Michaelmas Term
[2022] UKPC 49
Privy Council Appeal No 0017 of 2022

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) *v* Akili Charles (substituted by Melina Charles) (Appellant) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
8 December 2022

Heard on 5 October 2022

Appellant
Anand Ramlogan SC
Rowan Pennington-Benton
Adam Riley
(Instructed by Ganesh Saroop of Freedom Law Chambers (Trinidad))

Respondent
Peter Knox KC
Daniel Goldblatt
(Instructed by Charles Russell Speechlys LLP (London))

LORD HAMBLEN (with whom Lord Briggs, Lord Kitchin, Lord Burrows and Lord Richards agree):

Introduction

1. This appeal concerns a claim by the appellant, Akili Charles, for compensatory and vindicatory damages for alleged breach of his constitutional right to "the protection of the law" under section 4(b) of the Constitution of the Republic of Trinidad and Tobago ("the Constitution").

2. The factual circumstances in which this claim arises are in summary as follows.

3. On 5 December 2010 the appellant was charged with murder. He was remanded in custody as murder was a non-bailable offence under the law at that time. On 16 January 2012 a preliminary inquiry was begun before the Chief Magistrate. This proceeded for over five years until April 2017 when the Chief Magistrate was sworn in as a judge of the High Court. She had 53 part-heard matters before her at that time, including the appellant's preliminary inquiry.

4. On 1 June 2017 the new Acting Chief Magistrate ruled that all part-heard matters had to be heard *de novo* before another magistrate. At this stage the appellant had been in prison for six and a half years and faced the prospect of having to start his lengthy preliminary inquiry all over again. Moreover, for the first preliminary inquiry he had been able to fund representation by Mr Wayne Sturge, described by the judge in this case as an experienced attorney who is "one of the country's most renowned members of the criminal bar", but he could not afford to pay for Mr Sturge or indeed any legal representation a second time.

5. The appellant sought to challenge the decision that the preliminary inquiry had to be heard *de novo* in judicial review proceedings. These were ordered to be heard together with an interpretation summons brought by the Attorney General, the respondent to this appeal, seeking guidance from the court on the issue. On 4 January 2019 Gobin J ruled on the interpretation summons. She held that the Acting Chief Magistrate's ruling was correct and dismissed the judicial review proceedings.

6. On 7 March 2019 the appellant filed a claim for constitutional relief under section 14 of the Constitution. He sought compensatory and vindicatory damages for breach of his constitutional rights and in particular an order that the respondent pay

the appellant's legal costs of and occasioned by the second preliminary inquiry for counsel of his choice, Mr Sturge.

7. On 12 March 2020 Ramcharan J gave judgment on the constitutional claim. He dismissed the claims made for breach of sections 5(2)(c)(ii) (rights of arrested persons to retain a lawyer) and 5(2)(h) (deprivation of procedural protections). The judge, however, upheld the claim for breach of section 4(b) and awarded the appellant compensatory damages of TT$150,000 and vindicatory damages of $125,000.

8. The respondent appealed and on 15 July 2021 the Court of Appeal (Lucky, Dean-Armorer and Wilson JJA) allowed the appeal, primarily on the ground that the judge had found a breach of duty by the Judicial and Legal Service Commission ("JLSC") and the court considered that default by the JLSC had not been pleaded and that the respondent had not had adequate notice of the case which had to be answered.

9. On 18 October 2021 the Court of Appeal granted final leave to appeal to the Privy Council from its decision.

10. Meanwhile, following the issue of the claim for constitutional relief, an arrangement was made with Mr Sturge whereby he agreed to act for the appellant on the second preliminary inquiry on the basis that his fees would be paid out of any damages awarded on the constitutional claim, failing which the appellant would remain liable for them. In the event, on 21 May 2019 the second preliminary inquiry was dismissed on the basis of there being no case to answer.

The factual and procedural background

The judgment of Gobin J

11. Much of the relevant factual background is set out in the judgment of Gobin J in the combined judicial review and interpretation summons proceedings. Her findings are of importance as both the appellant and the respondent were party to these proceedings. As she notes in her judgment, there was a "common factual background".

12. On 12 April 2017 the then Chief Magistrate, Mrs Ayers-Caesar, was sworn in as a judge of the High Court at a time when there were 53 pending matters before her.

Gobin J noted that "there was considerable public outcry in respect of the Pending Matters not having been concluded prior to her appointment" and described what ensued as a "debacle". She recorded that on 24 April 2017 the Law Association of Trinidad and Tobago issued a press release stating that "it is unfair that anyone should suffer the expense and anxiety of an avoidable, repeat trial".

