Michaelmas Term
[2016] UKPC 37
Privy Council Appeal No 0056 of 2015

JUDGMENT

Sam Maharaj (Appellant) *v* Prime Minister (Respondent) (Trinidad and Tobago)

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

before

Lady Hale
Lord Kerr
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

19 December 2016

Heard on 5 October 2016

Appellant	*Respondent*
Robert Strang	Thomas Roe QC Hafsah Masood
(Instructed by Sheridans)	(Instructed by Charles Russell Speechlys LLP)

LORD KERR:

1. The appellant, Sam Maharaj, brings this appeal against the decision of the Court of Appeal of Trinidad and Tobago not to award him damages in a claim made by him against the Prime Minister and the Cabinet. That claim was made because the Cabinet had decided that Mr Maharaj should not be reappointed as a member of the Industrial Court.

The facts

2. In November 2000, Mr Maharaj became a member of the Industrial Court. He was appointed to that position by the Acting President of Trinidad and Tobago under section 4(3)(c) of the Industrial Relations Act (the Act). In making the appointment the Acting President had proceeded on the advice of the Cabinet, as required by section 80(1) of the Constitution of Trinidad and Tobago.

3. Section 5(1) of the Act provides that members of the Industrial Court shall hold office for a period of no less than three and no more than five years. The same provision stipulates, however, that members shall be eligible for reappointment. When he was approaching the end of his first period of appointment, therefore, Mr Maharaj wrote to the president of the Industrial Court, Addison Khan, on 15 September 2003 telling him that he wished to be reappointed. Mr Khan then wrote to the Attorney General, informing him of Mr Maharaj's wish and recommending that he be reappointed for a further term of five years. Mr Khan told the appellant that he had made this recommendation.

4. The appellant did not receive a response to his request for reappointment and so he wrote again to Mr Khan on 23 October 2003. In his reply to that letter on 29 October, Mr Khan told the appellant that he had submitted a recommendation to the Attorney General that Mr Maharaj should be reappointed for a term of five years and that the Attorney General had assured him that the recommendation would be placed before the Cabinet.

5. Nothing further was heard from the Attorney General or the Cabinet and since Mr Maharaj's term of office was due to expire on 17 November 2003, Mr Khan wrote to the President of Trinidad and Tobago on 13 November asking that the appellant be permitted to continue in office for a period of three months after the end of his term so that he could deliver judgments or do anything necessary in relation to proceedings that had begun before his term of office expired. On 14 November the President gave

permission to the appellant to continue in office during that period. The request made by Mr Khan and the permission granted by the President were made pursuant to section 4(9) of the Act.

6. The appellant had still not heard whether he was to be reappointed when three new members of the court were appointed in December 2003. Indeed, even when another new member was appointed in January 2004, there was still no news as to whether he was going to have a further term on the court. On 8 January 2004, therefore, lawyers acting on behalf of the appellant wrote to the Attorney General asking for information about his reappointment. No reply to that letter was received.

The proceedings

7. On 26 January 2004 the appellant issued proceedings seeking permission to apply for judicial review of the Cabinet's failure to reappoint him. On 30 January he was given permission to proceed with his application. On 2 February 2004 the appellant issued a Statement under Order 53 of the Rules of the Supreme Court in support of his application for judicial review. Among the claims made by him in this statement was a claim for "damages including damages for … contravention of [his] rights under sections 4 and 5 of the Constitution". He also sought an order of mandamus, requiring the Cabinet to act in accordance with the recommendation of Mr Khan that he be reappointed and directing the Cabinet to advise the President to reappoint him.

8. On 27 February 2004 the respondent filed three affidavits in defence of the appellant's claim. One of these had been sworn by Lawrence Achong. At that time Mr Achong was a minister in the government of Trinidad and Tobago with responsibility for labour and management resources. He deposed that he had been a member of the Industrial Court from November 1994 until November 1999. During that time, Mr Achong claimed, from his observation of the appellant, he had formed the view that Mr Maharaj could not write, read or speak properly and was therefore not suited to be a member of the Industrial Court. On that account, he opposed the reappointment of the appellant when the matter came before the Cabinet. No-one else spoke on the matter, according to Mr Achong, and Mr Maharaj was not reappointed.

