

Case No. G0554/09

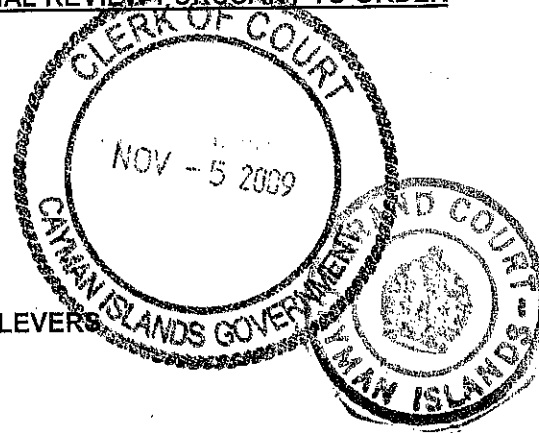
FORM 86A

IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER
GCR ORDER 53

AND

IN THE MATTER OF:

PRIYADARSHINI LEVERS



v

HIS EXCELLENCY THE GOVERNOR OF THE CAYMAN ISLANDS

**NOTICE APPLICATION FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW**

This form must be read together with Notes for Guidance obtainable from the Grand Court.

To the Honourable Attorney General of the Cayman Islands, Government Administration Building,
Elgin Avenue, George Town, Grand Cayman Strand, Cayman Islands B.W.I.

Applicant: PRIYADARSHINI LEVERS

Respondent: HIS EXCELLENCY THE GOVERNOR OF THE CAYMAN
ISLANDS

**Judgment, order,
decision or other
proceeding in respect
of which relief is
sought:**

Decision dated 2nd November 2009 of the Respondent to publish the Report of the Tribunal of Inquiry appointed by the Respondent to inquire into whether the Respondent should make a reference to Her Majesty's Privy Council on the question of whether the Applicant should be removed as a Judge of the Grand Court of the Cayman Islands to Sections 49 J (2) to (7) of Part VA of the Cayman Islands (Constitution) Order 1972.

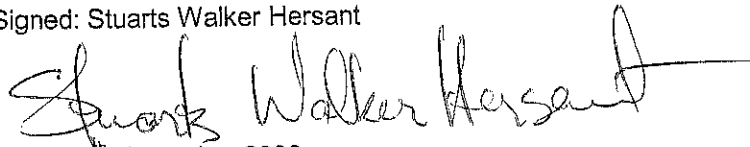
Relief Sought:

1. In respect of the Respondent's decision hereinbefore particularised, the Applicant seeks an Order of certiorari quashing the said decision;
2. In respect of the Respondent's decision hereinbefore particularised, the Applicant seeks an Order of prohibition against the Respondent permitting the publication of the Report of the Tribunal of Inquiry into the removal of the Applicant *until* a determination has been made by Her Majesty's Privy Council, upon its Advice to Her Majesty The Queen, on whether the Applicant should be removed as a Grand Court Judge pursuant to section Sections 49 J (2) to (7) of Part VA of the Cayman Islands (Constitution) Order 1972 or, in any event, until further Order of this Honourable Grand Court;
3. An Order that the Respondent disclose all relevant documentation including:
4. An Order for damages, to be assessed, for injury to the Applicant's reputation;
5. An Order that the Respondent pays the Applicant's costs, in any event and forthwith, on an indemnity basis.

**Name and address of
Applicant's Attorneys,
or, if no Attorneys
acting, the address
for service of the
applicant:**

Stuarts Walker Hersant
4th Floor, Cayman Financial Centre
Dr. Roy's Drive
George Town
Grand Cayman
Cayman Islands

Signed: Stuarts Walker Hersant

A handwritten signature in black ink that reads "Stuart Walker Hersant". The signature is written in a cursive style with a long horizontal line extending to the right.

