



Michaelmas Term

[2019] UKPC 44

Privy Council Appeal No 0014 of 2019

JUDGMENT

**Attorney General of Trinidad and Tobago (Appellant) v Ayers-Caesar (Respondent)
(Trinidad and Tobago)**

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

before

Lord Carnwath

Lady Black

Lord Briggs

Lord Kitchin

Lord Sales

JUDGMENT GIVEN ON

9 December 2019

Heard on 14 November 2019

Appellant

Howard Stevens QC

Daniel Goldblatt

(Instructed by Charles Russell Speechlys LLP (London))

Respondent

Peter Knox QC

Robert Strang

Philip Judd

(Instructed by BDB Pitmans LLP)

LORD SALES: (with whom Lady Black, Lord Briggs and Lord Kitchin agree)

1.

This appeal arises out of an unfortunate dispute which has arisen between the respondent, the Judicial and Legal Service Commission (“the Commission”) and the President of Trinidad and Tobago. The President is sued in the name of the Attorney General of Trinidad and Tobago, in a representative capacity. The appeal concerns the question whether leave to bring judicial review proceedings against the President should have been granted by the courts in Trinidad and Tobago to the respondent. Leave to apply for judicial review against the Commission has also been granted, and there is no appeal in relation to that aspect of the respondent’s claim.

2.

The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, para 14. Wider questions of the public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage.

The regime in the Constitution of Trinidad and Tobago for the appointment, removal and resignation of High Court Judges

3.

The material provisions in the Constitution which are relevant for present purposes are as follows. Section 104(1) provides:

“The Judges, other than the Chief Justice, shall be appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission.”

4.

Section 137 makes provision in relation to the removal of a judge from office. Section 137(1) provides that a judge may be removed from office only for inability to perform the functions of his office or for misbehaviour. Section 137(2) provides:

“A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.”

5.

Section 137(3) provides, among other things, that the Commission may inform the President that the question of removing a Judge (other than the Chief Justice) ought to be investigated, and if it does so the President shall appoint a tribunal to enquire into the matter and report back to the President whether he should refer the question of removal of the Judge to the Judicial Committee. Section 137(4) provides that in a case covered by section 137(3) involving a Judge (other than the Chief Justice, in respect of whom a different procedure is specified) the President, acting in accordance with the advice of the Chief Justice, may suspend the Judge pending the conclusion of the investigation.

6.

Section 142 provides in relevant part as follows:

“(1) Subject to the provisions of this Constitution, any person who is appointed or elected to or otherwise selected for any office established by this Constitution ... may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed ...

(2) The resignation of any person from any such office shall take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorized by that person or authority to receive it.”

Factual background

7.

The respondent served as a magistrate from 1992. By early April 2017 she had been promoted to the position of Chief Magistrate of Trinidad and Tobago.

8.

On 12 April 2017 the respondent was appointed as a High Court Judge by the President, acting in accordance with the advice of the Commission pursuant to section 104 of the Constitution. Shortly before her appointment, the respondent was contacted by the Chief Justice, who is the Chairman of the Commission, to ask whether she had any outstanding part-heard matters as a magistrate, and she provided details of some 28 outstanding cases.

9.

After the respondent's appointment as a High Court Judge, the Acting Chief Magistrate examined the position regarding outstanding part-heard cases in matters the respondent had been dealing with as Chief Magistrate and identified some 52 cases, considerably more than the respondent had reported to the Chief Justice. The Acting Chief Magistrate drew this to the attention of the Chief Justice.

10.

On 27 April 2017 there was a meeting of the Commission, including the Chief Justice. The matters discussed and the points decided at that meeting are in dispute in these proceedings. After the meeting, on the same day, the respondent had a meeting with the Chief Justice, acting for the Commission. What was said at that meeting is also in dispute. The respondent's case is that at her meeting with the Chief Justice, he informed her that the Commission had decided that either she tender her resignation as a High Court Judge or the Commission would advise the President to revoke her appointment. This is disputed by the Chief Justice. Unusually in judicial review proceedings, there is to be cross-examination of witnesses at the hearing of the case in order to resolve the factual issues which are in dispute between the parties. On 13 November 2019 the Board dismissed the Commission's appeal against the order made by the Court of Appeal for cross-examination of witnesses.

11.

Thereafter, also on 27 April 2017, the respondent went to see the President and handed him a letter of resignation from her position as a High Court Judge. The respondent's case is that she did this under duress, by reason of illegitimate pressure put on her to resign by the Chief Justice and the Commission.

12.

Having had time to reconsider her position, by letter dated 19 May 2017 the respondent wrote to the President setting out the circumstances in which she came to resign and making allegations against the Commission, including the Chief Justice. She maintained that her resignation was the result of unlawful and unconstitutional pressure placed on her by the Commission, that the President's acceptance of her resignation, as so obtained, was also unconstitutional and that her resignation was of no legal effect. She requested that the President acknowledge that what she described as her removal from office was unlawful, unconstitutional and of no legal effect.

13.

By letter dated 14 June 2017, the President replied to say that he had received legal advice that it would be inappropriate and outside of his constitutional remit to comment on the respondent's letter of 19 May or to accede to the request she had made.