9. Mr Achong stated that the view which he had expressed in Cabinet was one which he had voiced previously. In September 2001 he had been a member of the House of Representatives when, during a debate on the budget, he had named Mr Maharaj as someone who could not read, write or speak properly. This was said in the context of Mr Achong's previous membership of the court. He referred to having received written evidence and arguments from "various advocates … representing various parties". Mr Achong went on to assert:

> "Mr Speaker, I was a member of that court for a considerable length of time and therefore as a member you receive your written evidence and arguments from the various advocates who are representing various parties. There was a particular gentleman who could neither write, read properly nor speak properly, and this Government had the effrontery to force him on the court. It is causing untold damage down there and the court is fast becoming the laughing stock of Trinidad and Tobago when you have a judge sitting there who 'cyar' (*sic*) read nor write nor speak properly. That is - [Interruption] I will call name - Sam Maharaj."

10. In a replying affidavit, the appellant strongly disputed Mr Achong's claims. He referred to 13 judgments which he had written during the time that he had been a member of the Industrial Court. He also said that he had not been aware of any adverse comment about his ability to read, write or "speak properly". Moreover, he claimed that he had never met nor had any contact with Mr Achong. He suggested that, during the time that Mr Achong was a member of the Industrial Court, he could not have been in a position to make any assessment of the appellant's abilities, since Mr Maharaj had never appeared before him. Mr Maharaj had not "interacted" with Mr Achong during the time that he was a member of the Industrial Court, he claimed, and he was therefore "surprised and taken aback" by the assertions that Mr Achong had made. He suggested that those assertions were "mischievous and unwarranted". The appellant accepted that Mr Achong may have had sight of union documents relating to disputes involving the union of which he had previously been a member. He speculated that those documents might have contained his name and signature but they were not prepared by him. Although not stated by Mr Maharaj, the implication of this reference appears to be that Mr Achong may have formed a view about his ability on the basis of those documents but, for the reasons given, he was not to be judged by their contents. He pointed out that there had been no adverse comment about the discharge of his duties as a member of the Industrial Court and that the President of the court had recommended that he be reappointed for the maximum term possible. Finally, the appellant exhibited to his replying affidavit various certificates in relation to his educational and professional achievements.

11. The respondent did not counter any of the claims that Mr Maharaj had made in his replying affidavit. No further affidavit from Mr Achong was filed. When the matter came before Myers J on 13 February 2004, therefore, the claims of the appellant set out in his replying affidavit were unchallenged on two critical issues: 1. That he was fit for office as a member of the Industrial Court; and 2. That the respondents had failed to inform him of the decision not to reappoint him or to provide him with the reasons for that decision.

12. The application for judicial review was heard over six days between 2 and 17 March and 23 April 2004. Remarkably, judgment was not delivered until 24 April 2012. Even more remarkably, no explanation has ever been offered for this inordinate delay.

13. The appellant had relied on a number of grounds in his application for judicial review. These included: frustration of a legitimate expectation, breach of an implied representation by the Cabinet, lack of reasonable grounds for its decision and failure to observe the requirements of the doctrine of separation of powers. (The last of these occupied most of the submissions made.) Although somewhat fleetingly referred to, the oral arguments made on behalf of the appellant included the claim that there had been a breach of section 4(b) of the Constitution which, among other things, declares that the protection of the law is a fundamental human right of every individual. It was also claimed that the appellant had been deprived of natural justice in that fairness demanded that he be given the opportunity to be heard in relation to the allegations made about him by Mr Achong and that steps should have been taken to check whether there was any substance in those allegations or whether they were groundless.

14. In his judgment on the appellant's case, Myers J held that he did not have a legitimate expectation of reappointment; that the Cabinet had not made a representation, implied or otherwise, that it would reappoint the appellant; that there had been no violation of the doctrine of the separation of powers; and that the refusal to reappoint the appellant was not tainted by illegality or lack of reasonableness. The judge did not deal with the appellant's claim that there had been a breach of section 4(b) of the Constitution. Nor did his judgment touch on the breach of natural justice or unfairness arguments.

15. Mr Maharaj appealed the judge's decision. His Notice of Appeal contained various grounds. These included that the judge had erred in failing to hold that the respondent had acted unfairly and in breach of natural justice. It was asserted that the respondent had a duty to inform the appellant of "the matters it had in its mind against [the appellant] and to give him an opportunity to make meaningful representations to it before any decision was made against him".

