[2024] UKPC 13
Privy Council Appeal No 0043 of 2022

JUDGMENT

The Special Tribunal (Appellant) *v* The Estate Police Association (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lord Hamblen
Lord Leggatt
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
30 May 2024

Heard on 29 February 2024

Appellant
Thomas Roe KC
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Douglas L Mendes SC
Anthony Bullock
Clay Hackett
(Instructed by Chancery Chambers (Port of Spain))

LORD LEGGATT:

Introduction

1. On 15 May 2014 RBC Royal Bank (Trinidad and Tobago) Ltd ("the Bank") dismissed 42 estate constables from its employment on the ground that they were redundant as the Bank had decided to outsource the security services at some of its locations. The dismissals gave rise to a dispute between the estate constables and the Bank. The dispute was referred to the Special Tribunal - the body responsible for determining disputes between estate constables and an employer. The Special Tribunal decided that it had no jurisdiction to hear and determine the dispute. These proceedings are for judicial review of that decision.

The Estate Police

2. The Estate Police is constituted by section 3 of the Supplemental Police Act (Ch 15:02). It comprises constables employed on any estate to maintain order on and protect the estate: see section 4(2). As defined in section 2 of the Act, the term "estate" "includes any plantation, lands, warehouse, storehouse, or business premises … ".

3. Section 36 of the Act prohibits estate constables from being members of a trade union. But section 38 makes alternative provision for representation by an independent association. Section 38(1) establishes:

> "an organisation to be called the Estate Police Association which shall act through Branch Boards, and a Central Committee as provided by rules made under this Act."

The reference to "rules made under this Act" is to rules made under section 39 of the Act, which gives the Minister of Labour power to make rules for the constitution and governance of the Estate Police Association. Rule 2 of these Estate Police Association Rules states:

> "Every constable for the time being of the Estate Police shall be eligible for membership of the Association, and the Association shall act through Branch Boards and a Central Committee as is hereinafter provided."

4. As will be seen, the sole remaining issue in this appeal is whether the Estate Police Association ("the Association") is able to represent estate constables in a dispute with an employer when there is no Branch Board in place through which the Association can act.

The Special Tribunal

5. The Special Tribunal is established by section 21(1) of the Civil Service Act (Ch 23:01) and is charged under that Act and several other statutes with the responsibility to hear and determine disputes arising in various public services. These services include (among others) the civil service, the police service, the fire service, the prison service and the estate police.

6. The Special Tribunal consists of the Chairman of the Essential Services Division of the Industrial Court and two other members of that Division selected by the Chairman. The Industrial Court is established under the Industrial Relations Act (Ch 88:01) as a superior court of record to hear and determine trade disputes and deal with various other matters in the field of industrial relations. Other than the President and Vice-President, the members of the Industrial Court (and hence of the Special Tribunal) are not required to have any legal qualification.

7. The jurisdiction of the Special Tribunal in relation to the estate police is conferred by section 42 of the Supplemental Police Act. Section 40 of that Act provides that a dispute which arises between estate constables and an employer may, if not otherwise determined, be reported by the employer or by the Estate Police Association to the Minister of Labour. On such a report being made, the proceedings on the dispute are to be dealt with in the same manner as proceedings on a trade dispute under Part V of the Industrial Relations Act, but with references to the "Special Tribunal" substituted for references in Part V to the "Court". Under the incorporated provisions of Part V of the Industrial Relations Act, after a dispute is reported to the Minister, there is a period during which the Minister may take steps to secure a settlement of the dispute by conciliation. If at the end of this period the dispute remains unresolved, either party to the dispute may apply to, or the Minister may refer the matter to, the Special Tribunal for determination.

8. Section 42 of the Supplemental Police Act provides that the Special Tribunal shall hear and determine all disputes referred to it under section 40 and that any award, order or other determination of the Special Tribunal shall be final.

The reference to the Tribunal in this case

9. In accordance with section 40 of the Supplemental Police Act, the Association reported to the Minister of Labour the dispute that arose between the 42 estate constables whom the Bank had made redundant and the Bank. On 8 May 2015, the Minister certified that the dispute was unresolved and referred the dispute to the Special Tribunal.

