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Appellant*

Felix Augustus Durity

v.

The Attorney General of Trinidad and Tobago

Respondent

FROM

**THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 8th December 2008

Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

[Delivered by Lord Hope of Craighead]

1. The appellant, Mr Felix Durity, was until he took early retirement in 1997, a senior magistrate. In August 1989 he was suspended from his office by the Judicial and Legal Services Commission (“the Commission”) because it had been reported to it that he had been guilty of misconduct. Many months then elapsed before the Commission referred the matter to an investigating officer. The appellant took exception to the way the Commission had dealt with his case. His first complaint was that the charges which led to his suspension were misconceived, as the misconduct that was alleged against him related to

decisions that he took in the performance of his judicial duties as a magistrate. The second is that he was treated unfairly by the Commission because there was a delay of about 33 months before the charges against him were investigated, contrary to the requirements of regulation 90 of the Public Service Commission Regulations, chap 1:01.

2. The issue that lies at the heart of this appeal is whether, in the events which have happened, the appellant is entitled to constitutional relief for these complaints. The appellant claims that the Commission's decision to suspend him from office and its delay in referring the matter to an investigating officer contravened several provisions of the Constitution of Trinidad and Tobago, in particular section 4(b) (the right to the protection of the law) read together with section 5(2)(e) (the right to a fair hearing) and section 5(2)(h) (the right to procedural safeguards). He seeks redress by way of a constitutional motion under section 14 of the Constitution. Subsection (1) of that section provides:

“For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.”

3. The respondent submits that there has been no infringement of the appellant's constitutional right to the protection of the law. He maintains that the appellant always had access to the courts to challenge the proceedings that had been brought against him, including the delay which he acknowledges was unacceptable. This is because it was open to him from the outset to apply for judicial review, as he did later unsuccessfully. The fact that he did so late and unsuccessfully was no reason for concluding that there was an infringement of the right to the protection of the law. His right of access to the courts meant that he always had the protection of the law, and there was no deprivation of procedural safeguards. Furthermore, as that other procedure was available to compel either the laying or the dismissal of the charges that had been made against him, an originating motion under section 14 of the Constitution was inappropriate. It was an abuse of the process for him now to resort to it: *Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5; [2002] 1 AC 871, para 39. There is also an issue about the quantum of damages.

4. The litigation that the appellant has been pursuing has gone through many stages and the facts of the case have been narrated on a number of previous occasions, notably when the case was last before the Judicial Committee in 2002: [2002] UKPC 20; [2003] 1 AC 405. The point at issue on that occasion was whether the appellant's constitutional motion was subject to the twelve months limitation period contained in section 2(1) of the Public Authorities Protection Act, chap 8.03. The Board resolved that question in the appellant's favour. It left open the question whether judicial review proceedings could have afforded adequate relief for the Commission's failure to investigate or charge the appellant while he remained on indefinite suspension: para 39. The factual background to the questions that their Lordships have now been asked to decide has not changed in the meantime. But it needs to be set out again at this stage, as the context in which these questions arise has to be fully appreciated.

The facts

5. The appellant was appointed a magistrate in 1981 and a senior magistrate in 1986. He was the presiding magistrate in the Arima Magistrates' Court from October 1988 until August 1989, when he was suspended from office. He remained under suspension for nearly seven years from August 1989 to May 1996. In April 1997 he took early retirement.

6. The suspension had its origin in a bail application that was made to the appellant in his judicial capacity in February 1989. On 20 February 1989 Clement Boodoo appeared before the appellant on two charges of larceny. He was represented by counsel, Mr Robert Devenish, who applied for bail. The appellant fixed bail at \$25,000 by way of cash deposit with the court, and the case was adjourned to 20 March 1989. On 3 March 1989 another counsel, Mr Selwyn Ross, applied to a judge in chambers, Mr Justice Lucky, purportedly on behalf of Mr Boodoo to review the appellant's bail decision. Mr Justice Lucky ordered that the amount of bail should be varied to a surety in an increased amount of \$50,000. When Mr Boodoo next appeared before the appellant on 20 March 1989 he was represented again by Mr Devenish. Counsel informed the appellant, in the hearing of Mr Ross who was also present, of the order that Mr Justice Lucky had made. He said that the application had been made to the judge without Mr Boodoo's authority. He asked the appellant to continue Mr Boodoo's bail as ordered by him on 20 February 1989. The appellant acceded to this application, substituting his order for that which had been made by Mr Justice Lucky. The prosecution raised no objection, nor did Mr Ross.