13. On 1 June 2017 the Director of Public Prosecutions ("DPP") appeared before the Acting Chief Magistrate, Mrs Maria Busby Earle-Caddle, at which hearing she ruled that the pending matters had to be started again and that "she had been instructed to treat" these matters in that way. He inquired whether Mrs Ayers-Caesar had resigned as a magistrate and was told by the Acting Chief Magistrate that she could not answer that question. The DPP then wrote to the Chief Justice both as Chief Justice and as Chairman of the JLSC raising "serious concerns about the jurisdiction of the Acting Chief Magistrate to determine that the outstanding part-heard matters should be started *de novo"* and asking to be informed as to the status of Mrs Ayers-Caesar. On 8 June 2017 the DPP wrote to the Attorney General noting that he was not satisfied that Mrs Ayers-Caesar's appointment as a magistrate had ended. In these "extraordinary circumstances" the Attorney General filed the interpretation summons seeking determination of the following issues:

> "(a) The manner in which the matters commenced but not completed before Chief Magistrate Marcia Ayers-Caesar as at 12th April 2017 ("the Pending Matters") are now to be determined and/or concluded;
>
> (b) Whether Marcia Ayers-Caesar is a Magistrate and if so, whether the Pending Matters and or any of them may be continued before her;
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> (c) Whether the Pending Matters and or any of them are required to or may be restarted de novo before Magistrate Maria Busby-Earle Caddle and/or any other magistrate;
>
> (d) Whether the Pending Matters, and or any of them, may be continued before Magistrate Maria Busby-Earle Caddle and/or a different magistrate at all, and/or with the consent to the parties;
>
> (e) Whether the provisions of the Indictable Offence (Preliminary Enquiry) Act Chap 12:01 … and/or the

> Summary Courts Act Chap 4:20 permit the Pending Matters to be continued and or completed by any other magistrate."

14. The interpretation summons was ordered to be dealt with together with the appellant's judicial review application and he was joined as a party. Although final submissions in the judicial review application were filed in June 2018, Gobin J held that it would be ruled upon at the same time as the interpretation summons, noting that all parties were aware that it was only sensible to await the determination of that application.

15. On 26 June 2018 Gobin J ruled that the former Chief Magistrate was deemed to have voluntarily resigned from her post as magistrate upon her being appointed as a judge of the High Court.

16. In her judgment of 4 January 2019 Gobin J ruled on the other issues raised by the interpretation summons and dismissed the judicial review claim. She held that there was no statutory provision that permits or prohibits the continuation of a part-heard matter before the former Chief Magistrate before another magistrate. She further held that even in the absence of a statutory prohibition she was bound by the Privy Council decision in *Ng (alias Wong) v The Queen* [1987] 1 WLR 1356 ("Wong) to conclude that a new magistrate who had not heard the oral evidence could not hear a part heard matter. In that case Lord Griffiths stated as follows at pp 1358-1359:

> "In a criminal trial, whether before a jury or before magistrates, it is a fundamental requirement of justice that those called upon to deliver the verdict must have heard all the evidence. The evaluation of oral evidence depends not only upon what is said but how it is said. Evidence that may ultimately read well in a transcript may have carried no conviction at all when it was being given. Those charged with returning a verdict in a criminal case have the duty cast upon them to assess and determine the reliability and veracity of the witnesses who give oral evidence, and it is upon this assessment that their verdict will ultimately depend. If they have not had the opportunity to carry out this vital part of their function as judges of the facts, they are disqualified from returning a verdict, and any verdict they purport to return must be quashed."

17. Gobin J further held that the consent of the parties would make no difference and could "not validate what is a nullity at law", relying on *Chimuza v Dzepasi* [2015] ZWHHC 487. She further held that *Wong* equally applied to decisions as to whether a prima facie case had been made out in criminal proceedings, as in a preliminary inquiry, referring to *The State v Latiffa Ali,* 22 November 1990 (HC No 118 of 1990), approved by the Court of Appeal in *Hutchins v The State; Roberts v The State,* 26 July 1994 (Cr A Nos. 71 and 67 of 1991).

18. In conclusion, Gobin J held that "the general position on the current state of the law is that the part-heard matters cannot be continued before a different Magistrate and must be started de novo" (para 22).

19. In the light of this conclusion, Gobin J dismissed the judicial review application, but made note of the "extreme hardship, oppression and prejudice that is bound to be suffered" by the appellant (para 29). She also made the following trenchant findings and comments with regard to the appellant's case:

> "30. In the case of Mr Charles the dire consequences of his matter being rendered abortive have been disclosed in his affidavit. He was charged for murder on December 5, 2010. He has been in custody since that date at the Royal Jail in Port of Spain. The conditions there were found by this Court almost one decade ago to be inhumane. There is no reason to believe that there has been any improvement in the conditions. The hearing of his Preliminary Inquiry finally began in January 2012 and spanned 5 years up until April 3, 2017 about two weeks before the elevation of the Chief Magistrate. There was no indication on that date that she would not be available thereafter. More than sixty witness statements had been received and several witnesses have been cross-examined on their statements. Mr Charles paid one hundred and fifty thousand dollars for his legal representation over the period which he cannot recover. He will have to pay for representation for a new hearing. He has no means of raising further funds for his defence. That he should have to start over is oppressive.
>
> 31. What has happened here is a travesty of Justice. The stain on the administration of justice will remain indelible long after the cries and protests of justifiably angry suffering prisoners have gone quiet and long after the

> families of victims who, too, have been waiting for justice to be done, resign themselves to further delay. It may go some small way to alleviating the pain and injustice of this on all sides if those responsible are held to account. Almost two years on since the Chief Magistrate's elevation the initial shock and disbelief that this could have happened has dulled. But the ill effect on public confidence in the administration of justice and the institutions which allowed this to happen whether through lack of due diligence as suggested by the Law Association, or recklessness will persist. So far the financial cost to the taxpayer is limited to the costs of litigation in this and other cases which have been filed as a result of the colossal misstep."