10. The Association and the Bank each made a written submission to the Tribunal. In its submission the Association contended that the Bank had acted contrary to the Retrenchment and Severance Benefits Act (Ch 88:13), which lays down rules about the dismissal of workers for redundancy, and also that the Bank's actions had been contrary to good industrial relations practices and had been harsh and unjust. The Bank disputed the claim and contended that it had acted lawfully.

11. There followed an oral hearing before the Special Tribunal which took place over two days on 15 March 2017 and 31 January 2018. The members of the Tribunal were Mr L Achong (Chairman of the Essential Services Division), Mr K Jack and Mr M Maharaj. At the end of the evidence the Tribunal raised of its own motion the question whether it had jurisdiction to determine the dispute. After hearing from the parties' representatives, the Tribunal ruled that it had no jurisdiction to do so and dismissed the claim. Written reasons were later given for this decision. The only reason that remains relevant on this appeal was expressed in a single sentence:

> "At the time of the retrenchment the Estate Police Association had not established a Branch Board which is a requirement under the Supplemental Police Act Ch 15:02 in order that the Association be able to represent constables of an estate."

The Tribunal's reasons also quoted rule 2 of the Estate Police Association Rules (set out at para 3 above) and recorded the Association's admission when the question was raised that "a Branch Board was not in place at the time of the retrenchment exercise."

The application for judicial review

12. The Association applied to the High Court for judicial review of the Tribunal's decision. The Bank took no part in the proceedings. But the Special Tribunal itself opposed the application and appeared at the hearing by senior and junior counsel. The Special Tribunal raised two grounds of opposition. First, the Tribunal argued that, although not expressly designated as such, it is a superior court of record with final power to interpret the law for itself and that its decisions are immune from judicial

review. Second, the Tribunal argued that in any event it acted in accordance with the law in deciding that it had no jurisdiction to hear and determine the dispute.

13. In a written judgment dated 13 June 2019, Rampersad J rejected the Tribunal's first argument and held that decisions of the Special Tribunal are amenable to judicial review. But the judge held that the Tribunal had been correct in law to decide that it lacked jurisdiction to determine the dispute.

Appeal to the Court of Appeal

14. The Special Tribunal was dissatisfied with the decision of the High Court that it was amenable to judicial review. It appealed against that decision to the Court of Appeal. The Association cross-appealed on the question whether the Tribunal had jurisdiction to determine the dispute.

15. In a written judgment dated 30 July 2021, the Court of Appeal (Bereaux JA, with whom Mohammed JA and Dean-Armorer JA agreed) dismissed the Special Tribunal's appeal and allowed the Association's cross-appeal. Having reviewed cases including *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663, the Court of Appeal concluded that the judge had been correct to hold that the decisions of the Special Tribunal are subject to the supervisory jurisdiction of the High Court and are reviewable. The Court of Appeal further held that the judge and the Tribunal had erred in deciding that the Tribunal had no jurisdiction to determine the dispute, and that there is nothing in the Supplemental Police Act nor the Estate Police Association Rules which requires the Association to act through a Branch Board or prevents it from acting through its Central Committee.

16. In the light of these conclusions, the Court of Appeal ordered that the matter be remitted to the Special Tribunal. While the Association was wrong (as it now accepts) to assert in the proceedings before the Tribunal that the Retrenchment and Severance Benefits Act applies to estate constables, the Association also contended that the dismissals were harsh and oppressive and contrary to good industrial relations practices. The effect of the Court of Appeal's order is that the Tribunal must consider this argument and decide the dispute.

This appeal

17. The Special Tribunal was dissatisfied with the decision of the Court of Appeal. It has brought this appeal as of right to the Judicial Committee of the Privy Council. Its grounds of appeal raise both issues on which it lost in the Court of Appeal: (1) whether decisions of the Special Tribunal are amenable to judicial review by the High Court; and

(2) if they are, whether the decision of the Special Tribunal that it lacked jurisdiction in the present case was wrong in law and should be set aside.

18. In its written case the Special Tribunal abandoned its first ground of appeal. The Tribunal now accepts that its decisions are, in principle, reviewable by the High Court and that this is so even if (as the Tribunal has unsuccessfully argued) it is a superior court of record.

