JCPC/2025/0085

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL
OF THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN:

FAVIANNA GAJADHAR

Appellant

– and –

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

APPELLANT'S WRITTEN CASE

References to pages numbers in the Electronic Bundle are in the format ***[EB X]***

(I) Introduction

1. This is an appeal against the decision to set aside a declaration that the Appellant's right not to be deprived of the right to use and enjoy her property without due process under section 4(a) of the Constitution of Trinidad and Tobago ('**the Constitution**') and the Court of Appeal's exercise of its discretion on costs. It represents the final leg in a marathon journey for justice which has spanned over 15 years and prompted numerous judgements **[EB 46].**

2. The Appellant has two grounds of appeal:

   i) The Court of Appeal was wrong to set aside the trial judge's finding that the Appellant's right to property had been breached under section 4(a) of the Constitution; and

ii) The Court of Appeal erred by reducing the Appellant's costs of the appeal by 50%.

3. The case arose after the Trinidad and Tobago Prison Service failed to pay the Appellant her salary and related benefits for the period 1 March 2005 to 31 December 2022 **[EB** 888] due to an unlawful decision by the Public Service Commission ('**the Commission**') to declare the Appellant as having resigned from office. On 31 May 2024, almost two years after the instant claim was filed, the Commission paid the Appellant $1,572,160.68 as backdated salary, allowances and benefits via direct deposit but did not pay increments **[EB 1199]**.

(II) Background Facts

4. The facts are set out in the Statement of Facts and Issues. In summary, the Appellant was appointed as a prison officer in the Trinidad and Tobago Prison Service on 3 July 2000 **[EB 423]**. She took periods of leave, first taking sick leave from October 2004 due to a back injury she sustained at work, and then taking pregnancy related sick leave and maternity leave from 27 April to 18 September 2006 **[EB 424]**.

5. When the Appellant attempted to return to work at the end of her maternity leave on 19th September 2006, she was prevented from resuming duties as she was informed that she had not provided sufficient certificates covering her periods of sick leave **[EB 428]**. By a letter dated 18 April 2008 and received on 5 June 2008, the Commission declared the Appellant to have resigned from office with effect from 21 June 2007, due to her alleged failure to provide sufficient certification of her sick leave and alleged failure to respond to a letter purportedly dated 12 June 2007 requiring her to resume duty. The Commission asserted that the Appellant acknowledged receipt of that letter on 20 June 2007 **[EB 543]**. By reply letter of 13 June 2008 the Appellant made representations that she had not received the alleged 12 June 2007 letter, nor signed any acknowledgement. She emphasised her desire to return to work and her efforts to do so **[EB 575-476].** The Commission responded on 10 December 2008 and simply reiterated that she was declared as resigned from office with effect from 21 June 2007 **[EB 578].**

6. The Appellant successfully challenged this decision in *Favianna Gajadhar v The Public Service Commission* CV2010-00326. Judgment was handed down on 27 June 2012, with the High Court finding that the Commission had wrongly exercised its powers and the process it adopted was not procedurally sound and breached the principles of natural justice **[EB 475-508]**. On 31 January 2014, the Court of Appeal upheld the High Court's judgment on this point **[EB 457-474]**. The Court of Appeal set aside the Commission's 10 December 2008 decision to declare the Appellant as having resigned and remitted the matter back to the Commission to be given "urgent attention and reviewed as a priority" **[EB 474]**).

7. Following this judgment, the Commission twice more affirmed its decision that the Appellant had resigned from office on 21 June 2007: once on 24 October 2016 **[EB 596-597]**, and again on 9 November 2017 **[EB 665]**. Between the 2016 and 2017 letters, the Appellant filed for judicial review for a second time, but the Commission accepted it had failed to follow the process set by the Court of Appeal in the first judicial review. It made concessions in two subsequent letters that medical evidence was accepted for the Appellant's absence up to 26 April 2006 and her maternity leave respectively and the second judicial review proceedings were discontinued by consent **[694]**.

8. After the Commission upheld its decision for the second time, the Appellant brought a third claim for judicial review in *Favianna Gajadhar v The Public Service Commission* CV2018-01818. On 12 June 2019, the High Court found that the 9 November 2017 decision to uphold the finding that the Appellant had resigned on 21 June 2007 was made for entirely different reasons to the original decision (namely that there was a discrepancy in her estimated due delivery date and therefore the date she was due to return to work) without affording the Appellant an opportunity to provide representations and was therefore illegal, irrational, unfair, null and void and of no effect, and the Commission was ordered to reconsider its decision **[EB 737-761]**. The High Court also found that the original decision to declare the Claimant as having resigned had been taken in breach of section 129(4) of the Constitution ([46]-[47] and [73] at **[EB 752 and 759])**. The Commission appealed this judgment, but the Court of Appeal dismissed the appeal on 1 April 2021 **[EB 688-736]**.

9. On 15 June 2021, the Appellant's Attorney at Law sent a Pre-Action Protocol letter to the Commission requesting the Appellant's reinstatement with payment of full arrears in salary, allowances and/or benefits from 21 June 2007 **[EB 763-768]**. The Commission replied on 4 April 2022. It stated that it had decided the Appellant should be allowed to resume duty with immediate effect and that the Commissioner of Prisons had been instructed to take steps to appropriately classify the Appellant's "leave of absence" from 21 June 2007 **[EB 774]**.

10. The Appellant's Attorney at Law replied with a Pre-Action Protocol letter dated 22 April 2022 which queried the reference to the Appellant's "leave of absence". The letter stated that the Appellant had not been on leave but rather had been unlawfully prevented from performing her duties. The letter again requested payment of the Appellant's arrears of salary, allowances, and/or benefits from 21 June 2007 **[EB 776-780]**.

11. After receiving no response, the Appellant filed the instant claim on 8 June 2022 **[EB 10-44]**. The following day, the Appellant's Attorney at Law received a letter from the Commission, dated 23 May 2022, which stated that the Commission had rescinded its decision to instruct the Commissioner of Prisons to take steps to appropriately classify the Appellant's "leave of absence" **[EB 799]**. This letter did not discuss the outstanding arrears of salary, allowances, and/or benefits.