16. In extensive oral submissions to the Court of Appeal, counsel for the appellant did not advance a detailed specific argument about the nature of the relief to which the appellant was entitled. At the conclusion of oral argument, counsel on both sides were given permission to file written submissions on the question of relief. These were presented to the court on 20 March 2014. Para 7(c) of the submissions made on the appellant's behalf claimed "a declaration that [he was] entitled to be treated as though he [had] been reappointed as a judge of the Industrial Court for a period of five years and [was] entitled to such back pay and emoluments" as would have been due to him had he been reappointed.

17. Much of the earlier part of the judgment of the Court of Appeal is taken up with the questions of legitimate expectation and the separation of powers because arguments on these points appear to have been the centrepiece of the appellant's appeal. On these issues the Court of Appeal upheld the trial judge. On the argument relating to the fairness of the way in which the appellant's application for reappointment had been handled, however, the Court of Appeal found that the judge had not dealt with this satisfactorily. The court said that "Mr Achong was clearly mistaken in what he had represented to the Cabinet" and that this had led to the decision not to reappoint the appellant. Mr Maharaj had not been treated fairly in the view of the Court of Appeal. The Cabinet ought to have taken steps to verify "Mr Achong's startling accusations". This did not necessarily require that the appellant be given the opportunity to respond to the allegations made against him but some means of checking them should have been undertaken.

18. Notwithstanding this finding, the Court of Appeal considered that the appellant was entitled to declaratory relief only, the declaration stating that he had been treated unfairly because of the Cabinet's failure to take reasonable steps to verify the allegations made against him before deciding whether to reappoint him. In dismissing the appellant's other claims for relief, the Court of Appeal said this at para 46:

> "In this case there is little point in ordering the Cabinet to reconsider the appellant's request for reappointment. Some eleven years have passed since the appellant's initial term ended. Further, even if the Cabinet were to reconsider this matter we cannot predict the outcome of such a reconsideration, *so that an award of damages is too speculative and inappropriate in this case.*" (emphasis supplied)

19. The decision not to award the appellant compensation was therefore premised on the notion that it was incumbent on him to show that he would be reappointed if the Cabinet was required to consider his application for reappointment following the Court of Appeal's judgment.

The constitutional argument - should the appellant be permitted to advance it?

20. So far as is material, section 4(b) of the Constitution of Trinidad and Tobago states:

> "It is hereby recognised and declared that in Trinidad and Tobago there [has] existed and shall continue to exist … the right of the individual to equality before the law and the protection of the law."

21. Much of the argument before the Board (in contrast to that presented to the trial judge and the Court of Appeal) focused on the claim that the failure of the Cabinet to check the allegations which were instrumental in preventing the appellant's reappointment constituted a breach of section 4(b). In particular, the appellant claimed, he was not afforded the protection of the law. The respondent made a preliminary objection to the appellant's taking this point. It was suggested that it would be wrong for the Board to allow the appellant's appeal on this basis, "when the courts below were not invited to do so." (para 28 of the respondent's written case)

22. It is true that the main argument advanced on behalf of the appellant both at first instance and before the Court of Appeal was that the failure to reappoint the appellant represented a breach of the doctrine of the separation of powers. As pointed out in para 13 above, there was passing reference in oral argument before the judge to the section 4(b) argument. Moreover, para 9 of the Notice of Appeal contained the claim that the judge had erred in failing to find that the appellant's right to the protection of the law had been infringed, although this does not appear to have featured in the submissions made during the hearing of the appeal. Section 4(b) was thus at least formally before the Court of Appeal, however.

23. The respondent nevertheless contended that it would not be appropriate to permit the appellant to rely on the claim under section 4(b). In advancing this argument, the respondent relied on *Baker v R* [1975] AC 774, where at 788 the Board said that its normal practice:

> "… is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

24. As observed above, the question whether the actions of the Cabinet amounted to a breach of section 4(b) was in fact before the first instance judge and the Court of Appeal. Quite apart from this, however, there is no reason to suppose that the Board's view would depend on "an appreciation of matters of evidence or of facts of which judicial notice might be taken" if this matter had been canvassed more directly in oral argument. The evidence which is said to support the constitutional argument is not disputed. The Cabinet did not attempt to verify what was, by any standards, the astonishing claim of Mr Achong. Not only that, the Cabinet failed to take any action

after it became aware that Mr Achong's allegations were comprehensively disputed by the appellant and that no rejoinder to Mr Maharaj's denials had been made.