The Tribunal's new case

19. Having made this concession, the Special Tribunal sought to advance a new case before the Board that the scope for judicial review of its decisions is limited. Under section 18(2) of the Industrial Relations Act, there is a right of appeal from decisions of the Industrial Court to the Court of Appeal on specified grounds, which include error of law. The Tribunal accepts that section 18(2) of the Industrial Relations Act is not directly applicable to proceedings before the Special Tribunal and that there is no equivalent right of appeal to the Court of Appeal from the Tribunal's decisions. But the Tribunal invited the Board to indicate that the supervisory jurisdiction of the High Court over decisions of the Special Tribunal is limited to grounds on which an appeal would lie to the Court of Appeal if the decision had been made by the Industrial Court.

20. The Special Tribunal acknowledges that this was not an argument advanced in the courts below. It also accepts that, even if the supervisory jurisdiction of the High Court were found to be limited in this way, the particular decision of the Tribunal in this case would be reviewable. This is because the challenge to the decision is on the ground of error of law, which is one of the grounds on which an appeal lies to the Court of Appeal from a decision of the Industrial Court. The Tribunal therefore accepts that the question which it now seeks to raise does not arise on the facts of this case and that the answer to it can have no effect on the outcome of the appeal. Nevertheless, Mr Thomas Roe KC on behalf of the Special Tribunal submitted that it would be helpful, in the interests of providing clarity for the future, if the Board were to take the opportunity presented by this appeal to give an opinion on the point.

21. At the hearing of the appeal the Board declined the request to consider the Tribunal's new case. In doing so, the Board did not find it necessary to call upon counsel for the Association.

22. To accede to the Special Tribunal's request would infringe two fundamental principles. First, the principle of finality in litigation requires the parties to bring their whole case before the court at first instance so that all aspects may be finally decided (subject only to any appeal from that court's decision) once and for all: *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257, 260. It is, generally speaking, unjust

that a party which has successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis: *Jones v MBNA International Bank Ltd* [2000] EWCA Civ 514, para 52. Because of the principle of finality and the policy reasons which support it, an appeal court proceeds with great caution before it allows a new case to be raised on appeal: *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40; [2023] 3 WLR 1007, para 155.

23. An appeal court may allow a new case to be raised if it involves a pure point of law and the court is satisfied that the other party will not be prejudiced in responding to it. This generally requires the appeal court to be satisfied that it has all the facts bearing on the new case as completely as if the point had been raised at first instance and that the proceedings below would not have been conducted differently in that event: see *Primeo Fund*, paras 150-155.

24. Here it can be said that the point which the Tribunal now wishes to raise is a pure point of law and that no further factual enquiry would be necessary if the Tribunal were permitted to raise it on this appeal. But one reason why no such enquiry would be necessary is that, as already noted, the new point does not on any view arise on the facts of this case. Indeed, it is unclear on what facts the Tribunal's new argument would be relevant, given the breadth of the grounds on which an appeal lies from the Industrial Court. To attempt to identify hypothetical circumstances in which the point would be relevant would be an intricate task. It would also be an entirely inappropriate task to undertake. As Lord Bridge of Harwich said in *Ainsbury v Millington* [1987] 1 WLR 379, 381:

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

See also *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, 113-114.

25. To this second fundamental principle there is also an exception. Where the dispute between the parties is no longer live by the time the appeal is heard - for example, because it has been compromised - the court still has a discretion to hear the appeal if there is a good reason in the public interest to do so - for example, because the issue will or is likely to affect a significant number of other cases: see *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450, 456-457; *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326, paras 40-41. This discretion must be exercised with caution. Generally, an appeal which is academic as between the parties will not be allowed to proceed unless: (1) the

court is satisfied that the appeal would raise a point of some general importance; (2) the respondent to the appeal has agreed to it proceeding, or at least will be completely indemnified on costs and not otherwise unfairly prejudiced if it does; and (3) the court is satisfied that the issue will be properly argued: see *Hutcheson v Popdog Ltd* [2011] EWCA Civ 1580; [2012] 1 WLR 782, para 15.

26. The question whether to exercise this discretion, however, does not arise here. For this is not a case where an issue, once live, has ceased to have any practical significance and become academic by the time of the appeal. The question which the Tribunal seeks to raise was never a live issue between the parties and was always academic, as it does not arise on the facts of this case. As counsel for the Association sensibly observed, the Board should not get in the habit of giving advisory opinions.

27. The fact that the Board does not have the benefit of any consideration of the Tribunal's new case by either of the courts below is a yet further reason for refusing to entertain it.

