

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal against the Judgment of the Court of Appeal under and in terms of Articles 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Spl L.A.

Application No. 24/2012

SC Appeal No. 67/2013

C.A.(Writ) Application No. 411/2012

DR. UPATISSA ATAPATTU BANDARANAYAKE
WASALA MUDIYANSE RALAHAMILAGE SHIRANI
ANSHUMALA BANDARANAYAKE

Residence of the Chief Justice of Sri Lanka
129, Wijerama Mawatha,
Colombo 07.

Presently at:
No. 170, Lake Drive,
Colombo 08.

PETITIONER

VS.

1. **HON. CHAMAL RAJAPAKSE**
Speaker of Parliament
Parliament of Sri Lanka
Sri Jayawardenapura, Kotte.
2. **HON. ANURA PRIYADARSHANA YAPA,**
Eriyagolla,
Yakwilla.
3. **HON. NIMAL SIRIPALA DE SILVA,**
93/20, Elvitigala Mawatha,
Colombo 08.
4. **HON. A.D. SUSIL PREMAJAYANTHA,**
123/1, Station Road,
Gangodawila,
Nugegoda.
5. **HON. RAJITHA SENARATNE,**
CD 85, Gregory's Road,
Colombo 07.
6. **HON. WIMAL WEERAWANSA,**
18, Rodney Place,

Cotta Road,
Colombo 08.

7. **HON. DILAN PERERA,**
30, Bandaranayake Mawatha,
Badulla.
8. **HON. NEOMAL PERERA,**
3/3, Rockwood Place,
Colombo 07.
9. **HON. LAKSHMAN KIRIELLA,**
121/1, Pahalawela Road,
Palawatta,
Battaramulla.
10. **HON. JOHN AMARATUNGA,**
88, Negombo Road,
Kandana.
11. **HON. RAJAV AROTHIAM SAMPATHAN,**
2D, Summit Flats,
Keppetipola Road,
Colombo 05.
12. **HON. VIJITHA HERATH,**
44/3, Medawaththa Road,
Mudungoda,
Miriswatta,
Gampaha.

2nd-12th Respondents Members of the Select
Committee of Parliament appointed with regard to
the charges against the Chief Justice.
Also of Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.

13. **W.B.D. DASSANAYAKE**
Secretary General of Parliament
Parliament Secretariat
Sri Jayawardenepura Kotte.

RESPONDENTS

AND NOW BETWEEN

HON. ATTORNEY GENERAL,
Attorney General's Department
Colombo 12.

PARTY NOTICED (AMICUS CURIAE) PETITIONER

VS.

DR. UPATISSA ATAPATTU BANDARANAYAKE
WASALA MUDIYANSE RALAHAMILAGE SHIRANI
ANSHUMALA BANDARANAYAKE
Residence of the Chief Justice of Sri Lanka
129, Wijerama Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive,
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PETITIONER-RESPONDENT

1. **HON. CHAMAL RAJAPAKSE**
Speaker of Parliament
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Sri Jayawardenapura, Kotte.
2. **HON. ANURA PRIYADARSHANA YAPA,**
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Secretary General of Parliament
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AMICUS CURIAE - PETITIONERS

TO: HIS LORDSHIP THE CHIEF JUSTICE AND OTHER LORDSHIPS OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

**AMICUS CURIAE WRITTEN SUBMISSIONS ON BEHALF OF THE
COMMONWEALTH LAWYERS ASSOCIATION AND THE BAR HUMAN
RIGHTS COMMITTEE OF ENGLAND AND WALES**

INTRODUCTION

1. This amicus curiae brief is respectfully addressed to the Supreme Court of the Democratic Socialist Republic of Sri Lanka ('Supreme Court') by the Commonwealth Lawyers Association ('CLA') and the Bar Human Rights Committee of England and Wales ('BHRC').
2. It is filed in the instant appeal brought by the Attorney-General against the Judgment of the Court of Appeal setting aside the purported findings of the Parliamentary Select Committee. The appeal raises issues previously dealt with in a series of legal proceedings challenging the impeachment of Dr Bandaranayake as Chief Justice of Sri Lanka.