7. The following day an article appeared in the Trinidad Guardian newspaper under the heading "Magistrate reverses judge's bail decision." On 29 March 1989 the Chief Magistrate wrote to the appellant on the direction of the Chief Justice. He asked him to state whether the contents of the article were accurate and, if they were, for an explanation as to why he had purported to reverse an order of a High Court judge. The appellant responded by sending him a statement which he had obtained from Mr Devenish. In that statement Mr Devenish said that Mr Boodoo had not authorised the application to Mr Justice Lucky and that his application to the appellant for restoration of his order of bail by means of a cash deposit had been made with Mr Boodoo's consent. On 6 April 1989 the Chief Magistrate wrote again to the appellant on the direction of the Chief Justice asking for his reason for what he had done. On 24 April 1989 the appellant replied that he had acted judicially in granting bail to Mr Boodoo in accordance with the authority vested in him as inquiring magistrate. On 1 May 1989 he went abroad on vacation leave.

8. On 3 July 1989 the Chief Justice forwarded a report from the Chief Magistrate together with the copies of the correspondence to the Judicial and Legal Service Commission for its consideration. On 27 July 1989 the Commission met to consider the report. The Chief Magistrate, Mr Melville Baird, was in attendance. He gave details of the appellant's decision about Mr Boodoo's bail and of the correspondence that had followed the publication of the article in the newspaper. He also gave details of a report that he had received from the magistrate who had been acting as senior magistrate in Arima Magistrates' Court while the appellant was on leave. It referred to a substantial number of cases in which the appellant was said to have remanded defendants in custody without their consent beyond the statutory period. The Chief Magistrate said that on receipt of that report he had gone himself to the Arima court and enquired of the Clerk of the Peace whether the appellant was informed that the remands were illegal. He was told that the appellant had been reminded of this, but that he was of the view when he fixed bail that the onus was on the accused to get a bailor. The Commission was informed that the appellant had not been written to about the illegal remands as he was out of the country on leave until 17 August 1989.

9. After discussion the Commission decided that the appellant should be suspended. On 10 August 1989 the Commission's acting Director of Personnel Administration wrote to the appellant informing him that it had been reported to it:

“that on 20 March 1989 you disobeyed the order of Mr Justice Lucky concerning bail set for Clement John Boodoo and purported to reverse it by restoring the original order;

that you fixed bail for accused persons and without their consent remanded them to dates beyond the statutory period in contravention of section 14(3) of the Indictable Offences (Preliminary Enquiry) Act Chapter 12:01 and section 66(3)(b) of the Summary Courts Act Chapter 4:20.”

and that the Commission had decided that he should cease to report for duty with effect from the date of his receipt of that notification.

The disciplinary proceedings

10. On 23 November 1989 the Commission decided to refer the matter to the Solicitor General for the drafting of the allegations against the appellant that were to be investigated as acts of misconduct. The Director of the Commission wrote to the Solicitor General asking for this to be done on 5 December 1989. No response was received to this letter. Three reminders were sent to him by the Commission between June 1990 and January 1992. In March 1992 the appellant’s lawyers wrote to the Attorney General asking him to intervene. They copied their letter to the Chairman of the Commission. On 27 March 1992 the Director sent a further reminder to the Solicitor General. On 3 April 1992 draft allegations were sent to the Commission by the Solicitor General, but they required amendment. It was not until 15 April 1992 that the final allegations were submitted to the Director. On 28 May 1992, thirty-three and a half months after the date of the appellant’s suspension, the Commission appointed a master of the High Court, Master Doyle, to investigate the allegations.