The Branch Board issue

28. This leaves the issue whether the Special Tribunal was wrong in law to decide that it did not have jurisdiction to determine the dispute referred to it by the Minister of Labour. As stated at para 11 above, the reason given by the Tribunal was that the Association could not represent the estate constables in their dispute with the Bank when, at the time of their dismissal, a Branch Board had not been established. On this issue too, the Board did not find it necessary to call upon counsel for the Association.

29. Even if it had been correct that the Association could not represent the estate constables, it is by no means clear that this would deprive the Special Tribunal of jurisdiction to determine the dispute between the estate constables and the Bank. The dispute was referred to the Special Tribunal by the Minister of Labour under the provisions of Part V of the Industrial Relations Act as incorporated in section 40 of the Supplemental Police Act. Section 42 of the Supplemental Police Act requires the Special Tribunal to hear and determine such disputes. On its face, therefore, the refusal of the Special Tribunal to do so was a breach of its statutory obligation under section 42.

30. Be that as it may, the Tribunal's ruling that the Association cannot represent constables of an estate unless a Branch Board has been established was obviously wrong. The Tribunal based its view on rule 2 of the Estate Police Association Rules which, like section 38 of the Act itself, says that the Association "shall act through Branch Boards and a Central Committee …" The Tribunal relied on the reference here to Branch Boards but ignored the fact that the rule also gives the Association power to

act through a Central Committee. It would make no sense to read rule 2 as requiring the Association in everything that it does to act through *both* one or more Branch Boards *and also* its Central Committee. Section 38 and rule 2 are clearly to be understood as requiring the Association to act either through a Branch Board or its Central Committee (or both), as provided by the rest of the Estate Police Association Rules.

31. Those Rules go on to provide: that estate constables employed on the same estate may form a Branch of the Association (rule 3); that for each Branch of the Association formed under rule 3 there shall be constituted a Branch Board (rule 4); that a Branch Board shall consist of five members, with an additional member for each 25 members of the Branch if the Branch has more than fifty members (rule 5); for the members of the Branch to elect the members of the Branch Board (rules 6 and 7); and for the members of each Branch Board to elect two of their number to be delegates to the Central Committee (rule 8).

32. The evidence before the Tribunal showed that, immediately before the retrenchment exercise, the Bank employed over 120 estate constables at between 30 and 35 locations in both Trinidad and Tobago. Applying the definition of "estate" in section 2 of the Supplemental Police Act (see para 2 above), each such location was prima facie a separate estate which would therefore have to form a separate Branch.

33. The definition of "estate" in section 2 contains an additional provision that:

> "where two or more estates as so defined are in the ownership of the same employer, the Commissioner of Police, on the application of the employer, may by Order direct that any or all of such estates shall be deemed to be one estate for the purposes of this Act, and the estates shall thereupon be deemed to be one estate."

There is no evidence that, before the dismissals, the Bank had applied to the Commissioner of Police for an order directing that all (or any group) of its premises where estate constables were employed should be deemed to be one estate for the purposes of the Act. In the absence of such an order, if the constables employed by the Bank had wished to be represented by Branch Boards, those employed at each of the 30 to 35 relevant locations would, under rule 3, have had to form their own individual Branch. Given the requirement of rule 5 that a Branch Board shall consist of five members, it is unclear whether a Branch comprising fewer than five estate constables can constitute a Branch Board. Even if in principle it can, it would plainly be inefficient and impractical for estate constables scattered across a range of different locations who have a common dispute with the same employer to be represented in dealing with the

employer by a plethora of different Branch Boards. The sensible arrangement is for the Central Committee of the Association to represent them.

34. The Rules expressly authorise this. Rules 9 and 10 provide:

> "9. A Branch Board constituted for a Branch formed under rule 3 may submit to the employer of the members thereof or to all or any of the employers of the members thereof any competent representations so far as compatible with section 38 of the Act.
>
> 10. The Central Committee may submit to all or any of the employers of members of the Association any competent representations so far as compatible with section 38 of the Act."

The words "so far as compatible with section 38 of the Act" are needed because the right of the Association conferred by section 38 to make representations to employers is qualified by a prohibition against doing so "in relation to any question of discipline, promotion or transfer affecting individuals." That prohibition does not apply in this case.