(III) Relevant Legal Provisions

12. Part 1 of the Constitution sets out the fundamental human rights and freedoms enshrined within it. Section 4(a) **[EB 1280]** enshrines the right to property as follows:

> *"It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:*
>
> *(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law..."*

13. Chapter 9 of the Constitution makes provision for Service Commissions. Section 129(4) prohibits a penalty from being imposed on a public officer except as a result of disciplinary proceedings.

14. It was accepted between the parties below on local authority that income is "property" for the purposes of section 4(a) **[EB 1280]**, see **Bernadette Hood Ceasar v AG of Trinidad and Tobago HCA 3015 of 1987 [EB 1414]**. That case in turn relies upon **Inland Revenue Commissioners and Attorney General v Lilleyman and others (1964) 7 WIR 496 [EB 1595]**, where the British Caribbean Court of Appeal determined that "money" was property within the meaning of section 12(1) of the Constitution of British Guiana (as it then was) at 524:

> *"The paragraph therefore contemplates property in the most general sense which, but for the exceptions which it creates, would be entitled to the protection afforded by article 12(1). Article 12(1) itself is so worded as to shield against deprivation the whole bundle of rights which constitutes property and to comprehend property in its widest connotation…The subject matter of article 12(1) cannot be limited to corporeal property, nor possession to physical possession and money and choses in action are therefore not excluded."* **[EB 1623]**

15. As in all constitutional claims, rights are balanced against lawful exercise of State power. For the purposes of section 4(a), once a claimant has demonstrated their entitlement to property (i.e. their property rights are engaged), the burden shifts to the State to show that the deprivation was by due process of the law and, by implication, was justified and proportionate (**Jaroo v AG of Trinidad and Tobago** [2002] UKPC 5; [2002] 1 AC 871 **[EB1625]** at [27]- [28] **[EB 1637]** and **Suraj v Attorney General of Trinidad and Tobago** [2023] 5 LRC 35 at [93] **[EB 2001]** endorsing, among others, **Paponette v AG** [2010] UKPC 32; [2012] 1 A.C. 1 **[EB 1786]** at [36]-[43] **[EB 1799-1801]**). There is no burden on a claimant to prove that the deprivation was not justified (*Paponette* at [38] **[EB 1799]**).

16. The concept of due process of law is well established, and exhaustively considered by Sir Bernard McCloskey in **Seepersad v Commissioner of Prisons of Trinidad and Tobago** [2021] UKPC 13; [2021] 1 W.L.R. 5315 **[EB 1926]** at [29] – [39] **[EB 1940-**

1944]. In *Jaroo* at [23] **[EB 1635]** the Court cited **<u>Boodram v AG of Trinidad and Tobago</u>** [1996] AC 842 at 854 **[EB 1467]**:

> *"Lord Mustill said that it had two elements which were relevant to that case, where the applicant was asserting his constitutional right to a fair trial. First, there was the fairness of the trial itself. Secondly, there was the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. In the present context, a broader meaning is appropriate. Here too it has two aspects. First, there is the right to protection against the abuse of power. Secondly, there is the requirement that when powers are exercised by the state against the individual they must be exercised lawfully and not arbitrarily."* **[EB 1635]**

17. A finding of a breach of section 4(a) of the Constitution is fact dependent. This principle was set out by the Privy Council in *<u>Seepersad</u>* at [28] **[EB 1940]**:

> *"What, then, are the meaning and reach of section 4(a) of the Constitution? It forms no part of the Board's function to attempt a comprehensive reply to this question. Rather, this is a question which falls to be answered by reference to the facts of these individual cases. This is so not least because constitutions are living instruments, organic in nature and responsive to the changing circumstances of the society which they serve. Furthermore, individual rights must take their colour from the concrete factual matrix in which they arise."*

18. The determination of matters of fact is pre-eminently a matter for the trial judge. An appeal court can only overturn factual findings when it is satisfied that the trial judge was 'plainly wrong'. The Privy Council has recently given guidance on the application of the 'plainly wrong' test. In **<u>Gift v Rowley</u>** [2025] UKPC 37 **[EB 1888]**, the Board affirmed the following principles at [2]-[3] **[EB 1890]** of their judgment, citing the English case of **<u>Volpi v Volpi</u>** [2022] EWCA Civ 464; [2022] 4 W.L.R. 48 **[EB 2032]**:

> *"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract." **[EB 2033]**

(IV) Relevant Findings in the High Court

19. The trial judge handed down judgment on 26 October 2023. He found that the Commission's failure to pay the Appellant her salary from 21 June 2007 constituted a breach of section 4(a) of the Constitution ([29] at **[EB 160]**). He set out his reasoning in paragraphs 22-28 of his judgment.

20. At paragraphs 22-23, the trial judge noted that the Respondent had admitted that the Appellant was owed $2,821,744.54 of arrears in salary, allowances and/or benefits and that no payment had been made **[EB 158]**.

21. He noted that the 2021 decision of the Court of Appeal had determined that the Appellant had been "unlawfully prevented from resuming duties from 21 June 2007", and that the Court had expressly found that the Commission's decision to declare the Appellant as having resigned with effect from 21 June 2007 was not justified ([26] at **[EB 160])**.

22. The trial judge went on to reference the Commission's reaction to this judgment, which was to refer to the period of the Appellant's unlawful compulsory resignation as a "leave of absence" which needed to be classified. The judge noted that the Commission did not reverse this decision until the Appellant brought the instant legal action, at which point the Commission "did a *volte face*" ([27] at **[EB 160]**).

