing in Bermuda at which we would hear evidence from some of those witnesses, from the judge and also hear submissions from Ms Thomas, Counsel to the Tribunal, and Mr Lynch KC for the judge. All of the written material we obtained formed part of the evidence in our inquiry. On 6 January 2025 the Tribunal held a remote procedural hearing. One of the issues on which we heard submissions at that hearing was whether we should exclude from the substantive hearing all those not immediately involved in it. Both Ms Thomas and Mr Lynch submitted that we should do so. Section 1(3) of the 1935 Act empowers the Governor to direct that an inquiry be held in private. No such direction was given but the provision entitles the Tribunal to "exclude any person or persons" for any reason.

8. The concern of Counsel, which we shared, was that if our hearing in Bermuda were held in public it would cause irremediable harm to the judge whatever the outcome of our deliberations because of inevitable adverse publicity. That harm would be most damaging were we to conclude that the matter should not result in a referral to the Privy Council. Moreover, the complaint arises out of the way in which the judge conducted a family case in the Supreme Court concerning the educational arrangements to be made for a child. We have avoided naming the participants in this report save those already named in the judgment of the Court of Appeal. That will enable the report to be made public, if the Governor so decides. We concluded that to conduct our hearing in public, even with restrictions in place, would have substantially increased the risk of the identity of the child and parents becoming widely known. That would be so even if we made reporting restrictions (assuming we had such power) because of the ease, in a small community, of making deductions from apparently anodyne pieces of information.

9. For these reasons, we made an order that pursuant to our powers "by analogy with section 1(3) of the Commissions of Inquiry Act 1935, all those not immediately involved in the Tribunal's hearings of evidence and submissions shall be excluded from those hearings."

10. We held an oral hearing in Hamilton on 12 and 13 February 2025 at which we heard evidence from several of the witnesses who had provided statements to the Tribunal together with opening statements and submissions from Ms Thomas and Mr Lynch KC. That hearing was followed by written submissions from both counsel and a video hearing on 10 March 2025 to enable counsel to make final oral submissions.

The Judge's Legal and Judicial Experience

11. The judge was educated at school in Bermuda and then completed her first degree at Dalhousie University in Canada. From there she went to the University of Buckingham in the United Kingdom to study law and then to the Inns of Court School of Law in London. She was called to the bar of England and Wales by Lincoln's Inn in 1992 and then to the Bermuda bar in 1993. Her legal career in Bermuda in private practice was in criminal and civil litigation and corporate and financial law. She undertook government advisory work including with the Bermuda Monetary Authority.

12. In 2008 the judge was appointed an Acting Magistrate sitting in the criminal, civil and family jurisdictions. In 2010 she was appointed on a fixed two-year contract as a full-time magistrate hearing cases in all three jurisdictions. She was then appointed as a permanent magistrate, a role she held until her promotion to the Supreme Court in 2016. She came to specialise in family cases as a magistrate and her appointment to the Supreme Court was a specialist judge in the Matrimonial Division.

The Background to the Complaint

13. At a hearing before the judge on 4 August 2022 in the Supreme Court concerning the arrangements to be made for a child's education, an application was made on behalf of the mother for the judge to recuse herself for apparent and actual bias on a wide range of grounds. The mother was dissatisfied with the way the judge had conducted earlier hearings which, in her affirmation in support of the application,

the mother suggested indicated bias. Her complaints in that respect had no substance. At the hearing the mother's attorney did not pursue any allegation of actual bias but rather submitted that there was apparent bias.

14. The test for apparent bias is found in para [103] of the judgment of Lord Hope in *Porter v. Magill* [2002] 2 AC 357:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

15. If the answer to that question is 'yes' a judge should recuse him or herself.

16. For present purposes the material complaints from the mother which gave rise to the matter proceeding to the Court of Appeal were that:

    a. The judge is the sister of Mark Clarke, a retired police inspector who is a close friend of the child's paternal grandfather. The grandfather had been funding the education of the child and had been involved in renovating the inspector's home. The mother suggested that the judge knew both the child's father and paternal grandfather.

    b. Almost four years earlier, on 23 December 2018, the father had been arrested on suspicion of breach of a Domestic Violence Protection Order ("**DVPO**"). The judge was involved in the father being bailed to attend court on 24 December 2018. The mother described that as "an extraordinary step".

The First Instance Proceedings

17. The judge refused the application for recusal on 12 August 2022 and provided a written ruling. She summarised the background to the litigation which had started in June 2018 resulting then in a consent order. The proceedings were revived by the mother in September 2021 when she sought an order for interim care and control of the child and substantially to restrict the time the child resided with the father. There followed a series of hearings at which the mother did not pursue the application for care and control. Maintenance and educational arrangements became the focus of

her concern. The maintenance issue was resolved but not the questions concerning the child's education. To enable that issue to be resolved a hearing was scheduled to consider the views of the child but before it could take place the mother filed her recusal application.

18. The judge reviewed the authorities concerning recusal. She referred to the *Porter* case and to a range of others in the courts of England and Wales, the Court of Appeal of Bermuda, the Privy Council and other common law jurisdictions. One of the Privy Council cases was *Grant v. The Teacher's Appeal Tribunal & Another (Jamaica)* [2006] UKPC 59 which considered the problems facing judges in jurisdictions of the size and type of Jamaica, where parties and witnesses are not infrequently known to a judge. The connections which might lead a judge to accede to a recusal application had to be close to avoid it being too easy to remove a judge from a case in a society of that size. We observe that Bermuda has a population a tiny fraction the size of Jamaica's. The judge directed herself according to the authorities she had cited and then turned to her analysis of the application for recusal. In dealing with the two issues we have identified the judge said at para [44]:

> "The Mother's perception of the Judge's connection to the retired Police Inspector and his relationship with the Father's family is just that – her perception. The Mother's perception must not be confused with the fair-minded and informed observer, having considered the facts, "*connections*" and the issue before the Court in the context of Bermuda's geography, population size, cultural and social history." (emphasis in original)

19. She concluded her ruling by saying:

> "An informed and fair-minded observer in Bermuda with knowledge of Bermuda's geography, population size, cultural and social history including the Judge's specialist role within the Supreme Court, and the issue before the Court, would not perceive an appearance of bias."

20. Neither at the hearing of the application, of which we have the transcript, nor in her ruling did the judge indicate the nature of her relationship, if any, with Mr Clarke or the father and grandfather. She did not explain whether or how she had been involved in the release of the father on bail in December 2018.

