

**TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**HCA NO. 1688/2005**

**IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE  
NATIONAL LOTTERIES CONTROL BOARD FOR  
LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE DECISION OF THE STATUTORY  
AUTHORITIES SERVICE COMMISSION NOT TO PREFER  
A CHARGE OF MISCONDUCT AGAINST MR. DEVANT MAHARAJ,  
MARKETING AND PUBLIC RELATIONS OFFICER, NATIONAL  
LOTTERIES CONTROL BOARD COMMUNICATED TO THE  
APPLICANT BY LETTER DATED THE 20<sup>TH</sup> APRIL, 2005**

**BETWEEN**

**THE NATIONAL LOTTERIES CONTROL BOARD**

*Applicant*

**AND**

**THE STATUTORY AUTHORITIES SERVICE COMMISSION**

*Respondent*

**AND**

**DEVANT MAHARAJ**

*Interested Party*

**Before: The Hon. Mr. Justice Bereaux**

**Appearances: D. Mendes S.C. & M. Quamina for Plaintiff  
T. Thorne for 1<sup>st</sup> Respondent  
A. Ramlogan for Interested Party**

## JUDGMENT

- (1) This issue in this application for judicial review is whether a decision of the Statutory Authorities Service Commission (“the Commission”) was so unreasonable that no rational tribunal properly directing itself on the facts could have come to that conclusion.
- (2) The decision impugned was communicated by memorandum of 20<sup>th</sup> April, 2005 from the Commission to the Ag. Director of the National Lotteries Control Board. In that memorandum, the Commission indicated that it would not pursue further action against Mr. Devant Maharaj, Marketing and Public Relations Officer at the National Lotteries Control Board for derogatory remarks allegedly made about members of the Muslim faith at an official dinner hosted for Ms. Rebecca Paul, President and Chief Executive Officer of the Tennessee Lottery Education Corporation.
- (3) The Commission indicated that it had accepted legal advice,

***“that there was not sufficient cogent evidence to prefer a charge  
on the allegation of misconduct made against Mr. Maharaj”***

and enclosed a letter to Maharaj no doubt indicating to him that charges of misconduct would not be pursued. The Applicant, the National Lotteries Control Board has sought certiorari to quash the decision of the Commission, declaratory relief that the decision is of no effect, as well as mandamus to compel a reconsideration of the decision. The sole ground of challenge is that the decision is irrational.

- (4) The relevant facts for the purposes of this case are taken mostly from the statement filed with the application for judicial review. They are culled from the affidavits of Miss Phyllis Borde, the Applicant’s acting director. (The other affidavits filed on behalf of the Applicant have no impact on my decision.) Two

affidavits were filed in opposition on the respondent's behalf by Jeanette Renaud, the acting Executive Officer of the Commission and Helen Francis-Huggins, Human Resource Officer III, National Housing Authority, who was appointed to investigate the allegations. There are no disputes of fact between the parties but the sequence of events surrounding a statement purportedly of Miss Rebecca Paul, dated 14<sup>th</sup> January, 2004, needs to be examined.

### **The facts**

(5) The relevant facts are:

- (a) on September 3, 2004, the Applicant held an official dinner to honour Ms. Rebecca Paul, President and Chief Executive Officer of the Tennessee Lottery Education Corporation. The persons attending the dinner included Ms. Rebecca Paul, Ms. Carol Quan Chan, the Presiding Officer of the Applicant's on-line draws, Mr. Noel Maloney, then acting secretary to the Board, and Mr. Maharaj.
- (b) on the 9<sup>th</sup> September, 2004, Mr. Maloney reported that during the dinner, Mr. Maharaj had made derogatory remarks about people of Muslim religion and their holy books. Mr. Maharaj's comments allegedly included "*all Muslims were terrorists*" and "*all Muslims in Pakistan and other countries should be executed even if it meant wiping out whole nations and the rest of them should then move to Saudi Arabia!*" Mr. Maloney thereafter recommended that Mr. Maharaj not be allowed to entertain any official guests on the Applicant's behalf.

