[2011] UKPC 20
Privy Council Appeal Nos 0038 of 2010
0057 of 2010

JUDGMENT

Permanent Secretary, Ministry of Foreign Affairs & Prime Minister Patrick Manning (Appellants) *v* Feroza Ramjohn (Respondent)

Prime Minister Patrick Manning and The Public Service Commission (Appellants) *v* Ganga Persad Kissoon (Respondent)

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

before

Lord Phillips
Lord Brown
Lord Mance
Lord Kerr
Lord Dyson

JUDGMENT DELIVERED BY
Lord Brown
ON

18 July 2011

Heard on 10, 11 and 12 May 2011

Permanent Secretary and Prime Minister Patrick Manning
v
Feroza Ramjohn

Appellant	*Respondent*
James Dingemans QC Mrs Linda Khan	Sir Fenton Ramsahoye SC Jodie Blackstock Cindy Bhagwandeen
(Instructed by Charles Russell LLP)	(Instructed by Bankside Law Ltd)

Prime Minister Patrick Manning and Others
v
Ganga Persad Kissoon

Appellant	*Respondent*
Peter Knox QC	Sir Fenton Ramsahoye SC Jodie Blackstock Cindy Bhagwandeen
(Instructed by Charles Russell LLP)	(Instructed by Bankside Law Ltd)

LORD BROWN:

1. Section 121 of the Constitution of Trinidad and Tobago confers on the Prime Minister certain powers with regard to appointments to particular public offices. Having heard appeals by the Prime Minister in separate but successive cases against two judgments of the Court of Appeal (each given on 8 July 2009) with regard to the exercise of these powers, the Board has decided to deal with them both in a single judgment.

2. Before indicating anything more of the circumstances of the respective appeals, it is convenient at once to set out the material parts of section 121, provisions to be read in the context of Trinidad and Tobago having a Public Service Commission (PSC) with wide general powers of appointment, discipline and the like in connection with public offices. Section 121(3)-(6) provides:

> "(3) Before the Public Service Commission makes any appointment to an office to which this section applies, it shall consult the Prime Minister.
>
> (4) A person shall not be appointed to an office to which subsection (3) applies if the Prime Minister signifies to the Public Service Commission his objection to the appointment of that person to that office.
>
> (5) Subject to subsections (6) and (7), subsection (3) applies to the offices of Permanent Secretary, Chief Technical Officer, Director of Personnel Administration, to a head of a department of government, to the chief professional adviser in a Ministry of Government and to the office of Deputy to any of these offices.
>
> (6) Power to make appointments on transfer to the following offices shall vest in the Prime Minister:
>
> > (a) any office of Permanent Secretary from one such office to another such office carrying the same salary;
> >
> > (b) any office the holder of which is required to reside outside Trinidad and Tobago for the proper discharge of his functions, and such offices in the Ministry Of External

> Affairs as may from time to time be designated by the Prime Minister after consultation with the Public Service Commission."

3. The appeal to which Feroza Ramjohn is respondent (the first appeal), concerns the Prime Minister's exercise of his section 121(6)(b) power; the appeal to which Ganga Persad Kissoon is respondent (the second appeal) concerns the Prime Minister's exercise of his section 121(4) power (which for convenience we shall call the power of veto). Put shortly, the Court of Appeal in the first appeal (Warner and Mendonca JJA, Kangaloo JA dissenting) held that the Prime Minister had acted unfairly in appointing Ms Ramjohn to an office which required her to reside outside Trinidad and Tobago (a posting to the High Commission in London) and then, before she had assumed the duties of the office, revoking the appointment. The Court of Appeal in the second appeal (Archie CJ, Warner and Mendonca JJA) held that the Prime Minister had acted contrary to the rules of natural justice in vetoing Mr Kissoon's appointment, proposed by the PSC, as Commissioner of State Lands in the Ministry of Agriculture, Land and Marine Resources ("a head of a department of government" within the meaning of section 121(5)). In each case the Court of Appeal gave no relief other than a declaration of unfairness/ breach of natural justice and an order for costs. Principally it is the Prime Minister (represented in the first appeal by Mr Dingemans QC, in the second appeal by Mr Knox QC) who now appeals to the Board against the declarations in each case although in the first appeal the Permanent Secretary of the Ministry of Foreign Affairs also appeals to seek a costs order against Ms Ramjohn and in the second appeal Mr Kissoon also appeals to seek further relief against the Prime Minister and the PSC.