The Appeal

21. The mother appealed. One aspect of the criticism of the judge in the appeal was that she did not engage at all, whether in the hearing or in her ruling, with the substance of what the mother had said. In a letter to the judge between the recusal hearing and the hearing of the appeal, but not copied to the father, her lawyers inquired whether the judge wished to "respond to the allegation in respect of the intervention to help [the father]." That was a reference to his release on bail on 23 December 2018 rather than supposed connection with the father's family through Mr Clarke. They added that they appreciated that the judge may not wish to do so. She told us that she had no recollection of receiving this communication and there was no suggestion that the judge responded.

22. In our view, even if she had received this letter, she would have been right not to respond. Judges do not expand upon their reasons set out in a judgment in correspondence with one of the parties to the proceedings. There are other mechanisms which enable a judge to furnish an appellate court with information relevant to a suggestion of apparent bias. The judge might have communicated with the Court of Appeal either of her own motion or following a request from that court: see *Locabail (UK) Ltd v. Bayfield Properties Ltd and another* [2000] QB 451 at 476 F-H and *Grant* (above) at para [39] where the Privy Council records the detail given by the judge to the Court of Appeal. But she did not volunteer further information nor was she asked for it.

23. The Court of Appeal heard the appeal on 9 March 2023 and handed down judgment on 15 May 2023. The approved judgment refers to the hearing date as being March 2022, but that is a typographical error. Gloster JA gave the main judgment. Clarke P added some observations and Smellie JA agreed with both.

24. Gloster JA summarised the complaints of the mother and the submissions made on her behalf, namely that there was an appearance of bias because of connections between the judge and the father's family. Her advocate did not pursue the allegation made at first instance that the judge's conduct of proceedings was partial on many counts. Gloster JA quoted extensively from the mother's affirmation. The mother's

account was that she had made a complaint against the father for sexual assault on 6 May 2018, but the Director of Public Prosecutions ("**DPP**") did not approve charges. She was granted a DVPO on 28 September 2018 for a period of 11 months. The father, she said, breached the DVPO on 21 December 2018. She reported the matter to the police who arrested the father on 23 December 2018. They sent a file to the DPP, but he was released without charge. The decision not to prosecute the father for the earlier alleged sexual assault was reviewed and the decision reversed. He was eventually acquitted of the charge of sexual assault following his trial in 2021 but convicted of common assault and given a conditional discharge. The mother went on to say that she had:

> "reviewed the initial conduct of the DPP's office towards me and the decision not to initially charge [the father] with sexual assault/common assault until one year after the incident. Additionally, I have been reviewing the decision as to how [the father] was released from police custody without charge for breach of a DVPO."

25. She continued by stating that she was "aware" that the judge had released the father to attend a plea court on 24 December 2018. Then she said that she was "aware" of the family connection through Mr Clarke to which we have already referred.

26. Gloster JA noted that the evidence relating to the father's arrest was confused. The Court of Appeal had obtained a copy of the DVPO signed by Magistrate Tyrone Chin. It had been made by consent. The Court of Appeal had before it emails between the mother and police officers involved in the December incident. The father had not given evidence before the judge and provided no statement in the proceedings but at the hearing in the Court of Appeal it is apparent to us that his description of events (in relation to the criminal proceedings he had been involved in) was muddled. He unequivocally told the Court of Appeal that the allegation that he or his family had a relationship with the judge was "completely false. I don't know the judge. My father doesn't know the judge. All right?". The uncertainty prompted the Court of Appeal to address a series of questions to the Commissioner of Police. We recite the questions, which were set out in Gloster JA's judgment at paras [16] and [17], with the answers added by us in italics:

"(a) Was [the father] arrested on 23 December 2018 for breach of the DVPO? *Yes - 7:08pm on 23rd December 2018 by PC Best.*

(b) Was he released on bail to attend the plea court on 24 December 2018? *Yes - bailed to 24th December 2018 plea court [Hamilton Magistrates' Court]*

(c) When did that release occur? *23rd December 2018 at 10:31 pm*

(d) Did that release on bail arise on the direction of Stoneham J? *It is indicated in the custody record that this was at the direction of Justice Stoneham*

(e) If not, who decided on, or directed, his release on bail? *N/A*

(f) Did the father attend plea court on 24 December 2018 or any subsequent date in connection with the alleged breach of the DVPO? *No -plea court record attached for 24th December 2018*

(g) If not, how did it come about that he was released on bail to attend the court and thereafter nothing happened? *The charge of breach of DVPO was not approved by the DPP*

(h) Was a report submitted to the DPP for charge approval in relation to the alleged breach of the DVPO? *Yes*

(i) If so, what was the upshot of that report?

27. In response to the last question the Commissioner set out the content of a file note in the electronic records dated 27 December 2018 at 01:48:33am:

"file sent to Inspector Telemaque on Monday 24 - December- 18 about 0330 hrs for his perusal and comments.

Summary of evidence, complainant's statement, charge sheet and consent order sent to DPP's office via email.

Email response received from Senior Crown Counsel Nicole Smith 07:11 hrs on Monday 24 December 2018 stating that the DPP's office is not proceeding with this matter due to insufficient evidence to conclude that [the father] breached any specific term of the consent order. Email thread from Ms. Smith attached to the incident.

The complainant [the mother] informed of DPP's decision by APS Best; [the father] also informed of DPP's decision by APS Best."

28. Copies of the custody records had also been provided to the Court of Appeal. Under "circumstances of arrest" the record stated:

"About 20:40 hours on Friday, 21 December 2018 [the father] is alleged to have breached the Consent Order issued by the Magistrate Court by remaining within 50 meters of the complainant and by making contact with the complainant directly or indirectly."

29. The stated "reason for release" was that the father had been "bailed to attend [Hamilton Magistrates' Court] on Monday 24th December on instructions of Puisne Judge Stoneham."

30. In summarising the law between paras [20] and [24] Gloster JA referred to several well-known authorities including *Re L-B (Children)* [2010] EWCA Civ 1118 at para [22] where Patten LJ said:

> "Where a judge is faced with an application that he should recuse himself on the ground of apparent bias it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult, if not impossible properly to apply the informed bystander test …"

31. Gloster JA noted that the judge has provided no information about the nature and extent of the family connection or relationship beyond the reference to the mother's "perception" being "just that". She continued by observing that it was unclear what was meant by that but that it was unsatisfactory and added that "on one construction, the judge appears to be suggesting that the connection with her own brother is itself mere perception". As we shall see, that was precisely what the judge meant. It was a "perception" that Mr Clarke was her brother.