11. Master Doyle wrote to the appellant on 2 June 1992 enclosing a copy of the allegations and asking him to give him an explanation within seven days of receipt of that notice. The appellant replied to that letter on 10 June 1992. He pointed out that Master Doyle’s letter of 2 June was the first time for two years and nine months that details of the allegations about illegal remands had been brought to his attention. He said that he did not remand any person in custody without his consent and that he had used his judicial discretion in granting bail. As for the allegation about the order he had made in Mr Boodoo’s case, he repeated the explanation that he had previously given, adding that he had formed the opinion that the application in Mr Justice Lucky’s court had been fraudulent as Mr Ross did not have instructions from Mr Boodoo to make it. He said that

he had spoken to Mr Justice Lucky, who told him that he was satisfied with the explanation.

12. Six months later on 15 December 1992, after two more reminder letters from the appellant's lawyers, the Commission wrote to the appellant to inform him that it had considered Master Doyle's report and was preferring a disciplinary charge against him. The charge, a copy of which was enclosed, was that the appellant had conducted himself in such a manner as to bring the judicial and legal service into disrepute, contrary to his implied terms and conditions as a senior magistrate. The conduct referred to comprised granting bail to Mr Boodoo in the sum of \$25,000 to be secured by a cash deposit contrary to Mr Justice Lucky's order, and purporting to rescind Mr Justice Lucky's order knowing that he had no lawful authority to do so. There was no allegation that the appellant had acted in bad faith. Nor was mention made of the other complaint about remands in custody for excessive periods. On 18 February 1993 the Commission appointed Deyalsingh J as a disciplinary tribunal to hear the evidence and to find the facts.

The judicial review proceedings

13. On 16 March 1993 the appellant sought leave from the High Court to apply for judicial review of the Commission's decision to prefer the disciplinary charge. Sealy J refused leave, on the ground that the appellant did not have an arguable case. The appellant renewed his application to the Court of Appeal. On 30 November 1994 the Court of Appeal (Hamel-Smith, Gopeesingh and Permanand JJA) refused the application: (1994) 47 WIR 424. In the course of his judgment Hamel-Smith JA expressed extreme concern at the tardiness of the Commission during the lengthy period during which the appellant remained suspended. The appellant sought leave to amend his application to challenge the Commission's decision to suspend him pending the outcome of the disciplinary charge. This application too was refused, on the ground that the decision to suspend had been taken five years previously and the appellant had not made any previous attempt to challenge it.

14. On 26 July 1995 the Court of Appeal, Sharma JA dissenting, refused an application by the appellant for leave to appeal against these decisions to the Judicial Committee: (1995) 49 WIR 433. In September 1995 the appellant discontinued an application to the Board for special leave as the parties had entered into negotiations to resolve the dispute by agreement. The negotiations did not come to anything, and in May 1996 the appellant decided to take early retirement with effect from 1 April 1997. He was granted permission to take up paid employment during his pre-retirement leave. The suspension order was formally lifted from 1

May 1996. On that date too the disciplinary proceedings, which had been held in abeyance during the judicial review proceedings, were discontinued.

The constitutional proceedings

15. On 24 February 1997 the appellant commenced constitutional proceedings by way of an originating motion in the High Court. He claimed that the Commission's decision to suspend him from his office contravened several provisions of the Constitution, including his right to the protection of the law under section 4(b), his right to a fair hearing under section 5(2)(e) and his right to procedural safeguards under section 5(2)(h). He also claimed damages. The grounds of his complaint included the whole history of his suspension, during which the Commission failed to comply with regulation 90 of the Public Service Commission Regulations. On 29 April 1998 Sinanan J upheld two preliminary objections and dismissed the application. One of those objections was that the twelve months limitation period under section 2(1) of the Public Authorities Protection Act applied to it. The other was that there had been an inordinate and unexplained delay, as seven years had elapsed since the accrual of the appellant's cause of action in August 1989. The appellant appealed to the Court of Appeal (Ibrahim, Warner and Nelson JJA). He conceded that section 2(1) applied to his claims, so the sole issue was when his cause of action accrued. On 28 July 1999 his appeal was dismissed on the ground that the appellant's claims were statute barred. He then appealed against that decision to their Lordships' Board.

