IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

ACTION NO. CL120/2015

IN THE MATTER OF THE TURKS & CAICOS ISLANDS CONSTITUTION; AND IN THE MATTER OF SECTIONS 1, 5-7, 9, 13-17, 19 AND SECTION 21 OF THE AFORESAID CONSTITUTION
AND
IN THE MATTER OF THE INDICTMENT IN THE SUPREME COURT IN THE CASE OF R. V MICHAEL MISICK AND ORS FOR CORRUPTION AND OTHER OFFENCES .

BETWEEN:

Michael Eugene Misick

Applicant

-And-

The Director of Public Prosecutions

1st Respondent

-And-

The Attorney General

2nd Respondent

BEFORE THE HONOURABLE CHIEF JUSTICE

Mr. Ralph Thorne QC instructed by Mr. Beryn Duncanson of Duncanson & Co for the Applicant
Mr. Andrew Mitchell QC (by videolink) and with him Ms. Yaa McCartney for the Attorney General
Heard on the 4 August 2015

JUDGMENT

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1. This is the decision on the Applicants Notice of Motion filed on 21 July 2015 seeking Constitutional relief in the form of divers declarations which are set out below and dealt with seriatim as they were argued by Queens Counsel appearing for the Applicant:

    1. **A Declaration that the Court established for the Applicant's trial, CR 34/12, 35/12, 36/12, 37/12, 39-40-42, 44-12-46/12, Between The Queen and Michael Misick, Floyd Basil Hall, McAllister Eugene Hanschell and Seven Others, is established in breach of the Constitution of the Turks and Caicos Islands and therefore has no jurisdiction as such.**

2. **A Declaration that the trial Judge so appointed for the Applicant's trial, CR 34/12, 35/12, 36/12, 37/12, 39-40-42, 44-12-46/12, Between The Queen and Michael Misick, Floyd Basil Hall, McAllister Eugene Hanchell and Seven Others, is appointed to a Court established in breach of the Constitution of the Turks and Caicos Islands and is thereby functioning without constitutional authority as such.**

3. In advancing its grounds for the granting of these Declarations, the Applicant relied on Hinds v R to say that a special court has been established which contravened the provisions of the Constitution. This reliance is misplaced.

4. In Hinds the legislature had created a new Court, a Gun Court, to handle all firearm-related crime. The Gun Court was originally divided into three parts: (1) the Resident Magistrate presided over by one Resident Magistrate; (2) the Full Court, presided over by a panel of three Resident Magistrates; and (3) the Circuit Court, presided over by a judge of the Supreme Court who sat without a jury.

5. Lord Diplock delivering the judgment of the majority described the Full Court as being

> *"....of [a] different composition from any previously existing court in Jamaica. Its jurisdiction too is different from that of any previously existing court. It does not extend to any capital offence but with this exception it extends to all 'firearm offences' and* ***to all other offences of whatever kind committed by detainees whether a firearm was involved in the offence or not*** *and its sentencing powers for such offenses are coextensive with those of a circuit court."*

6. As such, the Full Court exercised a jurisdiction which had previously been reserved by the Constitution to a Judge of the Supreme Court. It was struck down by the Privy Council as unconstitutional on the ground that the jurisdiction conferred on the Judges of the Supreme Court by the Constitution could not be vested by the Legislature in Resident Magistrates who did not hold office on the same terms or enjoy the same Constitutional safeguards of their independence.

7. The legislation also provided that for certain offences the Gun Court should impose a mandatory sentence of detention at hard labour from which the detainee could only be discharged at the direction of the Governor General acting in accordance with the advice of a Review Board to be comprised of lay persons. The Privy Council held that Parliament could not, consistently with the separation of powers, transfer from the judiciary to any executive body, whose members were not appointed under the relevant provisions in the Constitution for the appointment of Judges, the discretion to determine the severity of the punishment to be inflicted on an individual member of a class of offenders.

8. Lord Diplock, applying *Liyange v R* held that,

> *"Implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution.*

9. No special court has been established here to try the Applicant. The jurisdiction of a Judge of Supreme Court to try and determine the matter has not been arrogated to an executive body or transferred to a person who has been appointed otherwise than in accordance with the procedure set out in our Constitution, as was done in Hinds. The Applicant is to be tried in the Supreme Court by a Judge who has been, as the Privy Council held and the Applicant concedes, properly appointed by His Excellency the Governor acting on the advice of the Judicial Services Commission and as such enjoys that independence which safeguards the Applicant's right to a fair trial.