14.

In judicial review proceedings commenced on 19 July 2017, the respondent sought leave to apply for judicial review of (i) relevant decisions made by the Commission on or about 27 April 2017 to seek her resignation and regarding the course of action it would take if she did not resign, of the alleged conduct of the Commission on that date in pressuring her to resign against the threat of action by it if she did not, and of the alleged decision of the Commission to treat her purported resignation as effective; and (ii) alleged decisions of the President on 27 April 2017 to agree to accept, and then to accept, the respondent's letter of 27 April as her resignation and of his continued refusal after receipt of her letter of 19 May to set aside her resignation and reinstate her as a High Court Judge.

15.

The respondent seeks various forms of relief against the Commission and the President. The relief sought as against the President includes damages for breach of the respondent's constitutional rights and a declaration that the purported resignation of 27 April was of no effect.

16.

By judgment dated 6 October 2017, Harris J granted leave for the respondent's claim against the Commission to proceed, refused leave for the respondent's claim against the President as regards his conduct on 27 April, and granted leave for the respondent's claim to proceed against the President as regards his continued refusal to set aside her resignation and reinstate her. The President appealed against this latter ruling.

17.

In a decision dated 29 March 2018, the Court of Appeal (Mendonça JA and Jamadar JA, Beraux JA dissenting) dismissed the President's appeal and affirmed that the respondent's claim against the President should proceed in relation to his continued refusal to set aside her resignation and reinstate her. In brief summary, Mendonça JA held that it was arguable that section 142 of the Constitution does not apply in the case of an invalid resignation, that the resignation letter of 27 April was invalid because arguably procured by illegitimate pressure by the Commission, and that section 142 did not preclude further involvement by the President to determine whether a resignation was invalid if he was notified that it might be. Similarly, Jamadar JA held that it was arguable that the President was not constrained by section 142(2) from investigating the matter if the letter of resignation of 27 April was not a lawful and voluntary resignation. According to Mendonça JA and Jamadar JA, it was arguable that the President had power to reconsider his decision to receive the respondent's resignation and to investigate her allegations and it was also arguable that he had a duty to do so, without necessarily having to refer the matter to a court for decision. Both Justices of Appeal also considered that it would be in the public interest to allow the judicial review claim against the President to proceed, since the issues raised in the proceedings as to the powers and duties of the President are of importance not only to the parties to the proceedings, and to the office of the President, but also to the general public. Beraux JA dissented on the basis that, in his view, by virtue of section 142(2) as properly construed, the President did not have the power to set aside the respondent's resignation, that there was no decision of the President regarding the respondent's resignation which could be made the subject of judicial review, and that any question of the invalidity of the resignation was a matter for the courts, not the President, to decide.

18.

The President appeals to the Board against the decision of the Court of Appeal.

Discussion

19.

The Board notes the thoughtful and careful judgments of all three Justices of Appeal. However, the Board bears in mind that this appeal arises at the leave stage. The Board does not consider that the legal position regarding the President and his role is clear at this preliminary stage in the proceedings. In the Board's view, the majority in the Court of Appeal were right to find that the respondent's remaining claim against the President is properly arguable and were also entitled to find that it would be in the public interest for the issues regarding the extent of the President's powers and what role he or she ought properly to play in a case such as this to be authoritatively decided by the courts after a substantive hearing on the merits.

20.

Subject to what is said below about the procedural position of the President, that is all that it is appropriate for the Board to say about the respondent's claim. The present appeal in relation to the preliminary stage of the grant of leave to apply for judicial review is not the occasion for the Board to seek to make any definitive ruling or to lay down any definitive principles in this area. Moreover, this is very much the sort of case in which on any future appeal the Board is bound to be assisted by further detailed and definitive examination of the law and the facts of the case by the courts in Trinidad and Tobago.

21.

Mr Knox QC for the respondent made a further submission, that even in the absence of a reviewable decision on the part of the President, he was nonetheless a proper defendant to the respondent's judicial review claim. In the Board's view, this is correct. Indeed, it considers that the President is a necessary defendant in relation to that part of the claim by which the respondent seeks a declaration that her resignation of 27 April was of no effect, with the consequence that her appointment as a High Court Judge has continued to the present time.

22.

This is because the ongoing validity of the respondent's appointment as a High Court Judge is, under the Constitution, a matter as between the respondent and the President. A person's status as a High Court Judge depends upon their continuing relationship with the President. It is the President who appoints a person as a Judge (section 104(1)), who removes a Judge from office where removal is appropriate (section 137(2)), who may suspend a Judge during an investigation (section 137(4)) and who is the recipient of any resignation by a Judge (section 142). It is clear, therefore, that the President is the legal person who represents the State in the context of judicial appointments.

23.

