
**Trinity Term**

[2021] UKPC 17

**Privy Council Appeal No 0090 of 2018**

**JUDGMENT**

**Duncan and Jokhan ( Appellants ) v Attorney General of Trinidad and Tobago ( Respondent ) (Trinidad and Tobago)**

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

**before**

**Lord Briggs**

**Lady Arden**

**Lord Sales**

**Lord Hamblen**

**Lord Leggatt**

**JUDGMENT GIVEN ON**

**12 July 2021**

**Heard on 2 February 2021**

| Appellants | Respondent |
| --- | --- |
| Anand Beharrylal QC<br>Siân McGibbon<br>Joshua Hitchins<br>Kenneth Thompson | Tom Poole |
| (Instructed by Alvin Pariagsingh (Trinidad)) | (Instructed by Charles Russell Speechlys LLP (London)) |

**LORD SALES:**

1.
This appeal is concerned with the effect of an error in legal approach by the Court of Appeal when dealing with the sentencing of persons convicted of criminal offences, as the appellants were in this case. Had the Court of Appeal followed the correct legal approach, it would have directed that the appellants should be released at an earlier date than it in fact stipulated. As a result of this error the appellants were imprisoned for a substantial period after the date on which they should have been

released. They then issued a constitutional motion claiming that there had been a violation of their right to liberty and security of the person, and not to be deprived thereof except by due process of law, as guaranteed by section 4(a) of the Constitution of Trinidad and Tobago ("the Constitution") and seeking orders for their immediate release and for payment of compensation. The principal issue in the appeal is whether in the circumstances of the case there was a violation of the appellants' rights under section 4(a) of the Constitution ("section 4(a)") which arose by reason of the error committed by the Court of Appeal. It is also necessary to examine what remedy was available to the appellants, whether for violation of their constitutional rights or otherwise.

2.
Sections 4 and 14 of the Constitution appear in Chapter 1, entitled "The Recognition and Protection of Fundamental Human Rights and Freedoms". They provide in relevant part as follows:

"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; …

14(1) 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.

(2) The High Court shall have original jurisdiction- (a) to hear and determine any application made by any person in pursuance of subsection (l); and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

…

(5) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal and shall be entitled as of right to a stay of execution of the order and may in the discretion of the Court be granted bail.

…"

3.
The issue in this appeal arises from the application and effect of section 49(1) of the Supreme Court of Judicature Act (Chap 4:01) ("section 49(1)"). It provides:

"The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary to any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court of Appeal, shall, subject to any directions which may be given by the Court of Appeal, be deemed to be resumed or to begin to run, as the case

requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence."

Factual background and the judgments below

4.
On 4 June 1999 the appellants were both convicted of serious criminal offences and sentenced to 15 years' imprisonment. The details of the offences are not material for present purposes. By notices of appeal issued on the same date, 4 June 1999, each of them appealed against his conviction and sentence. They remained in custody pending the determination of their appeals.

5.
By a judgment dated 30 November 2001, the Court of Appeal allowed the appellants' appeals against conviction in part, but affirmed the sentences which had been imposed. This is the point at which it is agreed that an error occurred.

6.
Section 49(1) sets out a general rule that where a person convicted of a criminal offence appeals against their conviction or sentence and is unsuccessful, the time they have spent in prison waiting for their appeal to be heard does not count towards their sentence, with the result that the Court of Appeal should give a direction to that effect ("a loss of time direction"). However, section 49(1) also confers a discretion on the Court of Appeal in such a case to direct that, notwithstanding the general rule, credit should be given for that period in prison in calculating the period remaining to be served under their sentence.

7.
On the basis of the judgments of the Board in Ali v The State [2005] UKPC 41; [2006] 1 WLR 269 ("Ali") and Bhola v The State [2006] UKPC 9 ("Bhola"), it is agreed that the Court of Appeal should have considered of its own motion whether to exercise its discretion under section 49(1) in the appellants' cases. Section 49(1) is substantially the same as a provision in the English Criminal Appeal Act 1907 and Lord Carswell, giving the judgment of the Board in Ali, considered the history of that legislation and the practice of the courts under it. He then gave guidance (paras 16-17) regarding the proper practice to be adopted under section 49(1) and equivalent provisions. Where an appeal is brought and fails, the Court of Appeal "should consider in each case in the light of the relevant facts whether to exercise its discretion to backdate the sentence" and should do so bearing in mind the rationale and objective of the provision and to ensure that any decision by which it is determined there should be a loss of time "should be proportionate, that is to say, it should impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant."

8.
In the present case it is common ground that the Court of Appeal failed to consider the exercise of its discretion under section 49(1) as it should have done. Instead, it simply applied the general rule in section 49(1) and gave a loss of time direction to the effect that the appellants' sentence of imprisonment should start to run only from 30 November 2001, meaning that the time spent by them in prison waiting for their appeal to be heard did not count towards their sentence. The appellants' appeals were not frivolous or vexatious and there was no proper ground on which they should have been penalised for bringing them by a loss of time direction given by the Court of Appeal.

9.

It is also common ground that, if the Court of Appeal had considered whether to exercise its discretion under section 49(1), it would have been obliged to direct that the time the appellants spent in prison between commencing their appeals against conviction and sentence on 4 June 1999 and the giving of judgment by the Court of Appeal on 30 November 2001, some 29 months, should count towards their sentence. The effect of such a direction would have been that the expiry of the appellants' sentences was calculated as from the date they were imposed by the trial judge. Calculated in that way, with due allowance for reduction of sentence for good behaviour, the appellants should have been released on 4 June 2009. By contrast, on the approach adopted by the Court of Appeal, the appellants' due date of release was postponed to 30 November 2011.