INTEREST OF THE AMICUS CURIAE

3. The CLA is an international organisation which exists to promote and maintain the rule of law throughout the Commonwealth. Its membership is made up of Bar Councils, Law Societies, law firms, barristers' chambers and individual legal practitioners from the 54 countries of the Commonwealth. Established in 1983, the CLA seeks to uphold the rule of law by ensuring that an independent and

efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth.

4. The BHRC is the international human rights arm of the Bar of England and Wales and its membership represents both practicing and non-practicing members of the Bar of England and Wales. Established in 1991, it is an independent committee of the General Council of the Bar of England & Wales. The BHRC is primarily concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.
5. The CLA and the BHRC have expressed their concerns in relation to the impeachment process by which Chief Justice Bandaranayake was removed from office on a number of previous occasions. Such concerns may be seen in the following publicly available materials:
 - a. CLA, Commonwealth Legal Education Association ('CLEA'), Commonwealth Magistrates and Judges Association ('CMJA') Resolution on the Rule of Law and Judicial Independence in Sri Lanka, 17 April 2013;¹
 - b. Report prepared by Geoffrey Robertson QC on behalf of the BHRC on the Impeachment of Sri Lanka's Chief Justice, 27 February 2013;²
 - c. BHRC Further Statement on the Impeachment of the Chief Justice of Sri Lanka, 17 January 2013;³
 - d. BHRC Statement on the Impeachment of the Chief Justice of Sri Lanka, 2 January 2013;⁴
 - e. CLA, CLEA and CMJA Further Statement on the Motion to Impeach the Chief Justice of Sri Lanka, 13 December 2013;⁵
 - f. CLA, CLEA and CMJA Statement on the Motion to Impeach the Chief

¹ <http://www.commonwealthlawyers.com>

² https://www.barhumanrights.org.uk/sites/default/files/documents/news/legal_opinion.pdf

³ <http://www.barhumanrights.org.uk/further-statement-sri-lanka-impeachment-chief-justice>

⁴

https://www.barhumanrights.org.uk/sites/default/files/documents/news/sri_lanka_statement_jan_2013_0.pdf

⁵ <http://www.commonwealthlawyers.com/PressRelease.aspx>

6. This brief is submitted in support of the Chief Justice, but the CLA and the BHRC wish to make it clear that they do not presume to examine or comment directly on the judgment of the Court of Appeal in this case. Rather, the main purpose of this brief is to clarify an issue of United Kingdom law which has been raised by the Attorney General in the course of his appellate submissions - namely the procedure by which Supreme Court judges may be removed from office in the United Kingdom.

SUMMARY OF THE ARGUMENT

7. The Supreme Court Judicial Complaints Procedure mandates for an independent, judicially constituted, tribunal to determine allegations of misconduct in respect of members of the Supreme Court consistent with the rule of law. Any such determinations are reached after a fair procedure is followed and the member in question has had the opportunity to both view the evidence against him or her and to make representations to the tribunal. It is only following such a procedure that it is possible for the Lord Chancellor to decide whether to initiate action to remove the member from office pursuant to section 33 of the *Constitutional Reform Act 2005*.
8. There is accordingly no basis upon which to suggest that the procedure in the United Kingdom for the removal of Supreme Court judges is a summary one in which a motion is filed in Parliament and, after due debate, Parliament simply decides whether to dismiss or retain the judge. Such a procedure would not be consistent with the primary aim of the *Constitutional Reform Act 2005*, which was to officially enshrine the independence of the judiciary in law.⁷

ARGUMENT

A. The UK's Constitutional Reform Act 2005 and its relevance to this appeal

9. As observed in paragraph 4.3(e) of the written submissions filed by the 12th Respondent (the Respondent on main arguments), the Attorney-General relies heavily on an article authored by Dr Mark Cooray which was published in the 'Daily News' in support of his Second Ground of appeal.