23. The trial judge outlined his "disinclination" to accept the Respondent's rationale for the failure to pay the Appellant's arrears of salary even after the Court of Appeal had made plain that the Commission's decision to uphold the compulsory resignation was unlawful ([28] at **[EB 160]**). He noted that the Respondent had asserted that the arrears of salary needed to be audited before they could be paid to the Appellant, but that the judge was "at a loss for the need or nature of this audit" as the Respondent had "not sought to adduce evidence to justify or explain the policy or practice with respect to the said audit" and "significant time has elapsed since this action was instituted and yet no such audit has been engaged" ([23] at **[EB 158]**). The trial judge found that, "given the time which has elapsed", "the repeated assertion as to the need for an audit is likely a delay tactic, designed to prolong the payment process" ([23] at **[EB 158]**).

24. The judge concluded that the Appellant had been deprived of her salary:

> *"without due justification and that the failure to pay her in a more timely manner is unlawful and unacceptable. Greater effort was required to enable the addressing of all the administrative matters which required attention to facilitate the payment."* ([28] at **[EB 160]**)

25. The Respondent in its submissions to the trial judge further attributed the delay in addressing the deprivation of salary to "the Covid-19 pandemic restrictions which adversely affected and limited the Commission's operations and ability" **[EB 113].** However, the trial judge concluded that "significant aspects of the relevant verification and calculation exercises" could have been carried out, even if the relevant officials were working from home, and the evidence suggested that "the system adopted was either grossly inefficient or designed to frustrate the Claimant" ([28] at **[EB 160]**).

26. At paragraph 29, the trial judge summed up his findings on section 4(a) of the Constitution as follows:

> *"The Claimant was not paid her salary and/or allowances/benefits for the period 21st day of June 2007 and the failure to address this situation, with dispatch, breached her rights under Section 4 (a) of the Constitution. As a direct consequence of the Service Commission's unjustified actions, the Claimant was denied the right to the enjoyment of her property and she was deprived of same without due process."* **[EB 160]**

(V) Appellant's Submissions

27. The Appellant has two grounds of appeal:

    (1) The Court of Appeal was wrong to set aside the trial judge's finding that the Appellant's right to property had been breached under section 4(a) of the Constitution;

    (2) The Court of Appeal erred by reducing the Appellant's costs of the appeal by 50%

Ground One: The Court of Appeal was wrong to set aside the trial judge's finding that the Appellant's right to property had been breached under section 4(a) of the Constitution

28. The Court of Appeal found that salary constitutes property for the purpose of section 4(a) of the Constitution, and that deprivation thereof would in principle constitute a breach of section 4(a) [**EB 386**]. This finding was made following an admission by the Respondent and is not challenged in the instant appeal.

29. However, the Court went on to conclude that the failure to pay the Appellant's salary and related benefits did not constitute a deprivation of her property [**EB 386**]. The Appellant submits that the Court erred in four ways in reaching this conclusion, in that:

i) The Court of Appeal applied the wrong legal test when determining whether section 4(a) had been breached;

ii) The Court of Appeal failed to apply the 'plainly wrong' test when overturning the trial judge's finding that section 4(a) had been breached;

iii) The Court of Appeal wrongly determined that the delay in paying the Appellant's arrears was insufficient to found a breach of section 4(a); and

iv) In any event, the Court of Appeal misconstrued the date at which the interference with the Appellant's property rights commenced.

(i) *<u>The Court of Appeal applied the wrong legal test when determining if section 4(a) had been breached</u>*

30. When considering the delay in the payment of the Appellant's salary between 1 April 2021 to 31 May 2024, the Court of Appeal erred by misunderstanding or misdirecting itself as to the trial judge's judgment and misdirecting itself in law by applying the wrong legal test.

31. The Court of Appeal found that the basis of the trial judge's decision that section 4(a) has been breached was that "the evidence simply suggests that the system adopted [*to audit the quantum of backdated salary*] was either grossly inefficient or designed to frustrate the Claimant" [**EB 386**]. The Court of Appeal erred by finding that this statement was the basis of the High Court's judgment, when it was only a minor part of

the trial judge's reasoning. The central reasoning of the trial judge is set out above at paragraphs 18 to 25 of this written case, and the Appellant submits that there is no error in the trial judge's analysis (the developed submissions on this aspect are set out in sub-section (iii) below).

32. In contrast, the Court of Appeal applied the wrong legal test when determining that the Appellant's section 4(a) right had not been breached. The Court of Appeal's judgment does not outline at any point the correct test for a breach of section 4(a) of the Constitution. Instead, the Court found that there was no breach of section 4(a) because four conditions were not satisfied (i) there was "no evidence of a design to frustrate" the Appellant, (ii) there was no "gross inefficiency", (iii) there was not a "culpable delay" in the Commission paying the Appellant her arrears of salary, and (iv) "nor was the length of the delay so egregious as to found a breach under section 4(a)" [**EB 386**].

33. None of the conditions set out by the Court of Appeal form part of the test for establishing a breach of section 4(a). It is not necessary to show that there was "gross inefficiency" or a "design to frustrate" a claimant. Section 4(a) simply prohibits a person's enjoyment of property being deprived without due process of the law. If this test is satisfied, and the State cannot show that the deprivation is justified, then there is a breach of section 4(a) (*Suraj* at [93] **[EB 2001]**). There is no burden on a claimant to prove that an interference was **not** justified (*Paponette* at [38] **[1799]**), and there is certainly no burden on a claimant to show that there was "evidence of a design to frustrate" or "gross inefficiency". Such an interpretation goes against the "generous and purposive interpretation" that should be given to constitutional provisions protecting human rights (*Seepersad* at [21-26] **[EB 1937-1939]**.

34. In addition, where a case involves a delay in the payment or return of property, there is no requirement for the delay to be "culpable" or "egregious". Periods of delay are considered under the "due process of law" provision in section 4(a), which gives constitutional protection to the concept of procedural fairness and therefore protects against unfair and arbitrary conduct (*Seepersad* [30]-[41] **[EB 1940-1945]** and *Jaroo* at [23]-[28] **[EB 1635-1637]**). In the context of a delay in the return of a person's property, the Privy Council has interpreted the due process provision as requiring a delay to be "reasonably necessary", "not arbitrary", and justified on "reasonable

grounds" which are "clearly ascertainable" (*Jaroo* at [23]-[28] **[EB 1635-1637]**). Therefore, a delay which is unreasonable, unnecessary, arbitrary or not based on reasonable and clearly ascertainable grounds will breach section 4(a). In requiring a delay to be "culpable" or "egregious" before a breach of section 4(a) could be established, the Court of Appeal again set the threshold far too high and failed again to give section 4(a) the "generous and purposive" interpretation required (*Seepersad* at [21-26] **[EB 1937-1939]**).