10.
According to a statement made in correspondence, the first appellant applied for special leave to appeal to the Board but it was refused. The Board has not been able to trace any record of this. The appellants have not provided any evidence about when the application was made, what the basis for it was or what happened in relation to it. The Board does not consider it likely that, if an application for special leave was made, it raised the point now made in relation to misapplication of section 49(1) by that court, and in the Court of Appeal it was conceded on behalf of the appellants that they had not made any relevant application for special leave. The Board therefore proceeds on the footing that the appellants did not apply for special leave to appeal on that issue.

11.
According to affidavits filed by the appellants, they learned of the Board's judgment in Bhola from contact they had with Mr Bhola, who served time in prison with them. The appellants do not say when they learned this, nor do they explain why there appears to have been a significant delay between the handing down of the Bhola judgment on 30 January 2006 and further action taken by them to challenge the loss of time direction given by the Court of Appeal in their cases. A considerable period elapsed between the judgments in Ali and Bhola being handed down and the appellants' complaint about their continued detention in 2010. It may be that this is because of difficulties experienced by the appellants in gaining access to legal advice and representation. However, in light of the Board's analysis of the legal position set out below, it is not necessary to examine or reach conclusions about the reasons for this delay.

12.
On 23 March 2010 the attorney for the first appellant wrote to the Attorney General to complain about his client's continued imprisonment. He received no reply. By letters dated 21 June 2010 from the attorney (who was now acting for both appellants) to the Attorney General, written pursuant to the Pre-Action Protocol, the appellants complained, among other things, that their rights under section 4(a) had been contravened, referred to Ali and Bhola and asked that they be released forthwith and be paid compensation for the period they spent in prison beyond their proper release date of 4 June 1999.

13.
By letters dated 5 July 2010 the Solicitor General's Department sent a short reply behalf of the Attorney General to each appellant, saying that the proposed claim would constitute an abuse of process and denying that the facts stated disclosed a breach of a constitutional right.

14.
On 3 March 2011 the appellants issued a constitutional motion seeking (i) a declaration that their imprisonment from 5 June 2009 to 3 March 2011 contravened their rights under section 4(a), (ii) an

order directing their immediate release from prison, and (iii) an order for monetary compensation. The respondent, the Attorney General, disputed the appellants' claims on the basis that they could have appealed to the Board in relation to the failure of the Court of Appeal to consider the exercise of its powers under section 49(1) or could have brought their constitutional motions more promptly, in time to vindicate their rights and have the error of the Court of Appeal corrected before it had any practical impact in terms of the period they spent in prison.

15.
The appellants' constitutional motion was heard before Harris J on 26 September 2013. By his judgment of that date, the judge accepted the appellants' submission that the Court of Appeal had committed an error of law by failing to consider the exercise of its discretion under section 49(1). However, he dismissed their constitutional claim in its entirety. He did so on the basis that the right in section 4(a) is a right that the justice system as a whole should be fair, not that it should operate infallibly and without error. In this case the system itself was fair, because it provided the appellants with a right to appeal to the Board against an error of law committed by the Court of Appeal and the appellants had had ample time to exercise that right of appeal before the decision of the Court of Appeal had any practical impact (as from 4 June 2009) in terms of extending the time they spent in prison. On the same basis, Harris J held that the appellants' constitutional motion was an abuse of process and struck it out. The appellants appealed to the Court of Appeal.

16.
The Court of Appeal (Mendonça, Bereaux and Rajkumar JJA) dismissed the appeal. The sole substantive judgment was given by Mendonça JA, with which the other justices agreed. Mendonça JA noted that the judgments of the Board in the Ali case and the Bhola case had been handed down after the decision of the Court of Appeal in this case on 30 November 2001. However, like Harris J, he held that the Court of Appeal had erred in law by failing to consider the exercise of its discretion under section 49(1) and that if it had considered this, it would have been bound to direct that the time spent by the appellants in prison waiting for their appeal to be heard should count towards the service of their sentence.

17.
Mendonça JA referred to relevant judgments of the Board in Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385 ("Maharaj (No. 2)") and Independent Publishing Co. Ltd v Attorney General of Trinidad and Tobago [2005] 1 AC 190 ("Independent Publishing") and of the Court of Appeal in Civ. App. 57/2013 Desmond Renne v Attorney General ("Renne"). In the latter decision, the court had considered the position in a similar case concerning the failure of the Court of Appeal to consider exercising its discretion under section 49(1) to direct that time spent in prison waiting for the hearing of an appeal should not count towards the sentence and had concluded that this represented an error in the particular case rather than demonstrating that the system as a whole was unfair. Mendonça JA came to the same conclusion in the present case. The system as a whole allowed for correction of the error and was therefore fair, since there was the possibility of an appeal to the Board to correct what the Court of Appeal had done. The fact that there had been a delay between the filing of the appellants' constitutional motion, before their sentences (according to the loss of time direction given by the Court of Appeal on 30 November 2001) came to an end, and its hearing, after that time, did not show that the system as a whole was unfair. That was so even though, on an appeal to the Board, it would not be possible to claim damages for any unjustified period of detention. The Court of Appeal overruled two High Court decisions which had held that prisoners' rights under section 4(a) of the Constitution had been violated in circumstances like those in this case: CV

2010-03410 Bhola v Attorney General (“Bhola (High Court)”) and CV 2012-05135 Wiggins v Attorney General.