4. With those introductory paragraphs the Board now turn to the facts of each case in a little detail.

The first appeal

5. Ms Ramjohn entered the public service in 1971, joining the Ministry of Foreign Affairs (MFA) in May 1984. From 1987 to 1989 she was the Officer in Charge of the Registry in the Consulate General of Trinidad and Tobago in New York and from 1989 to 1995 she was an Accounts Officer in Trinidad and Tobago's Permanent Mission to the United Nations in New York. After returning from New York she was then stationed continuously at the MFA in Trinidad, being promoted in January 2002 to the office of Foreign Executive Officer II.

6. On 24 May 2004 the Prime Minister signed an Instrument of Transfer in respect of Ms Ramjohn in the following terms:

> "In exercise of the power vested in me under Section 121(6) of the Constitution of the Republic of Trinidad and Tobago, I do hereby appoint you, Ms Feroza Ramjohn, Foreign Service Executive Officer II, to the High Commission of the Republic of Trinidad and Tobago, London, United Kingdom, with effect from the date of assumption by you of the duties of the post."

7. On 27 May 2004 Ms Ramjohn was told by Mr Patrick Edwards, the Permanent Secretary to the MFA, that she was being transferred to London to replace Mr Bisson Budhai in the High Commission's Accounts Division. Following a criminal investigation, Mr Budhai was being returned home having been charged with using diplomatic pouches to transport cocaine between Trinidad and Tobago and London.

8. On 28 May 2004 Ms Ramjohn received the Permanent Secretary's letter dated 26 May confirming her posting and enclosing her Instrument of Transfer. The letter included the following references to the Civil Service (External Affairs) Regulations 1977 (the 1977 Regulations):

> "As provided for in Regulation 5(3) [of the 1977 Regulations], the exigencies of the service require that you assume duty at the High Commission as soon as possible.
>
> . . .
>
> In keeping with Regulation 7(1) [of the 1977 Regulations], before your departure arrangements will be made for your medical examination and psychiatric assessment."

9. Regulation 5 of the 1977 Regulations provides so far as relevant:

> "(2) Subject to subregulation (3), an officer shall be given at least two months' notice of a posting or a transfer.
>
> (3) Where the exigencies of the service require, an officer may be given a shorter period of notice.
>
> (4) A Foreign Service Officer who after being notified in accordance with subregulation (2) or (3) refuses without reasonable excuse to accept a posting shall be liable to – (a) disciplinary action; (b) transfer; or (c) both disciplinary action and transfer."

10. Pursuant to Regulation 7(1), appointments were made for Ms Ramjohn's medical examination and psychiatric assessment on 11 June 2004. She also served notice on her brother (her landlord) ending her tenancy as from 30 June, sold her motor car, television, video, refrigerator, washing-machine, furnishings and several other appliances and effects, and gave away some of her clothing to the poor in her area. So much for her appointment. Now for its revocation.

11. On 4 June 2004 the Prime Minister signed the following document addressed to the Minister of Foreign Affairs:

> "I have reconsidered the appointment of Feroza Ramjohn in light of the contents of the Security Department Intelligence Report. So as to avoid any possibility of further damage to the reputation of the Republic, I hereby revoke the appointment.
>
> Please advise me as a matter of urgency on a safe and appropriate replacement against whom there can be no question raised in this moment of crisis."

12. On the same day the Minister of Foreign Affairs instructed Ms Yvonne Gittens-Joseph, the Acting Permanent Secretary (in Mr Edwards' temporary absence abroad), to advise Ms Ramjohn that her transfer had been rescinded. The Minister told Ms Gittens-Joseph that the Prime Minister had said that this was for reasons of national security based on the contents of the Intelligence Report.

13. On 7 June 2004 Ms Gittens-Joseph called Ms Ramjohn into her office and gave her a letter (which she had drafted and signed dated 7 June) in the following terms:

> "I wish to refer to [the letter dated 26 May] and to advise you that your transfer to the High Commission for the Republic of Trinidad and Tobago in London has been rescinded. You should, therefore, discontinue preparations for an early departure. With best wishes."

14. The Intelligence Report referred to in the Prime Minister's revocation notice was a report dated 23 June 2001, prepared by BWIA's Security Department (BWIA being at the time the national airline for Trinidad and Tobago amongst others) marked "secret", concerning the disappearance of a diplomatic pouch containing 200 blank Trinidad and Tobago passports which had been sent from Trinidad and Tobago to New York on 5 June 2001. The report stated:

> "On Saturday 23 June 2001, information received from an official at the Permanent Mission to the Republic of Trinidad and Tobago in New York tends to show that Ms Feroza Ramjohn of the Registry Foreign Affairs Office in Trinidad had been involved in a major conspiracy to steal a Diplomatic Pouch containing 200 blank Trinidad and Tobago passports that was sent from the Foreign Affairs Office Trinidad to the Permanent Mission to the Republic of Trinidad and Tobago in New York on BW 5278, June 05, 2001."