25. On the issue of possible assistance which might have been derived from "learning the opinions of the judges of the local courts", the Board is satisfied that this is not a reason to refuse to allow the appellant to advance the constitutional argument. In a series of cases where the protection of the law provision in constitutions in various Caribbean countries was considered, an expansive approach to its potential application has been taken. In *Attorney General of Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ) de la Bastide P and Saunders J said at para 60 of their joint judgment for the Caribbean Court of Justice said at para 60:

> "… the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed."

26. In *The Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 at para 47 CCJ took a similar stance:

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

> finding a breach of the protection of the law for which damages may be an appropriate remedy."

27. There is no reason to suppose that the courts in Trinidad and Tobago would have adopted a different approach. To the contrary, courts in that country have consistently favoured a wide-ranging interpretation of the "protection of the law" provision and, significantly, such an approach does not appear to have been opposed by state agencies who were parties to cases where the provision came under consideration.

28. For the most part those cases have applied the decision of the Board in *Rees v Crane* [1994] 2 AC 173. In that case the respondent, a serving judge of the High Court of Trinidad and Tobago, had been the subject of a referral by the Judicial and Legal Service Commission to the President under section 137(3) of the Constitution. Section 137 sets out the procedure for the removal of a judge from office. One of the preliminary steps in the process is for the Commission to represent to the President that the question of removal from office be investigated. The Court of Appeal held that the decision to refer the question to the President was unlawful. That conclusion was upheld by the Board. Lord Slynn, who delivered the judgment of the Board, said at 188G that the protection of the law provision in section 4(b) included the right to natural justice. The Commission had acted on allegations which had not been communicated to the judge and on which he had been given no opportunity to comment. At 196D Lord Slynn said:

> "… the respondent was not treated fairly. He ought to have been told of the allegations made to the commission and given a chance to deal with them - not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply."

29. In *Samaroo v Minister of Education* (HC 536 of 1998) judicial review of a decision to suspend a pupil from school was sought. The principal of the school which the child had attended had suspended him and the Minister of Education had authorised his continued suspension. An order was made by consent that the decision of the Minister to continue the suspension was unlawful. The only contentious issue before the court was whether the applicant was entitled to damages. The judge, Jamadar J, stated (at p 8 of his judgment) that a suspended pupil should be informed of the reasons for his suspension and be given the opportunity to make representations on those reasons. He continued:

> "… the failure to afford the applicant any such opportunity and to continue his suspension nevertheless, is a contravention of that right. A contravention which amounts to a breach of his constitutional right to the protection of the law (see *Rees v Crane* (1994) 43 WIR 444 at 453(j) and section 4(b) of the Constitution.)

> Implicit in the right to natural justice is the concept of fairness, the antithesis of which is arbitrariness."

30. In *Ramjohn v Manning* (HC 1098 of 2004) the applicant complained that the revocation of her appointment to the post of executive officer without informing her of the reasons for it was unfair and in breach of her constitutional rights. The first instance judge agreed, relying on *Rees v Crane* which (at para 94 of her judgment) she described as having held that the commission "had acted in breach of the principles of natural justice and had thereby contravened the respondent's right to the protection of the law … afforded by section 4(b) of the Constitution." The hearing before the Court of Appeal in the same case (CA 71 of 2007) was principally concerned with the question whether Ms Ramjohn was owed any duty under the principles of natural justice. It was conceded that if she was owed such a duty, it had not been fulfilled. No argument was made that breach of the rules of natural justice would not constitute a breach of section 4(b). On appeal to the Board ([2011] UKPC 20) again the thrust of the government's case was that natural justice did not arise in relation to the revocation of Ms Ramjohn's appointment. It was not suggested that, if the rules of natural justice applied, they had not been breached. No doubt was cast on the correctness of the decision in *Rees v Crane.*

31. *Mohammed v Attorney General for Trinidad and Tobago* (HC 4918 of 2007) is a further example of acceptance that breach of the rules of natural justice constitutes a violation of the protection of the law provision in section 4(b). The claimant challenged his removal from the position of commissioner in the Police Service Commission. In her judgment in the claimant's favour, Jones J said this at para 5:

> "Section 4(b) of the Constitution confirms the right of the individual to the protection of the law which protection includes the right to natural justice. In somewhat similar vein section 5(2)(e) of the Constitution provides that, subject to certain exceptions, Parliament may not deprive a person of the right to a hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. It is now accepted that the rights embodied in section 5 of the Constitution particularise in some greater detail what is included in the words 'the due process of the law' and 'the protection of the law' found in section 4 of the Constitution 4. Insofar as these proceedings are concerned both the claimant and the defendant do not dispute that what both sections provide is 'constitutional protection to the right to procedural fairness'."