35. On the contrary, it is submitted that the due process requirement for deprivation of property was repeatedly shown to have been violated by the failures of the Commission in addressing the Appellant's request to return to work.

(ii) *<u>The Court of Appeal failed to apply the 'plainly wrong' test when overturning the trial judge's finding that section 4(a) had been breached</u>*

36. The question as to whether section 4(a) of the Constitution has been breached is fact dependent (*Seepersad* at [28] **[EB 1940]**). In its appeal to the Court of Appeal, the Respondent challenged the trial judge's findings of fact, asserting that there was no evidential basis for the trial judge's conclusion that section 4(a) had been breached **[EB 207-212]**. The Court of Appeal agreed and overturned the trial judge's finding on this point **[EB 386]**.

37. In doing so, the Court of Appeal misdirected itself in law. The Court failed to apply the correct test when overturning a trial judge's findings of fact, namely that the trial judge was 'plainly wrong' and had reached a decision no reasonable judge could reach (*Gift* at [2]-[3] **[EB 1890]**). The Court of Appeal did not reference the 'plainly wrong' test. Instead, the Court substituted its own view of the facts for those of the trial judge. The Court stated that it considered the affidavits of the Respondent's witnesses, Marcel Waldron and Christopher Vidal, adequately "demonstrated the steps that had been taken to pay the arrears of salary to the Appellant" [**EB 386**]. In reaching this conclusion, the Court did not address the trial judge's reasoned finding that he was disinclined "to accept the positions advanced by Martel Waldron and Christopher Vidale as to the reasons why the sums due to the Claimant have not been paid" ([23] and [28] at **[EB 158 and 160]**), nor explain why this finding was plainly wrong.

38. The Court of Appeal also failed to consider several other key findings of fact which underpinned the trial judge's determination that section 4(a) had been breached, nor explain why these findings of fact were plainly wrong. The Court of Appeal did not refer to the trial judge's findings that:

a. The Respondent had asserted that an audit needed to be carried out before the arrears of salary could be paid, but no audit had been conducted despite the significant lapse of time since the instant claim was brought. There was no evidence to establish or explain the policy or practice with respect to the said audit, and the trial judge was at a loss as to the need for or nature of the audit ([23] at **[EB 158]**).

b. The prescribed statutory deductions [*which the Respondent asserted needed to be made from the Appellant's arrears of salary*]… are readily ascertainable ([23] at **[EB 158]**).

c. Greater effort was required from the Commission to address the administrative matters which required attention to facilitate the payment ([28] at **[EB 160]**).

d. The Commission only reversed its decision" to classify the period of unlawful compulsory resignation as a "leave of absence" when "faced with the prospect" of the instant legal action ([27] at **[EB 160]**).

e. The Respondent's attempt to attribute the delay to the pandemic was devoid of merit. Significant aspects of the relevant verification and calculation exercises could have been engaged, even if the responsible officials had to work from home ([28] at **[EB 160]**).

39. In any event, the trial judge's findings of fact were not plainly wrong, i.e. his decision was not one that no reasonable judge could have reached. By the time the case reached the trial judge:

a. The Respondent was not challenging the Appellant's claim that her salary amounted to property under section 4(a).

b. The Respondent admitted that the Appellant was owed $2,821,744.54 of arrears in salary, allowances and/or benefits from the period 21 June 2007 to 11 April 2022, less statutory deductions such as NIS and PAYE, and that no payment had been made.

c. A previous Court of Appeal judgment had concluded that the Commission had acted unlawfully by finding the Appellant to have resigned on 21 June 2007. The Commission had accepted this finding and reinstated the Appellant.

d. The Appellant had not been paid her salary for fifteen years on the basis of the unlawful decision that she had resigned.

e. There had therefore *prima facie* been a deprivation of the Appellant's right to enjoyment of her property (her salary) without due process of law.

40. Given the above, it is hard to see how the trial judge could have reached any other conclusion than that there had been a breach of section 4(a). Nonetheless, the trial judge properly considered the evidence and submissions that the Respondent presented, which focussed on the Commission's failure to pay the Appellant her arrears of salary following the Court of Appeal's judgment on 1 April 2021. These submissions did not properly address why this was relevant to the established deprivation of property prior to the judgment in April 2021. In any event, the evidence failed sufficiently to explain why the delay from April 2021 occurred or prove that the delay was by due process of the law (i.e. "reasonably necessary", "not arbitrary", and justified on "reasonable grounds" which are "clearly ascertainable" (*Jaroo* at [23]-[28] **[EB 1635-1637]**)).

41. The Respondent provided a number of inadequate reasons that did not satisfy the trial judge. First, the Respondent argued that the process of paying the Appellant her arrears had been complicated due to the length of time for which the Appellant had been deprived of her salary ([23(e)] at [**EB 116]**). In making this submission, the Respondent relied on the Commission having acted unlawfully for 15 years as a reason to excuse its delay in rectifying its unlawful act. That clearly is not a legitimate basis to find that the right to property has not been violated.

42. Second, the Respondent argued that, before the Appellant's arrears of salary could be paid, the computation of her salary must be audited ([23(e)-(f)] at [**EB 116-117**]). This statement was unsupported by evidence. The affidavits filed by the Respondent did not mention any need for an audit, nor contain any indication as to what such audit would entail. No other evidence was filed in relation to such an audit.