There was no reference to that report in Ms Ramjohn's service record. She had, indeed, subsequently been promoted within the service. Disclosed in the course of proceedings, moreover, were a number of governmental reports (prepared within the MFI and the Ministry of the Attorney General) concerning the loss of diplomatic pouches (both that which went missing in June 2001 and others lost in 1999), none of which mentioned or raised the least suspicion against Ms Ramjohn.

15. On 11 June 2004 Ms Ramjohn commenced judicial review proceedings challenging the decision revoking her transfer to London. The proceedings named the Permanent Secretary as respondent, the Prime Minister as an interested party. Following a five-day hearing intermittently between October 2005 and January 2006, Tiwary-Reddy J on 3 July 2007 allowed Ms Ramjohn to amend her proceedings to challenge the Prime Minister's decision directly, declared that she had been treated unfairly and contrary to the principles of natural justice, quashed the Prime Minister's revocation decision of 4 June 2004 and ordered the assessment of damages.

16. On 8 July 2009 the Court of Appeal allowed the Prime Minister's appeal against the quashing of his decision and the award of damages. By a majority, however, Kangaloo JA dissenting, they dismissed the Prime Minister's appeal against the grant of declaratory relief, albeit varying the declaration to read:

> "In the circumstances of this case the respondent was treated unfairly by the failure of the [Prime Minister] to inform her of the case against her and to give her an opportunity to make representations.

The second appeal

17. Mr Kissoon entered the public service in 1970 and since 1998 has been the Assistant Commissioner of Valuations in the Ministry of Finance. In January 2001 a vacancy was advertised for the position of Commissioner of State Lands (head of a department of government in the Ministry of Agriculture). Following the PSC Selection Board's interviews of the candidates for the position in July 2001, Mr Kissoon was placed first in the order of merit (with 241 marks), Mrs Stephanie Elder-

Alexander being placed second (with 229 marks). The Chairman of the PSC accordingly wrote to the Prime Minister (then Mr Basdeo Panday) on 5 November 2001 proposing Mr Kissoon's promotion to the office, stating that following interview he had been found suitable for the position, attaching particulars of his career, and asking whether the Prime Minister had any objections.

18. In the event it turned out that at that time the Director of Surveys had been empowered to carry out the duties and functions of the Commissioner of State Lands and, as the Minister of Agriculture informed the Prime Minister by letter dated 15 April 2002: "The separation of the duties of Commissioner of State Lands from those of Director of Surveys will therefore require the approval of Parliament".

19. The necessary subordinate legislation having been passed on 3 June 2004, the Chairman of the PSC on 19 October 2004 again wrote to the Prime Minister (by then Mr Patrick Manning) again proposing to promote Mr Kassoon, attaching his particulars and asking whether the Prime Minister had any objection. The Prime Minister forwarded the letter to the Minister of Agriculture for his comments and received back from the Minister of Agriculture a letter dated 22 October 2004 in the following terms:

> "Promotion of Mr Ganga Persad Kissoon as Commissioner of State Lands
>
> Reference is made to your correspondence . . .
>
> After lengthy and careful consideration of the suitability of the candidate proposed, I am not in agreement with this appointment. The reasons for my objection are as follows:
>
> > A considerable amount of time has elapsed since the interviews were conducted for this position on July 24, 2001.
> >
> > During this period, a number of initiatives have been undertaken by the Ministry of Agriculture, Land and Marine Resources in an attempt to enhance the land management systems in Trinidad and Tobago.
> >
> > The Government has already successfully obtained passage of a legislative package which includes an Act

governing Land Title and Registration; Land Adjudication; and Land Tribunal.

Cabinet has already approved the establishment of a Land Management Authority which is intended to effectively manage the nation's land portfolio. Draft legislation is now being prepared by the Chief Parliamentary Counsel.

Additionally, there is the Government's thrust to distribute and effectively manage the large landholdings of the former Caroni (1975) Ltd.