32. Gloster JA then analysed the Domestic Violence (Protection Orders) Act 1997 which makes clear that someone arrested on suspicion of breach of a DVPO may only be released at the direction of a Magistrates' Court. Accordingly, she said, "it would appear that Stoneham J had no jurisdiction or power to release the father on bail to appear before the Magistrates' Court": paras [27] and [28]. She further expressed the view at para [29] that:

> "the circumstances in which Crown Counsel informed the police, in the early hours of Monday, 24 December 2018 stating that the DPP's office was not '*proceeding with the matter due to insufficient evidence to conclude that [the father] breached any specific term of the consent order*' also gives rise for concern."

33. Gloster JA questioned whether the DPP could make such a decision or whether the father should nonetheless have been brought before the Magistrates' Court. She emphasised that the court was not deciding the matter and had heard no submissions on the point but continued:

> "All this might well have raised questions in the mind of the fair-minded and informed observer as to (i) why the DPP has so speedily decided not to proceed with the alleged breach against the father not to require him to attend court; and (ii) whether Stoneham J had expressed any views to the relevant authorities as to the strength or weakness of the evidence allegedly supporting the mother's complaint."

34. In allowing the appeal, Gloster JA concluded:

> "Stoneham J's failure to give any explanation as to the true extent of her connection (if any) with the father's family, and of her participation in the release of the father on bail, does indeed provide support for a real concern of bias. Absent a transparent account of the extent of the connection, the objective observer is left fearing the worst. Accordingly, in such circumstances I have no doubt that Stoneham J should have recused herself and that, in the light of her refusal to do so, this court should allow the appeal and accede to the mother's application."

35. Although the hearing before the Court of Appeal was held in private, this was, of course, a public judgment.

The Complaint of the Chief Justice

36. The legal criticism of the judge was that she had failed to give any explanation in response to the facts asserted by the mother and in the absence of such explanation the bystander test for apparent bias was satisfied. However, it was not the legal failing that gave rise to the complaint of the Chief Justice, but the three deeper concerns identified by the Court of Appeal:

a. The reality of the alleged relationship between the judge and the father's family;

b. The propriety of the judge's involvement in releasing the father from custody on 23 December 2018; and

c. The circumstances of the decision of the DPP not to proceed against the father for alleged breach of the DVPO.

37. It was those concerns that founded the complaint made by the Chief Justice to the Judicial and Legal Services Committee on 11 August 2023 pursuant to the Judicial Complaints protocol for Bermuda. By reference to the judgments of the Court of Appeal he distilled the complaint in these terms:

a. Failure of Justice Stoneham to make any disclosure of relevant information to the wife;

b. Justice Stoneham's intervention to release the father from police custody was "irregular at best and unlawful at worst";

c. Concern over whether Justice Stoneham expressed any views to the DPP.

38. The Chief Justice concluded his complaint by asking the Committee to consider whether the conduct of the judge complained of amounted to judicial misconduct. He referred to sections 8 to 10, 16, 72 and 74 of the Guidelines for Judicial Conduct. Sections 8 to 10 and 16 are concerned with impartiality, both as a matter of fact and reasonable appearance. They reflect the law on apparent and actual bias. Section 72 explains that:

> "Conflict of interest arises in a number of different situations. The Judge must be alert to any appearance of bias arising out of connections with litigants, witnesses and their legal advisors. The parties should always be informed by the Judge of facts which might reasonably give rise to a perception of bias or conflict of interest."

39. Section 74 reminds judges that they should disqualify themselves if they have a close relationship with litigants or witnesses, especially "close blood relationships or domestic relationships."

40. The Chief Justice wrote to the Governor on the same day identifying the complaint in the same terms.

41. The underlying concern was that the judge may indeed have had a close relationship with the father and his family, through Mr Clarke, and concealed it to avoid having to recuse herself. The Guidelines do not expressly deal with the possibility that a judge might privately interfere with the independent prosecutorial function of the DPP in respect of a person to whom the judge is connected in some way. If established, that would clearly be a serious matter of misconduct.

The Progress of the Complaint before the Appointment of the Tribunal

42. The Judicial and Legal Services Committee is a non-statutory body. The Committee has a Filtering Sub-Committee which considered the complaint to determine whether there was a case to answer. On 15 September 2023 it issued a report concluding that there was a case to answer. The judge's lawyers, Resolution Chambers, had engaged with the Sub-Committee. In a letter dated 5 September 2023 they said:

> "Justice Stoneham has been advised that any attempt to discipline her other than the procedure set out in the Constitution for the discipline of the judge would amount to an attack on her independence as a judge and should be resisted as being unlawful and/or illegal."

43. Correspondence then continued with the judge directly. On 16 November 2023 the Committee asked whether the judge intended to respond to the complaint and added:

> "if the position is that you do not intend to avail yourself of the opportunity to respond to the complaint, the Committee and Governor will need to decide how, and by what route, to proceed …"

44. There was an exchange of letters in December and then on 9 January 2024 Resolution Chambers wrote indicating that any attempt to discipline the judge by the Committee "will be met by filing an application into the Supreme Court for a declaration that the [Committee] has no power to discipline a judge and for an

interim injunction to restrain them from doing so, and other appropriate legal action."

45. In the face of that threat, the Committee dropped out of the picture. On 11 March 2024 the Governor wrote to the judge. Having referred to the judgment of the Court of Appeal and complaint from the Chief Justice, she continued:

> "I am of the view that the concerns which have been raised are serious, such that I should consider whether or not they warrant my consideration under section 74(4) of the Bermuda Constitution.
>
> The purpose of this letter is to provide you the opportunity to respond to the concerns about your conduct to inform my considerations."

46. The judge's lawyers responded on the 21 April 2024. They explained that the judgments of the Court of Appeal were based upon the appearance of bias rather than actual bias. They submitted that the matter had been fully dealt with by the Court of Appeal and no further action was required. They rejected any criticism based upon the judge's failure to reply to the post-ruling letter from the mother's lawyers asking for further information and stated that other mechanisms could have been employed to secure an explanation from the judge. They noted that their letter was the first opportunity for the judge to be heard. They continued by giving her explanation. It was accepted that the power to release the father on 23 December 2018 was in the exclusive province of the Magistrates' Court and that the judge had no power to do so. They continued:

> "However, she did release him genuinely believing that she had the power to do so. It is noteworthy that when instructing the police to release the father, it was 23 December 2018 leading up to the Christmas period when the police cells were full and the police themselves traditionally call and ask Magistrates to release persons in custody when it is appropriate to do so. Indeed, when the Judge called and spoke to the police about releasing the father, the police asked the Judge for permission to release other persons in custody so that the cells could be cleared for the holiday. Where the Judge innocently went wrong is that having been an Acting Magistrate and then Magistrate between 2008 - 2016 prior to then becoming a High Court Judge in April 2016 and had released many people from custody during her tenure as a Magistrate, she erroneously conflated her jurisdiction as a Judge and was of the opinion that she had the power to order the release of persons in custody. To be clear, the Judge was indifferent to the father, which can be shown by the fact that she released others at that time too. Such indifference is inconsistent with bias.