35. Rules 9 and 10 are, to state the obvious, separate and independent provisions. Rule 9 empowers a Branch Board constituted for a Branch formed under rule 3 to submit representations to the employer of the members of the Branch. Rule 10 provides a further and alternative means of representation. The Rules do not require members of the Association to form a Branch; nor, if they form a Branch, to constitute a Branch Board; nor to act through a Branch Board, if there is one. The Central Committee has all the same powers to represent estate constables in a dispute with their employer that a Branch Board has or would have. While those powers do not specifically include reporting the dispute to the Minister and, if the Minister refers the dispute to the Special Tribunal, representing the estate constables before the Special Tribunal and in any subsequent proceedings, such authority is implicit in the provisions as it is necessary to enable the Association to carry out its statutory function.

36. The crucial points for present purposes are: (1) that if a Branch Board has been established, there is no requirement that the Branch Board, rather than the Central Committee of the Association, must represent estate constables who are members of the Branch in a dispute with their employer; and (2) that a fortiori there is no reason why the Central Committee cannot represent estate constables in a dispute with their employer if no Branch Board has been established which could do so.

37. The view of the Special Tribunal that the Association could not represent the estate constables dismissed by the Bank was therefore misconceived. The Association undoubtedly had power to do so, acting through its Central Committee.

38. The judge found nothing wrong with the Tribunal's decision on this issue. But, like the Tribunal, the judge simply asserted that the legislation requires the Association to act through a Branch Board and seemingly ignored the express power of the Association to act through a Central Committee. The Court of Appeal pointed out the error, analysed the requirements of the Supplemental Police Act and the Estate Police Association Rules and explained that there is nothing to prevent the Association from acting through its Central Committee on behalf of members of the Association if there is no Branch Board in place. The reasons given by the Court of Appeal for that conclusion, which were substantially the same as those set out above, are unassailable. Had this been the only issue raised on this further appeal, it would have been appropriate to dismiss the appeal as devoid of merit without an oral hearing.

The role of the Tribunal in these proceedings

39. This conclusion is sufficient to dispose of the appeal. But the Board does not think it right to part with this case without considering the role played in these proceedings by the Special Tribunal. The Tribunal has participated in the proceedings in the manner to be expected of an ordinary litigant engaged in an adversarial dispute with another party. Before Mr Roe KC appeared on its behalf at the hearing of this appeal, no thought seems to have been given by the Tribunal to the fact that it is not an ordinary litigant but a judicial body, whose function is to adjudicate on the underlying dispute and to do so impartially. There is an obvious concern that acting as if it were a party with an interest in the outcome of the case is inconsistent with that role. The concern is all the greater when the result of the proceedings is that the matter will now be sent back to the Tribunal for further adjudication.

40. These concerns were raised by the Board at the hearing of the appeal. After the hearing, at the Board's request, the Tribunal made additional written submissions addressing the following questions:

> (i) Is the Tribunal aware of any precedent for the approach that it has taken in these proceedings?
>
> (ii) Is there anything which the Tribunal wishes to say in response to the potential criticism that the approach that it has taken is inconsistent with its role as the judicial body responsible for making the decision under challenge?

The Tribunal's submissions

41. In response to the first question, the Tribunal cited a number of cases in which specialist tribunals have participated actively in proceedings brought to challenge their decisions by advancing arguments that their decision was legally correct or was not reviewable. In some of these cases they did so alongside the party in whose favour the decision was made and in others they did so in the absence of that party.

42. The examples given include three recent Privy Council appeals. Two of these were appeals from Mauritius involving attempted challenges to decisions of the Employment Relations Tribunal: *Mauritius Shipping Corpn Ltd v Employment Relations Tribunal* [2019] UKPC 42; [2020] 1 All ER 844; and *C-Care (Mauritius) Ltd v Employment Relations Tribunal* [2022] UKPC 58. In each case the court in Mauritius had refused leave to the claimant to apply for judicial review of a decision of the Employment Relations Tribunal because the application for leave was not made promptly, and an appeal to the Privy Council against this refusal was dismissed. In each case the tribunal itself, as well as the other party to the underlying dispute, opposed the application and the appeal. The same occurred in *Jamaica Public Service Co Ltd v The All Island Electricity Appeal Tribunal* [2017] UKPC 20, an appeal from Jamaica.