Dated: 5th November 2009

GROUNDS ON WHICH RELIEF IS SOUGHT

INTRODUCTION

1. The Applicant is a Sri Lankan national who, on March 2003, was appointed by the Respondent as a Grand Court Judge of the Cayman Islands.
2. Following a number of complaints, the Respondent on 25th September 2008, in the exercise of the powers granted to him under 49 J (2) to (7) of Part VA of the Cayman Islands (Constitution) Order 1972, appointed a Tribunal of Inquiry to inquire into the question of whether the Applicant should be removed from her appointment as a Grand Court Judge.
3. The Tribunal of Inquiry, chaired by The Right Honourable Sir Andrew Leggatt PC, was required to provide its Report to the Respondent, within 90 days of the termination of the investigative proceedings. The Tribunal of Inquiry's Report dated 12th August 2009 was provided to the Respondent, on or about the same day and the Applicant was provided with a copy thereof on 20th August 2009.
4. Also on 20th August 2009, under the authority of the Respondent, a Press Release in relation to the Tribunal of Inquiry's Report was issued. In material particulars, the Press Release confirmed the issuance by the Tribunal of Inquiry of its Report to the Respondent and the Respondent's acceptance of the Tribunal of Inquiry's advice that the question of the removal of the Applicant as a Grand Court Judge should be referred to Her Majesty's Privy Council for its Advice, to Her Majesty, on whether the Applicant should be removed.
5. Furthermore, the Respondent's Press Release stated the following:

"Because the case is ongoing and will be referred to the Privy Council, the Governor is not at liberty to release the report. Once the Privy Council has made its ruling, a decision will be taken concerning the report's release to the public."
6. In a Cayman Net News publication dated 21st August 2009, the Respondent is attributed as having, in substantially the same terms as stipulated heretofore, made the statement that he was not "at liberty to release the report" because the case was ongoing and would

be referred to the Privy Council. The Applicant relies on the Respondent's concession, which was lawful, for its full terms and effect.

7. It should be noted that prior to the Press Release and the Respondent's public statement, the Applicant, concerned about the fairness of the process and the limitation any potential damage to her reputation had, together with her Legal Advisers, carefully considered the question of taking remedial or intermediate steps in Her Majesty's Privy Council in circumstances where the Respondent was to decide to publish the contents of the Tribunal of Inquiry's report.
8. In reliance on the Respondent's concession that any discretion he possessed, to publish the report was circumscribed by the fact that proceedings in Her Majesty's Privy Council were "ongoing", the Applicant did not pursue any applications to the Her Majesty's Privy Council to prevent the publication of the report pending the final determination of the question of whether the Respondent should be removed.
9. By a letter to the Applicant dated 2nd November 2009, that is to say, nearly three (3) months after the Respondent's public recognition that he was not at liberty to release the report, the Respondent's Special Counsel stated the following:

"Having provided you with ample time to peruse the report, His Excellency now considers it appropriate and in the "public's interest" that he makes the Report public. The proposed date for the release of the report is 10th November 2009."
10. For the reasons that follow, the Applicant respectfully contends that the Respondent's decision is irrational, *ultra vires*, inconsistent, in breach of the principles of natural justice, disproportionate contrary to the Applicant's legitimate expectation and, *prima facie*, unlawful.
11. Unlawfully and inconsistent with his public statements on 20th and 21st August 2009, the Respondent's decision of 2nd November 2009 is premised on the following:
 - (i) The Applicant having had "ample time to peruse the report;
 - (ii) That it is now "appropriate" that the report should be published (without any transparent regard to the principles of natural justice and fairness);

- (iii) In respect of (ii) above, the Respondent has, in breach of the principles of natural justice, irrationally and unlawfully reached his decision to publish the report without affording the Applicant an opportunity to make representations;
- (iv) That publication of the report is in the "public's interest" is (without any transparent regard to the principles of natural justice and fairness).

12. By a letter dated 3rd November 2009, Stuarts Walker Hersant, on the Applicant's behalf invited the Respondent to affirm his decision of 20th August 2009 and refrain from publishing the report on 10th November 2009 as previously indicated. The Respondent was invited to respond in writing by the close of business on 3rd November 2009 failing which, he was notified of the Applicant's intention to apply to the Grand Court for leave to move for judicial review and an interim injunction prohibiting the publication of the report pending the resolution of proceedings or further order of the Grand Court.