16. As already mentioned (see para 4), the Board held on 13 May 2002 that the statutory limitation period did not apply in the appellant's case. It was pointed out in para 30 of the judgment that the Constitution contained no express limitation period for the commencement of constitutional proceedings, and that the court should be very slow indeed to hold that by a side wind the initiation of constitutional proceedings was subject to a rigid and short time bar. The Board remitted the case to the Court of Appeal to consider the other preliminary objections relating to abuse and delay. But it took the opportunity in paras 35 to 39 of the judgment to make a number of general observations about the factors to be taken into account. Concern was expressed about the summary dismissal by the Court of Appeal of the appellant's claim in the judicial review proceedings that his suspension was unlawful, as a finding that he was guilty of "misconduct" could hardly be made in this case without causing damage to the independence of the judiciary. As for the prolonged period during which the appellant was under suspension, this could be regarded as an abuse of power. It was open to question whether judicial review proceedings could have afforded adequate relief.

Accordingly the question that arose, so far as that aspect of the constitutional proceedings was concerned, was whether the existence of the judicial review proceedings and the negotiations sufficiently explained the delay in their commencement.

17. On 17 January 2003 the Court of Appeal (Warner, Nelson and Kangaloo JJA) rejected the preliminary objections and remitted the constitutional claims to be heard at first instance. On 5 November 2004 Gobin J held that the appellant's suspension pending investigation into the Boodoo bail application was unlawful and that the Commission's delay in appointing an investigating officer breached his right to the protection of the law as it deprived him of the procedural safeguards to which he was entitled under the Public Service Commission Regulations. As she put it in para 44 of her judgment, the continuation of the suspension was lawful only so long as reasonable steps were taken within the time frames contemplated or within a reasonable time thereafter to allow the process to operate. She awarded the appellant damages, including exemplary damages, in the sum of \$175,000.

18. The respondent appealed against her decision to the Court of Appeal. On 30 April 2007 the Court of Appeal (Sharma CJ, Warner and Archie JJA) allowed the appeal and set aside the decision of the trial judge. Archie JA, who delivered the leading judgment, acknowledged that the case had to be considered against the background of the Board's observations. As he put it in para 8, the court was constrained to proceed on the assumption that the Commission's decision to charge and suspend the appellant was wrong, albeit with the benefit of hindsight, and that it acted under a misapprehension or misinterpretation of the regulations and the law although there was no allegation of a deliberate abuse of power. But he said that the Commission's actions did not breach the appellant's right to the protection of the law as remedies to address them were available on an application for judicial review. The fact that the appellant applied late and unsuccessfully was no reason for concluding that he had been denied the protection of the law. His failure to access the protection that was available to him in a timely and effective manner could not convert the decision of the Commission into a breach of his constitutional right, nor could the effluxion of time convert the suspension into a breach of that right as access to the courts was always available.

19. It is against that decision that the appellant now appeals to their Lordships' Board.

The Regulations

20. By section 3 of the Judicial and Legal Service Act, chap 6:01, there was established a Judicial and Legal Services Commission constituted by,

among other public offices, the judicial offices listed in the Second Schedule. They include the offices of chief magistrate, senior magistrate and magistrate. Section 15(1)(b)(ii) read together with Part I of the Second Schedule provides that, subject to the Constitution and to any written law, control and supervision over a senior magistrate may be exercised by the Chief Magistrate under the direction of the Chief Justice. Section 11(1) of that Act provides that the modes by which the appointment of a judicial or legal officer may be terminated include dismissal or removal in consequence of disciplinary proceedings. By a notice published in the Trinidad and Tobago Gazette on 23 February 1984 the Judicial and Legal Services Commission adopted the provisions of Chapter VIII of the Public Service Commission Regulations (“the Regulations”) which deal with discipline.