43. In all but one of the cases cited by counsel for the Tribunal (including these three appeals to the Judicial Committee) the judgments made no reference to the fact that the relevant tribunal had taken an active part in the proceedings. The only case cited by the Tribunal in which that fact was mentioned is a much older case: *R v Paddington and St Marylebone Rent Tribunal, Ex p Bell London & Provincial Properties Ltd* [1949] 1 KB 666. In that case a Divisional Court quashed decisions made by a rent tribunal on the grounds that the local council had acted outside its powers in referring the cases to the tribunal and that the tribunal had acted outside its powers in deciding the cases. Lord Goddard CJ, giving the judgment of the court, commented (at p 674):

> "The questions raised by these motions are of great public interest and importance, especially to the owners of blocks of flats, and it is satisfactory, therefore, that the case has been fully argued by the Solicitor-General for the tribunal and by Mr Harold Willis for the borough council, who both opposed the motions."

44. In response to the Board's second question (see para 40 above), the Special Tribunal acknowledged that it might be logical for there to be a rule or practice to the effect that a tribunal exercising judicial functions should invariably - like a judge whose decision is under appeal - play no part in any challenge to a decision, in spite of its formal entitlement to do so as a defendant to a claim for judicial review. But the

Tribunal submitted that the experience of the courts including that of the Judicial Committee, as shown by the examples cited, has been that it is sometimes convenient, or at least acceptable, for the tribunal itself to oppose the challenge, both at first instance and on appeal. The Tribunal argued that in these circumstances it would be unfair to single out its conduct of the present proceedings for criticism.

Canadian cases

45. In replying to these submissions, counsel for the Association drew the Board's attention to three decisions of the Supreme Court of Canada.

46. In *Northwestern Utilities Ltd v Edmonton* 1978 CanLII 17 (SCC); [1979] 1 SCR 684 at 709, Estey J, giving the judgment of that court, commented as follows on the participation in the appeal of the administrative tribunal from whose decision the appeal was brought:

> "One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance."

Estey J went on to say, citing three previous decisions, that:

> "It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction."

47. A somewhat less restrictive view of the proper role of the tribunal was expressed by two Justices, Dickson CJ and La Forest J, in a joint judgment in *CAIMAW v Paccar of Canada Ltd* 1989 CanLII 49 (SCC); [1989] 2 SCR 983 at 1016. They drew a

distinction between a tribunal seeking to argue that its decision was correct and merely arguing - as the tribunal had in that case - that its decision was reasonable when the test was one of reasonableness and the challenge was based on a contention that the decision was patently unreasonable. The other members of the Supreme Court did not comment on this point.

48. In *Ontario (Energy Board) v Ontario Power Generation Inc* 2015 SCC 44; [2015] 3 SCR 147, the Supreme Court of Canada, in a judgment delivered by Rothstein J on behalf of six of the seven Justices, revisited the question of the proper role of tribunals in judicial review proceedings or statutory appeals in which their decisions are challenged. The court held that *Northwestern Utilities* should not be read as establishing a categorical ban on the participation of the tribunal and that a discretionary approach was appropriate. In exercising its discretion whether to permit active participation by the tribunal, the court was required to "balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality" (para 57). One relevant factor was that "a reviewing court may benefit by exercising its discretion to grant tribunal standing" where "there is simply no other party to stand in opposition to the party challenging the tribunal decision" (see paras 54 and 58(1)). The court also drew a distinction between decisions of regulatory bodies - such as the utilities regulator whose decision about the rates which an electricity supplier could charge was challenged in that case - and decisions of tribunals whose function is to adjudicate individual conflicts between two adversarial parties. Concerns about the importance of maintaining the tribunal's impartiality may "weigh more heavily" in the latter type of case (see paras 55-57 and 59(3)).

49. The judgment also considered "bootstrapping" - a term used to describe attempts by a tribunal to defend its decision on a ground that it did not include in the reasoning set out in the decision itself (para 64). Rothstein J observed that to permit bootstrapping "may undermine the importance of reasoned, well-written original decisions" and may lead the parties to see the process as unfair (para 67). But he was "not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality" (para 68).

Current practice

50. In the experience of the Board the normal practice in England and Wales when a decision of a court or tribunal is challenged in proceedings by way of judicial review or statutory appeal is that the tribunal takes no active part in the proceedings and leaves its decision to be defended by the party in whose favour it was given. However, the cases cited by the Special Tribunal show that tribunals whose decisions have been the subject of challenge in judicial review proceedings have sometimes actively participated in the proceedings and have done so without any adverse comment.