20. Gobin J also held in relation to the issue of costs that "it was not unreasonable for the [appellant] to have filed this claim especially in the circumstances of the lack of clarity as to the status of the former Chief Magistrate. Indeed this concern was shared by the Director of Public Prosecutions and it was one of the factors which resulted in the filing of the Interpretation application by the Attorney General."

The claim for constitutional relief

21. In the light of the dismissal of his judicial review challenge, on 7 March 2019 the appellant filed a claim for constitutional relief supported by his own affidavit.

22. So far as material the Claim Form claimed the following relief:

> "a. A declaration that the Claimant's constitutional rights as guaranteed by Sections 4(b), 5(2)(c)(ii) and 5(2)(h) have been breached;
>
> b. An order that monetary compensation including vindicatory damages be paid to the Claimant by the Defendant for the breach of his constitutional rights;
>
> c. An order directing the Defendant to pay the Claimant's legal costs of and occasioned by the Second Fresh [Preliminary Inquiry] for Counsel of his choice;"

23. The Claim Form set out how 62 statements had been tendered in evidence in the first preliminary inquiry, with many witnesses being examined in chief and cross examined. It detailed how there had been some 24 hearings over a period of over five years before being "prematurely cut short" by the elevation of the Chief Magistrate. It asserted that it is "inherently unjust" for the appellant "to be remanded for such an extended … period of time because of the mishaps and mismanagement in the justice system" (para 14).

24. It summarised the history of the proceedings before Gobin J and specifically set out and relied upon paras 30 and 31 of her judgment (cited above) and the prejudice to the appellant which that demonstrated.

25. By way of "additional prejudice" it was said that the appellant had exhausted his savings and the charity of friends and family in paying for his representation by Mr Sturge at the first preliminary inquiry and that he could not afford to retain him or other attorneys for the second preliminary inquiry.

26. It then set out the effect of "further delays in inhumane prison conditions". It stated that:

> "The Claimant has been remanded since December 2010. To date he continues to be subjected to degrading prison conditions. He has become suicidal. The only shred of hope the Claimant had was knowing that his first PI was almost completed. It has gone on for a gruelling 5 years, prior to which he was remanded for 2 years just waiting for it to start…The Claimant's worst fears have been realised, in his PI being restarted *de novo*."

It invited the court to note that "the Claimant has been incarcerated for a significant length of time in degrading conditions" and that that "incarceration has been extended by mismanagement of the judicial appointments system, the injustice of which has already been noted by Gobin J" (para 33). It was said that he has been "placed in this position by, in Gobin J's words above, a 'colossal misstep'" (para 34).

27. The legal grounds upon which it was asserted that the State should be ordered to bear the cost of the appellant's legal representation at the second preliminary inquiry with counsel of his choice were then identified and in conclusion it was stated that he should be granted all the relief sought in the Claim Form.

28. The essential facts set out in the Claim Form were repeated and supported by the appellant's affidavit.

29. The Claim Form was supplemented by submissions and rejoinder submissions. Among other things, these set out the basis of the claim for compensatory and vindicatory damages.

The judgment of Ramcharan J

30. The parties relied on their written submissions. There was no oral hearing.

31. Ramcharan J ("the judge") summarised the facts at paras 1 to 10 and the parties' submissions at paras 14 to 22. He considered and rejected the claims for breach of section 5(2)(c)(ii) and (h) of the Constitution at paras 23 to 30. He then addressed the claim for breach of the appellant's right to the protection of the law under section 4(b).

32. In relation to the law the judge stated at para 31 that:

> "…As noted by the Claimant, and accepted by the Defendant, the law with respect to the right of a person to protection of the law has been modified and expanded greatly over the years until, as pointed out in *Boyce & Anor v The Attorney-General of Barbados*, the concept is a wide and pervasive one. And as set out in the now seminal case of *The Maya Leaders Alliance*, refers to a person's right to be protected against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power by the State."

33. He then considered the evolution of the case law leading up to the Caribbean Court of Justice decision in *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ); 87 WIR 178 which was summarised as holding that: "access to the court is not sufficient for there to be adequate protection of the law. An individual must be protected from irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."

34. He commented that the Privy Council seemed to have adopted this position, referring to its decisions in *Sam Maharaj v The Prime Minister of Trinidad and Tobago*

[2016] UKPC 37 and *Jamaicans for Justice v Police Service Commission* [2019] UKPC 12.

35. In the light of the guidance provided by the authorities the judge stated that a court is required to consider whether the claimant has been treated "fairly" by the State in all the circumstances and should ask itself the following question (para 45):

> "…whether in those circumstances, there has been a sequence of events which are so egregious that it would be unconscionable for a court to countenance the Claimant suffering as a result of it."