10. As to the 'special' nature of the learned Judge's short-term appointment for the express purpose of trying a particular matter of which the Applicant complains, the Privy Council in terms approved this *ad hoc* appointment and held that it was constitutional in the circumstances where the learned Judge had been appointed in the same manner as other Judges of this Court and enjoyed the same constitutional safeguards including security of tenure.

11. These conclusions of the Board were set out in paras 18 and 19 and 26 -28 of the judgment:

> *"...Then, on 26 February 2015, the Governor made the current appointment of Harrison J in the following terms:*
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> *"I, Peter Beckingham, Governor of the Turks and Caicos Islands, in exercise of the powers conferred on me by section 87(1)(a) of the Constitution, and acting in accordance with the advice of the Judicial Service Commission, do hereby extend the appointment of Hon Justice Paul Harrison as a Judge of the Supreme Court to preside over the criminal trials arising out of the Commission of Inquiry (including the consideration of any post trial orders, if any) which have been designated to him by the Chief Justice, namely R v Michael Eugene Misick and others and any severed or related matter as the Chief Justice may direct, with effect from January 1, 2015 for a period of three years."*
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> *19. It is transparently clear that Harrison J has been appointed ad hoc for the specific purpose of presiding over these cases, whether they turn out to be a single trial or more than one. They are, on any view, very exceptional trials for the very small courts system of the Turks and Caicos Islands. They have already been pending for over two years. They are likely to last several months. A special courthouse has had to be constructed on one of the principal islands to hear them. Almost all the leading advocates appear to have been recruited from outside the Islands, many of them from as far away as England and Wales. The impending trial of prominent local politicians has generated a good deal of controversy in the Islands. Plainly, the view was taken that it was sensible to appoint an ad hoc judge of considerable experience, from a larger jurisdiction and from outside the Islands.*
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> ...
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> *26. The position of a judge appointed ad hoc is yet clearer. If he has genuinely accepted appointment for a specific task, then, at least in the absence of some special factor, he will have no expectation of renewal or of further appointment. No objective observer would fear that he would be unable independently to discharge his duty as a judge because he was in place for a limited period; indeed his ad hoc position often strengthens his independence. His case is quite unlike that of the temporary sheriff in Starrs v Ruxton. In that case, both Lord Prosser (at 233)*

*and Lord Reed (at 242) adverted to the different case of a judge accepting ad hoc appointment. Lord Reed, in identifying the potential problems caused by temporary appointments, added that they were particularly apt to arise "where the duration of the appointment is **not** fixed so as to expire upon the completion of a particular task or upon the cessation of particular state of affairs" (emphasis supplied). Lord Prosser said this:*

> *If a person is appointed to judicial office ad hoc, for a particular purpose, the length of his tenure may be of no significance: he will go, and go only, when he is functus. Equally, length of tenure may be of little importance when the office is not a step in a career, but is something done out of a sense of duty, or at the end of a career." [And he then contrasted the case of temporary sheriffs.]*

Although there are many cases in which a limited term of judicial appointment has been against the requirement for sufficient security of tenure to demonstrate independence, none was cited to the Board where an ad hoc appointment had been held to fail such challenge.

27. In the present case, applying these principles, the Board has not the slightest doubt that any objective observer would see no danger of any lack of independence in Harrison J as the trial judge. The following aspects of his position are not in doubt:

(i) the Constitutional guarantee of judicial independence in section 83(1) (see para 16 above) applies to him as it does to any other judge;

(ii) so too does section 84 guaranteeing his remuneration, allowances and terms of service: see para 17 above;

(iii) he has been appointed on the recommendation of the independent (and, as to the majority, judicial) JSC;

(iv) he is undoubtedly guaranteed security of tenure during his appointment, except in the case of cause shown to this Board under the provisions of section 85 (see para 13 above);

12. Notwithstanding Mr. Thorne's submissions to the contrary, the arguments he has advanced in support of this application cover well-trodden ground with respect to the constitutionality of the *ad hoc* appointment of Mr. Justice Harrison, which issue has been, in my view, determined by the Privy Council in *Misick v R.* (2015).