13. The Respondent *failed* to respond substantively on 3rd November as requested. By a letter sent via e-mail timed at 13:48 on 4th November 2009, the Respondent's Special Counsel stated the following:

- (i) That the "advance in his position" follows after careful consideration" by the Respondent;
- (ii) On an unspecified date, the Respondent received a freedom of information request (no particulars have been provided as to when and by whom this request was made or the basis of or details of the consideration given by the Respondent to the admissibility and acceptance of the freedom of information request;
- (iii) That the Respondent considered that his decision of 20th August 2009 was purportedly "at odds with the position taken by Gibraltar in relation to the release of the Cullen Inquiry Report into the Removal of the Chief Justice Derek Schofield;
- (iv) That the Respondent had sought clarification from the Privy Council on the matter (without providing any particulars of when, by what means, by whom and what result or reasons were given by the Privy Council);

- (v) That the Respondent's determination to release the report is against the "background of the freedom of information request and the guidance from the Judicial Committee of the Privy Council that it is now appropriate and a matter of public interest that he release the report (without providing any particulars as to whether the competing public interests of the ensuring the fairness of judicial proceedings, the maintenance of the independence of the jury and the recognition of the principle of the presumption of innocence);
- (vi) That the Respondent "confirmed that there was no legal impediment preventing him from publishing the report (without advertng to the fact that, in the face of his public statements on 20th and 21st August 2009, he should have given the Applicant an opportunity to make representations to himself and to the Privy Council on the issue of whether or not the report should be public;
- (vii) That the Respondent did not consider that there was any proper basis for Madam Justice Levers to seek judicial review of his decision (a clear attempt by the Respondent to oust the jurisdiction of the Grand Court to intervene);
- (viii) That the Respondent considered that it was a matter of public interest that he disclose the Report bearing in mind that the matter was a public hearing and the public should be informed of the outcome (without advertng to the fact that this was a factor that the Respondent would have been aware of when he publicly stated on 20th and 21st August 2009 that because proceedings were ongoing, he was "not at liberty to disclose the contents of the report, that there is a distinction between the public interest and the interest of the public and, that insofar s there is an outcome, and having regard to the constitutional principle of the independence of the judiciary, the only outcome relevant to the public was whether or not, ultimately, Her Majesty was advised by Her Judicial Committee of the Privy Council to remove or restore the Applicant as a judge of the Grand Court of the Cayman Islands;
- (ix) That the Respondent had decided that "the public interest test supersedes your client's desire not to publish the report" (without advertng to the points made heretofore and to the principles of fairness and proportionality);

- (x) That the Respondent had, in accordance with the principles of transparency and openness in public affairs determined that the report would be released on 10th November 2009 (without advertng to the inherent contradiction between this asserted transparency and openness and his failure to provide the Applicant with an opportunity to make representations either to himself or tot he Judicial Committee of the Privy Council or, his failure to disclose to the Applicant the particulars concerning the purported freedom of information request and / or the Respondent's application to and communications to Judicial Committee of the Privy Council and or the responses or reasons given by the Judicial Committee of the Privy Council to the Respondent's *ex parte* request;

14. By a letter dated 4th November 2009, Stuarts Walker Hersant on behalf of the Applicant provided a full refutation of the contents of the Respondent's Special Counsel's letter of 3rd November 2009. The letter reinforced the Applicant's contention that the Respondent's decision was unlawful and capricious and invited the Respondent to provide full disclosure of all relevant material relied on by the Respondent in support of his decision to disclose the contents of the report. As of the time of drafting this application, the neither the Respondent or his Special Counsel have provided any response to Stuart Walker Hersant's request for disclosure.
15. It is in these circumstances that the Applicant seeks permission to challenge the Respondent's decision of 2nd November 2009 by way of an application for Judicial Review.

