Hilary Term

[2017] UKPC 12

Privy Council Appeal No 0069 of 2015

JUDGMENT

Attorney General (Appellant) v Dumas (Respondent) (Trinidad and Tobago)

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

before

Lord Kerr

Lord Clarke

Lord Wilson

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

8 May 2017

Heard on 31 January 2017

Appellant	Respondent
Thomas Roe QC	Peter Knox QC
	Robert Strang
	Ms Elaine Green
(Instructed by Charles Russell Speechlys LLP)	(Instructed by Bircham Dyson Bell LLP)

LORD HODGE:

1.
This appeal raises an important question about the jurisdiction of the High Court to hear an application by a citizen for the Court to interpret a provision of the Constitution.

2.
The respondent, Mr Dumas, as an engaged citizen with an interest in the good governance of the Republic, seeks a determination of the meaning of the phrase “qualified and experienced” in section 122(3) of the Constitution and declarations that the nomination and appointment of two persons to the Police Service Commission under that section of the Constitution were invalid because, he asserts, the nominees lacked the specified qualifications and experience. Mr Dumas claims no personal interest in

the appointments. He asserts a right as a citizen to seek the assistance of the courts in the upholding of the Constitution.

3.
In this appeal the Board is not concerned with the merits of Mr Dumas's challenge and expresses no view on the interpretation of the relevant provision of the Constitution. Its only concern is the question of the jurisdiction of the High Court.

4.
Mr Dumas is not seeking redress for a contravention in relation to himself of any of the provisions of Chapter 1 of the Constitution, which protect fundamental rights and freedoms. Accordingly, he cannot invoke the procedure to enforce those protective provisions by application to the High Court by originating motion, which section 14 of the Constitution provides. He looks elsewhere in the law for the jurisdiction of the Court.

The factual and legal background

5.
The Police Service Commission is one of the service commissions established under Part I of Chapter 9 of the Constitution. Among its important functions are the appointment of the Commissioner and the Deputy Commissioner of Police, the disciplinary control of those officers, the making of appointments on promotion, and the hearing of appeals from decisions of those officers in relation to appointments on promotion and as a result of disciplinary proceedings (section 123(1)).

6.
Section 122 of the Constitution provides that the Police Service Commission shall consist of a chairman and four other members, each of whom is appointed by the President in accordance with the procedure which that section lays down. The procedure is in three stages. First, the President, after consulting the Prime Minister and the Leader of the Opposition, nominates the individuals (section 122(3)). Secondly, the President notifies the House of Representatives of each of his nominations and that notification is subject to affirmative resolution of the House (section 122(4)). Thirdly, after the notification has been so approved, the President makes the appointment (section 122(5)). The President does not have unlimited discretion in nomination; sub-section (3) provides:

"The President shall … nominate persons, who are qualified and experienced in the disciplines of law, finance, sociology or management, to be appointed as members of the Police Service Commission." (emphasis added)

Mr Dumas founds on this provision in his challenge. He submits that section 122(3) requires the nominees to have both formal qualifications and post-qualifying experience in one or more of the stated disciplines. Mr Dumas submits that two of the four persons whom the President nominated for appointment to the Police Service Commission in September 2013, namely Mrs Roamar Achat-Saney and Dr James Kenneth Armstrong, did not have that combination of a formal qualification and post-qualifying experience.

7.
Mr Dumas commenced legal proceedings using a fixed date claim form on 10 April 2014. He sought a determination of several issues, including (i) the meaning of the phrase "qualified and experienced" in section 122(3) of the Constitution, (ii) whether the two nominees had the needed qualifications and experience and (iii) whether, as a result, the Police Service Commission was properly constituted

according to law. He sought declarations that the nominees lacked the needed qualifications and experience and that the Police Service Commission as then constituted was contrary to section 122(3) of the Constitution by reason of those purported appointments.

8.
In his affidavit, which accompanied his claim form, Mr Dumas explained that he was retired but had been Head of the Public Service and a former Ambassador and High Commissioner of the Republic. He explained why he was raising the legal challenge thus:

"My concern was not personal. I do not know Mrs Achat-Saney and am only slightly acquainted with Dr Armstrong. Nor did I judge that I would be directly affected in my individual capacity by any possible consequences of the Notifications, if approved by the House of Representatives. Rather I was and am concerned as a citizen who has for many years written and spoken publicly about the need for good governance in this society, particularly including respect for our institutions such as our Constitution, which is the highest law of the land. I am therefore acting in what I consider to be the public interest of Trinidad and Tobago."