21. Regulation 84 of the Regulations provides:

“An officer who is alleged to be guilty of misconduct or who is alleged to be guilty of indiscipline by failing to comply with any regulation, order or directive for the time being in force in the Ministry or Department to which he is assigned, is liable to disciplinary proceedings in accordance with the procedure prescribed in these Regulations.”

Regulation 88 gives the Commission power to suspend an officer when it becomes aware of any act of indiscipline or misconduct and it is of the opinion that the public interest or the repute of the public service requires this. Regulation 90 sets out the procedure for dealing with the investigation of charges that have been reported to the Director for the information of the Commission.

22. Regulation 90(1) provides:

“Where a report or allegation of indiscipline or misconduct is received from which it appears that an officer may have committed an offence, the Permanent Secretary or Head of Department shall, in addition to making a report as required by regulation 85, concurrently warn the officer in writing of the allegation of indiscipline or misconduct and shall forthwith refer the matter to an investigating officer appointed by him.”

The word “forthwith” indicates that the matter must be referred to the investigating officer without delay. The need for prompt action is further emphasised by the strict timetable for the conduct of the investigation that

is laid down in regulations 90(3) to 90(5). The investigating officer must within three days of his appointment give the officer a written notice specifying the time, not exceeding seven days, within which he may give an explanation in writing concerning the report or allegation to the investigating officer. He has power to require a person having direct knowledge of the alleged indiscipline or misconduct to make written statements within seven days. And he must with all possible despatch, but not later than twenty-one days from the date of his appointment, forward to the Commission for its information his report on the particular act together with the original statements and all relevant documents.

Are there grounds for constitutional relief?

23. The appellant has based his claim for constitutional relief on two grounds. The first is that the allegation about the way he dealt with Mr Boodoo's bail application was not capable of constituting misconduct within the meaning of regulation 90, as it related to a decision that he took in the performance of his judicial duties as a magistrate. As his counsel Mr Yell put it, the appellant was suspended for a non-cognisable offence. The second is that the Commission's delay of 33 months in appointing an investigating officer was a breach of regulation 90(1), which requires that the allegation must be referred to an investigating officer "forthwith". It was in any event an unacceptable delay as he was suspended during the whole of that period. Their Lordships will consider whether there is substance in these complaints before dealing with the question whether, if there is substance in them, a constitutional motion is the appropriate remedy.

24. The Board said when this case was last before it that it was plain that the appellant was exercising a judicial function in good faith when he was dealing with Mr Boodoo's bail application: [2003] 1 AC 405, para 37. Leaving the issue of good faith aside for the moment, he was certainly exercising a judicial function. A mistaken discharge of that function by a judicial officer cannot constitute the offence of "indiscipline" within the meaning of regulation 84, as this is defined as a failure to comply with a regulation, order or directive. The essence of such a charge is disobedience to an instruction of an administrative nature. This has nothing to do with the performance of a judicial function. The expression "misconduct" for the purposes of regulation 84 has a wider meaning. It is capable of being applied to things done or left undone by a judicial officer while exercising a judicial function. But, as the Board was careful to emphasise in para 37, there is a risk that applying it to the judicial function too readily will damage the independence of the judiciary. As Lord Denning MR pointed out in *Sirros v Moore* [1975] QB 118, 136-137, every judge from the highest to the lowest should be protected to the same degree from liability so that

they may be free in thought and independent in judgment when acting judicially. That was a comment on the judges' immunity from suit, but the same principle applies to allegations of misconduct. Every judge, from the highest to the lowest, must be free in thought and independent in judgment when acting judicially. An error of judgment, honestly made in the performance of the judicial function, must not be treated as misconduct. Nor must an act which is based on a mistake of fact or a misunderstanding of the law that is to be applied.