⁶ <http://www.commonwealthlawyers.com/PressRelease.aspx>

⁷ <http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/constitutional-reform>

10. This article argues that the *Constitutional Reform Act 2005* enables the Parliament in the United Kingdom to summarily remove Supreme Court judges from office without any procedural safeguards. It states:

"Britain is the head of the Commonwealth and we may perhaps gather what exactly was meant in terms of the Latimer House Principles by studying the British Constitutional Reform Act of 2005 which was promulgated long after the ratification of the Latimer House Principles was formulated. One of the most radical aspects of the British constitutional reform was that a new 12-member Supreme Court was created to be highest court in Britain and it would function outside the House of Lords breaking the centuries of British tradition. The interesting thing is to note how these judges of the Supreme Court were to be removed. Article 33 of the British Constitutional Reform Act of 2005 is as follows:

"A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament."

That is all this huge 323-page Act of Parliament says about the removal of judges of the Supreme Court. This provision to remove Supreme Court judges basically follows the time honoured British practice. There is no talk of an 'impartial tribunal' or about filing charges, hearings and the right to defend oneself. Somebody files a motion in parliament and after due debate, Parliament will decide whether to sack or retain the judge."

11. The Attorney-General's reliance on Dr Cooray's article purportedly evidences the Attorney-General's contention that in Sri Lanka, as in many other Commonwealth countries, the Parliament is supreme and the Courts have no jurisdiction over Parliamentary acts.
12. The CLA and the BHRC agree with the submissions of the 12th Respondent on this issue (contained in paragraphs 4.3 (a)-(k) of its written submissions). These submissions are to the effect that it is the Constitution (which is firmly based on the principles of the rule of law and the independence of the judiciary), not the Parliament, which is supreme in Sri Lanka.
13. Given the emphasis that is placed on Dr Cooray's reasoning in the Attorney-General's appeal, in order to assist the Court, the CLA and the BHRC set out below an:
- a. analysis of the parliamentary debates which led to the adoption of the provisions of the *Constitutional Reform Act 2005* relating to the tenure of Supreme Court judges;
 - b. an examination of the detailed procedural safeguards which are applicable when seeking to remove a Supreme Court judge in the

United Kingdom; and

- c. a summary of the detailed procedures applicable when disciplining judges in England and Wales who are not members of the Supreme Court.

B. Hansard discussion of the appropriate procedure for the removal of judges in the Constitutional Reform Bill

14. Prior to the Constitutional Reform Bill ('the Bill'), the procedure in England and Wales with respect to judicial tenure was that senior judges held office "during good behaviour" and were removable only by an "address in both Houses of Parliament". However, as Baroness Carnegy of Lour characterised this position in the House of Lords debates on the Bill on 11 October 2004, this was "simply not adequate for modern times and in the context of this Bill".⁸ As she put it:

"It is therefore necessary to provide better means of investigation into a judge's behaviour. It would be quite possible for a Minister to have it in for a judge, as it were, for political or other reasons or to be prejudiced against him. It is important to know exactly what bad behaviour and good behaviour are. ... Section 95 of the Scotland Act 1998 ... provides for a process of investigation by a tribunal which the Minister will appoint, and for guidance on what constitutes unacceptable behaviour. This may or may not meet the wishes of distinguished noble Lords ... but it is an attempt, based on recent legislation north of the Border, to improve protection of judges of the Supreme Court in modern times. The Government should not brush this off..."⁹

15. Lord Goodhart added his support to the comments by Baroness Carnegy and reiterated the need for a proper procedure to be set out in detail to regulate the removal of judges by Parliament:

"For more than 300 years, it has been a rule that senior judges from the High Court upwards in England and Wales are removable only by an address in both Houses of Parliament. It was once done in respect of an Irish judge in the early 19th century, when Parliament had jurisdiction over Ireland, but it has never been done in relation to a judge in England and Wales. The nature of the powers is uncertain, and the procedure that has to be gone through before an address can be made is unclear. We are talking about the Supreme Court, which is at the centre of the legal system for the entire United Kingdom. To leave it in the basic wording of Clause 27 is inadequate, as it is very unclear what, if any, procedure is appropriate to obtain the necessary address of both Houses of Parliament. Something along the lines of the amendment moved by the noble Baroness, Lady Carnegy, which is based on the draft by the Law

⁸ Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 93.