18.
The appellants now appeal to the Board.

The authorities

19.
It is appropriate to begin by considering the leading judgment of the Board in Maharaj (No. 2). That case concerned a barrister wrongly committed to prison for seven days for contempt of court by order of a High Court judge, Maharaj J, in circumstances where there had been a breach of natural justice by reason of a failure to give proper notice of the charge relied on. There was no right of appeal to the Court of Appeal in a case involving committal for contempt, but an appeal lay to the Board, though only with special leave; and it would have taken time to apply for such leave and for that application and any application for a conservatory order to be considered by the Board. So the appellant sought an immediate means of collateral attack on the judge’s order, and on the day of his committal he applied to the High Court ex parte by constitutional motion relying on what is now section 4(a) (which at the time was section 1(a) of the version of the Constitution then in force: I will refer to this provision using the current numbering) claiming his immediate release and an order that the Attorney General pay damages in respect of his wrongful detention. The ex parte application came before Braithwaite J who considered that the appellant had made out a prima facie case of contravention of his right under section 4(a) and granted immediate interim relief in the form of a conservatory order for the appellant’s immediate release, which was given effect after he had suffered imprisonment for part of the day. However, about a month later the appellant’s substantive motion came before another High Court judge, Scott J, who dismissed it and reinstated the committal order and required the appellant to serve out the outstanding part of that order in prison. The appellant appealed to the Court of Appeal against that ruling and in the meantime obtained special leave to appeal to the Board against the committal order made by Maharaj J. The Board gave judgment first, setting aside that committal order. After that, the Court of Appeal gave judgment holding, among other things, that the breach of the rules of natural justice by Maharaj J did not constitute a violation of section 4(a). The appellant again appealed to the Board. That appeal also was successful. The Board held that a motion claiming a violation of constitutional rights could be brought in the High Court, even though that might involve one High Court judge ruling upon something done by another High Court judge; the Attorney General was rightly sued for breach of constitutional rights as the party appropriate to represent the state; Maharaj J had breached the appellant’s right under section 4(a) by committing to him to prison on a charge of which no proper notice had been given, which involved a failure to observe one of the fundamental rules of natural justice; and the case was remitted to the local courts for monetary compensation to be assessed. In the present context it merits emphasis that the Board found there was a violation of the appellant’s right under section 4(a) even though he had a right of appeal to the Board with special leave against the order of Maharaj J, which he was eventually able to exercise, and even though the Board would have had power to grant bail itself in connection with such an appeal.

20.
However, Lord Diplock, giving the judgment of the Board, was at pains to explain the limits of the right under section 4(a) so as to ensure that constitutional claims should not supplant or circumvent the remedial routes already available as a matter of the ordinary general law (pp 399-400):

"… no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by [section 4(a)]; and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice.

…

… even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 [now section 14 of the Constitution] unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6(l) [now section 14(1)] with a further right of appeal to the Court of Appeal under section 6(4) [now section 14(5)]. The High Court, however, has ample powers, both inherent and under section 6(2) [now section 14(2)], to prevent its process being misused in this way; for example, it could stay proceedings under section 6(1) [section 14(1)] until an appeal against the judgment or order complained of had been disposed of."

21.
In these passages, Lord Diplock emphasised that the proper route to challenge a decision of a court imposing a punishment which is said to involve some error of law is to appeal, and that this remedial route should be given priority as against any constitutional claim which sought in substance to raise the same issue. However, he also recognised that there may be cases where a punishment such as imprisonment might take effect before an appeal could be heard where a constitutional claim might then be the appropriate means for seeking relief on the basis of a complaint of violation of rights under section 4(a). That was what had happened in the case at hand. The appellant only had a right of appeal to the Board, not to the Court of Appeal, and by the time he had applied and obtained special leave to appeal and his appeal had been heard and upheld, he had already suffered the full punishment imposed on him by Maharaj J in breach of a fundamental principle of justice and hence in violation of his right under section 4(a). The appellant was, accordingly, entitled to seek monetary compensation under the Constitution for the violation of that right. On this approach, section 4(a) and what is now section 14(1) of the Constitution, taken together, provide a supplementary or gap-filling right of redress in cases falling within the scope of section 4(a) in relation to which the ordinary existing legal regime does not sufficiently protect the interests which that provision states should be protected "by due process of law". Lord Hailsham of St Marylebone delivered a dissenting opinion in which he explained he would have dismissed the appeal and questioned (p 406) the validity of drawing distinctions between different types of unlawfulness in the context of considering the ambit of section 4(a).

22.

The point that constitutional claims should not supplant or circumvent claims for relief according to ordinary general law was emphasised again in Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15; [2006] 1 AC 328, in a judgment delivered by Lord Nicholls of Birkenhead. Lord Nicholls explained (para 23), with reference to Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265, that a court has a discretion whether to grant relief pursuant to a constitutional claim and gave guidance (para 24) as to how that discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant, explaining that it will be an abuse of the section 14 procedure (involving an application to the High Court for relief in respect of infringement of a constitutional right) if it is invoked solely as a substitute for an application in the normal way for an appropriate judicial remedy for unlawful action by a public authority. At paras 25-26 he said:

“25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

26. That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But ‘bona fide resort to rights under the Constitution ought not to be discouraged’: Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.”