Moreover, it is evident that the responsibilities assigned to the office of the Commissioner of State Lands have significantly increased in scope from those which existed in July 2001. The effective management of land in Trinidad and Tobago will be re-organised into a modern and efficient system geared towards achieving Government's goal of developed country status by 2020.

I am of the view that the person appointed to this position must be visionary, committed and dynamic to lead this transformation effort.

As a result of the foregoing, I am therefore recommending that the candidates, who [were] placed first, second and third in the interviews held on 24th July, 2001 be re-interviewed."

20. On 10 November 2004 the Prime Minister wrote to the Chairman of the PSC:

"With reference to your letter . . . dated 19 October 2004, I should like to inform you that I do not support the proposed promotion of Mr Ganga Persad Kissoon, Assistant Commissioner of Valuations, Valuation Division, Ministry of Finance, as Commissioner of State Lands, Ministry of Agriculture, Land and Marine Resources."

On 6 December 2004 the Chairman of the PSC wrote again to the Prime Minister, this time proposing Mrs Elder-Alexander for the post, attaching her particulars and asking whether the Prime Minister had any objection. On 8 December 2004 the Prime Minister again forwarded the letter to the Minister of Agriculture for his comments,

this time receiving back the Minister's reply the same day stating simply: "I have no objections". In the result Mrs Elder-Alexander was promoted to the Office with effect from 17 December 2004.

21. On 28 December 2004 Mr Kissoon wrote to the Director of Personnel Administration at the PSC, saying that the Director of Surveys had told him of Mrs Elder-Alexander's promotion, that he had previously been told that he had topped the promotion interviews, that the then Minister of Housing had shown him the PSC's original letter recommending him for the office, stating that in those circumstances he found it difficult to understand how he could have been bypassed for this promotion, and applying for a statement of reasons pursuant to section 16 of the Judicial Review Act 2000.

22. The PSC's Director of Personnel Administration replied to Mr Kissoon's letter on 28 January 2005 stating that the Prime Minister had been consulted under section 121(3)–(5) and had not supported the proposal for Mr Kissoon's promotion.

23. On 18 February 2005 Mr Kissoon was granted leave by Narine J to bring judicial review proceedings challenging the Prime Minister's decision to veto his appointment. Following a hearing before Myers J on 9 and 10 May 2005 – at the start of which the judge had struck out an allegation that the Prime Minister had been improperly influenced by racial considerations – Myers J on 20 February 2006 gave an oral judgment dismissing Mr Kissoon's motion with costs and setting aside Narine J's grant of leave (promising, but regrettably never delivering, a subsequent written judgment).

24. On 8 July 2009 the Court of Appeal allowed Mr Kissoon's appeal, making a declaration that:

> "The Prime Minister acted contrary to the rules of natural justice by making a decision to object to [Mr Kissoon's] promotion without informing him of the factors that militate against him and affording him the opportunity to make representations in his favour."

25. It is convenient at this stage, before turning to the arguments in the individual appeals, to set out two provisions of the Judicial Review Act 2000 [the 2000 Act] relevant to both appeals:

> "16(1) Where a person is adversely affected by a decision to which this Act applies, he may request from the decision-maker a statement of the reasons for the decision."

(The 2000 Act, by virtue of section 5(1), applies to decisions of, amongst others, a "public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law . . .")

> "20. 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 exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner."

26. The first question to arise in both appeals is whether the Prime Minister, in the exercise of his power of veto under section 121(4) or his power to make appointments on transfer under section 121(6) is a person acting in the exercise of a public duty or function in accordance with any law within the meaning of section 20 of the 2000 Act.

27. The policy underlying section 121 as a whole is plain. As Lord Diplock observed in *Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, 124 with regard to the equivalent provision in the 1962 Constitution, the "whole purpose" of this provision "is to insulate members of the civil service . . . in Trinidad and Tobago from political influence exercised directly upon them by the government of the day." It is also worth noting in this connection Regulation 18(1) of the Public Service Commission Regulations:

> "18(1) In considering the eligibility of officers for promotion, the Commission shall take into account seniority, experience, educational qualifications, merit and ability, together with relative efficiency of such officers, and in the event of an equality of efficiency of two or more officers, shall give consideration to the relative seniority of the officers available for promotion to the vacancy."

The reason for the Prime Minister being given a power of veto in respect of the section 121(4) offices is to be found in the 1974 Report of the Constitution Commission (at para 288) (following which the 1962 Constitution veto was maintained in the 1976 Constitution):

> "These officials are so directly concerned with the formulation of the policy and the supervision of its implementation that they must be acceptable to the political chiefs with whom they must have a close working relationship. This does permit some measure of political influence in purely public service appointments but is necessary on purely practical grounds. We would mention that this recommendation of ours is in keeping with the views of the Public Service Associations as expressed to us."