⁹ Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 94.

Society of Scotland, is worth careful consideration. It may be that the wording is not ideal and could be improved, but it is much better to spell out in some detail the circumstances in which a justice of the Supreme Court can be removed rather than leaving it in the general and vague terms of the existing Clause 27.”¹⁰

16. The need for procedural safeguards to be put in place to protect judges who decide cases against the Government and experience of where this has happened outside of the United Kingdom was recalled by the Duke of Montrose who warned:

“I might add to the comments of my noble friend Lady Carnegy. She talked in reasonable terms about what the pitfalls might be, but we are supposed to envisage a time in the distant future when people may not be as reasonable as we all tend to be at present. It has happened in other countries that do not have our traditions. If a judge decides a case in a way that the Government do not like, does that constitute good or bad behaviour?”¹¹

17. Following a promise from the Government that the matter would be reviewed in consultation with the Law Lords, the amendment premised on the Scottish system (proposed by Baroness Carnegy) was withdrawn. The issue of removal of judges was then discussed again in the House of Lords on 14 December 2004 in respect of what was by then Clause 24 of the Bill. At that stage, Baroness Carnegy again expressed her dissatisfaction with the current arrangements (as they then were) for the removal of judges, stating in relation to what she regarded as a matter of “fundamental constitutional importance”¹²:

“In future, a political Minister in charge might well take against a particular judge, and he might well be supported by the Home Secretary, who might want to put pressure on that judge. The Minister made the point in Committee that there was strong protection for the judge and the public—that of Parliament and the Queen, who would have to agree. However, we all know just how compliant the House of Commons can be with a big majority. Her Majesty would have great difficulty in agreeing to something that Parliament disagreed with. The existing criteria for good behaviour have, I understand, never been tested in the context of the highest court in the land; that is a significant fact.”

18. The Minister, Baroness Ashton of Upholland, indicated at the end of the debate that she understood the concerns which had been raised and that her Department was in “very detailed discussions with the Law Lords”, which were then “at a very advanced stage” and that these discussions would lead to an

¹⁰ Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 94.

¹¹ Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 11 October 2004, Column 94.

¹² Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 14 December 2004, Column 1228.

“agreed protocol” which would be made available as a public document.¹³ Upon adoption, this protocol for a judicial complaints procedure was to be read in conjunction with section 33 of the Constitutional Reform Act 2005 (during the Parliamentary debates this provision was referred to as Clause 27 and later Clause 24 of the Constitutional Reform Bill) and would have to be followed prior to any action under section 33 to remove a Supreme Court judge. It was on this basis that section 33 of the Constitutional Reform Act 2005 was passed by both Houses of Parliament in the following terms:

33. Tenure

A judge of the Supreme Court holds that office during good behaviour, but may be removed from it on the address of both Houses of Parliament.

C. Procedural safeguards applicable to the removal from office of a Supreme Court Judge in England and Wales

19. The Supreme Court Judicial Complaints Procedure which was devised by the Government (in conjunction with the Law Lords) operates in advance of any action to remove a Supreme Court judge (‘member’) under section 33 of the Constitutional Reform Act 2005. It is a public document which can be obtained directly from the Supreme Court website¹⁴ and is set out in full in at Annex A to this Amicus Brief.

20. Under the Supreme Court Judicial Complaints Procedure, any complaint made as to the conduct of a member is initially assessed by the Supreme Court’s Chief Executive who will assess as a preliminary matter whether or not the complaint “relates only to the effect of a judicial decision” or discloses “not ground of complaint”. If this is the case, no further action shall be taken in respect of the complaint and the complainant will be informed of this.¹⁵

21. Where the complaint is deemed by the Chief Executive to be one on which action may be taken, it is referred to the most senior Supreme Court member to whom the complaint does not relate. That member will consult with the next senior member of the Court to whom the complaint does not relate. These two members (“the panel”) will then make a decision whether to either (a) take no action; (b) raise the complaint with the member in question to resolve the matter informally; or (c) consider taking “formal action”.¹⁶ Reasons for taking either informal or formal must be recorded by the two members considering the matter.