> Subsequent to the father's arrest, the DPP made a separate and independent decision not to prosecute. There is no evidence whatsoever that the Judge had any involvement in the DPP's decision. It is speculative, wrong and unfair for the Court of Appeal to suggest that the Judge's decision to release the father and the DPP's decision not to prosecute were inextricably connected. The Court of Appeal is wrongly conflating these two separate and independent situations to allege bias against the Judge. There was nothing "*Delphic*" or "*evasive*" about the Judge's response. We reiterate that these were unfortunate standard errors which often rear their heads in applications alleging bias and which can show the important distinction between appearance of bias and actual bias. However, in the Judge's case it was neither actual bias nor appearance of bias that can warrant a section 74(4) referral and nothing indicates that the judge is unable to perform her judicial functions. At the most, the judge made an innocent error in law when exercising her jurisdiction and which was the duty of the Court of Appeal to explore."

47. This explanation accepted that the judge called the police about releasing the father but did not explain the circumstances in which she came to do so. Moreover, it gave no information concerning her alleged connection with the father's family, whether through Mr Clarke or otherwise.

48. The Governor replied on 11 July 2024. She had concluded that the question of removal ought to be investigated and that she had decided to appoint a tribunal under section 74(4) of the Constitution. She also suspended the judge pursuant to section 74(6).

Our Investigation into the Allegation Concerning the Charging Decision

49. The suggestion that the judge might have influenced or interfered in the decision of the DPP whether to proceed with a proseuction in respect of the alleged breach of the DVPO had not been raised by the mother or her advocate at the recusal hearing nor was it raised by her advocate at the hearing of the appeal. While the Court of Appeal made inquiries of the Commissioner of Police it did not seek any help from the DPP's office in connection with the decision not to proceed.

50. The Tribunal wrote to the DPP on 23 September 2024 seeking assistance with what had occurred on 23/24 December 2018 and in addition as to the confusion that had arisen as a result of the father's submissions before the Court of Appeal. The father did not think he had been arrested for breach of the DVPO and was clearly muddled

about the various proceedings in which he had been involved. Cindy Clarke, the DPP, replied on 26 September 2024. She said:

> "I can state with certainty that Madame Justice Nicole Stoneham had no involvement whatsoever in the decision of these offices not to prosecute [the father] on 24 December 2018."

51. She observed, with some justification, that the issue raised by the Court of Appeal was:

> "not only an accusation against Justice Stoneham, but an accusation against my predecessor, now Chief Justice Larry Mussenden, and the integrity and independence of his office."

52. Cindy Clarke, who in 2018 was the Deputy DPP, had personal involvement in the complaint made in May 2018 and the complaint in December 2018. She had made the decision not to proceed with a prosecution in May 2018, about which the mother was unhappy. She received an email at 11:00pm on 23 December 2018 asking for a decision on the alleged DVPO breach relating to the father who had been bailed to appear at Hamilton Magistrates Court the following morning. Acting Sergeant Best has produced the email exchanges sent to Ms Clarke. At 11:10pm he sent a short message to Ms Clarke saying that Chief Inspector Tracy Adams had communicated by landline that bail was authorised by the judge. Ms Clarke considered herself conflicted in the matter because of her earlier involvement and so she assigned Senior Crown Prosecutor Nicole Smith to make the decision. She explained that it is for the DPP's office to decide whether to commence a prosecution and that:

> "once a prosecution is refused, a suspect is to be released from all bail obligations in relation to the relevant criminal complaint … Therefore, there was no need for [the father] to answer bail at court at 9.30 on 24 December."

53. Ms Smith provided a statement confirming those matters. She explained, having read the papers sent by the police in the early hours of 24 December, that she concluded that there was insufficient evidence to provide a realistic prospect of conviction. She therefore advised the police that she did not approve a public prosecution. At no time did she discuss the matter with the judge, indeed she was unaware of the judge's involvement the evening before.

54. In view of this unequivocal evidence and in the absence of any evidence at all that the judge had been in contact with the DPP's office, we were satisfied by this correspondence and statement that there was no substance in the suggestion of misconduct or impropriety on the judge's part in connection with the decision not to proceed against the father for alleged breach of the DVPO. There was no contact between the judge and the DPP's office. The decision was made in an entirely orthodox way by the DPP's office.

55. On 3 October 2024 we wrote to Resolution Chambers to inform them, in view of the confirmation from the DPP that the judge had no involvement in the decision not to prosecute, that we would not be investigating this issue further.

56. Cindy Clarke also resolved the confusion surrounding the progress of the complaint that the mother had made on 6 May 2018. Ms Clarke was asked in August 2018 to review the complaint of sexual assault and common assault. She decided not to proceed with either matter and provided written reasons. She learned that the mother was unhappy with the decision. As a result, Ms Clarke agreed to meet the mother. On or about 4 March 2019 the mother asked for the charging decision to be reviewed. As Ms Clarke observed in her letter, the mother "was fully aware of the opportunity to have a charging decision by our offices reviewed." A different lawyer in the DPP's office reviewed the decision and decided to proceed with charges both for sexual assault and common assault. The prosecution was commenced in April 2019 but, for various reasons including problems caused by COVID-19, the trial did not occur until the summer of 2021. The father was acquitted of sexual assault but convicted of common assault. The mother's account was not accepted by the court in connection with sexual assault. It did not find her "to be an honest or credible witness" in connection with that allegation. The father was given a conditional discharge for the common assault.

The Connection with the Father and his Family

57. The judge referred in her ruling to the connections with the family of the father including a connection to her "brother" as being no more than the mother's perception. The Court of Appeal found this difficult to understand and so did we. It

was only when the judge provided an affidavit setting out her full account of all matters identified in the complaint that the picture became clearer. We also obtained a witness statement from Mr Clarke which further explained the position, and both gave evidence about this aspect at the oral hearing in Hamilton.