43. Third, the Respondent submitted that the Covid-19 pandemic contributed to the delay in payment of the Appellant's arrears, and specifically the 10-month delay in the Commission responding to the Appellant's letter of 15 June 2021 requesting her reinstatement and the payment of her arrears of salary and other benefits ([19] and [21] at [**EB 113-114**]). Martel Waldron's affidavit asserted that the Covid-19 pandemic restrictions "adversely affected and limited [*the Commission's*] operations and its ability to respond while the Public Health restrictions were in place" ([7] at [**EB 806]**). However, the letter that the Commission sent to the Appellant in October 2021 noted that, due to Covid-19 restrictions, "officers in some units are not required to report for duty" and "files and information required to respond are housed in various units" **[EB 771-72]**. No further detail or explanation was given as to why the Covid-19 pandemic restrictions prevented any substantive response to the Appellant's letter for almost a year. Given that, by April 2021, over a year had passed since the pandemic had commenced, the trial judge, applying local knowledge, made a legitimate and reasonable finding that the Commission should reasonably have adapted their ways of working.

44. Fourth, Martel Waldron stated that the Commission only met to consider whether they should reinstate the Claimant on 29 March 2022 ([9] at **[EB 807]**). This was almost a full year after the Court of Appeal concluded that the Commission had acted unlawfully by finding the Appellant to have resigned on 21 June 2007 and there is no explanation given as to why the Commission could not have met earlier. Mr Waldron outlines the matters the Commission discussed at the 29 March 2022 meeting. Notably absent is any discussion as to payment of the Appellant's arrears. There is no explanation given as to why the Commission did not discuss this matter, given that the Appellant had been requesting repayment of her arrears since at least June 2021.

45. Fifth, Martel Waldron's affidavit goes on to note that, on 27 April 2022, over a year since the Court of Appeal handed down judgment, the Chief State Solicitor advised the Commission that the Appellant was entitled to her arrears of salary from 21 June 2007 ([16]-[17] at [**EB 809**] and [**EB 850-851**]). Mr Waldron states that the Commission met again 17 May 2022 to discuss the Appellant's case, but there is no evidence that payment of arrears was discussed at this meeting ([19] at [**EB 810]**) Mr Waldron's evidence is that it then took a further three months for the Chief State Solicitor to seek instructions about the Appellant's promotional opportunities, eligibility, salary and procedural requirements, which occurred on 5 August 2022 ([21] at **[EB 810]** and **[EB 899-900]**). The Appellant had sent a Freedom of Information Request seeking the same information on 22 April 2022 [**EB 776**].

46. Sixth, Christopher Vidale's affidavit discusses the delay in paying the arrears from this point onwards. Mr Vidale states that, on 11 August 2022, the Chief State Solicitor sought from the Senior Superintendent of Prison Administration information as to the Appellant's salary, promotional opportunities and allowances, including a breakdown of the salary and benefits the Appellant "would have enjoyed had she been working for the period from June 21, 2007 to the day before she resumed duties… after being reinstated" ([13]-[14] at **[EB 886]** and **[EB 902-903]**). Some of the requested information was provided on 15 September 2022, although the Senior Superintendent noted that the Appellant's current and historic salary breakdown, allowances and/or benefits were not available as they were being processed by the Accounts Section ([15] at **[EB 887]**). At this point, it was almost a year and half since the 1 April 2021 Court of Appeal judgment.

47. Mr Vidale's evidence is that the computation of arrears was produced on 12 October 2022 ([17] at **[EB 888])**. There was then a significant delay in paying the arrears. The Appellant was eventually paid $1,572,160.68 on 31 May 2024. The year and a half delay from October 2022 to May 2024 is entirely unexplained aside from the Respondent's statement, unsupported by evidence, that there was a need to "audit" the sums.

48. Considering this evidence and the agreed facts outlined above at paragraph 51(a)-(d), the trial judge was in no way "plainly wrong" to make the findings of fact set out above at paragraphs 49 to 50, nor to find that section 4(a) had been breached on the basis of

those facts. This is especially the case as the evidence that the trial judge was considering went to whether the deprivation of the Appellant's property was by due process of law and was justified. The burden of proving these matters fell on the Respondent (*Jaroo* at [27]-[28] **[EB 1637]** and *Suraj* at [93] **[EB 2001]**), and the trial judge was not "plainly wrong" to find that the Respondent had not provided sufficient evidence to satisfy this test.

49. In addition, although not a central feature of his reasoning, the trial judge was not plainly wrong to find that the evidence suggested the system adopted by the Commission to pay the Appellant her arrears of salary was "either grossly inefficient or designed to frustrate the Claimant" ([28] at **[EB 160]**). This was a reasonable inference to make given the deficiencies in the Respondent's evidence as set out above. In the alternative, if this finding was not fully borne out by the evidence, the Court of Appeal erred by failing to uphold the decision of the trial judge when the primary focus of his rationale was justified, even if the findings were not fully borne out in the evidence (Attorney *General of Trinidad and Tobago v. JM* [2022] UKPC 54 **[EB 1642]**).

(iii) *<u>The Court of Appeal erred when determining that the delay in paying the Appellant's arrears was insufficient to found a breach of section 4(a)</u>*

50. Following the Court of Appeal's April 2021 judgment in the third judicial review, the Appellant was deprived of her back salary for a further three years without any indication as to when she was likely to be paid. Nor was even an interim payment provided given the substantial amount accrued in consequence of the 17 years of arrears. During this time, she was prevented from using the money she was owed in any manner. Lesser periods of delay or the imposition of shorter temporary measures have been found to breach section 4(a) in previous cases. In **<u>Bernadette Hood-Caesar v. The Attorney General</u>** (HCA 3015 of 1987) **[EB 1414]**, the High Court found that the suspension of certain salary increases for fifteen months was "a very long period of time, indeed, to have a measure of a temporary duration enforced with no response from the Respondent as to when that suspension will be lifted" and was "approaching some degree of permanence" (pages 25-26) **[EB 1438-1439]**. The Court concluded that section 4(a) of the Constitution had been breached (page 40) **[EB 1453]**.