¹³ Hansard, House of Lords Discussion of Constitutional Reform Bill, Committee Stage, 14 December 2004, Column 1228.

¹⁴ <http://www.supremecourt.gov.uk/about/judicial-conduct-and-complaints.html#02>

¹⁵ Supreme Court Judicial Complaints Procedure, clause 1.

¹⁶ Supreme Court Judicial Complaints Procedure, clauses 2-3.

22. Consideration of “formal action” by the panel is only appropriate where a complaint, a final conviction for an offence, or a member’s conduct casts serious doubt on the member’s character, integrity or continuing fitness to hold office.¹⁷
23. Where such formal action is under consideration, the most senior Supreme Court member to whom the complaint does not relate, must inform the member in question (both of the consideration of formal action and the matters alleged against them). The most senior member must then inform the Lord Chancellor of the facts and consult with him or her as to the action to be taken.¹⁸ Formal action may only be initiated after these steps have been taken and only then if it is considered appropriate to do so by the most senior member.¹⁹
24. Where formal action is taken, strict procedural safeguards apply. These are that:
- a. A tribunal is established to consider the allegations. This tribunal is constituted by the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland (or the next most senior judge in that jurisdiction in the event of disqualification) as well as two independent persons of high standing nominated by the Lord Chancellor).
 - b. The member in question is to be fully informed of the details of the allegations made against him or her.
 - c. The Tribunal shall adopt a fair procedure (which is expeditious to the extent that this is consistent with fairness) to investigate the allegations.
 - d. The Tribunal shall prepare a report summarising the relevant facts and recommending action (if any) to be taken. This report shall be delivered to the Lord Chancellor who may choose to publish it.
 - e. The Lord Chancellor shall then decide whether to initiate action to remove the member from office pursuant to section 33 of the Constitutional Reform Act 2005.

¹⁷ Supreme Court Judicial Complaints Procedure, clause 4.

¹⁸ Supreme Court Judicial Complaints Procedure, clause 5.

¹⁹ Supreme Court Judicial Complaints Procedure, clause 6.

- f. The member in question may vacate his or her office voluntarily at any time.
- g. Formal action may be discontinued at any stage.²⁰

25. The “fair but expeditious” procedure to be adopted by the Tribunal is presently unknown as there has not yet been cause in the history of the Supreme Court for such a procedure to be invoked. However, it will almost certainly be substantially influenced by the strict procedures for similar tribunals which are charged with determining complaints against members of the judiciary who are not Supreme Court judges.

D. Procedural safeguards applicable when disciplining members of the judiciary in England and Wales who are not members of the Supreme Court

26. The procedure for these tribunals is set out in detail in subordinate legislation - see for example, the *Judicial Discipline (Prescribed Procedures) (Amended) Regulations 2008 (SI 2008/2098)* and the *Judicial Discipline (Prescribed Procedures) Regulations 2006 (SI 2006/676)*.²¹ These statutory instruments were promulgated pursuant to section 115 of the *Constitutional Reform Act 2005* and govern matters of judicial discipline for all members of the judiciary in England & Wales other than members of the Supreme Court. For these judges, matters of discipline are supervised by a specific Government agency known as the Office for Judicial Complaints.²²

27. The Office for Judicial Complaints is detailed and exhaustive in its procedures in order to ensure fairness to the judge who is the subject of the complaint. At each stage of the investigation of the allegations against him or her, the judge in question has the opportunity to view the evidence against them, to make representations as to this evidence (including giving oral evidence), to have their case considered by an independent and judicially qualified tribunal, to comment on draft reports prepared by the tribunal giving findings in respect of their case and to request appellate review of any adverse findings reached. It is

²⁰ Supreme Court Judicial Complaints Procedure, clauses 7-9.