36. The judge concluded that this test was satisfied. His reasoning was as follows:

> "46. In the instant case, what transpired was that the then Chief Magistrate was sworn in as a judge while she had 53 part-heard matters that were left without being properly determined. In the case of the Claimant, this matter was at an advanced stage. The reason for this state of affairs is the subject of other pending judicial proceedings, and therefore I am careful not to cast blame at the foot of any person as to why the then Chief Magistrate was allowed to demit office as a magistrate to take up office as a judge without first putting things in place to deal with the part-heard matters before her.
>
> 47. However, what I do find disturbing is that whatever was said or not said by the then Chief Magistrate, there was nothing done by the JLSC to ascertain what was the status of the matters before the Chief Magistrate, and measures put in place to ensure that no part heard matter would have been negatively affected by the Chief Magistrates demission from office and elevation to the High Court. There was nothing preventing the swearing in of the Chief Magistrate being put off until her part heard matters were completed. I find that this was a duty that the JLSC had, and has, when persons are appointed a judge of the high court from positions of judicial office within the ambit of the JLSC (masters, magistrates, registrars).

> 48. Therefore, in the very narrow circumstances of this case, I hold that there has been a breach of the Claimant's right to protection of the law under section 4(b) of the constitution. To be clear, the breach has only occurred because the cause of the second hearing was due to the fault of an arm of the State, in not ensuring that proper measures were put in place to ensure that part heard matters before the then Chief Magistrate were adequately dealt with before she demitted office and was elevated to the High Court. It would hardly be the case that a person whose matter had to be reheard for another reason, such as the death of a magistrate could claim a breach of their right under section 4(b). It is the culpability of the State in this matter which has led to the breach."

37. The judge then considered the question of damages and awarded the appellant compensatory damages of $150,000 and vindicatory damages of $125,000. His reasons will be addressed below.

The judgment of the Court of Appeal

38. In its judgment the Court of Appeal focused on paras 47 and 48 of the judge's judgment (set out above), the criticisms he there made of the JLSC and his finding of a duty owed by the JLSC. It held as follows:

> "67. An examination of the affidavits at first instance suggests that there was no legal or evidential basis for the Judge's words at paragraphs 47 and 48. There was nothing in the Claim, that fixed the JLSC with a duty of enquiry into part-heards left by a Magistrate, and there was no basis for ascertaining the extent of the duty.
>
> 68. There was also no evidential basis for asserting that the JLSC defaulted either by omitting to make enquiries of the Chief Magistrate or of any other official who would have been seized of information concerning part-heards…"

39. It concluded that he had thereby "deviated entirely from the case which was before him" and that this meant that the respondent had no opportunity to meet or

answer the case in respect of the JLSC. It therefore held that the judge's decision was wrong and should be set aside.

The Issues

40. The following issues arise on the appeal:

(1) Did the Court of Appeal err (a) in holding that the judge had found for the appellant on a basis which had not been advanced in the pleadings or in the evidence, and (b) in holding that the State's appeal should therefore be allowed?

(2) Was the judge entitled to find that there was a contravention of the appellant's fundamental right to the protection of the law?

(3) If there was a contravention, did the judge err in holding that the appellant was entitled to vindicatory damages and compensatory damages in the amounts he assessed or at all?

Issue (1): Did the Court of Appeal err (a) in holding that the judge had found for the appellant on a basis which had not been advanced in the pleadings or in the evidence, and (b) in holding that the State's appeal should therefore be allowed?

41. It is correct that no specific criticism is made of the JLSC in the Claim Form, supporting affidavit or in the submissions. By focusing his findings on the failings of the JLSC the judge was therefore going beyond the case being advanced. It was not, however, necessary for the appellant to identify which particular arm of the State was at fault, nor was that necessary for the judge's decision.

42. Constitutional motions are brought against the State with the Attorney General being joined as a notional party. The claimant does not have to assert that a specific State body, or that individuals within such a body, are responsible for the breach of his or her constitutional rights. What matters is establishing that the State is so responsible.

43. The appellant's case clearly alleged that the State was responsible for the alleged breach of his constitutional rights and how it was so responsible. In particular, the State bore responsibility for the "colossal misstep" (see para 19

above) which resulted in the cutting short of the first preliminary inquiry and the need to start a second preliminary inquiry *de novo* and the consequential prejudice and unfairness suffered by the appellant. That prejudice was not limited to the refusal of the State to pay the legal fees of the appellant's counsel of choice. This is made clear, for example, by the claims made for both compensatory and vindicatory damages.

44. The Claim Form specifically alleged "mishaps and mismanagement in the justice system" and "mismanagement of the judicial appointments system" and asserted that this involved a "colossal misstep", as stated by Gobin J. There was no suggestion by the respondent that the State was not responsible for this "colossal misstep" nor of how or why it was not so responsible.

45. In para 48 of his judgment the judge found that the breach of the appellant's constitutional right occurred "because the cause of the second hearing was due to the fault of an arm of the State, in not ensuring that proper measures were put in place to ensure that part heard matters before the then Chief Magistrate were adequately dealt with before she demitted office and was elevated to the High Court". That conclusion does not depend on identifying that the relevant arm of the State was the JLSC or some other body or person. All that matters is that it was the responsibility of an arm of the State, as was never disputed.

46. It follows that it was not necessary for the judge to identify the JLSC as the relevant arm of the State in para 47 of his judgment and that this was immaterial to his decision. That decision was correctly summarised and expressed in more generalised terms in para 48. As Mr Ramlogan SC, counsel for the appellant, pointed out, if the references in para 47 to "the JLSC" were replaced with references to "the State" or "the responsible arm of the State", it would be unobjectionable. The findings made by the judge can stand on that basis.