23.
The protection of liberty and the security of the person by law is, by long tradition, recognised as a fundamental value in the common law and this is reflected in the Constitution. It is also recognised as a fundamental value in international human rights instruments including the European Convention on Human Rights and the International Covenant on Civil and Political Rights (“the ICCPR”) with which Chapter 1 of the Constitution has a close affinity: Minister of Home Affairs v Fisher [1980] AC 319, 328-330. Lord Bingham summarised the position in A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68 (the so-called Belmarsh case) at para 36:

“In urging the fundamental importance of the right to personal freedom … the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day. Recent statements, not in themselves remarkable, may be found in In re S-C (Mental Patient: Habeas Corpus) [1996] QB 599, 603 and In re Wasfi Suleman Mahmod [1995] Imm AR 311, 314. In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom. In Kurt v Turkey (1998) 27 EHRR 373, para 122, it referred to ‘the fundamental importance of the guarantees contained in article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities’ and to the need to interpret narrowly any exception to ‘a most basic guarantee of

individual freedom'. In Garcia Alva v Germany (2001) 37 EHRR 335, para 39, it referred to 'the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned'. The authors of the 'Siracusa Principles', although acknowledging that the protection against arbitrary detention (article 9 of the ICCPR) might be limited if strictly required by the exigencies of an emergency situation (article 4), were none the less of the opinion that some rights could never be denied in any conceivable emergency and, in particular (para 70 (b)), 'no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge ...'."

The Constitution has to be interpreted bearing in mind the importance of these values.

24.
The Board again considered the meaning and effect of section 4(a) in Independent Publishing. In that case, the judge at a criminal trial made an order prohibiting the publication of certain matters. Two journalists breached that prohibition and were convicted by the judge for contempt of court. One (Mr Ali) was sentenced to 14 days' imprisonment and the other was fined. They appealed against their conviction and sentences, and Mr Ali was granted bail the day after his appeal was lodged, after he had spent four days in prison. Together with newspaper publishers affected by orders made by the judge, they also brought proceedings under section 14 of the Constitution relying on their rights under section 4(a), among other provisions. The constitutional motions were dismissed and the publishers and journalists appealed. The Court of Appeal heard the various appeals together and, so far as is relevant for present purposes, allowed Mr Ali's appeal against his conviction (and quashed his sentence) and also allowed his constitutional appeal based on section 4(a) and made an order for damages to be assessed for the time he had spent in prison before being released on bail. The Attorney General successfully appealed in respect of the constitutional relief awarded to Mr Ali.

25.
The judgment of the Board was delivered by Lord Brown of Eaton-under-Heywood. Lord Brown clarified the effect of the judgment in Maharaj (No. 2), explaining (para 87) that a critical feature in that case was that the appellant had no right of appeal to the Court of Appeal against his committal and therefore had no right to apply for bail pending such appeal and (para 88) that, where there was no avenue of redress (save only an appeal by special leave direct to the Board), then it was appropriate to characterise the legal system as unfair, and to identify a breach of the fundamental human right identified by Lord Diplock to "a legal system … that is fair"; by contrast, Mr Ali had had a right of appeal and had been able to secure his release on bail promptly using the ordinary local avenue of redress available to him, which meant that the legal system as a whole was fair. Lord Brown pointed out (para 89) that Mr Ali was in a position no different from that of a person convicted of any other offence, who has a right of appeal and who, even if successful on such appeal, cannot seek constitutional relief in respect of time spent in prison. He referred to Hinds v Attorney General of Barbados [2001] UKPC 56; [2002] 1 AC 854 ("Hinds"), and in particular to this statement by Lord Bingham at para 24:

"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision … The applicant's complaint was one to be pursued by way of appeal against conviction, as it was …"

Lord Brown also referred to Forbes v Attorney General of Trinidad and Tobago [2002] UKPC 21 ("Forbes"), in which Hinds had been followed. Lord Brown further explained (para 93) that, now that rights of appeal existed, the Board saw little reason to maintain the distinctions drawn in Maharaj (No. 2) between fundamental breaches of natural justice, mere procedural irregularities and errors of law, which were not satisfactory and had been the subject of criticism by Lord Hailsham in his dissenting opinion in Maharaj (No. 2).

26.
The Hinds case concerned a claim for constitutional relief under the constitution of Barbados, which includes a right similar to that in section 4(a) at issue in this case. The claimant had been subject to a criminal trial at which he had wrongfully been denied legal aid by the judge and had been convicted. On appeal, he was represented by counsel and the Court of Appeal had power to allow an appeal and order a retrial if the interests of justice so required, and there was the possibility of a further appeal to Her Majesty in Council. In the judgment of the Board (para 19), the ordinary processes of appeal offered the claimant an adequate opportunity to vindicate his constitutional right. The claimant's complaint regarding the unfairness of his trial was one to be pursued by way of appeal against conviction, as it had been, and his appeal having failed he could not try to raise the same issue again in fresh proceedings under the equivalent of section 14 of the Constitution (see para 24, part of which has been quoted above).