25. That having been said however, no judge is immune from disciplinary measures taken to control things said or done that amount to an abuse of the judicial function or to a failure to act judicially. The public interest and the reputation of the judicial arm of the public service demand that misconduct of that kind must be capable of being dealt with. Cases where the office is liable to be brought into disrepute as a result of the improper conduct of its office holder, as where acts are done which appear to challenge the relationship between the superior and the inferior courts within which the judicial officer is required to operate, will fall into that category. An assertion that what was done was done in good faith will not always be an answer, especially if it is found that it was done deliberately. Suspension under regulation 88 is one of the measures that may be taken to protect the reputation of the judiciary if the Commission has reasonable grounds for thinking that a judicial officer has misconducted himself in this way.

26. The Board said in para 37 that the Court of Appeal's summary dismissal of the appellant's claim in the judicial review proceedings that his suspension was unlawful was questionable. Gobin J said in para 26 of her judgment that she took this observation to indicate that the Commission acted outside of its jurisdiction when it purported to suspend the appellant pending the investigation. The Court of Appeal disagreed. In para 5 of his judgment Archie JA said that the administration of justice would be brought into disrepute if good faith could provide an absolution for disobedience to the rulings, judgments or orders of superior courts. In para 6 he acknowledged that misconduct was not established merely because a judicial officer acts without jurisdiction. In such a case intent was relevant. With the benefit of hindsight the Commission's decision to charge the appellant was wrong. But the mere preferring of the charge could not constitute a breach of the right to the protection of the law, as any illegality could be dealt with by way of an application for judicial review: para 9. Mr Dingemans QC for the respondent accepted Gobin J's findings of fact, but he submitted that the Court of Appeal was right in its assessment of how the allegation against the appellant should have been dealt with.

27. Their Lordships agree with the Court of Appeal in this point. In their judgment the Commission were entitled to take the view that the appellant's conduct in the handling of Mr Boodoo's bail application raised an issue which required to be investigated. The High Court of Trinidad and Tobago is a superior court of unlimited jurisdiction. It has jurisdiction to determine the limits of its own jurisdiction, unless otherwise directed by statute. So whenever a judge of that court makes an order he must be taken implicitly to have decided that he had jurisdiction to make it: *Strachan v The Gleaner Co Ltd* [2005] UKPC 33, [2005] 1 WLR 3204, para 32. This is not to say that his decision cannot be challenged. If he makes an error he can be corrected by the Court of Appeal. But it is not for a magistrate to take this function upon himself, even if he is invited to do so. The appellant's explanation for what he did in this case, such as it was, suggests that he exceeded his own jurisdiction when he reversed Mr Justice Lucky's order. The key issue, as Archie JA said, was that of intent. Was this a bona fide mistake or was it a deliberate challenge to the authority of a judge in the superior court? There were grounds for thinking that the issue as to whether this was a case of misconduct could not be determined without an inquiry.

28. Whether this was a case for the appellant's immediate suspension is more open to question. But their Lordships agree with the Court of Appeal that it cannot be said that the appellant was deprived of the protection of the law when this step was taken against him. It was open to him to challenge the legality of the decision immediately by means of judicial review. Taken on its own therefore this complaint is not one that stands up to examination as an infringement of the appellant's constitutional rights. In any event, as a remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the Commission's decision to suspend him. The choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases. As Lord Diplock observed in *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, the value of the safeguard that is provided by section 14 will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In *Jaroo v Attorney-General of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871, para 39, the Board said that if another procedure is available, resort to the procedure by way of an originating motion will be inappropriate and it will be an abuse of the process to resort to it. Their Lordships consider therefore that the decision to suspend the appellant is not a proper subject for relief by way of a constitutional motion under section 14.