58. Mr Clarke claims to be the biological half-sibling of the judge, sharing the same father, but has never been accepted as such by the judge or her immediate family.

59. The judge was born in 1966. She has a full brother who is three years older. The judge and Mr Clarke gave a similar account of how they first met. Mr Clarke is two years older than the judge. In 1978 she started at a secondary school where he was also a pupil. She was approached by Mr Clarke who claimed that they shared the same biological father. The judge asked her mother about this who in turn suggested she raise it with her father. He denied it. There was no further interaction at school and no further discussion about the matter before her father's death in 1986.

60. Mr Clarke attended, uninvited, at the judge's call to the Bermuda Bar in 1993. The judge explained that "there have been moments when Mr Clarke and I have met and conversed, but I have never accepted that Mr Clarke is my brother on a biological basis or otherwise."

61. The judge gave an account of her knowledge of the father and his family:

> "I have no knowledge whatsoever of the nature of Mark Clarke's relationship with [the father] or his family, including [the grandfather] … I have no knowledge whatsoever whether [the grandfather] renovated Mark Clarke's house. Further, I do not personally know [the father] nor do I know of him through [the grandfather's] relationship with Mark Clarke. I have no knowledge whatsoever of [the father's] personal life or that he had a child with [the mother] until the proceedings were before me. I do not personally know [the grandfather] and have never socialized with him, but I do recognise him so as to be able to acknowledge him in the street as he [is well-known]."

62. Mr Clarke explained that he became aware of what he was told was a familial relationship with the judge when he was about 11. He described himself as "an outside child" and confirmed the account of approaching her at school. He said that he has not had a real relationship with the judge, but he would occasionally send her pictures of his family "not even on a yearly basis". He said she had visited his house

once, but he had never visited her home. Indeed, he told us in evidence that he does not know where she lives, not even in which parish. In writing he described the judge as a stranger to his life and in oral evidence that he had tried to reach out to the judge over the years but that she did not reciprocate.

63. It is clear to us that there was no acceptance by the judge or her immediate family that Mr Clarke was related to them. There was no relationship between them despite Mr Clarke having been keen from time to time over the years to establish one.

64. Mr Clarke accepted that the grandfather was a friend and that he had known the father all his life.

65. The grandfather also provided a statement in which he stated that he has no relationship or friendship with the judge but merely knew of her and that she was a judge. By contrast Mr Clarke was a friend he had known since they were teenagers. Mr Clarke also knew his son but did not socialise with him.

66. In her oral evidence the judge readily accepted that she should have explained the essence of this account in the recusal hearing. The reason for not doing so was because it was a matter of embarrassment to her and of some pain within her family. She considered the suggested familial connection to be "gossip". While we understand the judge's position, the unhappy history of this case shows how important it is for judges to provide information to ensure that the rejection of a recusal application is understandable both to the parties and to an appellate court. The absence of information also fuels speculation and a belief that there is something being hidden. In the absence of the judge's explanation, confirmed as it is in all material respects by Mr Clarke and which we accept, it is understandable why the Court of Appeal allowed the appeal on the basis of the uncontradicted (albeit hearsay) assertions of the mother of close connections between the judge and the family of the father through her "brother".

67. The irony of the situation is that had the true position about the absence of connection between the judge and father (with an explanation of the "relationship" with Mr Clarke) been known, that would not in itself have given rise for the need to recuse herself. In our opinion, the fair-minded and informed observer, possessing

knowledge of the real facts, would not have concluded that there was a real possibility that the judge was biased on account of the supposed connection with the father through Mr Clarke.

The Release of the Father on Bail on 23 December 2018

68. We shall now turn to the arrest and release of the father in December 2018 and consider the implications of the judge's intervention to release him on bail.

69. We have recited the information obtained by the Court of Appeal from the police concerning the arrest and release of the father. We made further inquiries of the Commissioner of Police and caused statements to be taken for the officers who were involved in the father's case on 23 and 24 December 2018. They were Acting Sergeant Melvin Best, Detective Constable Delfi Burrows, Chief Inspector Tracy Adams and Sergeant Glynn Kellman. We also obtained a statement from Deputy Commissioner Na'imah Astwood, who was acting Commissioner of the Bermuda Police Service when we made our inquiries.

70. We have used the ranks held on 23 December 2018 by the officers involved. A number (including Mr Clarke) have since retired and returned to the police in a lower rank, something we were told is a common practice and does not reflect a demotion.

71. DC Burrows' evidence was uncontroversial, merely confirming the father's arrest and the timing of his interview. She did not give oral evidence. Neither did the Deputy Commissioner whose evidence produced the results of a search of the records for 23 December 2018 to identify whether any other detainees were released at the direction of the judge. They suggest that they were not. Messrs Best, Adams and Kellman gave oral evidence about these events.

The Written Evidence

72. The judge gave an account of her recollection of events in an affidavit sworn on 11 December 2024. She qualified her evidence with the reasonable comment "as best as I can recall from 6 years ago". This was a theme taken up by all in their oral evidence. The police witnesses had the advantage of some contemporary records,

the accuracy of which there is no reason to doubt, but struggled to recollect surrounding details. That is hardly surprising. Not only had six years passed but at the time, a busy evening just before Christmas, there was no reason to have paid special attention to make a mental note of the detailed circumstances of the father's release from detention.

73. The judge's best recollection was that she received a telephone call from Mr Clarke who told her that he had given her number to the grandfather from whom she could expect a call regarding his son, the father. The grandfather called to ask whether her son could be bailed from the police station but was unable to give details of why his son was in custody. He suggested the judge should obtain details from the police. The judge said that "it was not uncommon for notable members of public to call on behalf of members within their community. I considered this to be no more than one of those calls from a member of the public." She continued by relaying that it was common practice for her to call the custody suite in relation to bail when she was a magistrate and she believed that she had the same power as a Supreme Court judge. She continued to deal with bail matters. The practice was common leading up to holidays. She would speak to a senior officer to get the details about the detainee and reason for detention and only then call the custody sergeant.

74. The judge described calling Chief Inspector Adams who she recollects described the father as having been arrested for a breach of the peace. She then spoke to the custody sergeant (Sergeant Kellmann) who gave information consistent with what she had been told by Chief Inspector Adams. On that basis she authorised the release of the father. "If memory serves me correct" she thought she had authorised the release of others having been asked to do so by Sergeant Kellmann. She explained that after the call she thought nothing more about the matter. "It was a wholly unremarkable event as far as I was concerned."