32. The Board was not referred to a case in which the government of Trinidad and Tobago or any of its emanations or agencies had argued that the right to the protection of the law enshrined in section 4(b) did not comprehend a right to be treated fairly or

that it did not give rise to an obligation on the part of public bodies to observe the rules of natural justice. In light of this and of its consideration of the various authorities discussed above, the Board is satisfied that it would not have been assisted by "learning the opinions of the judges of the local courts". It is clear that *Rees v Crane* has held sway in the courts of Trinidad and Tobago and that it would not have been questioned had the matter been raised in the courts below.

The breadth of the concept of "the protection of the law"

33. For the respondent, Mr Roe QC argued forthrightly that the statement in *Rees v Crane* that the protection of the law provision in section 4(b) included the right to natural justice was incapable of bearing the weight that had been placed on it. He suggested that the Board in that case had not intended to propound a general principle and that Lord Slynn's statement should not be treated as such. It should be seen against the background that counsel for the appellants in that case had submitted that the common law principles of natural justice enshrined in section 5(2)(e) of the Constitution (which guarantees the right to a fair hearing in accordance with the principles of fundamental justice) were aspects of the protection of the law provided for in section 4(b). Not only, therefore, was the question not in dispute, it had been positively asserted by the appellants (the Commission and the Chief Justice) that the protection of the law covered breach of natural justice.

34. Moreover, the text of section 4(b), Mr Roe suggested, was not indicative of an intention to extend the protection of the law provision to a failure to observe the rules of natural justice. The availability of judicial review to challenge the actions of the Cabinet afforded the necessary protection, he said. To suggest, as the appellant did, that where a person exercising a public power acts in a way that is procedurally unfair, anyone affected is deprived of the protection of the law was taking the concept much too far, Mr Roe argued.

35. For the appellant, Mr Strang submitted that a failure to abide by the rules of natural justice fell clearly within the protection provided for in section 4(b). He pointed out that the decision in *Rees* had been endorsed not only by cases in Trinidad and Tobago but also by the Board's judgment in *Durity v Attorney General for Trinidad and Tobago* [2008] UKPC 59. In that case the appellant, a senior magistrate, had been suspended by the Commission because it had been reported that he had been guilty of misconduct. Many months passed after his suspension before the charges against him were investigated. At para 29 the Board said that "the constitutional right to the protection of the law and the principles of natural justice demand that particular attention must be paid to the need for fairness in the investigation: *Rees v Crane.*"

36. Mr Roe suggested that the Board's decision in *Durity* was underpinned by the need to protect judicial independence and by the circumstance that the availability of judicial review of the delay in carrying out an investigation was, at best, uncertain. The Board did not intend, he submitted, to sanction the availability of a constitutional remedy for any failure to comply with procedural safeguards.

Discussion of the application of the protection of the law concept

37. Access to the courts in order to challenge a claimed breach of an individual's legal rights is clearly an important aspect of the constitutional protection provided for in section 4(b). But, for the protection to be effective, access to justice must be prompt and efficacious. In this case, the appellant was deprived of any form of remedy for many years. The passage of those years at least contributed to the decision that the appellant was not entitled to any tangible recompense, for instance, in the form of reconsideration of his application to be reappointed.

38. It can be said that the Cabinet was not directly responsible for the delay which had occurred before the appellant finally succeeded in the Court of Appeal. But, throughout the time that elapsed between the launch of proceedings and the Court of Appeal delivering judgment, the Cabinet had continued to resist the appellant's claim when it was clear that there was no viable defence to his assertion that he had been unfairly treated.

39. While there may be cases where the right to the protection of the law can be fulfilled by the availability of an effective and prompt remedy provided by the courts, the Board is satisfied that this is not one of them. For many years the appellant was denied legal redress for the obvious wrong which had been done to him. The finding of the Court of Appeal such a long time after that wrong had been perpetrated cannot be said to amount to effective protection of the law. There is, moreover, the consideration that it was the government, which should have been the guarantor of his constitutional right, that denied him that right.