27.
In Forbes, the appellant had been convicted of a serious offence and his appeal to the Court of Appeal was dismissed. He made a further appeal against conviction to the Board which was successful, after he had served some 11 months of his sentence in prison. The appellant subsequently brought a constitutional claim complaining of violation of his rights under section 4(a) which also went on appeal to the Board. It was dismissed. Lord Millett said (para 18):

"[The authorities] establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Board. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed ..."

28.
The Court of Appeal in the present case followed its previous judgment in Renne. In that case, a person convicted of serious crimes brought an appeal which was partially successful, but the Court of Appeal in the criminal proceedings failed to consider the exercise of its discretion under section 49(1) and gave a loss of time direction. The result of this error was that the appellant was only released on 7 May 2008 whereas he should have been released on 6 February 2007. In 2012, after serving this additional time in prison, the appellant brought a constitutional claim relying on Ali and Bhola and complaining that his rights under section 4(a) had been violated. His claim was dismissed at first instance and his appeal was dismissed. Bereaux JA gave the main judgment in the Court of Appeal, with which Smith and Jones JJA agreed. Bereaux JA held that the proper course for the appellant was

to appeal against the sentence as imposed by the Court of Appeal in the criminal proceedings by special leave to the Board, pursuant to section 109(3) of the Constitution; that this afforded the appellant a sufficient opportunity to have his sentence reduced to satisfy his right to due process under section 4(a); and, the appellant not having exercised that right of appeal, even after the judgment in Ali was handed down, it was an abuse of process for him later to challenge the extra time served in prison by way of constitutional motion. Bereaux JA considered that the judgment of the Board in Independent Publishing, at paras 89-93, provided a complete answer to the appellant's case.

29.
The Court of Appeal in Renne disapproved the judgment of Gobin J in Bhola (High Court). That was a constitutional claim brought by Mr Bhola in the High Court after his success on his appeal to the Board in Bhola. Mr Bhola was released on bail when he was granted special leave to appeal to the Board, but by then he had already served three more months in prison than he should have done. Gobin J addressed the issue which arises in this appeal, namely whether a constitutional claim lies under section 4(a) together with section 14 where a prisoner has served additional time in prison in circumstances where the Court of Appeal failed to consider the exercise of its discretion under section 49(1) on an appeal against conviction or sentence which is unsuccessful. She sought to follow the approach in Maharaj (No. 2), as explained in Independent Publishing, and held that there had been a violation of Mr Bhola's right under section 4(a) with the result that he was entitled to compensation. He was entitled to redress under the Constitution because, like the appellant in Maharaj (No. 2), he had no right of appeal and therefore no immediate access to bail at the local level.

30.
According to Bereaux JA in Renne, however, at para 25, "[i]n so far as [Mr Bhola] spent three months more in prison than he should have, unfortunate though it is, it is a manifestation of the fact that our legal system though fair, is not free from error." In his view (para 27), since "[a] right of appeal to a higher court [ie the Board] existed throughout", the defining factor in Maharaj (No. 2), as identified in Independent Publishing, to justify a finding of violation of section 4(a), namely the absence of a right of appeal and the consequent inability to apply for bail, was not present; the result was that Mr Bhola had been afforded due process as required by section 4(a).

Discussion

31.
There clearly was no violation of section 4(a) at the point at which the Court of Appeal hearing the appellants' appeals against conviction and sentence had to consider what to do pursuant to section 49(1). The legal system, as it operated at that stage, made it possible for the law to be applied properly and with due respect for the right to liberty and security of the person which due process of law was supposed to provide. Had the Court of Appeal understood the principles according to which section 49(1) should be applied, it would have directed itself in line with the guidance in Ali and Bhola and would have exercised its discretion in favour of the appellants accordingly. Further, counsel for the appellants had the opportunity at that stage to make submissions to the court regarding the proper application of section 49(1). Therefore, the legal system as a whole could not possibly be said to be unfair at this stage.

32.
It seems to the Board that the position might have been otherwise if the legislation made the general rule in section 49(1) a mandatory blanket requirement with no possibility of relaxation, since the effect of that would have been tantamount to making the legitimate exercise of appeal rights in

circumstances where the appeal was unsuccessful into a punishable offence. Although the analysis in Ali was directed to section 49(1) and the Board did not need to address constitutional arguments which were raised in the appeal, the reasoning of the Board tends to support the view that a mandatory blanket requirement to issue a loss of time direction in every case would have been incompatible with section 4(a).

33.
As it is, it is true that, as the Attorney General accepts, the Court of Appeal failed to apply the law correctly, but that is simply an example of an error in a particular case rather than an illustration of unfairness in the system as a whole. As the authorities reviewed above make clear, the fact that a judicial error has resulted in a person being imprisoned for a period when they should not have been does not in itself show that the legal system as a whole is unfair.

34.
As regards the loss of time direction given by the Court of Appeal, the appellants were essentially in the same position as any other person convicted and sentenced by a court in criminal proceedings, so far as concerns their ability to challenge the decision and have it set aside. They had a legitimate case that the Court of Appeal had erred in law so that its direction ought to be set aside and they had available to them the usual ability to appeal in relation to the Court of Appeal's decision. The authorities referred to above make it clear that there is no violation of section 4(a) which arises from the fact that an appeal has to be brought to correct a legal error committed by the Court of Appeal as to conviction or the imposition of a sentence, where the appellant spends time in prison between the decision under challenge and the decision of the Board setting that decision aside. As explained in the authorities, the ability to appeal is the manner in which the legal system as a whole affords protection to the right to liberty and security of the person by due process in that type of situation so far as concerns the need to ensure that the order of the court is quashed and deprived of legal force.