28. As for why the Prime Minister is accorded the power to make the appointments specified in section 121(6), the explanation must surely be, in respect of the transfer of permanent secretaries, that no promotion or salary increase is involved and there can be no objection to these decisions being taken on purely political grounds. With regard to a transfer requiring the office-holder to live overseas (or, perhaps, to an office in the Ministry of External Affairs), the likely explanation is that the Prime Minister has the responsibility for promoting the Republic's image abroad.

29. None of these considerations, however, affords the least reason for doubting that in the exercise of these respective powers the Prime Minister is exercising a public duty or performing a public function so as to be required by section 20 of the 2000 Act to do so in accordance with the principles of natural justice or in a fair manner.

30. For the purposes of these two appeals, the Board proposes to put aside consideration of the principles of natural justice (if, indeed, in this context they are materially different from the demands of fairness) and in each case to address simply the question whether, in the exercise of the power in question, the Prime Minister acted in a fair manner. In each case, was the process by which the respective decisions came to be taken a fair one?

The first appeal

31. On the face of it, nothing could be clearer than that the sudden revocation of a person's foreign posting on grounds of suspected criminality without the person concerned being told of the allegation and given an opportunity to respond – without, indeed, any reason whatever being given for the decision (see para 13 above) until after the commencement of judicial review proceedings – is unfair. What, then, is said on behalf of the Prime Minister to justify such a process?

32. As the Board understands Mr Dingemans' first and main submission, it is that the decision whether or not to transfer Ms Ramjohn to London was essentially an operational or management decision beyond the reach of the court supervisory jurisdiction and at any rate not such as to require the Prime Minister to act otherwise than he did. The submission relies heavily on the decision of the Court of Appeal (Aldous, Scott Baker LJJ and Sir Philip Otton) in *R (Tucker) v Director-General of the National Crime Squad* [2003] ICR 599; [2003] EWCA Civ 57 concerning the summary termination of a detective inspector's five year secondment to the National Crime Squad on the ground that the Deputy Director General (DDG) of the Squad had lost confidence in the officer's management performance. At the same time several other officers were arrested on suspicion of drug-related offences and two more, whose secondments were also terminated, were returned to their home force for

disciplinary investigation. Harrison J at first instance held the decision to be judicially reviewable but that the DDG had acted fairly notwithstanding the absence of reasons for his decision and the lack of opportunity for the officer to make representations. The Court of Appeal upheld the judge's decision on fairness but held in addition that the DDG's decision had no public law element to it and had not been amenable to review in the first place. Giving the Court of Appeal's only reasoned judgment, Scott Baker LJ said at para 32, under the heading *Nature of the decision*:

> "In contradistinction to the decision with regard to the other officers, there was no disciplinary element to the decision in the applicant's case. He was returned to his force because the director general had lost confidence in his ability to carry out his responsibilities. It seems to me that this was an entirely operational decision similar to the kinds of decision that are made with officers up and down the country every day of the week. Examples are transferring officers from uniform to CID or from traffic to other duties. These, to my mind, are run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to the individual officer personally and have no public element. They are, if you like, the nuts and bolts of operating a police force, be it the national crime squad or any other. It is, in my judgment, quite inappropriate for the courts to exercise any supervisory jurisdiction over police operational decisions of this kind. There is, quite simply, no public law element to them."

Later (at para 38) the Lord Justice described the decision as being "of purely domestic nature".

33. Under the heading *Fairness*, there then appear the following passages in the judgment:

> "39 It is common ground that the impugned decision was honestly made and that no question of bad faith arises. The judge concluded that, whilst it may be sensible and desirable for reasons to be given when terminating an officer's secondment, the sensitive nature of the work and information in the national crime squad's hands may exceptionally make this inappropriate in the public interest. This was one of those cases. The director general went as far as he reasonably could in informing the applicant why his secondment was being terminated. The decision was subsequently reviewed and maintained by him. There was no requirement in law to do more.