9.
Counsel for the Attorney General raised a preliminary issue as to jurisdiction which focused on the terms of the Civil Proceedings Rules 1998 ("CPR"). Mr Dumas's counsel submitted that the claim proceeded under Part 62.2(1) of the CPR which provided: "The general rule is that applications to the High Court may be made by … (b) a fixed date claim in Form 2 where - (i) an enactment requires an application to be by originating summons, originating application or originating motion; and (ii) in any other case not falling within paragraph (a)". But counsel for the Attorney General pointed out that Part 62 of the CPR did not cover the claim because the scope of that Part was set out in Part 62.1 which provides:

"This Part deals with the procedure to be followed -

(a) when any enactment (other than the Constitution) gives a right to apply to the court; and

(b) where money is paid into court under an enactment,

unless any enactment or any other rule makes contrary provision."

He submitted that no enactment gave Mr Dumas the right to apply to the court and that Part 62.1(a) excluded any claim under the Constitution.

10.
In a judgment dated 22 July 2014 Mohammed J determined the preliminary issue by dismissing Mr Dumas's claim. He concluded that while Order 5 rule 4 of the Orders and Rules of the Supreme Court of Judicature of Trinidad and Tobago 1975 ("RSC") had allowed proceedings for the interpretation of the Constitution, the CPR, which replaced the RSC in 2005, did not. CPR Part 62.1(a) excluded such proceedings with the result that the courts could interpret the Constitution only where a claimant alleges a breach of his or her fundamental rights - ie by seeking redress under section 14 of the Constitution.

11.
Unsurprisingly, Mr Dumas challenged this ruling which was to the effect that an alteration of the court's procedural rules in 2005 had removed the right of citizens of Trinidad and Tobago to seek rulings on the proper interpretation of their Constitution, except by proceedings for redress under

section 14 of the Constitution. On 20 October 2014 the Court of Appeal (Jamadar, Bereaux and Smith JJA) heard his appeal and in an extempore summary judgment allowed the appeal, sending the matter back to proceed before the trial judge. In the summary, which Jamadar JA delivered, the Court held that there was jurisdiction to hear the claim as an administrative action under Part 56 of the CPR. Part 56.1 provides:

“This Part deals with applications -

(a) for judicial review (which includes mandamus, prohibition and certiorari);

(b) by way of originating motion under section 14(1) of the Constitution;

(c) for a declaration in which a party is the State, a court, a tribunal or any other public body; …

(2) In this Part such applications are referred to generally as ‘applications for an administrative order’.”

Part 56.7 provides that an application for an administrative order must be made by a fixed date claim which identifies whether the application is (a) for judicial review, (b) under section 14 of the Constitution, (c) for a declaration, or (d) for some other administrative order. The Court of Appeal held that if Mr Dumas had commenced the action under Part 62, the Court could remedy that error by using its power to put matters right under Part 26.8(3) of the CPR. The Court reserved to itself the right to expand on its reasons, if necessary.

12.
On 22 December 2014 the Court of Appeal set out its reasons in an impressive judgment delivered by Jamadar JA. Bereaux and Smith JJA produced a short judgment in which they concurred on all but one element of his reasoning, which element is not material to this appeal. Jamadar JA reviewed the developing jurisprudence of common law countries in the field of constitutional review and public interest litigation, including several Caribbean countries whose constitutions were similar to that of Trinidad and Tobago. He also pointed out that in the Judicial Review Act 2000 (which the Board discusses in paras 20-26 below) the legislature of Trinidad and Tobago had enacted provisions which allowed the court to grant standing to a person if the court was satisfied that the application was justifiable in the public interest. This was a codification of the common law in the field of judicial review. The Court held that Mr Dumas had an arguable case on a matter of public importance, that he was not a busybody or acting for a collateral purpose, and that he had demonstrated the competence to litigate the matters effectively. It stated that there was no established tradition in Trinidad and Tobago of the Attorney General raising proceedings in the public interest to make sure that the rule of law was observed. The citizen had a legitimate interest in upholding the Constitution and the rule of law.

13.
Jamadar JA summarised the Court’s approach in para 133 of his judgment, in which he stated:

“In our opinion, barring any specific legislative prohibition, the court, in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action; provided the litigation is bona fide, arguable with sufficient merit to have a real and not fanciful prospect of success, grounded in a legitimate and concrete public interest, capable of being reasonably and effectively disposed of, and provided further that such actions are not frivolous, vexatious or otherwise an abuse of the court’s process.”

14.
The Board is satisfied that the Court of Appeal was correct so to hold. The Board sets out its reasons for that view in the rest of this judgment.