47. In these circumstances the Board considers that the Court of Appeal was wrong to find that the judge materially erred. It was also wrong to find that prejudice was caused thereby. There was no evidence of such prejudice or of what might have been done differently had it been specifically alleged that it was the JLSC that was responsible for the "colossal misstep". Unless it was to be suggested that no arm of the State bore responsibility, which it never has been, then which arm was so responsible did not matter. Moreover, the respondent's case did not dispute the essential facts but instead focused on legal submissions.

48. On Issue (1) the Board therefore concludes that the Court of Appeal was wrong to hold that the judge had materially erred. On a proper analysis of his

judgment, he did not find for the appellant on a substantive basis which had not been advanced in the pleadings or in the evidence. The Court of Appeal was accordingly wrong to hold that the State's appeal should be allowed.

Issue (2): Was the judge entitled to find that there was a contravention of the appellant's fundamental right to the protection of the law?

The right to protection of the law – the law

49. So far as material section 4 of the Constitution provides:

> "4. 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;
>
> *(b)* the right of the individual to equality before the law and the protection of the law; …"

50. The right to the protection of the law guaranteed by section 4(b) of the Constitution has been considered in some detail in two relatively recent Privy Council decisions: *Maharaj v Prime Minister (Trinidad and Tobago)* [2016] UKPC 37 and *Seepersad v Commissioner of Prisons of Trinidad and Tobago* [2021] UKPC 13, [2021] 1 WLR 4315.

51. In *Maharaj* Lord Kerr of Tonaghmore, giving the judgment of the Board, noted at para 25 that: "In a series of cases where the protection of the law provision in constitutions in various Caribbean countries was considered, an expansive approach to its potential application has been taken". In this connection, he cited the judgments of the Caribbean Court of Justice in *Attorney General of Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ), 69 WIR 104 at para 60, which describes the right as being "broad and pervasive", and the *Maya Leaders Alliance* case at para 47, which describes it as being "a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law". He set out

the often-cited passage at para 47 of the *Maya Leaders Alliance* case, which was relied upon by the judge in this case. It provides as follows:

> "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."

52. Lord Kerr further observed at para 27 that the courts of Trinidad and Tobago had "consistently favoured a wide-ranging interpretation of the 'protection of the law' provision."

53. *Maharaj* concerned whether a procedurally unfair failure to reappoint the appellant to the Industrial Court involved a violation of the protection of the law provision in section 4(b). Given this context, Lord Kerr considered a number of cases in which a failure to observe the rules of natural justice was found to involve such a violation, and in particular the Board's decision in *Rees v Crane* [1994] 2 AC 173 and later cases in Trinidad and Tobago which adopted a similar approach: *Samaroo v Minister of Education,* 2 April 2001 (HC 536 of 1998); *Ramjohn v Permanent*

Secretary, Minister of Foreign Affairs, Manning interested party, 3 May 2007 (HC 1098 of 2004); *Mohammed v Attorney General for Trinidad and Tobago,* 5 February 2013 (HC 4918 of 2011).

54. Lord Kerr stated (at para 37) that in such cases an important consideration will be whether access to the courts provides adequate protection of the individual's legal rights, but that it would only do so if there is "prompt and efficacious" access to justice. His conclusion (at para 40) was that while there is no inflexible rule that a failure to observe the rules of natural justice will give rise to a constitutional claim, "in general, where a prompt and effective legal remedy cannot be or is not provided, such a claim will arise". On the facts it was held that there was no prompt or effective remedy available and that there had been a breach of the appellant's right to protection of the law.

55. *Seepersad* concerned an unexplained failure by the executive to put into place arrangements necessary to give effect to mandatory requirements of legislation that appropriate detention facilities be provided for children. Having regard to all the material circumstances the Board concluded that the exercise by the executive of its legal powers had been arbitrary, that the claimant appellants had suffered real and substantial prejudice, that neither the substantive provisions of the law nor the legal system provided adequate redress, and that a violation of the protection of law provision had been established.

56. In giving the judgment of the Board, Sir Bernard McCloskey emphasised (at para 62) the importance of identifying and evaluating all material facts and circumstances and then assessing them in the round (para 73). He explained that this will be fact-sensitive and case specific (para 62).

57. Sir Bernard McCloskey considered relevant case law, including the cases of *Joseph and Boyce*, the *Maya Leaders Alliance* and *Maharaj*. As in *Maharaj*, the Board considered that the availability of a prompt and efficacious remedy through judicial proceedings was an important factor (para 55) and held that there was no such remedy in that case (paras 73 and 74).

The right to protection of the law – the facts

58. On the facts of the present case, the Board considers that the most material circumstances are (i) whether there was an irrational, unreasonable, fundamentally unfair or arbitrary exercise of power; (ii) if so, whether this caused real and

substantial prejudice to the appellant, and (iii) whether there was a prompt and effective legal remedy.

(i) Whether there was an irrational, unreasonable, fundamentally unfair or arbitrary exercise of power.

59. As stated in *Seepersad* at para 69, it is relevant to consider whether the State has offered any defence of or justification for its conduct. In the present case, there has been no evidence from the State to explain how the "colossal misstep" came to be made.