75. The judge now accepts that a judge of the Supreme Court does not have the powers of a magistrate to bail a detainee from a police station. She accepts she acted in excess of her jurisdiction.

76. The grandfather, now suffering from memory loss, had no recollection of the events of 23 December 2018 or even the arrest of his son.

77. Mr Clarke's statement gave details of his service in the police eventually as a Chief Inspector. It included leading the Vulnerable Persons Unit which became the Juvenile and Domestic Crime Unit. He led investigations into domestic violence and he had direct responsibility for creating the post of Domestic Violence Officer. He explained that he knew the mother who was another police officer. Mr Clarke's recollection has varied surrounding the events of 23 December 2018. In his statement he described his "immediate recollection" as being that he had no contact with the judge or the grandfather and had nothing to do with the release of the father. He believed that only a lawyer could contact a magistrate out of hours to secure bail and, in any event, he would not have put the grandfather in touch with the judge. However, he was aware of a summary of the judge's account (provided orally to him when he was questioned for his statement) which surprised him as he was "adamant that no contact took place on 23 December 2018". He had checked his phone records but could not find any record of calls to the judge or the grandfather. He continued by saying that he "could see it as having occurred and her memory may be clearer than mine." He might have put the judge and grandfather in touch but nonetheless had no recollection of the events. Had he spoken to the grandfather he would have told him that only a magistrate could order bail having been contacted by a lawyer and so he struggled to see why he would have put the grandfather in touch with a Supreme Court judge.

78. Acting Sergeant Best arrested the father. His contemporary records show that he did so for "1 count of Breach of a domestic violence protection order" with the circumstances being:

> "About 2040 hrs on Friday 21st December 2018 the DP is alleged to have breached the Consent Order issued by the Magistrate Court by remaining within 50 meteres of the complainant and by making contact with the complainant directly or indirectly." (reproduced as written)

79. He interviewed the father under caution between 8:59 and 9:17 pm on 23 December. Later, Chief Inspector Adams contacted him via the landline in the Sergeant's Office inquiring about the father. Acting Sergeant Best told him that the father had breached "the consent order which had a power of arrest attached." He remembers Chief Inspector Adams calling again to say that the father's release had been authorised by the judge. He transferred the call to the custody sergeant, Sergeant Kellmann. The father was charged at 10:22pm for the "offence of breach of consent order" and released at 10:31pm on the authority of Sergeant Kellman but "on instructions of Puisne Judge Stoneham to attend Hamilton Magistrates' Court" the following morning. These precise timings come from the contemporary electronic records.

80. Acting Sergeant Best explained that he sent a copy of the summary of evidence, complainant's statement, consent order and charge sheet to the DPP's office at 11:00pm. He followed that with an email at 11:10pm about the authorisation of bail. As the Court of Appeal noted, he compiled and sent the file to Inspector Telmaque at 03:30am on Monday 24 December 2018. At 07:11am he received an email from Nicole Smith at the DPP's office informing him of her decision not to proceed. Further exchanges followed because of a mistaken reference to another case. All these steps are recorded in the emails.

81. Chief Inspector Adams made two statements, on 4 and 11 October 2024. In his first he explained that he was the senior officer on call on 23 December 2018. He recalled receiving a call from the judge about bailing the father. He could not remember the detail of the call but thought the judge mentioned a breach of the peace. He called Acting Sergeant Best and, because this was a minor matter, told him that the judge had authorised bail to the Magistrates' Court the following morning. He thought Acting Sergeant Best confirmed that the offence was a breach of the peace. The Chief Inspector said:

> "It is not uncommon to receive calls from members of the judiciary to approve the bailing of persons held in police custody for minor offences and warrants. In cases like this, we call the station and have the sergeant on duty bail the person to Court as so directed. I did not see Justice Stoneham['s] request as unusual as this happens quite often and especially during holiday periods, some

magistrates/judges grant approval in advance for traffic warrants and minor offences."

82. In his second statement Chief Inspector Adams dealt with a series of questions addressed to him by the Tribunal. He could not recall "the extent of the conversation" but remembered it being about granting bail for minor offences. He did not ask the judge how she came to be involved. She only discussed the father and no other cases. He was asked about his social and professional relationship with the judge. He explained that he had known her for about 30 years as a friend of his wife. He was asked about the difference of recollection between him and Acting Sergeant Best about whether breach of a consent order was mentioned but he was firm in his belief that only a breach of the peace was discussed.

83. Sergeant Kellman relied on the electronic records to recreate the chronology of his involvement in the events of 23 December 2018, about which he had no clear recollection. But he was able to confirm that:

> "At that time in 2018, it was standard practice and normal custody procedure for magistrates or judges, during out-of-hours detentions, to provide instructions to custody staff regarding bail decisions based on information supplied by the police or an attorney representing the detainee.
>
> Typically, a police officer – usually a member of the custody staff – or an attorney, contacts the magistrate or judge by telephone, presenting the circumstances of the detention and requesting a decision on bail. The magistrate or judge then determines whether to grant bail, providing verbal instructions to custody staff to either detain the individual for presentation at the next available court session or release them on bail with a specified court date and time. The custody officer or their assistant would normally make a brief note in the custody logs of MEMEX Patriarch that the detainee was granted bail on the authority of the judge or magistrate."

84. MEMEX Patriarch is the electronic log kept at the police station.

85. The Deputy Commissioner produced a schedule extracted from electronic records of those released on 23 December and the days either side. Five people appear in the schedule who were arrested on 23 December 2018 and were released that same day.

Two paid the fines underlying the warrants for their arrest. Two were released on police bail and one, the father, was released on the instruction of the judge.

86. In view of the confusion over the basis on which the judge acted in directing the father's release, both regarding her underlying jurisdiction to do so and the information on which she acted, we sought the assistance of several retired magistrates and judges to explain the practice, procedure and requirement for record keeping.

87. Archibald Warner became Senior Magistrate in 2001. He continued as a magistrate until 2018 and is now in private practice in Bermuda. He stated that it was common practice and part of the duties of a magistrate to be contacted out of hours "by attorneys and members of the public regarding release on bail of their clients, friends and family who were detained in police custody." Communication was largely by telephone. It was not his practice to make a note or record of such requests because the police would make a record on the police system. He explained:

> "I would contact the police officer in charge of detention … and make enquiries about the circumstances of the person detained and *inter alia* ascertain whether there was a good reason as to why the person should not be released on bail. It was a routine and informal process. If there was no objection by the police officer in charge of the detention and there was no good reason for their continued detention I would authorise their release. In certain cases, the officer in charge of detention would refer me to a more senior officer and on being satisfied there was no objection to the person being released by the senior officer and there being a proper basis for doing so I would authorise the person's release."