Discussion

i) The competency of constitutional challenges: applications for an administrative order

15.
Section 2 of the Constitution provides:

“This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency.”

It is the task of the judiciary to uphold the supremacy of the Constitution and thereby the rule of law. In Bobb v Manning [2006] UKPC 22 the Board at para 12 quoted counsel’s submission that the courts should not abdicate their important function of constitutional adjudication and also his citation of the judgment of Bhagwati J in the Supreme Court of India in State of Rajasthan v Union of India AIR [1977] SC 1361 para 143 in which he stated:

“This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and, if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law.”

The Board accepted “with little or no reservation” (para 13) the role of the Trinidadian courts and the Board itself as the ultimate guardians of constitutional compliance and stated (para 14):

“The rule of law requires that those exercising public power should do so lawfully. They must act in accordance with the Constitution and any other relevant law.”

16.
Support for the existence of this jurisdiction, which extends beyond the proceedings for redress in section 14 of the Constitution, can be found in the Constitution itself, which in section 100(2) provides that the High Court is “a superior Court of record” with all the powers of such a court, including all powers that were vested in the Supreme Court of Trinidad and Tobago immediately before the commencement of the Constitution. In section 108 the Constitution includes among the constitutional questions which can be appealed as of right to the Court of Appeal “any order or decision in any civil or criminal proceedings on questions as to the interpretation of this Constitution”.

17.
How does the court come to exercise this jurisdiction? Parties, and not judges, initiate the litigation by which the courts uphold the Constitution. As the Court of Appeal has explained, in Trinidad and Tobago there is no established practice of the Attorney General raising proceedings against public authorities in the public interest (Jamadar JA para 119, Bereaux and Smith JJA para 149). Nonetheless, there are precedents of citizens approaching the court to seek rulings on the proper construction of provisions of the Constitution or for orders to enforce those provisions: Sookoo v Attorney General of Trinidad and Tobago [1986] AC 63 and Bobb v Manning (above).

18.

In the former case (Sookoo), the appellants wished to issue a writ claiming damages for negligence, which in accordance with procedural rules had to be witnessed by the Chief Justice. They raised proceedings in an originating summons to determine by declaration a question of construction of section 136(2) of the Constitution, which empowered the President to allow a judge to remain in office after reaching his compulsory retirement age to enable him to complete judicial business commenced before he attained that age. In the latter case (Bobb), the appellants, in their capacity as electors, applied for leave to apply for judicial review in an attempt to resolve the constitutional crisis of 2001-2002 by challenging the constitutional right of the then Prime Minister to retain power. While both applications failed on their merits, there was no suggestion that the court lacked jurisdiction to entertain them.

19.
Procedural rules have provided for such challenges formerly in Order 5 rule 4 of the RSC and since 16 September 2005, when the CPR 1998 came into effect, in Part 56 of the CPR: para 11 above.

20.
In the Judicial Review Act 2000 ("the 2000 Act") Parliament placed the law of judicial review on a statutory basis. Section 5(1) of the 2000 Act provides that an application for judicial review of "a decision of an inferior court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law" shall be made to the High Court. The Act allows for public interest litigation. Section 5(2) provides:

"The Court may, on an application for judicial review, grant relief in accordance with this Act -

(a) to a person whose interests are adversely affected by a decision; or

(b) to a person or a group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case."

21.
Section 6 provides that leave of the Court is required and that the Court shall not grant leave "unless it considers that the applicant has a sufficient interest in the matter to which the application relates". That notwithstanding, section 7(1) empowers the Court to grant leave to apply for judicial review of a decision if it considers that the application is justifiable in the public interest. Among the relevant factors which the Court may take into account in determining whether the application is justifiable in the public interest are (section 7(7)):

"(a) the need to exclude the mere busybody;

(b) the importance of vindicating the rule of law;

(c) the importance of the issue raised;

(d) the genuine interest of the applicant in the matter;

(e) the expertise of the applicant and the applicant's ability to adequately present the case; and

(f) the nature of the decision against which relief is sought."

22.
The 2000 Act has thus empowered the court to hear legal challenges in the public interest by means of applications for judicial review. It has given directions on some of the matters which are relevant to the exercise of the court's discretion in giving leave for such public interest applications. As well as

the traditional orders of mandamus, prohibition and certiorari, the court may grant a declaration or injunction or such other orders “as it considers just and as the circumstances warrant” (section 8(1)).