A declaration sought from a court as relief in relation to some claim is a declaration of right as between the claimant and the relevant person who is required to respect that right. It is not possible to sue for a declaration in the abstract, without issuing proceedings against a relevant defendant. In this case, in respect of the respondent's claim that her resignation was of no effect so that her appointment as a High Court Judge has continued to the present time, the President is the relevant person who is required to respect that right and who is properly named as the defendant as regards that claim. If the respondent is right in her claim that she was subjected to illegitimate pressure when she tendered her resignation, such that it could not be treated as a resignation for the purposes of section 142(2), then even if the President had taken no decision himself and had personally done nothing wrong he would nonetheless be the proper defendant in relation to that claim. In addition, of course, it follows from the decision of the Court of Appeal which is under appeal to the Board that the respondent has arguable claims for other forms of relief against the President.

24.

For these reasons, the Board dismisses the appeal.

LORD CARNWATH: (dissenting)

25.

I agree that the President was properly joined as a party for the reasons given by Lord Sales (paras 22-23). However, this does not imply any active participation in the proceedings or anything more than a purely formal role. I am unable, with respect, to agree that the President arguably had any relevant duty or power to investigate, or otherwise respond substantively, to the respondent's letter of 19 May 2017. He was rightly advised that it was "outside of his constitutional remit" to accede to her request.

26.

I can deal with the point relatively shortly as I find myself in full agreement with the dissenting judgment of Bereaux J in the Court of Appeal. The functions of the President in respect of the judiciary are entirely the creation of the Constitution, and it is to the Constitution that one must look for the solution to this case. Mr Knox QC, for the respondent, sought to persuade us of the existence of a residual power, derived in some way from the Crown prerogative. That suggestion was not advanced below - for good reasons in my view. The clear intention and effect of this part of the Constitution are to provide a comprehensive statutory framework for the appointment, removal and resignation of the judges to which it applies.

27.

The relevant provisions have been set out by Lord Sales. The functions of the President are specifically defined. It is notable that they are all to be performed on advice, either of the Commission or the Chief Justice. There is nothing to suggest that the President has any independent power of action or investigation. More specifically section 142 makes clear that a letter of resignation takes effect on receipt, thereby (inter alia) negating any common law presumption that resignation only takes effect on acceptance (see *Marks v Commonwealth of Australia* (1964) 11 CLR 549, p 11 per Windeyer J). It is not in dispute that the respondent's letter of resignation was received by the President on 27 April 2017. There is now (following the refusal of leave by Harris J) no challenge to his failure to act at that point. The resignation thus having taking effect under that section, and in the absence of any express power of intervention, there is in my view no arguable basis for an implied duty or power on the President to act of his own motion at a later stage.

28.

Bereaux J summarised the position thus:

"... section 142(2) gives the President no discretion to refuse to accept the resignation or to set it aside (or to return it to the author). The resignation takes effect once received by the President. The President has no power whatever to set it aside. Any question as to the invalidity of the resignation will be a matter for a court of law. No decision falls to be made by him and he made none. There is no decision to review. The respondent's contention that he made a decision to continue to accept her resignation is totally misconceived. At best there is a power of re-appointment under section 143 but such a re-appointment is not at the discretion of the President. It would be exercised based on the advice of the [Commission] pursuant to section 104(1)."

I respectfully agree.

29.

The majority found assistance in the decision of the English Court of Appeal in *R v Hertfordshire County Council, Ex p Cheung* *The Times* April 4, 1986. The judgment confirmed the power of a local education authority to reopen its own decision to refuse an education grant, when it became apparent that the first decision had been based on a mistaken assumption of law (the law having been clarified in the interim by the House of Lords). Mendonça JA (at para 29) cited the words of Lord Donaldson MR:

“That is not to say that, having determined that the applicants were not qualified, the authorities had no power to reconsider their decision. I am sure that they had. It would be strange indeed if a public authority which discovered that it had inadvertently denied a citizen a benefit to which he was entitled could not correct its error. Indeed, I think that it would have a duty to consider exercising its power, although I also accept that it would have a discretion as to what action should be taken. This discretion would have to be exercised in accordance with the requirements of good public administration.”

30.

It is unnecessary to consider whether that was in all respects a correct or complete statement of the law in its own statutory context. It provides no relevant assistance in the present case. It started from a clear statutory duty to determine whether the grant conditions were satisfied. Here the President had no equivalent power or duty to decide anything. It is also unclear to me, absent any express statutory power, what mechanism the President could or should have used to resolve the factual issues which are at the heart of the present dispute. Mendonça JA (para 34) mentioned the possibility of a “timely intervention in a less adversarial setting”. That seems to suggest that the President might have undertaken some more informal, intermediary role. Whether or not that was a realistic possibility in the circumstances of this case, it does not seem to me relevant to defining the President’s statutory functions.

31.

Finally, it is not clear to me what practical purpose, whether for the respondent or the public interest more generally, has been, or will be, achieved by pursuing substantive claims against the President. Mr Knox was unable to assist. Even assuming the President might have had some residual power to investigate the complaint, following receipt of the letter of 19 May 2019, that has been overtaken by events. Once the present proceedings were launched it was clear that the underlying disputes would ultimately have to be resolved by the court. The President was not a party to that dispute, other than in a formal sense, and his involvement can do nothing to assist its determination.

32.

For these reasons, while I agree with the majority of the Board that there was no objection to joinder of the President as such, I do not accept that there is any arguable basis for the substantive claims against the President.