60. It was or should have been obvious that if the Chief Magistrate was to be made a High Court judge consideration would have to be given to her part-heard cases and how they were to be dealt with. These cases would involve criminal proceedings and, given her status as Chief Magistrate, were likely to include very serious criminal proceedings, including death penalty cases, as with the appellant. It also was, or should have been, obvious that unless appropriate steps were taken there was a real risk that all such proceedings would have to be started over *de novo*, with very severe consequences for many defendants. The resulting "public outcry" (see para 12 above) is entirely understandable. No evidence has been proffered which puts forward a reason for, or a rational explanation of, the decision which was reached. In all the circumstances, the Board considers that it is justifiable to conclude that the "colossal misstep" was irrational and unreasonable, although the Board would accept that that does not mean that it was arbitrary.

61. Not only was the decision irrational and unreasonable, it was also fundamentally unfair to the appellant, as borne out by the considerations summarised in para 30 of Gobin J's judgment (set out at para 19 above). As Gobin J found, what happened was "a travesty of justice" and for the appellant it was "oppressive". As the judge found, there was "a sequence of events which are so egregious that it would be unconscionable for a court to countenance the Claimant suffering as a result of it."

62. In these circumstances, and in the light of the findings made by Gobin J and the judge, the Board considers that this is a case involving an irrational, unreasonable and fundamentally unfair exercise of power.

(ii) whether this caused real and substantial prejudice to the appellant

63. The fundamental unfairness involved is highlighted by a consideration of the position of the appellant and the prejudice caused to him.

64. The "dire consequences" for him are aptly summarised by Gobin J in para 30 of her judgment. He had been held on remand in "inhumane" prison conditions for over six years. His preliminary inquiry had been proceeding before the Chief Magistrate for over five years and was nearing completion. He was financially ruined having used all available financial means to pay counsel for conducting the now abortive preliminary inquiry. He had no means to pay for representation for a new preliminary inquiry, an inquiry that could prospectively last as long as the first had done. As the judge found, he was "suffering from [this] possibility" (para 50(b)). He had become suicidal. His one shred of hope that his preliminary inquiry was almost completed had been dashed. He was now going to have to start all over again and to do so without the benefit of his counsel. As Gobin J found, that he should have to do so was "oppressive" and the appellant was bound to have suffered "extreme hardship, oppression and prejudice".

65. Mr Peter Knox KC, counsel for the respondent, sought to suggest that no serious prejudice had been established as there was no evidence to show that the first preliminary inquiry would have been completed any earlier than the second preliminary inquiry which, in the event, was completed in about 3 months. This involves both far too narrow a view of the facts and hindsight.

66. As the judge found at para 50(b): "At the time that his matter was aborted and a fresh hearing ordered, the Claimant would have been suffering from the possibility that his matter would have been prolonged for a further period of 5 years, given the length of time that the first hearing took." This was "the only benchmark within which the Claimant would have had to work". That would have been so throughout the period from the Acting Chief Magistrate's decision that a *de novo* hearing was required on 1 June 2017 until the second preliminary inquiry had reached the stage at which a no case submission was in prospect, nearly two years later.

67. Throughout most of that period the appellant would also have had to face the prospect of that further five year inquiry being conducted without the experienced and "renowned" counsel (see para 4 above) of his choice and, importantly, the counsel who had all the knowledge and experience of having conducted the first preliminary inquiry.

68. Throughout that actual period of nearly two years, and the prospective further period of five years, the appellant was being and would be held in "inhumane" prison conditions, although no prima facie case had been established against him and he had already spent six and a half years in prison on remand.

69. In all the circumstances, the serious prejudice suffered by the appellant is clear and is amply borne out by the findings made by the judge and Gobin J.

70. Mr Knox KC also submitted that, to the extent that there was prejudice to the appellant, that was the result of his own choice not to proceed straightaway with the second preliminary inquiry. Had this been done the likelihood is that he would have been released after the three months which the second preliminary inquiry took. He pointed out that Gobin J refers in her judgment to other of the pending cases proceeding in this way and to the fact that they were afforded priority.

71. The Board unhesitatingly rejects this submission. What the appellant entirely understandably wanted to avoid was a second *de novo* preliminary inquiry which prospectively was going to take as long as the first preliminary inquiry. What he also wanted to avoid was any such inquiry being conducted without his counsel of choice, and, in particular, the counsel who had represented him throughout the first preliminary inquiry. That is why he brought his claim for judicial review, which Gobin J found in terms to be "not unreasonable" (see para 20 above).

72. Had the appellant opted to proceed with a *de novo* second preliminary inquiry in June 2017 he would have had to forego his arguable judicial review application that the Acting Chief Magistrate was wrong to rule that there had to be a *de novo* inquiry. That his application was well arguable is borne out by the fact that leave to bring the application was granted and also by the myriad of questions which the respondent considered it necessary to ask the court in the Interpretation summons. As matters then stood, the only prospect of legal representation for the appellant at that further inquiry would have been through legal aid. Any such counsel would not have been counsel of choice, is unlikely to have been of Mr Sturge's experience and renown, and would not have had the advantage of Mr Sturge's detailed knowledge of the case. It was plainly reasonable for the appellant to do all he could to avoid that outcome.