23.
The 2000 Act also contains two important restrictions on applications for judicial review. First, section 9 provides that “save in exceptional circumstances” leave shall not be granted where any other written law provides an alternative procedure to review or appeal the decision. Secondly, section 11 imposes a time limit for the application of three months from the date when the grounds for the application first arose, “unless the Court considers that there is good reason for extending the period”.

24.
During the hearing of this appeal before the Board, a question arose as to whether the 2000 Act superseded the procedure for declarations on the interpretation of the Constitution by requiring all applications for redress for the infringement of rights protected by public law to take the form of an application for judicial review. This requirement has been the general rule in English law since 1982: O’Reilly v Mackman [1983] 2 AC 237, 285D-E. This question was not debated in the courts below. But the Court of Appeal in its judgment of 22 December 2014 saw judicial review under the 2000 Act as existing alongside not only the procedure for constitutional redress provided by section 14 of the Constitution but also declarations on the interpretation of provisions of the Constitution.

25.
There are several factors which would support the view that the 2000 Act has not superseded the procedure for obtaining declarations on the interpretation of the Constitution. First, an important distinction between Trinidad and Tobago on the one hand and England on the other is that Trinidad and Tobago has a written constitution which is its supreme law and which must be interpreted. Secondly, English law does not have an equivalent to section 14 of the Constitution which itself would exclude the general rule in O’Reilly v Mackman. Thirdly, there is the precedent of the Sookoo case which was heard at a time when reforms to Order 53 in Trinidad and Tobago had enabled an application for a declaration to be made by application for judicial review. Fourthly, Part 56.1 of the CPR (para 11 above) provides for declarations against public bodies as well as applications for judicial review and claims under section 14 of the Constitution. The Board has been assisted by considering the judgment of the Court of Appeal of Belize in Belize Bank Ltd v Association of Concerned Belizeans Civ App No 18 of 2007, which was concerned with a similar procedural rule in Belize. In that judgment the Court of Appeal (Sosa, Carey and Morrison JJA) upheld a ruling that it was competent to seek declaratory relief in relation to issues of public law other than by judicial review and declined to adopt the reasoning of O’Reilly v Mackman that it was an abuse of process to proceed other than by application for judicial review. In so doing, they made the first, second and fourth points above.

26.
These factors, and the absence of an express statement in the 2000 Act that it provides an exclusive procedure, suggest that the right to seek a declaration on the interpretation of the Constitution exists alongside the right to apply for judicial review. But it is not appropriate that the Board should determine this issue without the benefit of the views of the courts of Trinidad and Tobago, nor is it necessary for the determination of this appeal. Having regard to the views expressed by the Court of Appeal concerning his application, Mr Dumas would have standing under sections 5(2)(b) and 7(1) of the 2000 Act if he had presented an application for judicial review. Further, section 13 of the 2000 Act provides:

“Where the Court is of the opinion that a decision of an inferior Court, tribunal, public body or public authority against which or a person against whom a writ of summons has been filed should be subject to judicial review, the Court may give such directions and make such orders as it considers just to allow the proceedings to continue as proceedings governed by this Act.”

Thus it would remain within the power of the trial judge in the exercise of case management powers to convert this application into one for judicial review.

ii) Further submissions

27.
The Attorney General in his written case sought to raise new arguments which had not been presented to Mohammed J or to the Court of Appeal. The Board agreed to hear the submissions de bene esse. It will rarely be appropriate for the Board to consider submissions which have not been presented to the courts in Trinidad and Tobago. But because the appeal raises constitutional issues, because the Board is satisfied that there is no substance in the new arguments and because, therefore, Mr Dumas’s counsel is not prejudiced by the late arrival of those submissions, the Board deals with them briefly.

28.
The first submission founds on the approval by the House of Representatives of the President’s notifications and the second invokes the ouster in section 38(1) of the Constitution.

The approval by the House of Representatives

29.
The Attorney General criticises the Court of Appeal for overlooking the role of Parliament. The House of Representatives had debated and approved the President’s notification of his nomination of Mrs Achat-Saney and Dr Armstrong in the knowledge that Mr Dumas had challenged their qualifications and experience. In his written case the Attorney General argued that because the House had approved the nominations, the challenge was impermissible “on ordinary separation of powers principles”. In his oral submissions, counsel for the Attorney General wisely did not press this argument as a bar to jurisdiction.