51. In **<u>Samuel Friday v Attorney General</u>**, CV 2021-02843 **[EB 1902]**, the High Court found that a delay of two years in paying retirement benefits owed to a former police officer was a breach of section 4(a), in circumstances where the Attorney General submitted that the delay was necessary due to the challenges of the Covid-19 pandemic and the need to conduct calculations to determine the amount owed [16]-[27] **[EB 1906 – 1909]** and [45]-[50] **[EB 1916 – 1917]**. The evidence provided in *Friday* to explain the delay was significantly more detailed than that provided in the instant case, but the Court found that the "fact that it took years to resolve issues of accuracy in the leave entitlement" deprived the claimant of his property without due process [45]-[50] **[EB 1916 – 1917]**.

52. As set out above at paragraph 46, the Board has established that a delay in the return of property will breach section 4(a) if it is unreasonable, unnecessary, arbitrary or not based on reasonable and clearly ascertainable grounds. Considering the deficiencies in the Respondent's evidence explaining the delay the Court of Appeal was plainly wrong to find that the delay did not contravene section 4(a). This is especially the case as the delay from 1 April 2021 followed the Commission wrongly failing to pay the Appellant her salary for fourteen years, due to its unlawful decision to declare that she had resigned. The delay also constituted a failure by the Commission to comply with the 2019 and 2021 judgments of the High Court and Court of Appeal, which entitled the Appellant to automatic repayment of her arrears of salary for the reasons set out above at paragraph 37.

(iv) *<u>In any event, the Court of Appeal misconstrued the date at which the interference with the Appellant's property rights commenced.</u>*

53. The Appellant's salary had been wrongly stopped from 21 June 2007, i.e. the date at which the Commission unlawfully declared her to have resigned from her office. The Appellant's salary payments resumed some 15 years later, when she was reinstated in her role as Prison Officer I. On 31 May 2024, almost two years after the instant claim was filed, the Appellant was paid $1,572,160.68 as backdated salary, allowances and benefits. However the increments for the period March 2005 to 31 December 2022 were not paid. On 13 August 2026 the Appellant received payment of the damages awarded

by Seepersad J for distress and inconvenience, loss of chance and vindicatory damages and interest. The Respondent has therefore acknowledged the right to that property and provided the monies owing.

54. The Appellant's claim form and written submissions before the High Court listed 21 June 2007 as the date at which the Commission interfered with the Appellant's property rights by stopping her salary ([52] at **[EB 35]**; [23] and [41]-[43] at [**EB 52 and 59]**). The trial judge agreed, finding that the Appellant's rights under section 4(a) were breached due to the Commission's failure to pay the Appellant's salary and related benefits from 21 June 2007 and failure to address this situation with dispatch ([29] at [**EB 160**]).

55. However, the Court of Appeal made no reference to the Appellant's salary having been stopped since 21 June 2007, nor the long history of the case before the instant claim was brought. Instead, the Court found that the correct computation date for establishing a breach of section 4(a) was April 2021, some fourteen years after the Commission had stopped paying the Appellant's salary [**EB 386**]. April 2021 is when the Court of Appeal affirmed in the third judicial review proceedings that the Commission's decision to declare the Appellant as having resigned with effect from 21 June 2007 was in breach of section 129(4) of the Constitution, and the Commission's 2017 decision to uphold the compulsory resignation was illegal, irrational, unfair, null and void and of no effect. The Court of Appeal in the instant case noted that the 2021 judgment had "clarified" the "entitlement" of the Appellant.

56. Although, the Claimant did not seek payment of the arrears until after the April 2021 Court of Appeal, by letter of June 2021, the Appellant was deprived of her property every month that her salary fell due since June 2007 and was not paid, because she was unlawfully deemed to have resigned from her post. The Constitutional proceedings were commenced by the Claimant due to lack of payment following the pre-action protocol demand in June 2021, but that does not mean that the property right was not violated from June 2007 and on a continuing and accruing basis until full payment was made of the arrears owing.

57. If the Court of Appeal's computation date of April 2021 is correct, a claim for a deprivation of property under section 4(a) could only succeed in narrow circumstances. A claim requires the court to be satisfied that (i) the claimant's enjoyment to property was deprived, and (ii) this was done without due process of law. Often, the claimant will be arguing that limb (ii) is satisfied because the state's decision to deprive the property was unlawful or originated from an unlawful act. If the Court of Appeal's judgment were correct it would mean that the date for calculating when limb (i) began to occur is only *after* a court has confirmed that the decision underpinning the deprivation of property was unlawful.

58. If this were correct, it would make every judicial decision prospective, defy the principle of *restitutio ad integrum* and the application of interest and create significant hardship for past losses that could not be recognised.

59. Previous decisions of the Privy Council confirm the error made by the Court of Appeal. In the recent case of **Hamilton v Attorney General of Bermuda** [2025] UKPC 50; [2025] 1 W.L.R. 5218 **[EB 1534]**, the Board summarised its case law relating to the right to property in Caribbean constitutions. Section 13(1) of the Bermuda Constitution contains a similar provision to section 4(a) of the Constitution of Trinidad and Tobago, and provides that "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired" unless certain conditions apply. At paragraph 176 of their judgment, the Board located the correct computation date for determining a breach of section 13(1) as simply the date at which the property was taken: *"Once property to which section 13(1) applies is compulsorily taken or acquired, then the section is contravened unless its other requirements are fulfilled (compensation for one) or one of the exceptions applies"* **[EB 1582]**. The Board did not require the State to have been put on notice that the requirements which justify the taking of property had not been satisfied.