40. While, therefore, *Rees v Crane* and *Durity v Attorney General* should not be interpreted as laying down an inflexible rule that every instance of failure to observe the rules of natural justice will give rise to a constitutional claim, in general, where a prompt and effective legal remedy cannot be or is not provided, such a claim will arise.

41. On the need to demonstrate the failure of the legal system to deliver rapid redress it is significant that in *Durity* the Board rejected the first of the appellant's grounds of challenge. This was that the charges which led to his suspension were misconceived because the misconduct alleged against him related to decisions he had taken in

performance of his judicial duties. At para 28 of its judgment the Board dealt with that argument:

> "Whether this was a case for the appellant's immediate suspension is more open to question. But their Lordships agree with the Court of Appeal that it cannot be said that the appellant was deprived of the protection of the law when this step was taken against him. It was open to him to challenge the legality of the decision immediately by means of judicial review. Taken on its own therefore this complaint is not one that stands up to examination as an infringement of the appellant's constitutional rights. In any event, as a remedy by way of judicial review was available from the outset, a constitutional motion was never the right way of invoking judicial control of the Commission's decision to suspend him. The choice of remedy is not simply a matter for the individual, to decide upon as and when he pleases. As Lord Diplock observed in *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 268, the value of the safeguard that is provided by section 14 will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action …"

42. Mr Roe suggested that this passage indicated that infringement of a person's constitutional rights would only arise where it could be shown that judicial review was not available as a remedy or where the outcome of an application for that relief was uncertain. He also claimed that the judgment in *Durity* had made plain that a significant factor was the need to protect the integrity and independence of the judiciary. This was not a matter of substantial importance in the present case, said Mr Roe, because Mr Maharaj was not a serving member of the judiciary, merely an applicant for reappointment to it.

43. The Board does not agree. The availability of judicial review is a factor to be considered in deciding whether a constitutional claim that an individual has been denied the protection of the law should be entertained. It is not determinative of that issue. In the present case, it was open to the appellant to challenge the decision not to reappoint him by way of judicial review but, as was the case on the second ground put forward by Mr Durity, this was not an effective or timeous remedy.

44. So far as the purported contrast between Mr Durity's situation and that of the appellant is concerned, the Board rejects the suggestion that the failure to treat Mr Maharaj's application for reappointment in a fair manner was a matter of little consequence. His application was made while he was a serving member of the judiciary. It was supported by the President of the Industrial Court. It was rejected because of

allegations which directly impugned his ability to serve as a member of the Industrial Court. He was not told of the reasons that his application was rejected. He was given no opportunity to refute them before the decision that he would not be reappointed had been made. It appears that the allegations made against him were without foundation. His forthright rejection of them has never been disputed. Where a serving member of the judiciary is not afforded the chance to defend his reputation against such allegations, the integrity and independence of the judiciary are obviously implicated.

Would an award of damages be "too speculative and inappropriate"?

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

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

46. As the Board observed in *Alleyne v Attorney General of Trinidad and Tobago* [2015] UKPC 3 at para 38, while the section does not state what form such redress may take, "it may include an injunction, a declaration, a monetary award or a combination of remedies". In that case the Board referred to the leading authority in this area, *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328 and then made the following observations:

> "39. In summary, the object of the jurisdiction is to uphold and give effect to the right which has been contravened. Sometimes the court may judge a declaration to be sufficient for this purpose, just as the European Court of Human Rights will sometimes treat a finding of violation of the European Convention on Human Rights as affording sufficient satisfaction to the applicant. But often the court will find that more than words are required to redress what has happened. There are no standard rules, but the fact that the injured party has suffered damage will obviously militate in favour of a monetary award. In assessing compensation in such a case, the common law measure of damages will be a useful guide, but no more than a guide (just as an award by the Strasbourg court will not necessarily be the same as the measure of damages at common law for conduct amounting to a tort). Other relevant factors would include the seriousness of the breach."