30.
In answering the submission the Board reminds itself of the basics of the Constitution. Section 1 of the Constitution provides that the Republic of Trinidad and Tobago shall be a sovereign democratic state. As already stated, the Constitution is its supreme law and “any other law that is inconsistent with this Constitution is void to the extent of the inconsistency”: section 2. The Republic is a parliamentary democracy on the Westminster model. Chapter 1 of its Constitution sets out protections for fundamental human rights and freedoms. Chapter 3 provides for the establishment of the office of President as Head of State and Commander-in-Chief. The Constitution makes provision for Parliament, comprising the President, the House of Representatives and the Senate (Chapter 4, sections 39-73), an executive (Chapter 5, section 74-89) and the judicature (chapter 7, sections 99-111). Provision is also made in Chapter 11A for a House of Assembly and Executive Council in Tobago. Parliament may amend the Constitution only by means of the enhanced majorities in both the House and the Senate specified in section 54. Like similar Westminster-style constitutions, the Constitution takes for granted that the principle of the separation of powers will apply to the exercise by the three organs of government of their respective functions. Like such constitutions, one branch of government may not trespass upon the province of any other. These principles have long been established in the

jurisprudence of the Board: Hinds v The Queen [1977] AC 195, 212B-213H; Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 302-303; State of Mauritius v Khoyratty [2007] 1 AC 80, para 11; and Brantley v Constituency Boundaries Commission [2015] 1 WLR 2753, paras 27-31.

31.
Thus, if the President, after consulting the Prime Minister and the Leader of the Opposition, nominates for appointment as members of the Police Service Commission people who meet the requirements of section 122(3) of the Constitution in terms of qualifications and experience, the court will have no legal basis under that sub-section to uphold a challenge to their nomination. Similarly, the court will have no legal ground under sub-section (4) to uphold a challenge if the House of Representatives duly resolves to affirm the notifications of the nomination of such persons. In those circumstances, the suitability of the candidates for nomination and appointment is a matter for the judgement first of the President and then of the House. But if the phrase "qualified and experienced" requires a nominee to have a formal qualification in one or more of the specified fields and confines the requisite experience to post-qualifying experience, it cannot lie in the hands of the President or the House of Representatives to waive those requirements. Appointment of persons without the required qualifications and experience would be unconstitutional; and the President's nomination and appointment of such persons would be invalid. That is the separation of powers at work.

32.
Mr Dumas seeks a legal determination of the meaning of the phrase "qualified and experienced" in section 122(3) of the Constitution. The House of Representatives cannot determine that matter. Only the courts of Trinidad and Tobago can give a binding legal judgment on the interpretation of the Constitution.

Section 38(1) of the Constitution

33.
The Attorney General's second new argument is concerned with the actions of the President in nominating and appointing Mrs Achat-Saney and Dr Armstrong. He founds on the ouster of the court's jurisdiction in section 38(1) of the Constitution which provides:

"Subject to section 36, the President shall not be answerable to any Court for the performance of the functions of his office or for any act done by him in the performance of those functions."

34.
Although counsel for Mr Dumas made submissions on the correct interpretation of the sub-section, the Board does not need to address them. Mr Knox's other point provides a complete answer to supposed ouster. The protection which the sub-section gives to the President does not prevent the courts from examining the validity of his acts. It has long been recognised that a statutory ouster clause, which provides that a determination shall not be called into question in any court of law, will not protect a purported determination from a legal challenge that it is ultra vires and therefore a nullity: Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147. Thus in Attorney-General of Trinidad and Tobago v Phillip [1995] 1 AC 396 the Board considered the validity of a pardon which the President had purported to grant during the armed insurrection in July 1990. Lord Woolf, who delivered the Board's judgment, stated (412E-G):

"Where the head of state has made a formal decision which in normal circumstances would constitute a pardon, it is important that the state should not be able to resile from the terms of that pardon except in the most limited of circumstances. … The Constitution of Trinidad and Tobago supports this

approach by providing in section 38(1) that the President shall not be answerable to any court for the performance of the functions of his office or for any act done by him in the performance of those functions. However section 38(1) does not go so far as to prevent the courts from examining, as did the courts below, the validity of the pardon." (emphasis added)

35.
In his oral submissions counsel for the Attorney General cleverly sought to finesse the two new arguments by asserting that Mr Dumas's claims went far beyond a claim of error of law and amounted to a disagreement on the quality of the nominees' qualifications. In his reply he conceded that if the nomination and appointment were ultra vires, neither the approval of the House of Representatives nor the section 38 ouster could save them. He was correct to do so. Both of the Attorney General's new arguments therefore fail.

Conclusion

36.
The Board therefore dismisses the appeal. It is the Board's provisional view that Mr Dumas should be entitled to his costs, but parties are invited to make written submissions on costs within 21 days of the delivery of this judgment.