²¹ For complaints relating to Magistrates see the *Complaints (Magistrates) Rules 2008*. For complaints relating to Tribunal Judges see the *Judicial Complaints (Tribunals) Rules 2008* and *Judicial Complaints (Tribunals) (No2) Rules 2008*. Further information about the procedures involved for complaints against Magistrates and Tribunal Judges can be found here:

http://judicialcomplaints.judiciary.gov.uk/complaints/complaints_judge.htm

²² This office was set up on 3 April 2006 to handle complaints and provide advice and assistance to the Lord Chancellor and the Lord Chief Justice (who bear joint responsibility for judicial discipline under the sections 108 and 109 of the *Constitutional Reform Act 2005*). It will be rebranded as the ‘Judicial Conduct and Investigations Office’ from 1 October 2013.

only when all of these procedures are concluded that the judge may be removed from office in accordance with section 108 of the *Constitutional Reform Act 2005*. For reference purposes, a more detailed summary of the applicable procedures for disciplining judges in England and Wales who are not members of the Supreme Court is attached at Annex B to this Amicus Brief.

28. In sum, it is very likely that these detailed and fair procedures applicable to tribunals investigating judges in England & Wales who are not members of the Supreme Court will significantly inform the procedures to be adopted by a tribunal considering misconduct by a member of the Supreme Court in order to ensure compliance with the “fairness” requirement under clause 7 of the Supreme Court Judicial Complaints Procedure.

E. Conclusion

29. As set out above, the Supreme Court Judicial Complaints Procedure mandates for an independent, judicially constituted, tribunal to determine allegations of misconduct in respect of members of the Supreme Court consistently with the rule of law. Any such determinations are reached after a fair procedure is followed and the member in question has had the opportunity to both view the evidence against him or her and to make representations to the tribunal. It is only following such a procedure that it is possible for the Lord Chancellor to decide whether to initiate action to remove the member from office pursuant to section 33 of the *Constitutional Reform Act 2005*.

30. There is accordingly no basis upon which to suggest that the procedure in the United Kingdom for the removal of Supreme Court judges is a summary one in which a motion is filed in Parliament and, after due debate, Parliament simply decides whether to dismiss or retain the judge. Such a procedure would not be consistent with the primary aim of the *Constitutional Reform Act 2005*, which was to officially enshrine the independence of the judiciary in law.²³

²³ <http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/constitutional-reform>

Respectfully submitted

26 August 2013

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ANNEX A

SUPREME COURT JUDICIAL COMPLAINTS PROCEDURE

1. Any complaint against a member of the Supreme Court, by whomever received, shall in the first instance be passed to the Chief Executive. If the complaint relates only to the effect of a judicial decision or discloses no ground of complaint calling for consideration the Chief Executive if she thinks it appropriate, shall take no action save to inform the complainant (if identifiable) that no action will be taken.

2. In any other case the Chief Executive shall refer the complaint to the President, unless the complaint relates to the President, in which case it shall be referred to the Deputy President, unless the complaint relates also to the Deputy President, in which case it shall be referred to the most senior member of the Court to whom it does not relate.

3. The President or Deputy President or Senior member, as the case may be, (hereafter "the appropriate member"), shall then consult the next senior member of the court to whom the complaint does not relate and, having done so, may:

- i. take no action; or
- ii. bring the complaint to the notice of the member who is the subject of the complaint and resolve the matter informally; or
- iii. consider taking formal action as defined below.

In the event of either 3(i) or 3(ii) being pursued the reasons for that action being taken should be recorded and filed.

4. Consideration of taking formal action will be appropriate, whether or not any complaint is made, where a member of the Court is finally convicted of any offence which might reasonably be thought to throw serious doubt on that member's character, integrity or continuing fitness to hold office or where a member's conduct otherwise appears to be such as to throw serious doubt on that member's continuing fitness to hold office.

5. Where formal action is under consideration the appropriate member shall (1) inform the member whose conduct is in question of that fact and of the matters alleged against him or her, (2) inform the Lord Chancellor of the facts so far as they are known, and (3) consult the Lord Chancellor on the action to be taken.

6. Having taken steps listed in paragraph 5 above, the appropriate member may, if it is considered appropriate to do so, initiate formal action.