> 45 . . . The very nature of the work to which he was seconded is such as to be likely to involve sensitive intelligence information. It is relevant to look at what the applicant was told about why he could not be told more. Initially it was that the professional standards unit of the national crime squad had received information that he had failed to maintain the professional standards required of someone in his position and that the deputy director general no longer had confidence in his ability to carry out his responsibilities; . . . Finally in February 2002 the applicant was told by his deputy chief constable, after the decision to terminate his secondment had been confirmed as correctly taken, that his development needs required attention to 'the skill areas of informant handling and decision-making, bearing in mind the difficulties surrounding the source of the intelligence.
>
> 48 In my judgment the deputy director general was entitled to have in mind the risks attached to disclosing to the applicant the full circumstances of why his secondment was being brought summarily to an end. This does not of course mean that fairness goes out of the window altogether and nor, so far as I can see, did it in this case. The bottom line is the deputy director general acted in good faith and gave such information as he felt he could. Furthermore, the decision was reviewed and some further information provided as events unfolded. What the court cannot do in a case such as this is scrutinise the decision and form its own view whether the deputy director general was objectively justified in withholding information."

34. On the issue of reviewability, the Board has some doubt as to the correctness of the Court of Appeal's conclusion in *Tucker* that the DDG's decision was altogether beyond the Court's supervisory jurisdiction. Whether or not, however, that was the correct view there, it cannot properly affect our approach (already expressed at para 29 above) to the application here of section 20 of the 2000 Act. *Tucker* cannot operate to dilute the effect of the statute.

35. On the question of fairness, very different considerations arise in the present case from those arising in *Tucker*. A central argument below was that "the question of natural justice had to yield to the issues of national security involved" (para 4 of the Prime Minister's skeleton argument in the Court of Appeal). This was elaborated by reference to a number of well-known authorities concerning national security including *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (*CCSU*) and the contention (at para 7 of the skeleton argument) that:

> "the interest of national security overrode the requirements of natural justice namely the duty to inform the respondent of allegations made

> against her in the Intelligence Report, and to permit her an opportunity to make representation in respect of these allegations. Indeed any revelation of these allegations to the respondent may have brought about the very consequences to national security that was to be avoided."

That, of course, was precisely the situation in *CCSU*, the Prime Minister there having been concerned that consultation with the unions at GCHQ would result in the very industrial action that the de-unionisation of the service was intended to avoid. Manifestly, however, it was not the position with regard to Ms Ramjohn: no possible damage to national security could have been done by telling her of the BWIA report's allegation against her.

36. There was, of course, a very different sense in which national security was involved. As Mendonca JA pointed out in his judgment, "the theft of blank passports is a matter of national security" (para 31) and "it would follow that . . . those who might be involved in the theft of the passports may be regarded as a danger to national security" (para 34). As, however, he then observed (para 35), that provided no reason whatever why "she was not told of the case against her or given any opportunity to make representations".

37. Before the Board, therefore, Mr Dingemans urges as an additional reason what he contends was the urgency of the situation. The Board, however, is unimpressed by this. No evidence has been put before us to suggest that there was not time for the permanent secretary at least to notify Ms Ramjohn of the allegation and give her a chance to deal with it. We know nothing whatever of the circumstances in which the BWIA report came into the Prime Minister's hands nor of how it related to the governmental reports on the loss of diplomatic pouches nor why Ms Ramjohn's service record contained no hint of suspicion against her. All we are told is that the transfer was revoked "because of information that had recently become available". How recently we do not know. How urgently Mr Budhai's replacement needed to be in London we do not know (although, of course, we know that regulation 5(3) of the 1977 Regulations was invoked and Ms Ramjohn was required to assume duty "as soon as possible"). When in fact Mr Budhai's eventual replacement took office we do not know.

38. Of course the Prime Minister could not properly have ignored the BWIA report and of course it presented him with an immediate problem. Obviously too, after Mr Budhai's disgrace, he could not risk another appointment which might have threatened the state's reputation. None of this, however, justified the course actually taken of telling Ms Ramjohn nothing whatever of the reasons for so devastating a reversal of her fortunes. As Warner JA observed (para 23): "A foreign posting is perceived to carry with it a certain degree of glamour and prestige, because of the perquisites attached to it" and, as already described (para 10 above), Ms Ramjohn had (as must

have been anticipated) taken a number of steps preparatory to her departure. It may very well be that, even had Ms Ramjohn been told of the BWIA report and given the opportunity to respond to it, she would not in the event have been able, in the comparatively limited time available for the purpose, to rebut it sufficiently decisively to preserve her London posting. Threadbare though the report undoubtedly was and self-interested though it could be regarded (BWIA as the state's carriers being themselves under suspicion), it might well have taken months rather than days before, as in the event happened, the report came to be recognised as worthless. These considerations notwithstanding, however, Ms Ramjohn would then at least have been treated fairly and that is what the process required.