APPLICABLE LAW

Arguable Case

16. In the light of the afore-going, the Applicant respectfully contends that she has an arguable case with a good prospect of success thereby enabling the Grand Court to grant her leave to move for judicial review pursuant to Grand Court Rules Order 53.
17. For the reasons previously set out, it is respectfully contended that there is, *prima facie*, evidence that the Respondent's decision of 2nd November 2009 is unlawful. Reasons for the illegality of the Respondent's decision are:

Natural Justice

- (i) The primary submission that the Applicant has suffered an abrogation of his right to natural justice is premised on the dictum of Lord Denning in **KANDA v GOVERNMENT OF MALAYA AC 322**:

“The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is called natural justice. The Romans put them in two ways: *Nemo iudex in causa sua*; and *Audi alteram partem*. They have recently been put in two words, impartiality and Fairness.”

- (ii) The relevant principle engaged hereunder is the denial of the Applicant's right / opportunity to make representations prior to the Respondent determining that he will authorise publication of the Report. In **Rees v Crane 1994 2 AC 173**, the Privy Council cited, with approval, the dicta of the English Court of Appeal in **Lewis v. Heffer [1978] 1 W.L.R. 1061**, a case in which “officers of a constituency political party were suspended pending an inquiry. The Court of Appeal held that the rules of natural justice did not apply since suspension was a holding operation pending inquiry and ‘The suspension in such a case is merely done by way of good administration:’ *per* Lord Denning M.R., at p. 1073c. Geoffrey Lane L.J. regarded what happened in that case as ‘an administrative action which by its very nature had to be taken immediately,’ at p. 1078g, and said, at pp. 1078-1079:

‘In most types of investigation there is in the early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially, and the greater the importance of observing the maxim audi alteram partem.’

- (iii) See also **R v P Borough Council, ex p S [1999]** per Charles J: One of the basic requirements of procedural fairness is that the decision maker must disclose to the person affected, in advance of the decision, information of relevance to the decision so that the person affected has an opportunity to controvert or comment on it" cited with approval by Fordham in the Third Edition of the Judicial Review Handbook at page 851.
- (iv) On the issue of confidentiality and the breach of natural justice, reference is made to **R v Chief Constable of North Wales Police ex p AB QB 396**, where Lord Bingham said:

When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty. This principle would not prevent the police making factual statements concerning police operations, even if such statements involved a report that an individual had been arrested or charged, but it would prevent the disclosure of damaging information about individuals acquired by the police in the course of their operations unless there was a specific public justification for such disclosure. This principle does not in my view rest on the existence of a duty of confidence owed by the public body to the member of the public, although it might well be that such a duty of confidence might in certain circumstances arise. The principle, as I think, rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce.

Consistency / Abuse of power/ Irrational

- (v) See **CARDIFF COUNTY COUNCIL EX PARTE SEARS GROUP PROPERTIES LIMITED, R v. [1998] EWHC Admin 320 (13th March, 1998)**
However, as the discussion in de Smith shows, there is, in the cases, a

tension between those principles and the recognition of the need for the public to be able to rely on the consistency and stability of decisions of public authorities. The resolution of that tension has given rise to much jurisprudential debate. But it is, in my view, possible to discern in the cases a broad principle (subject to variations in detail) that where a formal decision has been made on a particular subject matter or issue affecting private rights by a competent public authority, that decision will be regarded as binding on other authorities directly involved, unless and until circumstances change in a way which can be reasonably found to undermine the basis of the original decision. That change may be a change in the factual circumstances or sometimes in the underlying policies affecting the decision.

Legitimate Expectation

- (vi) See *Ex p Coughlan* [2001] QB 213 at paragraph 55 to 57:

“In considering the correctness of this part of the judge’s decision it is necessary to begin by examining the court’s role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr Goudie and Mr. Gordon accept.