47. In *Alleyne* the appellants were municipal police officers. They complained that the state had failed to equalise their salaries with those of regular police officers; that no regulations had been made for their promotion; and that no regulations had been made enabling recognition of their associations. The first instance judge dismissed the equal pay complaint but upheld the other two. She made declarations that the failure of the state to make regulations was in breach of the appellants' rights under section 4(b) of the Constitution and ordered that the respondent should pay compensation, although not to include vindicatory damages. The Court of Appeal set aside one of the judge's declarations, upheld the other but reversed her decision that the appellants should be paid compensation. Her ruling that vindicatory damages were not recoverable was also upheld.

48. The Court of Appeal had concluded that compensation was inappropriate because any attempt to compute the appellants' loss would be "mere speculation". The Board roundly rejected this as a reason not to award damages, saying at para 44:

> "It is a general principle of the common law that if an injured party can establish a head of loss, which by reason of the wrongdoer's conduct it is difficult to quantify, the fact that there may be many speculative factors is not a reason for denying the assessment: see *Simpson v London and North Western Railway Co* (1876) 1 QB 274, 277, *Chaplin v Hicks* [1911] 2 KB 786, 792, *Davies v Taylor* [1974] AC 207, 212, *Gregg v Scott* [2005] 2 AC 176, paras 17 and 76-79, and *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486; [2011] QB 477, paras 22-23. A monetary award under section 14(1) is discretionary, but that is not in itself a reason to adopt a different approach."

49. As was the case in *Alleyne,* the Board in this appeal recognises that there may well be difficulties in making an assessment of the appropriate amount of damages. It must be left to the local court who can examine the circumstances to determine if and by how much the appellant should be compensated.

50. The respondent suggested that the appellant should not be permitted to advance a claim for pecuniary loss because he had not formulated any such claim at any stage of the proceedings. Moreover, this was not a case where, exceptionally, an award of damages should be made for an administrative tort. In promoting that argument, the respondent relied on the dictum of Laws J in *R v Ealing London Borough Council, Ex p Parkinson* (1997) 29 HLR 179, 184 that the "general principle of administrative law [is] that the law recognises no right of compensation for administrative tort."

51. As to the first of these arguments, the Board has pointed out (in para 7 above) that the appellant had indeed intimated a claim for damages and that he was entitled to be treated as though he had been reappointed as a judge of the Industrial Court for a period of five years. On that basis it was claimed that he was entitled to such back pay and emoluments as would have been due to him had he been reappointed (para 16 above). Although the appellant's pecuniary loss claim has not been particularised beyond this somewhat general claim, the Board does not find that especially surprising. If it had been determined that the appellant was entitled to advance a claim for damages, it is to be expected that a judge would have been appointed to carry out an assessment of damages, such as was ordered by the first instance judge in *Alleyne*.

52. On the second argument, it is necessary to refer to section 8(4) of the Judicial Review Act 2000. It provides:

> "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 has been made in an action begun by the applicant at the time of making the application, the applicant could have been awarded damages."

53. The Board has concluded that both these conditions are satisfied in the appellant's case. For the reasons earlier given, it is clear that the appellant had provided notice of an intention to claim damages. It is also clear that, had the appellant's claim been begun as an action for compensation for constitutional redress under section 14 of the Constitution, the appellant could have been awarded damages. The appellant also contends, of course, that he is entitled to promote a claim for the loss of a chance in that his application to be reappointed was not treated on a fair basis and that, if it had been, he might well have been reappointed. Alternatively, he claims that, as a matter of probability, it ought to be determined that he would have been appointed. The Board is satisfied that these are matters to be assessed by a judge conducting a fact finding exercise which the claims require.

54. The judge carrying out that exercise will also need to address the question of what have been described as "vindicatory damages". In *Alleyne* the Board expressed some reservations about the aptness of that term to describe an award for breach of constitutional rights. However they are described, the nature of those damages is well

understood. As Lord Nicholls said in *Ramanoop*, they are designed to "reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches" - para 19. These are matters which *par excellence* fall within the province of a local tribunal, better equipped than is the Board, to make a judgment about the significance of the failure of the Cabinet to verify the claims made by Mr Achong and, more particularly, to revisit the decision after Mr Maharaj's comprehensive refutation of those allegations.

Conclusion

55. The appeal will be allowed. The matter will be remitted to the High Court for that court to give directions as to how the assessment of whether the appellant is entitled to compensation and, if so, the amount of that compensation, should be undertaken. The Board invites the parties' submissions about the precise terms of the order and on the question of costs within 21 days.