29. As the Board pointed out on the previous occasion however, the Commission's gross delay in appointing an investigating officer is a separate and distinct matter: [2003] 1 AC 405, para 38. The suspension of a judicial officer because misconduct has been alleged against him must always be taken very seriously, as it affects the independence of the judiciary. It is liable to give rise to the suspicion that the Commission thinks that there is real substance in the allegation. This means that it is liable to damage the reputation of the judicial officer. The longer the suspension lasts the greater and more sustained this damage will be. The constitutional right to the protection of the law and the principles of natural justice demand that particular attention must be paid to the need for fairness in the investigation: *Rees v Crane* [1994] 2 AC 173. Fairness includes having the allegation investigated promptly and determined as quickly as possible, especially if the judicial officer has been suspended. The independence of the judiciary demands that a judicial officer cannot be suspended from his duties indefinitely without good cause being shown. The power to suspend will be abused if the suspension is allowed to continue for an unreasonably and unnecessarily long period without appointing an investigating officer.

30. Cases may arise where the delay in having the matters investigated is contributed to by the judicial officer. As Lord Rodger of Earlsferry pointed out in *Dyer v Watson* [2002] UKPC D1; [2004], 1 AC 379, para 157, many accused persons who are in fact guilty may prefer to dwell in the interim state of uncertainty rather than march steadily on to the end of their case where that state of uncertainty may be replaced by something worse. But there is no suggestion that the appellant contributed to the delay in this case. On the contrary the delay was attributed by the Service Commissions' Director of Personnel Administration, Michael Mahabir, to a chronic shortage of staff in the Solicitor General's Department, coupled with its move to other premises as a result of the attempted coup in 1990. The most that can be said against the appellant is that he delayed in applying for judicial review. The question then is whether this delay has deprived him of the opportunity to apply for constitutional relief, applying the *Harrikissoon* principle.

31. Mr Dingemans submitted that there was never anything to prevent the appellant from bringing the issue of delay before the courts for judicial review, so it could not be said that there was a breach of the constitutional guarantee of due process as described in *Jaroo*, paras 23-27. But this approach puts the onus of avoiding undue delay on the judicial officer. The responsibility for appointing an investigating officer forthwith lay entirely with the Commission, not with him. It was not for him to take the initiative. Regulation 90 sets the standard that must be adhered to. The procedural safeguard against undue delay to which the

appellant was entitled lay in the Commission's adherence to that standard. The constitutional right which the appellant invokes entitled him to expect that the standard would be adhered to. The process of judicial review is in any event, in cases of delay, an uncertain remedy. As the Board said on the previous occasion, it must be open to question whether it could have afforded adequate relief for a past and irreversible event such as the allegedly unlawful continuation of a suspension: [2003] 1 AC 405, para 39.

32. The *Harrikissoon* principle on which Mr Dingemans relies to defeat the appellant's constitutional motion is based on the assumption that there was another procedure for obtaining a sufficient judicial remedy for the unlawful administrative action of which the person complains. If there was, he ought to have invoked it. For the reasons just given, however, that cannot be said to be the situation in this case. The appellant is not to be criticised for not resorting to the uncertain procedure of judicial review as a means of enforcing the Commission's obligation to deal with his case promptly. It was for the Commission to ensure that it adhered to that standard, not for the appellant to prompt it to do so. Their Lordships have concluded that there was a breach of his constitutional right to due process - the essence of his right to the protection of the law under the procedure that regulation 90 lays down - and that he is entitled to relief against it by invoking the constitutional remedy.

Damages

33. The trial judge awarded the appellant damages for inconvenience and distress together with what she described as "aggravated", "punitive" or "exemplary" damages. She held that an award of aggravated damages was justified by the fact that the appellant had made it clear from the beginning that he was exercising a judicial function, by a persistent failure to acknowledge his correspondence for more than three years, by the Commission's abuse of its power to suspend and by its disregard for the independence of the judiciary.

34. As Mr Yell pointed out, the trial judge did not have the benefit of the Board's observations in *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328, paras 18 and 19 about the approach that the court should take when it is awarding damages in the exercise of its constitutional jurisdiction. In most cases something more than a declaration that the Constitution has been infringed will be necessary. Compensation measured by the comparable common law measure of damages may be awarded if the person has suffered damage, but in principle this may not suffice as the fact that the right that has been violated was a constitutional right adds an extra dimension to the wrong.