7. Formal action shall mean:

- i. that a tribunal is established comprising the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland (or, if any of them is disqualified, the next most senior Judge in that jurisdiction) and two independent persons of high standing nominated by the Lord Chancellor, to be chaired by whichever of the three first-named office-holders has longest held his or her office;
- ii. that the member whose conduct is in question shall be informed of the full details of what is said against him or her;
- iii. that the tribunal shall investigate the accusation or complaint adopting such procedure as shall be fair and as expeditious as it consistent with fairness;
- iv. that the tribunal shall make a report summarizing the facts as found by the tribunal so far as relevant and recommending the action, if any, to be taken;
- v. that the tribunal shall deliver this report to the appropriate member and provide a copy to the member whose conduct is in question;
- vi. that the appropriate member shall deliver the report to the Lord Chancellor;
- vii. that the Lord Chancellor shall decide whether to initiate action to remove from office the member whose conduct is in question and, if he judges it appropriate to do so, shall take such action pursuant to section 33 of the Constitutional Reform Act 2005.

8. Whether or not the Lord Chancellor decides to take action to remove the member from office, he or she may publish the report made by the tribunal.

9. The member against whom a complaint or accusation is made may at any time vacate his or her office voluntarily, without prejudice to any other action which may be taken against him or her, and formal action may be discontinued at any stage.

ANNEX B

SUMMARY OF THE COMPLAINTS PROCEDURES APPLICABLE TO JUDGES IN ENGLAND AND WALES WHO ARE NOT MEMBERS OF THE SUPREME COURT

1. In any investigation into alleged judicial misconduct by an Office for Judicial Complaints caseworker, a copy of the complaint will initially be sent to the Judge concerned and inquiries will be made of them as to their recollection of the incident. If the complaint is unresolved by this inquiry, the caseworker will refer the complaint to a senior judge who will conduct an investigation into the allegation. That senior judge is obliged to take evidence from the judge who is the subject of the complaint and may elect to also hear evidence from the judge at an oral hearing. They are also obliged to disclose to the judge in question all of the evidence which has been gathered as part of the investigation pertaining to the complaint against the judge. In the event that the investigating judge finds that the complaint is justified, a report will be sent to the Lord Chief Justice and the Lord Chancellor. Prior to this the judge in question will be given an opportunity to make further representations on the draft report which are then considered by the investigating judge prior to the report being finalised.²⁴

2. If the complaint is upheld by the Lord Chancellor and the Lord Chief Justice, they will decide upon the appropriate disciplinary action (if any) to be taken, including advising, warning, reprimanding or removing a judge for misconduct. Where the Lord Chancellor and the Lord Chief Justice decide to take formal disciplinary action, the judge in question has the right to have the case referred to a Review Body for further consideration.²⁵ The Review Body is constituted by two other judges and two laypersons and if requested to do so by the judge in question is required to hear oral evidence from them. The Review Body is also entitled to conduct further interviews of other witnesses. The Review Body then prepares a draft report of its findings which it sends to the judge who is the subject of the complaint. That judge then has the right to make final representations to the Review Body as to their proposed findings. The Review Body considers and responds to these representations and then prepares its final report of recommendations for the Lord Chancellor and the Lord Chief Justice.²⁶

3. Before the Lord Chancellor and the Lord Chief Justice take a final decision on disciplinary measures, the judge who is the subject of the complaint has a final opportunity to make representations in their defence which the Lord Chancellor and Lord Chief Justice are obliged to consider before making a final decision. The Lord Chancellor and the Lord Chief Justice are bound by the findings of fact made by the Review Body and are not permitted to take any disciplinary action more severe than that recommended by the Review Body.²⁷

²⁴ See Parts 3 - 5 of the *Judicial Discipline (Prescribed Procedures) Regulations 2006 (as amended)*.

²⁵ See Parts 6 and 7 of the *Judicial Discipline (Prescribed Procedures) Regulations 2006 (as amended)*.

²⁶ See Part 7 of the *Judicial Discipline (Prescribed Procedures) Regulations 2006 (as amended)*.

²⁷ See Part 6 of the *Judicial Discipline (Prescribed Procedures) Regulations 2006 (as amended)*.