73. This was effectively what Rampersad J decided when granting leave to seek judicial review. As he found at para 38 of his judgment:

> "…it seems rather unfair in all of the circumstances to have the applicant go through the costs, resources and time of a *de novo* hearing and await the end to then lodge an appeal against the decision already taken. It has already taken him seven years to get to this point. A *de novo* hearing and a subsequent appeal would add years to a challenge which can be made more effectively at this stage under this court's supervisory jurisdiction."

74. Rampersad J further found that there was "obvious prejudice" to the appellant and that his circumstances were sufficiently exceptional for the grant of leave even if he was wrong to find that no alternative remedy existed. As he stated at para 47:

> "Having determined that there may be an arguable case, even if there was a way to appeal at this stage, the facts of this case clearly constitute an exceptional circumstance especially in light of a prisoner on remand who, seven years after his incarceration, is nowhere closer to having his day in court to attempt to clear his name. The order for the *de novo* rehearing might be tainted and there is a distinct possibility that it may not be a valid one which, obviously, can impact upon the applicant down the line. To my mind, it is imperative to have the same reviewed as early as possible to minimize the obvious prejudice to him. To my mind, the fact that this case is an exceptional one is self evident. It is difficult to pigeonhole cases into particular categories but this one crosses the Rubicon as the mix of uncertainty has propelled it out of the norm. The thought of refusing leave in circumstances where the decision-making process in relation to a person who has been incarcerated and presumed innocent for over seven years is impugned seems contrary to principles of justice. To my mind, there is no effective and convenient manner of dealing with this imbroglio other than to have the administrative court review the circumstances and process as a matter of urgency rather than await the outcome of an already tarnished process."

75. In all the circumstances, the Board is satisfied that the appellant suffered real and substantial prejudice and that this was caused by the State's "colossal misstep" and not any choice or decision on his part.

(iii) whether there was a prompt and effective legal remedy.

76. Mr Knox KC submitted that there was a prompt and effective legal remedy available for the appellant, namely getting on with the second preliminary inquiry which, in the event, only took around three months.

77. As the judge found, however, prospectively that second preliminary inquiry was going to take a further five years and the appellant was going to have to face that inquiry without the services of Mr Sturge. As already held, the appellant understandably and reasonably sought to do all he could to avoid that outcome.

78. Against that background the relevant legal remedy was that sought by the appellant, namely, judicial review of the decision that there had to be a *de novo* preliminary inquiry.

79. Indeed, in granting leave to seek judicial review Rampersad J specifically rejected the respondent's argument that there were alternative remedies available to the appellant.

80. In the event, judicial review did not prove to be an effective remedy as the application was dismissed.

81. Having sought the appropriate remedy and found that no relief was available the appellant had no alternative but to join in a *de novo* preliminary inquiry, although he sought to mitigate the consequences of so doing by bringing his claim for constitutional relief. By this time nearly two years had passed. Whilst he did ultimately obtain redress due to the successful outcome of the second preliminary inquiry, if that is a relevant remedy it was not available promptly since the judicial review proceedings needed to be gone through first, as Rampersad J had held.

82. It is also over-simplistic to assume that because the second preliminary inquiry was brought to a successful conclusion by Mr Sturge reasonably quickly, the same would have happened had it been conducted by some other counsel, without his detailed knowledge of the case. There is no evidence of what happened at the second preliminary inquiry or of how it was brought to a conclusion so quickly but, as Gobin J's decision and the *Wong* case make clear, a *de novo* preliminary inquiry would ordinarily require all oral evidence to be adduced again.

83. The Board therefore concludes that this is not a case where there was a prompt and effective legal remedy available for the appellant.

Conclusion on Issue (2)

84. Looking at the material facts and circumstances of this case in the round, the Board is satisfied that the judge was entitled to find that there was a contravention of the appellant's fundamental right to the protection of the law.

Issue (3): If there was a contravention, did the judge err in holding that the appellant was entitled to vindicatory damages and compensatory damages in the amounts he assessed or at all?

Damages – the law

85. Section 14(1) of the Constitution provides:

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

86. The award of damages as appropriate redress for breach of constitutional rights has been considered by the Board in various cases and, in particular, *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328 at paras 17-19 (per Lord Nicholls); *Alleyne v Attorney General of Trinidad and Tobago* [2015] UKPC 3 at paras 37-47 (per Lord Toulson), and *Maharaj* at paras 45-54 (per Lord Kerr). The main principles set out in those cases may be summarised as follows:

(1) When exercising its jurisdiction under section 14 the court is concerned to uphold or vindicate the constitutional right which has been contravened (*Ramanoop* para 18).

(2) If the person wronged has suffered damage the court may in its discretion award compensatory damages. The comparable common law measure of damages may be a guide (*Ramanoop* para 18).

(3) If the person wronged can establish a head of loss, the fact that it is difficult to quantify and involves speculation is not a reason for denying the assessment (*Alleyne* para 44).

(4) It will generally be for the local court to examine the circumstances to determine if and in what amount there should be compensation (*Maharaj* para 49).

(5) An award of compensatory damages may not fully vindicate the infringed constitutional right. An additional award may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. These are "vindicatory damages" but they are not designed to punish the defendant and are therefore distinguishable from punitive or exemplary damages (*Ramanoop* para 19).

(6) The fact that it may be very difficult to prove a financial loss may be a good reason for adding an amount to mark the importance of the constitutional right which has been violated (*Alleyne* para 40).