60. In **Minister of Energy v Maharaj** [2020] UKPC 13 **[EB 1774]**, the Privy Council found that section 4(a) of the Constitution was breached when the state suspended the appellants' de facto licences for the sale of petrol. The Board found that the interference with the appellants' property rights began at the date at which the State suspended the

licenses [62] **[EB 1784]**. The appellants were therefore entitled to damages representing their loss of profit from the start of the suspensions (which occurred in 2012), up to the end of the period for which the de facto licenses were granted (determined to be either 2013 or 2014) [64] **[EB 1784]**. There was no question that the deprivation of the appellants' property could only have occurred when the courts "clarified" the appellants' "entitlement". In fact, the appellants' entitlement was not fully determined by the point at which the Privy Council ruled their property rights to have been breached. It was not apparent when the end date of the suspension of one of the appellant's licenses should be calculated, so after finding that section 4(a) had been breached, the Board remitted the case to the local courts to determine the period in respect of which damages should be paid [64] **[EB 1784]**.

61. Therefore, and simply put, the date at which an interference with an individual's property rights begins should be computed from the date at which that interference happened on the facts of the case, regardless as to when a court rules that the interference was the result of an unlawful act. The Court of Appeal in the instant case therefore erred by choosing 21 April 2021, and not 21 June 2007, as the date from which the interference with the Appellant's property rights should be computed.

62. The instant case was perhaps somewhat unusual in that the courts had already established that the Commission had acted unlawfully before a claim for deprivation of property was brought. Usually a court will be asked to consider both the right to property and whether it was deprived by due process at the same time in a claim for breach of section 4(a). In this case, the State had an opportunity to rectify the salary arrears owing to the Appellant after each court decision in the judicial review proceedings, but failed to do so. Even after the Court of Appeal's April 2021 decision, it did not promptly address the issue. The promptness of that decision and any explanation for it from April 2021 onwards is a matter as to compensation and vindicatory damages, not whether the right to property was in fact breached or not.

63. In the alternative, were the Court of Appeal to be correct that the prior proceedings had some bearing on the date at which the right accrues, the Court ought to have found that the interference with the Appellant's property rights to have begun from 12 June 2019. This is when the High Court found that the Commission's decision to uphold its declaration that the Appellant had resigned from office on 21 June 2007 was illegal,

irrational, unfair, null and void and of no effect, and that the original decision to declare the Claimant as having resigned had been taken in breach of section 129(4) of the Constitution. The Respondent did not apply to stay the High Court judgment pending appeal to the Court of Appeal, meaning that the consequences that flowed from the High Court's judgment took effect when it was handed down on 12 June 2019, not when the Court of Appeal affirmed the judgment two years later.

64. If the prior decisions did not create an automatic right to payment of the Appellant's arrears of salary, the High Court's third judgment must have. This is because the High Court found that the Commission's initial decision that the Appellant had resigned from office was taken in breach of section 129(4) of the Constitution. The legal effect of such a finding was that the Appellant had not been lawfully removed from her post and was entitled to her arrears of salary as damages. This principle can be seen in the case of **<u>Long v Police Service Commission</u>** [2018] UKPC 32; [2019] 2 All E.R. 35 **[EB 1690]**. In *Long,* the Police Service Commission had required Mr Long to retire as the result of alleged misconduct. The Privy Council found that the compulsory retirement breached s129(4) **[EB 1286]** of the Constitution and, as a consequence, set aside the decision [15]-[16] **[EB 1696 – 1697]**. The case was remitted to the High Court to assess the damages to be paid to Mr Long "arising from the loss of salary and such other benefits as may be applicable until retirement and therefore pension" **[EB 744]**.

65. The Court of Appeal's failure to identify the correct computation date is a fundamental error which impugns the rest of the Court's judgment in relation to section 4(a). In finding that section 4(a) had not been breached, the Court only considered whether the Appellant's right to property had been breached in the three years from 1 April 2021 to 31 May 2024. The Court did not consider the Commission's failure to pay the Appellant her salary over the significantly longer, period. Therefore, if the Board is with the Appellant on this point, then the Court of Appeal's judgment in relation to section 4(a) cannot be saved.

Ground Two: The Court of Appeal erred by reducing the Appellant's costs of the appeal by 50%

66. Rule 66.6 **[EB 1290]** of the Civil Proceedings Rules 2016 ('the CPR') in Trinidad and Tobago sets out the ambit of the Court of Appeal's discretion in relation to costs awards. The Rule provides that:

> *"(1) If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.*
>
> *(2) The court may, however, order a successful party to pay all or part of the costs of an unsuccessful party.*
> *…*
> *(4) In deciding who should be liable to pay costs the court must have regard to all the circumstances.*
>
> *(5) In particular it must have regard to—*
> *(a) the conduct of the parties;*
> *(b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;*
> *(c) whether it was reasonable for a party—*
> *(i) to pursue a particular allegation; and/or*
> *(ii) to raise a particular issue;*
> *(d) the manner in which a party has pursued—*
> *(i) his case;*
> *(ii) a particular allegation; or*
> *(iii) a particular issue;*
>
> *…*
>
> *(6) The conduct of the parties includes—*
> *(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties complied with any relevant pre-action protocol…"*

67. When the Court of Appeal makes a decision as to costs, it must also bear in mind the overriding objective set out in Rule 1.1 of the CPR **[EB 1288]**:

"(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes—

(a) ensuring, so far as is practicable, that the parties are on an equal footing;

(b) saving expense;

(c) dealing with cases in ways which are proportionate to—

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party.

(d) ensuring that it is dealt with expeditiously; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

68. In the consolidated appeal of **Judicial and Legal Service Commission v De Silva CA No. P-029 of 2023 and Jogee v Cabinet of the Republic of Trinidad and Tobago CA No. P-148 of 2024** **[EB 1710]** (15 December 2025), the Court of Appeal noted that the local rules acknowledged and intended to implement the Woolf Reforms which sought to improve access to justice in the courts of England and Wales [35] **[EB 1728]** and outlined how these principles should be applied in public law cases. The Court noted that:

a. *"In public law matters the litigant is invariably a private individual with unequal bargaining or financial power against a much more resourced respondent. Equally there is an underlying relationship between the individual and the public authority which ought to be repaired to instil a humanism in good State governance. Caution should therefore be exercised by a court before awarding costs in favour of the State against a private individual. The benefit of investigating public law values of accountability, transparency and fairness transcends the need for compensation under a loser pays costs system… For these same reasons where the individual litigant is successful against the State,* *it should be rewarded by an order for costs unless there are good reasons not to do so"* [66]-[67] **[EB 1743]**.

b. *"An order for costs made pursuant to the Court's wide discretion under our new CPR has become an important evaluative and behavioural tool to guide, reward and regulate the reasonable conduct of civil litigation"* [4] **[EB 1714]**.

c. "The extent of compliance [*with the Pre-Action Protocol*] (which must therefore include non-compliance) is part of the parties' conduct to which the court must have regard under Part 66.6(5) and (6)" [52] **[EB 1736]**.