35.
The Constitution affords no general right to be paid compensation by reason of the fact that the offending order was given effect for a period of time before being corrected. In that respect, the position under the Constitution is in line with the general position in the common law tradition and under the European Convention and the ICCPR, and indeed is similar to that in most, if not all, legal systems. The judgment of the Board in Independent Publishing reinforces this analysis, since it makes it clear (para 93) that the scope of application of section 4(a) does not depend upon the nature of the legal error committed by the lower court.

36.
On the other hand, the judgments of the Board in Maharaj (No. 2) and Independent Publishing make it clear that this is not the whole picture. According to the tradition explained by Lord Bingham in the Belmarsh case, by virtue of the fundamental nature of the right to liberty and security of the person and its due protection by law it is of great importance that an individual who is detained and claims the detention is unlawful should be able to come to court very quickly to test the matter and secure their prompt release if there is no proper or sufficient justification in law for their detention. That was the objective of the habeas corpus statutes, and the value accorded by them to vindicating the right of liberty has been recognised by the common law over centuries. It is also inherent in the European Convention and the ICCPR. Similarly, it has been identified by the Board in Maharaj (No. 2) and Independent Publishing as inherent in the Constitution, particularly as reflected in section 4(a) and section 14. The ability to apply promptly for bail where a court has ordered detention of an individual is the functional equivalent of a prompt application for habeas corpus in other contexts involving

detention. In the Board's view, having regard to the guidance in the Ramanoop case, the attempt by the appellants to invoke their constitutional rights to achieve their immediate release from detention clearly did not involve any abuse of process.

37.
The ability to apply for bail allows for a proper balance to be struck between liberty of the person and due application of the law in a context where a court has given a ruling and made an order for detention, but may have committed a legal error in doing so. Upon an application for bail, the court hearing the application has to make a decision in circumstances involving some degree of uncertainty as to whether it will eventually be found on appeal that the court making the order for detention did in fact err. In deciding whether bail should be ordered, the court may have regard to the degree to which the error alleged by the individual is serious and obvious.

38.
Two points may be made. First, the legal system as a whole will be unfair and there will be a breach of the right under section 4(a) if there is no avenue allowing a prompt application for bail to be made and heard pending the hearing of an appeal against conviction or sentence, in order to provide the possibility for speedy release where it can readily be identified that a court has made a serious error of law. The possibility of combining an application for bail with an application to the Board for special leave to appeal - whether against a first instance judgment, as in Maharaj (No. 2), or a judgment of the Court of Appeal, as might have been done in Ali, Bhola and in the present case - will not be sufficient, because of the delay involved in getting before the Board to have the issue of bail tested. The Board has a constitutional role as the final court of appeal across a large range of jurisdictions and the demands on it are many and various. It is neither feasible nor appropriate to expect it to operate as the front line in dealing with habeas corpus or bail matters. Thus, in Maharaj (No. 2), even though there was a right of appeal to the Board with special leave and the Board would have been able to grant bail in connection with such an appeal, the Board clearly considered that Braithwaite J had been entitled to make a conservatory order pursuant to section 4(a) of the Constitution for the immediate release of the appellant. Applied in that way, the "due process of law" obligation in section 4(a) operated to fill a gap in the general law by providing at local level what can be regarded as a form of constitutional habeas corpus or its equivalent, a right to apply for bail. Accordingly, with respect, the Board cannot endorse the reasoning of Bereaux JA in Renne at para 27, referred to above.

39.
Secondly, in so far as a claimant seeks to rely on a violation of section 4(a) as the basis for a claim for monetary compensation pursuant to section 14 of the Constitution, as distinct from immediate release (bail), he or she would have to show that the absence of the ability to apply for bail had caused them loss. To do that they would have to show (a) that they would have moved to apply for bail, if afforded the opportunity, and (b) that they would have obtained bail if they had been able to apply for it.

40.
As regards (a), whilst the absence of a right to apply for bail pending the hearing of an appeal (or other relevant legal challenge to an order for detention, eg by way of judicial review) constitutes a general problem with the legal system as a whole, it is only at the point when an individual would have wished to exercise such a right that he or she is denied "due process of law" to protect their liberty and security of their person. In the present case, the appellants in fact had an opportunity to apply for immediate release (bail) throughout the period of their detention after 4 June 2009 relying on their constitutional rights and the judgments of the Board in Ali and Bhola and, more particularly, Maharaj (No. 2) and Independent Publishing, but did not do so. It was only by letter dated 23 March

2010 that the first appellant sought immediate release and only by letter dated 21 June 2010 that the second appellant did so: see para 12 above. It could not be said that they would have applied more promptly had they been able to rely on a right under the general law to seek bail as opposed to a right under the Constitution to do so. Accordingly, it is only as from these dates that the appellants can say that their constitutional rights to protection by "due process of law" under section 4(a) came to be infringed in their particular cases. They suffered a personal violation of their constitutional rights at those times by reason of the inability of the ordinary legal system to react to their complaints of unjustified detention when they made them, and this entitled them to seek to vindicate their right to liberty at that point by asserting their rights under the Constitution. They are not able to show that they were in any way deterred from seeking their release before then by the state of the law and have not attempted to do so. To the extent that they could have applied for immediate release at an earlier stage but failed to do so, that is a consequence of them failing to enforce their rights rather than being denied relevant rights under the law or the legal system being unfair.