What is still the subject of some controversy is the court’s role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *Re Findlay* [1985] 1AC 318 at p338, “But what was their *legitimate* expectation?” Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds. This has been held to be the effect of changes of policy in cases involving the early release of prisoners (see *Re Findlay* [1985] AC 318; *R v Home Secretary ex parte Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *A-G for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

Ultra Vires

- (vii) Reference is made in the Respondent's correspondence of 4th November 2009 to a freedom of information request. Received in the course of preparation for this application for judicial review by way of late disclosure are documents including an e-mail request from a journalist pursuant to the Freedom of Information Law 2007.
- (viii) It is by no means clear whether the Respondent has any power to make a disclosure pursuant to that law. Section 3 (5) of the Law specifically excludes from its ambit the judicial functions of a court, the holder of a judicial office or other office connected with a court. The Tribunal of Inquiry established under

section 49 J of the Constitution and pursuant to the Tribunal of Inquiry law with its powers to receive evidence, issue summonses, find witnesses in contempt and issue other penal processes functioned for the purposes of the constitutional function as a Court. Prima facie, therefore, there is good a persuasive argument to the effect that the Freedom of Information Law 2007 has no application and to the extent that the Respondent relied on it, he acted *ultra vires*.

- (ix) Further, the Respondent contends in the letter of 4th November 2009, that disclosure is in the public interest. There is no reference, in this context to which aspect of the public interest, if any, as stipulated by the Freedom of Information Law if any, is engaged. The Regulations to the Law prescribe a specific definition of the public interest which the Respondent is not at large to modify or otherwise amend.
- (x) In any event, consideration of the public interest must include a transparent consideration of the competing public interest in ensuring that the principles of natural justice and the preservation of the independence of the judiciary (expressly recognised by section 3 (5) of the Law) are adhered to.

18. For all these reasons, it is the respectful application for the Applicant that she be granted leave to move for judicial review. It is the Applicant's contention in this regard, that an injunction or an order prohibiting the publication of the report is necessary for the preservation of the *status quo* pending the determination by the Grand Court of the legality of the Respondent's decision. The recent spate of incomplete disclosures by the Respondent, reinforces the Applicant's submission, that all information relevant to the exercise by the Respondent of his assumed power to disclose the report, contrary to his earlier acceptance that he was not at liberty to publish the report, should be the subject of full and frank disclosure.

Removal of Judges

19. Finally, a short submission on the nature of the process invoked by the Respondent on 25th September 2008. The Judges of the Grand Court, including the Chief Justice, subject to provisions concerning qualification shall be appointed by HE The Governor of the Cayman Islands, acting in his discretion by instrument under public seal which may

specify the duration for such appointment which subject to specified exceptions, shall be determined on the date at which the appointee attains the age of 65.

20. Following his appointment, a Judge of the Grand Court *may be removed from office in the restrictive circumstances* stipulated by Sections 49 J (2) to (7) inclusive. The material provisions state:

- (i) A Judge 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;
- (ii) Removal of a Judge is conditional on the Advice of the Judicial Committee of the Privy Council to Her Majesty The Queen that the Judge be removed on the grounds of inability or misbehaviour;
- (iii) The Advice of the Judicial Committee is conditional upon a request of HE The Governor to Her Majesty The Queen for a reference to be made to the Judicial Committee of the Privy Council for the removal of the Judge on the grounds of inability or misbehaviour;
- (iv) HE The Governor may only make such a request for a reference following his appointment of a Tribunal composed of members who hold or have held high judicial office to investigate and advise on the question of whether he should request to Her Majesty the question of the removal of the Judge on the grounds of inability or misbehaviour;
- (v) The powers conferred on HE the Governor under this section shall be exercised by him in his discretion.

21. By reason of the process heretofore described, the following fundamental and interleaving submissions can be made:

- (vi) A person appointed to sit as a Judge of the Grand Court has security of tenure;

- (vii) Insofar as it is relevant, such security of tenure is dependent on the Judge possessing the ability to perform his functions or being of good behaviour;
- (viii) A Judge may be removed by Her Majesty only on the grounds inability or proved misbehaviour and, following the adherence to the restricted and protective steps mandated by the Constitution;
- (ix) There are no other circumstances (such as by an address to the Legislative Assembly and a consequential Petition to Her Majesty) by which a Judge of the Grand Court of the Cayman Islands may be removed.

22. For all these reasons, the Applicant respectfully requests the Orders prayed for.

Stuarts Walker Hersant

5th November 2009