13. I concur with the Attorney General's submission that the application on this ground is wholly without merit and frivolous and vexatious and dismiss it accordingly.

3. A Declaration that the Trials Without A Jury Ordinance 2010 of the Turks and Caicos Islands is in contravention of the Constitution of the Turks and Caicos Islands which said Ordinance has been invalidly enforced against the Applicant in his trial CR 34/12, 35/12, 36/12, 37/12, 39-40-42, 44-12-46/12, Between The Queen and Michael Misick, Floyd Basil Hall, McAllister Eugene Hanschell and Seven Others and is therefore void and of no effect.

4. **A Declaration that the Applicant's trial being so conducted as aforesaid contravenes the Constitution of the Turks and Caicos Islands and deprives the said Applicant of the fundamental rights and freedoms contained at PART I of the Constitution of the Turks and Caicos Islands and is therefore void and of no effect.**

14. The submission that the Trial Without a Jury Ordinance (TWAJO) is unconstitutional as offending against the right to a fair hearing guaranteed by section 6 is untenable. As was said by Carnwath LJ in the Administrative Court in the matter of *R ex parte Misick and the Secretary of State for Foreign and Commonwealth Affairs* in which the Applicant, then Premier, challenged the decision to abolish the right to jury trial in these Islands, and cited with approval by Lord Justice Laws in the Court of Appeal, [2009] EWCA Civ 1549 at para 20

> *" ... jury trial is not seen as essential in other parts of the world, not under Article 6 of the Human Rights Convention. Mr. Crowe also fairly makes the point that the great majority of criminal offences are tried without a jury, and that it is hard to point to a principled basis for drawing a clear* line."

15. Mr. Mitchell QC submits[1] on behalf of the Attorney General that the issue of the constitutionality ofd the Ordinance was raised before Mr. Justice Harrison who held in his June 2014 judgment that the Court that the Ordinance was and remained compliant with the Constitution and would be enforced by the Court. There was no appeal from that part of the learned Judge's decision and I agree with the submission that it is vexatious to raise it at this stage in an attempt to have the matter re-litigated.

16. The Applicant's other challenge to the constitutionality of TWAJO is that the law is selective in its application and so offends against section 7 guarantee of equality before the law and the section 16 guarantee protection from discrimination, is equally untenable. It is predicated on the fact that to date no other application has been made by the Crown to try any other matter without a jury but that fact does not change the character of the law as being of universal application. In my judgment, the application for a declaration in terms of 3 and 4 is frivolous as being wholly without merit.

5. **A Declaration that the preferment of the specific charges against the Applicant in spite of the stated charges of the extradition request constitute a breach of the Applicant's constitutional right to lawful administrative action.**

17. The Applicant contends that the charges preferred against the Applicant are disproportionate as he was extradited on one or two charges and is now facing trial on "*many, many more.*" Mr. Thorne submits this is a breach of the doctrine of specialty and a breach which infringes the Applicant's rights under section 19 of the Constitution which provides that all decisions and acts of the Government and of persons acting on its behalf must be lawful, rational, proportionate and

[1] Written Case on behalf of the Second Respondent

procedurally fair. Even if section 19 were engaged – a matter which I strongly doubt - the number of charges in itself cannot be the factor that determines whether the Crown's decision to prefer them is 'disproportionate' and no other ground is advanced. The resolution of the question of whether the charges preferred against the Applicant are in breach of the doctrine requires a consideration of the evidence that was before the Brazilian Court and a finding that the additional charges do not arise from the same set of facts as the original offence and were not extraditable: see Bantekas and Nash **International Criminal Law** p 184. If the charges all arise from the same set of facts and are all extraditable then the number of them cannot amount to a breach of either the doctrine of specialty or the Constitution. In my judgment, the ground advanced by the Applicant has no prospect of success.

18. Mr. Mitchell says that the question of whether any of the counts on the indictment are in breach of that principle has already been raised before the trial judge who is well placed to make that determination and has the power to stay proceedings if he is satisfied that the proceedings would be otherwise unfair. That matter is scheduled to be dealt with in September. Not only am I satisfied that section 19 is not engaged, but I am satisfied that the trial court is the appropriate court to hear and determine the issue.

19. The application is dismissed on the ground that it is frivolous and or vexatious for the reasons given with no order as to costs.

DATED 5 AUGUST 2015

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CHIEF JUSTICE