88. Mr Warner added that sometimes, especially at busy periods, the police officer may ask for authority to release others.

89. Charles-Etta Simmons is a retired judge of the Courts of Bermuda having first been appointed as a magistrate in 1994 and then a judge of the Supreme Court from 2003 until her retirement in 2022. She described a practice whereby lawyers would telephone magistrates, explain the circumstances of a client's detention, and request that the magistrate telephone the police to authorise bail. She was not aware of any magistrate keeping a record of such an intervention. She could recall only one occasion when she was involved as a puisne judge. That was when a neighbour

telephoned about his son who had been taken into custody. She explained to the neighbour that she had no power to direct bail. No magistrate was apparently available and so Justice Simmons called the police station, explained the circumstances and that she could vouch for the young man. She did not direct his release. That was a matter for the police who (she later learned) had released him on police bail.

90. Khamisi Tokunbo, a retired magistrate, also described an informal system with no records being kept by the magistrate. Telephone calls seeking bail would come from lawyers or members of the public.

91. Mark Pettingill is a practising lawyer in Bermuda who is also an Assistant Justice of the Supreme Court. He sat as an Acting Magistrate for some years. He had seen the practical operation of out of hours requests for bail from both sides: as attorney and as magistrate. As a lawyer, his practice would involve taking instructions from family or friends of someone detained and then call the police station to verify the facts and discover why the person was being detained. Only then, if appropriate, would he contact a magistrate to intercede. As an acting magistrate he would receive calls from friends and family of detainees out of hours. It was his practice to make "a simple note or record regarding these requests for my own record." He then gives the same description of contacting the police and gaining information as does Mr Warner.

92. We also sought help from the Acting Registrar of the Courts of Bermuda, Cratonia Thompson, about whether there were any records in connection with the judge, acting as a justice of the Supreme Court, making an out of hours order for the release of the father. There were no records of which she was aware. The judge confirmed she would not have kept a record. The Tribunal wished to understand what out of hours procedures were in place. In answer, Ms Thompson relayed information from the current Senior Magistrate that there was a roster of magistrates in place provided to the Police, together with their telephone numbers. The court did not keep a record of calls made to out of hours magistrates.

93. We have referred to the affirmation produced by the mother in the recusal hearing and her statements that she was "aware" that the judge had authorised the release of the father and "aware" of a connection with the father and his family. This evidence was hearsay and not supported with any explanation of direct knowledge. In those circumstances we decided not to invite the mother to give oral evidence.

The Oral Evidence and our Findings

94. The written evidence that we have summarised leaves a confused picture of two aspects of the release of the father, namely how the judge became involved and various people's understanding of the suspected offence for which the father had been arrested. These matters were explored in oral evidence. In addition, there were different views expressed about whether judges, as well as magistrates, might involve themselves in out of hours bail applications.

95. It became clear when Mr Clarke gave evidence that he had no active recollection of events on 23 December 2018. He remained doubtful whether he was involved but was not in a position to contradict the judge. On the question of phone records he said that there were no records in his telephone for that period. It follows that his inability to find a record does not assist. On this aspect, the judge had a firm recollection. Telephone calls from Mr Clarke were very rare – "once in a blue moon" – and she remembered this call. She was at her mother's home beginning to decorate the Christmas tree.

96. We accept that the judge was called by Mr Clarke and that his call was followed by another from the grandfather. These calls initiated the process that led to the release of the father on bail. It is clear beyond doubt, first, that the judge had no connection with the father or grandfather and, secondly, that the father and grandfather were close to Mr Clarke. There is no plausible alternative explanation for the judge becoming involved.

97. The detail of the content of the call with the grandfather, the call or calls between the judge and Chief Inspector Adams and his with Acting Sergeant Best cannot now be unravelled. But it is unnecessary for our purposes to do so. That is because we are satisfied that the judge became involved in the release of the father in what she

thought was a routine way on behalf of someone she did not know. There was no improper motive.

98. The judge explained that she was unable to get a coherent explanation of events from the grandfather. She could give no account of what he did tell her. She said she gathered information from Chief Inspector Adams. That was how she understood that the alleged offence was a breach of the peace. By contrast, his recollection was that the judge had given him the explanation that the matter concerned a breach of the peace or a minor offence. If that were right, the information could have come only from the grandfather. The Chief Inspector recalled that Acting Sergeant Best confirmed that detention was in connection with a breach of the peace. He had telephoned the station rather than accessing the computer from home because it was easier to call. Of course, Acting Sergeant Best had recorded contemporaneously that the father had been arrested for breach of a DVPO (also referred to as a consent order in the records). Acting Seargent Best was clear in his oral evidence that he told Chief Inspector Adams that the father was arrested for breach of a DVPO with a power of arrest and was "sure that I didn't say breach of the peace." His emails to and from the DPP's office overnight referred to "breach of consent order".

99. What is clear is that confusion somehow crept in. We think it highly unlikely that Acting Sergeant Best was responsible for the confusion. He had made the arrest shortly before and knew the correct position. It is improbable in the extreme that he would have misdescribed the nature of the alleged offence, assuming he was asked about it. Even that is unclear. We think it likely that the confusion had crept in during the discussion between the judge and Chief Inspector Adams, perhaps as a result of something said to the judge by the grandfather.

100. The judge and Chief Inspector Adams were first asked to remember this detail years after the event, and we do not consider that either has a reliable recollection. It would be surprising if they did. Neither thought there was anything out of the ordinary in their dealings that evening. Neither made any note and there is no special reason why the details of their conversations should have fixed in their minds to the extent that they could be retrieved years later. But a striking piece of common evidence emerged in their oral testimony. Chief Inspector Adams and the judge were

intimately familiar with the legislation around DVPOs and knew that even a magistrate could not authorise the release by telephone out of hours of a person arrested for breach of a DVPO. Had either appreciated that they were dealing with a DVPO they would not have contemplated authorising his release on bail. The judge had sat for years as a family magistrate dealing with DVPOs and was the family specialist judge in the Supreme Court. Chief Inspector Adams was also familiar with the operation of the DVPO scheme. He was in charge of juvenile domestic violence for three years. Had he known of the true reason for the arrest of the father, the father "would never have got bail from me". In his oral evidence Sergeant Kellman also volunteered that he would not release someone detained on suspicion of breach of a DVPO, unless that person was ill.