39. As is trite law, the requirements of fairness in any given case depend crucially upon the particular circumstances – see, for example, *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560. Almost always, however, if a decision is to be taken against someone on the basis of an allegation such as that made here, fairness will demand that they be given an opportunity to meet it. A characteristically illuminating statement of the law appearing in Bingham LJ's judgment in *R v Chief Constable of the Thames Valley Police Ex p Cotton* [1990] IR LR 344 (para 60) deserves to be more widely known:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by Megarry J in *John v Rees* [1970] Ch 345 at p402, experience shows that that which is confidently expected is by no means always that which happens.
>
> 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-

making process into the forbidden territory of evaluating the substantial merits of a decision.

5. This is a field in which appearances are generally thought to matter.

6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied."

40. In the result the Board would uphold the judgment of the majority below and confirm the correctness of the declaration they made (see para 16 above). There is nothing whatever in the Permanent Secretary's appeal against the Court of Appeal's decision to make no order as to costs as between him and Ms Ramjohn. He was not separately represented and any additional costs incurred as a result of his being party to the proceedings must have been negligible. There is, if possible, even less in the contention that Ms Ramjohn should have been refused leave to amend her proceedings to add the Prime Minister (originally joined as an interested party) as a respondent and should therefore have been refused a declaration.

The second appeal

41. Despite Mr Kissoon's request under section 16 of the 2000 Act for the Prime Minister's reasons for vetoing his recommended promotion, the only information before the Board (besides the bare facts set out at para 17-22 above) comes from the Prime Minister's Permanent Secretary's affidavit stating that the Prime Minister wrote his veto letter of 10 November 2004 "having taken account of the matters stated in [the Chairman of the PSC's letter of 19 October 2004 proposing Mr Kissoon's promotion and attaching his particulars and in the Minister of Agriculture's letter of 22 October 2004]." There is no suggestion that the Prime Minister knew anything of Mr Kissoon personally or that he had discussed his promotion with the Minister.

42. True it is that the Minister of Agriculture's Permanent Secretary eventually came to depose in the course of the litigation:

"The restructuring of the Ministry requires a person with a strong Land Management background to head the Division of the Commissioner of State Lands. The functions of land administration have been separated from those of Land Surveys. Mrs Elder-Alexander is the person with that Land Management background and her qualification of Master of Science in Geographic Information Systems helps in that regard."

There was nothing, however, in the Minister's letter of 22 October 2004 to suggest that he knew Mr Kissoon (who was in a different Ministry) or had any doubts about his "Land Management background", still less that he knew who had come second or third in the July 2001 interviews and whether they had any stronger such background. On the contrary, all that the Minister's letter made plain was that, because of the length of time since those interviews and because of the increased responsibilities of the proposed appointment, the top three candidates should be re-interviewed.

43. On the face of it, therefore, it seems that the Prime Minister without more treated the Minister's letter as a sufficient basis for exercising his veto against Mr Kissoon's proposed promotion. It is hardly surprising that in those circumstances the PSC (faced solely with the veto letter) then simply proposed Mrs Elder-Alexander (whom they regarded as the second best candidate) for the appointment and that the Minister of Agriculture (who must have assumed that the Prime Minister had communicated to the PSC the substance of his letter and that they had acted in accordance with his recommendation) then raised no further objection.

44. Was this, however, fair? The Board recognises that this is a very different question from that asked and answered by the court below – see the declaration set out at para 24 above. The obligation of fairness in the exercise of the veto under section 121(4), said Mendonca JA in the only reasoned judgment of the Court of Appeal:

> "requires that before the veto is exercised in relation to an applicant who is proposed by the Commission for appointment he is informed of what there is against him and given an opportunity to make representations on his behalf. This is required in all cases."

45. In the Board's view that (and the declaration that followed) goes altogether too far. Rather their Lordships are disposed to accept Mr Knox's submission that the power of veto is subject only to comparatively narrow limitations and that the obligation to act fairly must be viewed in that light. Clearly the veto power is subject to constitutional rights – the right to equal treatment, for example – and clearly it must not be used for a collateral purpose. The Board would reject, however, counsel's argument for Mr Kissoon that the only purpose for which the power can properly be used is a purely political purpose – namely that identified in the 1974 Constitutional Commission Report as set out at para 27 above. In their Lordships' view the veto could properly be exercised to prevent the promotion of a candidate whom the Prime Minister regarded as unsuitable for appointment on other than political grounds. If, obviously, the ground of objection was some specific allegation – as in Ms Ramjohn's case – then fairness would require that it be put to the candidate. But if the Prime Minister was objecting on general grounds involving no particular "case" against the candidate, fairness would not demand any advance notice of the veto.