41.
As regards (b), whilst any alleged error of law is potentially relevant when assessing whether there has been a violation of section 4(a) (see Independent Publishing, para 93), the majority of the Board in Maharaj (No. 2) was right to emphasise the fundamental nature of the breach of natural justice which had occurred in that case as something which was relevant to whether relief should be granted pursuant to what are now section 4(a) and section 14 of the Constitution. It was clear that there had been an obvious and serious legal error which affected the liberty of the appellant, and on an application for immediate release (bail) pending the hearing of an appeal against the detention order made in his case he should have been released. That is indeed what Braithwaite J ordered pursuant to the relevant provisions of the Constitution and the Board considered that he was right to do so. In other cases, by contrast, a court considering an application for bail pending appeal may be disinclined to grant it if the alleged legal error by the court is not obvious and other factors militate against such grant. Again, however, it should be pointed out that the absence of a right to apply for bail means that the individual is deprived of the opportunity to seek to persuade a court that the error is serious or obvious enough to warrant the making of an order to restore their liberty straightaway. The right to "due process of law" under section 4(a) is a right to be able to have the question of immediate release pending the hearing of an appeal tested before a court, not a right in every case to be released pending the hearing of the appeal.

42.
In the present case, once the Court of Appeal had given its loss of time direction on 30 November 2001 it was functus officio and there was no means, other than by constitutional motion, by which the appellants could apply locally for their immediate release. Mr Tom Poole, for the Attorney General, submitted that this does not matter and that the legal system as a whole was fair because after the Court of Appeal gave that direction it was open to the appellants to appeal to the Board with special leave to have it set aside and they had ample time to do so before it began to have a material impact on them from 4 June 2009. He also sought to support the reasoning of Bereaux JA in Renne.

43.
In the Board's view, these submissions must be rejected. The failure of the Court of Appeal to consider the exercise of the discretion conferred by section 49(1) and its decision to give a loss of time direction in relation to the appellants had a particularly severe effect on their right to liberty and security of the person, a core interest of individuals protected by the Constitution. They were penalised by imposition of an additional period of imprisonment for bringing proper and legitimate

appeals, which in context amounted to a form of arbitrary detention without justification. By failing to consider the exercise of its discretion under section 49(1), the Court of Appeal treated the provision as though the general rule was a blanket requirement to give loss of time directions in every case and thereby prevent time in prison awaiting the hearing of an appeal from counting towards sentence. It was in recognition of the severe interference with the right to liberty and security of the person of individuals appealing in criminal cases arising from automatic application of the general rule in section 49(1) that the Board in Ali and Bhola held that the Court of Appeal in criminal proceedings has an obligation to consider, of its own motion, the exercise of its discretion under that provision to ensure that any loss of time imposed on an appellant is justified and proportionate to the legitimate interest of the state in the efficient operation of the criminal justice system.

44.
The appellants in those cases could have asked the Court of Appeal to consider the exercise of its discretion and did not, yet that did not prevent there being an error by the Court of Appeal which fell to be corrected on appeal. In view of the importance of the interest of liberty, the responsibility was on the state, acting in that situation by the Court of Appeal, to apply the law correctly. The fact that the appellants did not take advantage of an opportunity to seek to protect themselves did not remove that responsibility. Similarly, in the present appeal Mr Poole accepts that the Court of Appeal committed a legal error liable to correction on appeal even though the appellants failed themselves to raise the issue of the exercise of discretion under section 49(1) as they could have done at the time the Court of Appeal gave the loss of time direction.

45.
In the Board's view, by similar reasoning it cannot be said that the appellants had a fair and sufficient opportunity to vindicate their right to liberty and security of the person by virtue of the fact that they could have sought to appeal to the Board to raise the section 49(1) issue before the Court of Appeal's loss of time direction had a practical impact on them as from 4 June 2009. The state, in breach of its legal obligations, had failed to act to protect the appellants as it should have done at the outset when the Court of Appeal considered their cases and that breach of obligation created a situation with effects extending far into the future which constituted, as from 4 June 2009, a serious ongoing interference day-by-day with the appellants' right to liberty and security of the person. The appellants did not lose such rights as they had to complain about those effects because they failed to raise the section 49(1) issue at the hearing in November 2001, nor did they lose such rights by failing to complain in the period down to 4 June 2009. The right to the protection by "due process of law" of individual liberty and security of the person is of such importance that it cannot be treated as having been waived by an individual in the position of the appellants who fails to take steps to protect him- or herself at an earlier point in proceedings. As from 4 June 2009 there was no sound legal justification for the detention of the appellants and they were entitled to seek to vindicate their right to liberty at any point thereafter.

46.
The Board's judgments in Ali and Bhola meant that a clear criterion existed by which it can be said "that there was error" (to use Lord Diplock's phrase in Maharaj (No. 2), p 399, quoted above), and by 4 June 2009 this began to have a practical impact on the appellants. Mr Poole does not suggest that the loss of time direction given by the Court of Appeal was in any way defensible. It clearly was not. The error of law is as clear as was the error by the judge in Maharaj (No. 2). Therefore, this is a case in which it is established that, had the appellants been able to get before a court to seek bail pending an appeal, it would have been granted.