51. Further evidence of this can be seen in the judgment of Brooke LJ in *R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207; [2004] 1 WLR 2739, which examined the established practice of the courts when considering whether to make an order for costs against an inferior court or tribunal in proceedings in the High Court that challenge its decision. Brooke LJ reviewed case law relating to magistrates, tribunals and coroners. One of the conclusions reached, at para 47, was that:

> "the established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event."

This obviously recognises the possibility that an inferior court or tribunal may choose actively to resist a challenge to its decision, although by doing so it would put itself at risk of an adverse costs order. The overall conclusion of the Court of Appeal in *Davies* was that an order for costs should only be made against a tribunal if the tribunal participated in the proceedings otherwise than in a neutral way, or the challenge had exposed a flagrant instance of improper behaviour: see also *R (Gudanaviciene) v First-tier Tribunal (Immigration and Asylum Chamber)* [2017] EWCA Civ 352; [2017] 1 WLR 4095.

52. In *R (Gourlay) v Parole Board* [2020] UKSC 50; [2020] 1 WLR 5344, an unsuccessful attempt was made to persuade the UK Supreme Court to review this practice in relation to the award of costs. The claimant had succeeded in a claim for judicial review of a decision of the Parole Board. Although the claimant was the successful party, the judge made no order for costs against the Parole Board, which had played no active part in the judicial review proceedings. The judge's order was upheld by the Court of Appeal and the Supreme Court. Commenting on the approach described in *Davies*, Lord Reed PSC (with whom the other Justices agreed) said, at para 46:

> "A body which takes a decision in a judicial or quasi-judicial capacity, and then declines to defend it when it is challenged in court proceedings, choosing instead to maintain its impartiality and to let the reasons which it gave for its decision speak for themselves, acts in accordance with principles of judicial independence and impartiality which have long been recognised both in English law and at an international level: see, for example, the United Nations Commentary on the Bangalore Principles of Judicial Conduct (September 2007), paras 72 and 74."

53. The Bangalore Principles of Judicial Conduct and Commentary to which Lord Reed here referred were drafted under the auspices of the United Nations by a group composed of Chief Justices and other senior judges from around the world. Paras 72 and 74 of the Commentary relate to Principle 2.4, which states:

> "A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. …"

Para 72 of the Commentary includes the statement that "[i]n judicial review proceedings where the judge is a litigant in an official capacity, … the judge should not comment beyond the record." Para 74 counsels judges to refrain from answering criticisms of their decisions made by the media or interested members of the public and in that context states:

> "A judge should speak only through his or her reasons for judgments in dealing with cases being decided. It is generally inappropriate for a judge to defend judicial reasons publicly."

54. In *R (Gorani) v Inner West London Assistant Coroner* [2022] EWHC 1593 (QB), a Divisional Court commented on the participation of a coroner in a claim for judicial review that challenged her conduct, findings and conclusion at an inquest. Garnham J said (at para 2):

> "The coroner is a judicial office holder. The normal course for a judge or other judicial office-holder facing a judicial review is to adopt a neutral stance in the proceedings and to appear, if at all, not as a party to defend her decisions, but simply to offer the court her assistance on matters of procedure or specialist caselaw. By contrast, the Coroner here has not only appeared by counsel to oppose the application, but has submitted a witness statement in support of her case. A coroner who chooses to enter the arena in this way puts herself at risk of a costs order against her should the claim succeed …"

55. In *R (Koro) v County Court at Central London* [2024] EWCA Civ 94 the Court of Appeal of England and Wales took the exceptional course of positively directing that the court which was the defendant to the claim should participate in the appeal. The proceedings had a complex history involving a series of mishaps and mistakes by the county court which it was necessary to unravel. Stuart-Smith LJ explained, at para 3:

> "As is usual where the actions of a court are brought into question, the defendant initially indicated that it intended to take no part in the proceedings and that it adopted a neutral stance. When directing that this rolled-up hearing should happen, Stuart-Smith LJ directed that the defendant should participate. As a result, Ms Milligan was instructed to appear for the defendant. Her written and oral submissions were of the highest quality and extremely helpful, while maintaining a rigorously neutral stance."