46. It follows from this that the challenge to the fairness of the Prime Minister's decision process here cannot be on the basis of a failure to give Mr Kissoon the opportunity to meet the ground of objection in advance. Rather it is that to this day Mr Kissoon does not know what, if any, ground of objection the Prime Minister had to his appointment or whether, indeed, he simply misunderstood or paid insufficient attention to the Minister of Agriculture's letter. That seems to the Board clearly unfair and it is no answer to this to say, as Mr Knox does, that this is merely an "application case" demanding little in the way of fairness, let alone natural justice.

47. Mr Knox founds his argument in this regard on Megarry VC's well-known judgment in *McInnes v Onslow-Fane* [1978] 1 WLR 1520 and especially the classification there (p1529) of three particular categories of case: "forfeiture cases", "application cases" and "expectation cases", the latter "an intermediate category" in which "the applicant has some legitimate expectation from what has already happened that his application will be granted." In application cases, he said, "nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges". In forfeiture cases, by contrast, "there is a threat to take something away for some reason". Expectation cases, he suggested, "may at least in some respects be regarded as more akin to the forfeiture cases than the application cases".

48. In the Board's judgment these classifications are of little assistance in the present context. There is a very great difference between admission to and expulsion from a social club (one of the Vice-Chancellor's illustrations) or indeed (as in that case) the grant of a boxers' manager's licence and, as here, the exercise of a veto against the proposed appointment of a candidate successful in a competitive selection process for promotion to senior public office. Section 20 of the 2000 Act apart, such a person must surely have an expectation of being fairly treated, not least where, as here, he knew that he had topped the promotion interviews and been recommended for the office.

49. In the result the Board would dismiss the Prime Minister's appeal in this case also, save only to the extent of varying the declaration granted by the Court of Appeal (see para 24 above) to read:

> "In the circumstances of this case the respondent was treated unfairly by the Prime Minister's failure to exercise his power of veto rationally or at least to provide a rational explanation for exercising it against the respondent's appointment."

50. As for Mr Kissoon's appeals against the Court of Appeal's refusal of further relief respectively against the Prime Minister and the PSC, these too must be

dismissed. These arguments can be disposed of very briefly indeed. The claim for damages against the Prime Minister failed below on the ground that "there is no claim for damages as is required by section 8(4) of the Judicial Review Act" (para 56 of Mendonca JA's judgment). Section 8(4) of the 2000 Act does indeed provide that: "On an application for judicial review, the Court may award damages to the applicant if (a) the applicant has included in the application a claim for damages arising from any matter to which the application relates; and (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages." Mr Kissoon's insurmountable difficulty in this regard is that his claim for damages was (and could only have been) based solely on his allegation that he was unequally treated – a claim pursuant to sections 4(d) and 14 of the Constitution. This allegation, however, was struck out by the unappealed order of the trial judge on 9 May 2005 (see para 23 above). No damages claim thereafter survived.

51. Mr Kissoon's claim against the PSC was pursuant to the Freedom of Information Act and sought disclosure of the minutes of the PSC's meeting(s) discussing the relevant promotion. Section 27(1) of the Act, however, provides that:

> "Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act –
>
> > (a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Ministers of Government, or an officer and a Minister of Government, in the course of, or for the purpose of, the deliberative processes involved in the functions of a public authority; and
> >
> > (b) would be contrary to the public interest."

True it is that section 35 of the Act provides for the disclosure of exempt documents in certain specified circumstances but none of those circumstances even arguably exist here. It is, indeed, accepted that from Mr Kissoon's standpoint this appeal is purely academic. So much, therefore, for Mr Kissoon's cross appeals.

52. With regard to the dismissal of the Prime Minister's appeals in both cases, the Board would add only this. There is no question here of the Prime Minister having acted otherwise than in good faith in each case. The Board's decision is simply that in the very particular circumstances of these two cases, on the evidence put before the reviewing courts, the decision-making processes can be seen to have been unfair to the

respective officers concerned. This judgment should certainly not be regarded as a charter for those disappointed in their applications for public service appointments routinely to challenge the process. On the contrary, only exceptionally is it likely that such challenges will succeed.

53. Submissions in relation to costs should be submitted in writing within 28 days.