101. We are satisfied, for reasons which are now opaque, that both the judge and Chief Inspector Adams proceeded on a misapprehension regarding the nature of the alleged offence. We are unable to conclude with any confidence how that misapprehension arose, but we are sure that it was inadvertent. Had they known they were dealing with an alleged breach of a DVPO, neither would have authorised the father's release.

102. Acting Sergeant Best had a copy of the consent order for a DVPO but neither the judge nor Chief Inspector Adams saw it at the time. Indeed, the judge saw it only the day before she gave oral evidence and Chief Inspector Adams only during his oral evidence. It was not, in fact, in the form prescribed by the Magistrates Courts (Domestic Violence Protection Orders Prescribed Forms) Rules 1997 SI BR59/1997, but nothing turns on that for our purposes.

103. We have referred to the schedule provided by the Deputy Commissioner which does not provide support for the judge's initial recollection that she was asked, and agreed, to authorise the release of others in police custody on 23 December 2018. Neither Acting Sergeant Best nor Sergeant Kellman could remember asking her or the judge doing so. However, both doubted whether the schedule, compiled from underlying records, was necessarily complete. The judge herself told us that she "may not have authorised others" to be released but that it was "common to be asked". This is another of those issues of detail which, given the passage of time,

cannot be resolved with confidence. But it is peripheral and does not cast any light on the central issue of how and why the judge became involved in the father's case on 23 December 2018.

104. Chief Inspector Adams told us that calls relating to bail would come from both magistrates and judges. Sergeant Kellman had said the same thing. We do not doubt their recollection but how widespread the involvement of judges was, rather than magistrates, is unclear. The evidence of Justice Simmons demonstrates that she was aware of the correct jurisdictional position.

105. Mr Warner's written evidence had been unclear about whether he had remained in post as the Senior Magistrate until 2018 or had left that office in 2015 but remained sitting as a magistrate to 2018. In his oral evidence he told us that he was Senior Magistrate until 2018 and that in his time there was no out of hours duty rota for magistrates to deal with urgent business. He had relatively little experience of DVPOs and could not recall an occasion when he was asked to intervene out of hours to release a person detained on suspicion of breach of a DVPO. The bail matters dealt with out of hours would usually be in respect of unpaid fines or those who had failed to surrender to their bail at court. He said that there were large numbers of outstanding warrants in respect of that second category. He explained that a broad range of people might call to seek help for a detainee. His experience was that those who called would often not be able to explain what was going on and so it was the police who were relied upon to give accurate information concerning the detainee and reasons for detention. The system was "very loose". He accepted that no records would be kept by magistrates.

106. The absence of records of the involvement of a judge (whether magistrate or supreme court judge) in an out of hours decision relating to bail, and the universal agreement among those who gave written and oral evidence that none would be kept, troubled us. This case itself illustrates how, without the judge or magistrate keeping notes, the possibility of confusion and crossed wires can arise. We recognise that Bermuda is a small jurisdiction, that the grant of bail would be recorded in the police records and that over-formalising a simple process may be unnecessary and burdensome. That said, the intervention of a magistrate or judge in a bail matter

involves the exercise of the judicial power of the state. Our experience suggests that a decision by a judicial officer, even made out of hours, should be recorded in the records of the court itself. Save in exceptional circumstances, we would expect judicial officers to make and keep a short note of the nature of any application made, the basis upon which they were being asked to act, the decision and short reasons for the decision. The confusion in this case and the unfounded suspicion of improper motive would have been avoided if a note, which need not be more than a few sentences, had been kept by the judge.

107. Our findings of the circumstances surrounding the release of the father show that there was nothing sinister or improper in the judge intervening on his behalf. As she acknowledges, she made a legal error in exercising a jurisdiction she did not have. This was an intervention on behalf of the father, someone she did not know at all, through the grandfather who she "knew" in the loosest possible sense but with whom she had no real connection, still less friendship. We have already indicated our conclusion that her supposed connection with the father through Mr Clarke and the grandfather would not have given rise for the need to recuse herself applying the test in the *Porter* case. The question arises whether the fact of the judge having released the father on bail some years before the family proceedings came under her control would lead a fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that she was biased? The answer to that question is no. Former involvement with a party to proceedings rarely gives rise for the need for judges to recuse themselves.

Conclusions

108. On a proper understanding of the facts in this case, there would have been no call for the judge to recuse herself had she given an explanation of those facts at the recusal hearing. Her reasons for not doing so, essentially because she did not want to ventilate private matters relating to what she and her family considered "gossip" that Mr Clarke was her biological half-brother are understandable. But as a matter of law, she had no choice.

109. The judge had no connection with the father through Mr Clarke or the grandfather or otherwise. She did not know the grandfather, beyond recognising who he was and

acknowledging him in the street as a matter of courtesy. On examination, the matters raised by the mother in the recusal application bear no weight. The judge's failure to give an explanation amounted to an error of law. It is the appellate process that exists to correct errors of law. The Court of Appeal did so when it allowed the appeal. It is regrettable that the judge did not volunteer, nor did the Court of Appeal seek, an explanation which would have clarified the position and dispelled the suspicions spoken of in the Court of Appeal judgment. The issue raised by that court of its own motion, namely that the judge may have played a part in the decision of the DPP not to prosecute the father for alleged breach of the DVPO, had not been advanced by the mother and on examination has no substance. There was nothing sinister, partial or improper in the judge directing the father's release on bail on 23 December 2018. She now recognises, although she did not appreciate it at the time, that a Supreme Court judge does not have jurisdiction in out of hours bail matters. She should not have been involved in such applications at all.

110. Neither the error of law in failing to give an explanation in response to the suggestion of a relationship with the family of the father through Mr Clarke, nor the misapprehension of the powers of a judge of the Supreme Court in bail matters amount to judicial misconduct. All judges make mistakes from time to time. Such mistakes are appropriately corrected by the appellate process.

111. That being the case, there could be no question that the judge has been guilty of misbehaviour for the purposes of section 74(4) of the Constitution. In those circumstances, we advise that the Governor should not request that the question of the removal of the judge be referred by His Majesty to the Judicial Committee of the Privy Council.

The Rt Hon. The Lord Burnett of Maldon PC DL

The Rt Hon. Dame Janice Pereira DBE

The Hon. Dame Linda Dobbs DBE

15 April 2024