(7) Such damages may include an award for non-pecuniary loss, including distress and vexation caused by the denial of the constitutional right (*Alleyne* para 41).

(8) The appropriate award does not have to be large, but it should not be nominal or derisory (*Alleyne* para 41).

(9) These are matters which *par excellence* fall within the province of the local court which is much better placed to make a judgment about the significance of the breach (*Maharaj* para 54).

(10) If a court is to make such an award it should explain what it is doing and why (*Alleyne* para 41).

The award of compensatory damages

87. The judge awarded the appellant compensatory damages in the amount of $150,000 which he found to have been the amount charged by Mr Sturge for conducting the second preliminary inquiry. This was the same fee as he had charged for the first preliminary inquiry.

88. The judge rejected the respondent's case that it was unreasonable for Mr Sturge to charge this sum, finding that Mr Sturge would have to have put in a similar amount of work for both preliminary inquiries, that the fact that in the second preliminary inquiry the matter was dismissed at a no case submission did not mean that substantial work was not done, and that, in setting the fee, Mr Sturge was not likely to have known that the matter would have been concluded in the way that it was (para 26). This was "a reasonable sum" for him to charge having regard to "the work reasonably expected to be done at the rehearing of the preliminary inquiry" (para 52).

89. At the hearing of the appeal the respondent sought to question for the first time whether Mr Sturge had actually charged or been paid his fee of $150,000, given that the preliminary inquiry had been concluded quickly. If the respondent wished to raise an issue of this kind, this should have been done before the judge. The sole issue raised before the judge was the reasonableness of Mr Sturge's fee, not whether it was in fact his fee. The judge clearly found that $150,000 was the fee being charged by Mr Sturge for the second preliminary inquiry and to suggest that he did not insist on being paid the fee he was charging is mere speculation. There is nothing unusual about a brief fee being agreed for a hearing which remains the fee payable, whether the hearing goes long or short. In any event, the Board was informed that the appellant had to give an undertaking to the judge that Mr Sturge's fee would be paid.

90. A further point raised for the first time was that credit should be given for any further fee that may have been payable for completing the first preliminary inquiry. Again, it is far too late to raise evidential points of this kind. The case and evidence before the judge was that $150,000 was the fee for each inquiry, and he so found.

91. In all the circumstances, the Board is satisfied that the judge was entitled to find that $150,000 was an appropriate amount to award as compensatory damages.

The award of vindicatory damages

92. The judge gave the following reasons for awarding vindicatory damages at para 50:

> "a. As a result of the matter having to be heard *de novo*, the Claimant was kept incarcerated for a longer period of time than he would have otherwise had been, had his matter not been reheard. It is well known, and I take judicial notice of the fact that the conditions in remand yard in Trinidad and Tobago are very unpleasant to say the least;
>
> b. At the time that his matter was aborted and a fresh hearing ordered, the Claimant would have been suffering from the possibility that his matter would have been prolonged for a further period of 5 years, given the length of time that the first hearing took. While I take judicial notice of the fact that the preliminary inquiry was disposed of within a year, at the time that the order was made, the only benchmark within which the Claimant would have had to work with was the length of time that the first preliminary inquiry had taken".

93. As to the first of those reasons, prolonged incarceration in the remand prison conditions in Trinidad and Tobago would clearly be an appropriate ground for awarding vindicatory damages (in so far as not covered by the compensatory damages). The respondent suggested that there was no evidence or allegation that the period of incarceration had been prolonged and that it was unlikely to have been, given the speed with which the second preliminary inquiry was concluded. Both the Claim Form (para 33 cited at para 26 above) and the appellant's affidavit did assert that his "incarceration had been extended" by the "colossal misstep" found by Gobin J. Even if one assumes that the first preliminary inquiry would have been concluded in no lesser period than the second preliminary inquiry, that still leaves the period of nearly two years when the appellant was reasonably challenging the decision that there had to be a *de novo* inquiry, during which time no inquiry was progressing. For reasons already given, this period of delay was caused by the "colossal misstep".

94. As to the second of those reasons, as already stated the appellant would have been suffering in this manner throughout the period from the Acting Chief

Magistrate's decision that a *de novo* hearing was required on 1 June 2017 until the second preliminary inquiry had reached the stage at which a no case submission was in prospect, nearly two years later. The respondent submitted that what matters is not how things seemed but what happened in the end. What happened in the end did not, however, alter or affect the period of nearly two years suffering which had already occurred. Mental suffering and distress of this kind and extent is clearly an appropriate ground for the award of vindicatory damages (in so far as not covered by the compensatory damages).

95. Finally, it is to be observed that none of these detailed factual arguments were raised by the respondent before the judge. All that was then stated was that this was not an appropriate case for vindicatory damages because there had been no breach of a constitutional right.

96. In all the circumstances, the Board is satisfied that the judge was entitled to find that this was an appropriate case for vindicatory damages for the reasons given by him. The amount to be awarded was *par excellence* a matter for the local court.

Conclusion on Issue (3)

97. The judge did not err in holding that the appellant was entitled to vindicatory damages and compensatory damages in the amounts he assessed.

Conclusion

98. For all the reasons set out above, the Board allows the appeal and directs that the order of the judge be restored.