69. The Court of Appeal in *Jogee* drew particular attention to paragraphs 2.4 and 2.5 of the Pre-Action Protocol Practice Direction, which requires a court to focus on two aspects of non-compliance with the relevant Pre-Action Protocol when considering whether costs sanctions should be applied, namely (i) whether non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or to the incurring of unnecessary costs; and (ii) for the court to consider exercising its powers with the object of placing the innocent party in no worse a position than he would have been in if the protocol had been complied with.

70. The relevant Pre-Action Protocol in this case, the Protocol for Administrative Orders, requires the claimant to send a letter before claim, and the defendant to normally respond within 30 days (at paras 2-3). The Protocol also notes that a failure to respond within 30 days will be taken into account by the court in exercising its discretion to award costs (at para 3.1). The defendant's response should state in clear and unambiguous terms if the claim is being conceded in part or not at all, address any points of dispute (or explain why they cannot be addressed) and enclose any relevant documentation requested by the claimant, or explain why the documents are not being enclosed (at para 3.4).

71. Applying the above principles, it is submitted that the Court of Appeal erred when reducing the Appellant's costs by 50%. The Court of Appeal's judgment on costs was brief, with the Court merely stating that "*the order that we propose to make is that the order of the Trial Judge with respect to Section 4(a) is hereby set aside. And so, in those*

circumstances, the appeal is allowed in part. The Appellant is to pay the Respondent 50 percent of the costs of the appeal, such costs to be assessed by the Registrar in default of agreement." [**EB 392**]. In making this judgment, the Court failed to take into account the following four relevant considerations.

72. First, the Appellant should be considered the successful party in the appeal. The Respondent appealed three findings of the trial judge: (i) that section 4(a) of the Constitution had been breached, (ii) that the Appellant was entitled to vindicatory damages, and (iii) the quantum of damages ([3]-[6] at [**EB 193-194]**). In appealing the latter two findings, the Respondent attempted to reduce the damages to which the Appellant was entitled by almost 40%. However, the Respondent only succeeded in appealing the first finding, which did not significantly alter the relief the Appellant was awarded. The Commission was still found to have breached the Appellant's constitutional rights (namely, section 4(b) and 129(4) of the Constitution), which were borne out of the same facts as the section 4(a) claim, and the Appellant retained the full sum of damages she was awarded by the High Court.

73. Often in human rights and constitutional rights claims, where breach of one right is made out, the courts do not go on to consider whether a further right is breached because the claim is made out on the first finding. Here, two constitutional claims were successful with damages pertaining to the whole set of facts.

74. Second, the litigation involved a claim by a private individual against the State. Per *Jogee*, the Court should therefore have taken into account the matters outlined above at paragraph 68(a). This was a claim where the Appellant was treated appallingly by the State through 17 years of litigation simply because she took maternity leave. The administrative and bureaucratic treatment of her case went far beyond normal mistake or error. Challenge was made to the Appellant's lawful reinstatement three times, despite direction from the Court of Appeal to properly consider the evidence. As if that were insufficient, challenge continued to the Appellant's rightful salary and compensation for its non-payment, again appealed to the Court of Appeal, and even now defended, to the Board.

75. Third, the Respondent's Notice of Appeal and submissions argued that vindicatory damages should not have been awarded at all ([3iv] at [**EB 193]** and [5] at [**EB 199]**) and in written submissions, argued that it amounted to double compensation [**EB** 220 para 54]. They did not pursue this point in oral submissions and only challenged the quantum of damages. The Appellant therefore spent time and resources preparing for a ground of appeal that was not pursued in the hearing.

76. Fourth, there was a failure by the State to comply with the Pre-Action Protocol. There was no response within 30 days to the Appellant's Pre-Action Protocol letter dated 22 April 2022, which was sent to the Commission, the Commissioner of Prisons, and the Chief State Solicitor's Department **[EB 776-780]**. When the Commission did respond, its letter did not address key points of dispute and, in particular, failed to address the Appellant's assertion that she was owed arrears of salary from 21 June 2007 **[EB 799]**. The Constitutional claim was brought to obtain the salary arrears that the Appellant was entitled to. This followed years of litigation which was stressful and difficult for the Appellant to finance, never mind her lack of earnings throughout this period. Those arrears have been paid during the life of this case. The litigation could have been avoided if the State had complied with the Protocol.

77. The Appellant submits that the 50% reduction in costs was plainly wrong taking into account the Respondent's approach to the litigation and the proportion of the appeal attributable to the section 4(a) claim. The panoramic overview of the appellant's quest for justice spanning over 15 years with 5 judgements in her favour underscores the respondent's obstructionist conduct throughout the history of this matter. There was no lawful justification for depriving the Appellant of 50% of her costs on the appeal. It was arbitrary, unjust and disproportionate.[1] If ever a case illustrated the appropriate award of costs, it is this one and the Appellant is entitled to her full costs.

(VI) Conclusion

78. For the reasons set out above, the Appellant invites the Board to find that:

[1] Even after the judgement of the Court of Appeal, the State obtained leave to appeal against the award of damages to the Board which has since been abandoned.

i) The Court of Appeal was wrong to set aside the trial judge's finding that the Appellant's right to property under section 4(a) of the Constitution was violated; and

ii) The Court of Appeal erred by reducing the Appellant's costs of the appeal by 50%.

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