The position in principle

56. This is an area in which practice and perceptions have evolved. It may once have been regarded as purely a matter of choice for a court or tribunal whose decision is challenged in proceedings for judicial review or on a statutory appeal whether actively to oppose the claim or to adopt a neutral role. The tribunal had only to bear in mind that, if it chose actively to oppose the claim, it would put itself at risk of an adverse order for costs if the claim succeeded. In the opinion of the Board, this is no longer a sufficient statement of the position. What has for some time been the usual practice that the tribunal, if it takes part at all, will adopt a neutral stance in the proceedings cannot nowadays be seen as a matter of choice; it is an approach that is required by internationally recognised principles of judicial independence and impartiality.

57. A court or tribunal has no interest of its own, any more than does an individual judge, in trying to prevent a successful challenge to its decision. Its sole function is that of an independent and impartial adjudicator of disputes that come before it. A tribunal acts inconsistently with that function and compromises its independence and impartiality if it takes part in proceedings brought to challenge its decision in an adversarial way, in effect aligning itself with the interests of the successful party to the dispute on which it has adjudicated. A further violation of these principles occurs if the tribunal seeks to defend its decision by adding to the reasons that it gave when the decision was made rather than leaving those reasons to speak for themselves.

58. Whether the tribunal takes any active part in the proceedings at all and, if so, what assistance it offers to the court must, in the first place, be a matter of judgment for the tribunal - though it is always open to the court in managing the case to define the scope of the participation by the tribunal that is requested or permitted. Circumstances vary greatly and it is not possible to be prescriptive. There are cases in which a more active participation than is usual may be justified to ensure that the court is informed of relevant law and potential arguments, particularly if the case raises a difficult or important point of law that would otherwise go by default. In providing any assistance, however, the tribunal and its advocate should view their role as similar to that of an

amicus or advocate to the court. It is essential that they maintain a strictly neutral stance and avoid adopting an adversarial role in the proceedings.

The Tribunal's conduct of these proceedings

59. In its written case on this appeal, in the context of its request to raise a new issue, the Special Tribunal observed that judicial review claims can take a long time to resolve. The Tribunal gave the present case as an example, pointing out that it reached its decision on 31 January 2018. What the Tribunal did not acknowledge was that its own conduct has been the main cause of this regrettable delay. Instead of determining the dispute referred to it by the Minister, as it was required to do, the Tribunal took it upon itself to question the standing of the Association to represent the estate constables and decided that the Association was incapable of doing so for a reason that was manifestly bad. To correct that error, the only option open to the Association was to bring a claim for judicial review. Not only did the Tribunal actively oppose the claim at every level but it sought to argue that its erroneous decision was immune from challenge on grounds which it now concedes are unsustainable.

60. The concerns occasioned by the Tribunal's role as an active party to these proceedings might have been avoided if the Bank had taken part in the proceedings and defended the Tribunal's decision to the extent that it could reasonably be defended. It is unclear why this did not happen. There is no evidence to show whether the claim form was even served on the Bank. If it is not already the practice, the Board agrees with counsel for the Association that, when any decision of a court or tribunal is challenged in proceedings for judicial review, it is desirable that the claim form should be served on the other party or parties to the underlying dispute, who should be invited to join in the proceedings.

61. In the absence of the Bank and when the claim would otherwise have been entirely unopposed, the Board does not criticise the Tribunal for appearing in the High Court and on the appeal by the Association to the Court of Appeal. Whether in the manner of its participation in the proceedings below the Tribunal maintained an appropriately neutral stance is not a matter on which the Board is well placed to comment.

62. Where, however, in the Board's opinion, the Tribunal clearly lost sight of the principles of impartiality and neutrality which should govern its conduct as a judicial body is in its the decision to bring this further appeal. By exercising the right of a litigant to appeal to the Judicial Committee even though its appeal raised no arguable point of law of general public importance, the Tribunal substantially prolonged these proceedings and put the Association to yet further expense. Moreover, it did so in pursuit of an argument which the Board has found to be devoid of merit.

Conclusion

63. The appeal is dismissed. The Court of Appeal's order therefore stands remitting the matter to the Special Tribunal to hear the dispute. Any further hearing should take place before a fresh panel of the Tribunal which, if possible, does not include any member who heard the dispute previously or who has had any involvement in these judicial review proceedings.