47.
Even in 2010, after the appellants asked to be released, they did not in fact seek to appeal to the Board by applying for special leave. Does that make any difference in this case? In the Board's view, it does not. The Attorney General has never sought to suggest that the Court of Appeal's loss of time direction could be justified, so it would have been an unnecessary and expensive formality to require the appellants to seek to launch an appeal when the primary relief that they wanted was to be released immediately from detention which, according to the judgments in Ali and Bhola and as implicitly accepted by the Attorney General, was unjustified. When the letter on behalf of the first appellant dated 23 March 2010 and the letters on behalf of the first and second appellants dated 21 June 2010 were sent to the Attorney General, representing the state, demanding the release of the appellants, the state was put on notice that the continuing detention of the appellants was unjustified according to law and that they should be released. Just as the state, acting by the Court of Appeal in November 2001, was required to consider of its own motion the exercise of discretion under section 49(1) by reason of the constitutional importance of the interests of the appellants which were at stake, so also in March and June 2010 was the state, now acting by the Attorney General, required to take action to protect those interests, now that it had been put on notice that they were being subjected to unjustified detention. The appropriate response of the state at that point would have been to accept that they ought to be released, to agree to support a constitutional motion by the appellants to secure their immediate release from detention and, if thought necessary, to agree to support an application by the appellants for special leave to appeal to the Board to have the Court of Appeal's loss of time direction set aside. Instead, the Attorney General failed to reply to the first letter and sent a negative response to the letters sent in June 2010.

48.
The Board wishes to emphasise that the Attorney General was not obliged to accept that the appellants were entitled to all parts of the relief sought by them in their letters. In the Board's view, the appellants' claim for monetary compensation in respect of their detention from 4 June 2009 to the time their letters were sent cannot be sustained, for the reasons given above. However, they also clearly asked the Attorney General to agree to their immediate release, and this should have been done. It would have been a simple matter for a constitutional motion to have been prepared for an order for release, supported by the Attorney General, which would have secured the prompt release of the appellants.

49.
In the Board's view, therefore, the appellants have established that they have suffered material harm by reason of the absence of a right to apply locally for immediate release (bail) in respect of their continuing detention, in breach of their rights under section 4(a), and that they are entitled to monetary compensation in respect of that harm. A further question arises as to whether the delay between the sending of letters in March and June 2010 and the commencement of proceedings on 3 March 2011 affects the date as from which compensation for detention may be claimed. In the Board's view, it does not. The state, acting by the Attorney General, was notified by those letters of the relevant circumstances which made the continued detention of the appellants unjustified and should have reacted promptly to bring that detention to an end. Just as the onus was on the state, acting by the Court of Appeal, to ensure that consideration was given to the exercise of the discretion in section 49(1) at the outset, so the onus was on the state, this time acting by the Attorney General, to take steps to remove the unjustified impact of the previous error on the appellants' right to liberty and security of the person when the appellants drew his attention to their plight. Therefore, in the Board's view, the appellants' claims for monetary compensation should be remitted to the High Court for

assessment of the compensation due from about 23 March 2010, in the case of the first appellant, and from about 21 June 2010, in the case of the second appellant.

50.
In the light of these conclusions, it is possible to make more detailed comments about previous decisions in the High Court and the Court of Appeal. The Board is grateful to those courts for the careful consideration they have given to the constitutional issues arising from its judgments in Ali and Bhola, which are not straightforward. As appears from the discussion above, the Board considers that it is important to distinguish between claims for immediate release from continuing detention which can be seen to be unjustified by reference to those judgments and claims for monetary compensation in respect of detention pursuant to loss of time directions which were unlawful. Where a person is currently detained pursuant to such a direction and should not be, they should be able to vindicate their right to liberty and security of the person by seeking immediate release pursuant to a constitutional motion based on sections 4(a) and 14 of the Constitution. Where they have been detained in the past under such a direction but have not sought their immediate release, they are not entitled to monetary compensation in respect of that detention; so far as that is concerned, there is no legally significant distinction between the position of a person who is held in prison pending an appeal against conviction or sentence which is successful, who is not entitled to compensation for such detention, and a person who is held in prison pending an appeal against sentence founded on a successful challenge to a loss of time direction given by the Court of Appeal under section 49(1). However, if a person subject to ongoing unjustified detention pursuant to such a direction seeks release and that is resisted by the state, they may be entitled to monetary compensation for the continuing violation of their constitutional rights at that stage.

51.
Accordingly, the Board considers that the decision of the Court of Appeal in Renne was correct on its facts, albeit the Board cannot endorse the entirety of the reasoning of Bereaux JA in that case. On the Board's understanding of the facts in Bhola (High Court) it agrees with the view of Bereaux JA in Renne that Gobin J came to the wrong conclusion in that case. It does not appear that Mr Bhola had made a claim for his release before the Board heard his appeal against conviction in Bhola, and it was at the hearing of that appeal that the Board itself raised the section 49(1) issue, granted him special leave to appeal in relation to the loss of time direction given in his case and quashed that direction, with the result that he was immediately released from prison. He was released three months later than he should have been, but in those circumstances he was not entitled to monetary compensation for that period.

Conclusion

52.
For the reasons given above, the Board allows the appellants' appeals in part. The Board will make an order to set aside the order of the Court of Appeal; to declare that there was a violation of the first appellant's rights under section 4(a) from about 23 March 2010 and a violation of the second appellant's rights under section 4(a) from about 21 June 2010; and to remit their claims for monetary compensation to the High Court for assessment.