- (c) by a letter dated September 10, 2004, Ms. Carol Quan Chan also gave a written report to the Director (Ag) that Mr. Maharaj had made extremist remarks. The report states:

*“This confirms my verbal request that I not be assigned to work in future social settings with our Marketing and Public Relations Officer, Mr. Devant Maharaj. I feel it necessary to state that I enjoy the challenges of being a part of the teams who organize the various functions and activities of the Board. However, I don’t feel I should be subjected to Mr. Maharaj’s extremist remarks.*

*On the night of the parting dinner for Ms. Rebecca Paul – feature speaker at our 10<sup>th</sup> Anniversary Gala – and her guest, the conversation included discussions on the outcome of the hostage situation in Russia, which, we all agreed was a terrible and horrific event. Mr. Maharaj stated that Chechens were Muslims and that all Muslims were terrorists who should be wiped out. He added that Pakistan should also be wiped out since they had been fighting with ‘them’ for over 1000 years.*

*I responded by stating that he should not generalize nor categorise all the people of the Muslim faith because of the action of a few of them. He then asked our guests whether they were aware that Muslims had held this country to ransom and that at the last Trinidad and Tobago General Elections Muslims were allowed to walk around with guns and to terrorise citizens. Ms. Paul indicated that she was aware of the attempted coup in 1990. For approximately two (2) minutes Mr. Maharaj*

*went on about how Muslims have terrified others in the world. I then asked him some pointed questions.*

*One might question why I did not allow Mr. Maharaj's comments to go unchallenged but I believe that we are all entitled to our opinions and beliefs. I am also of the view that since we were on NLCB's business the forum was inappropriate for such extremist remarks which were disconcerting and embarrassing to me. I, however, do not want to be associated with his views – it is anyone's guess whether Ms. Paul is Muslim or not.*

*In a parting conversation with me, Ms. Paul and Mr. Hargrove indicated that they were in agreement with my sentiments but Ms. Paul thought it best not to prolong the issue by giving her opinion at that time. She again extended an invitation to the NLCB to visit Tennessee as her guests.*

- (d) by letter dated the 17<sup>th</sup> September, 2004 the Director (Ag.) informed Mr. Maharaj that the Applicant was in receipt of the reports from Mr. Noel Maloney and Ms. Carol Quan Chan. The Director identified the remarks attributed to him and requested a reply in writing by 21<sup>st</sup> September, 2004.
- (e) by letter dated 21<sup>st</sup> September, 2004, to the Director (Ag.) Mr. Maharaj responded as follows:

*“Further to your letter dated 17<sup>th</sup> September, 2004, please note that the contents of the dinner*

*conversation were not memorized and as such the specific details are not recalled.*

*As far as I could summon up however some issue that was on the news currently led off a particular conversation. A spirited and open discussion with views of those in that discussion ensued on the matter and the subject changed after a few minutes.*

*It is indeed unfortunate that it has been misconstrued into something which it was not intended and evokes such a subsequent response.”*

There was no outright denial of the remarks.

- (f) by letter dated 27<sup>th</sup> September, 2004, the reports received on the conduct of Mr. Maharaj were forwarded to the Commission advising that Mr. Maharaj was not suitable to represent the Applicant at public functions as its Marketing and Public Relations Officer and requesting his transfer to another statutory authority.
- (g) by letter dated the 22<sup>nd</sup> October, 2004, the Commission responded, indicating that it could not re-assign Mr. Maharaj but that his alleged conduct may have made him liable to disciplinary action. It suggested that any disciplinary action should follow the procedure outlined in Part VIII of the Statutory Service of the Statutory Authorities Service Commission Regulations, Chapter 24:01

- (h) pursuant to that advice, the Applicant, by letter dated 18<sup>th</sup> November, 2004, forwarded the reports on Mr. Maharaj's conduct to the Commission.
  - (i) by letter dated 14<sup>th</sup> December, 2004 the Commission appointed Mrs. Helen Francis-Huggins, Human Resource Officer III, National Housing Authority to investigate the allegation of misconduct.
  - (j) also by letter of the 14<sup>th</sup> December, 2004, the Commission informed Mr. Maharaj of the allegation of misconduct against him and of Mrs. Francis-Huggins' appointment.
  - (k) the investigating officer, by letter dated the 5<sup>th</sup> January, 2005, informed Ms. Rebecca Paul that she was investigating the allegation of misconduct made against Mr. Maharaj and requested a written statement from her of her knowledge of the alleged misconduct against Mr. Maharaj.
- (6) There is controversy as to the response of Ms. Paul. Subsequent to the Commission's decision a letter dated 14<sup>th</sup> January, 2005, allegedly signed by Ms. Paul, was submitted to the Commission by the Applicant's attorney at law. The letter is addressed to Mrs. Francis-Huggins but Mrs. Francis-Huggins, in her affidavit in reply, maintained that she did not receive any written reply from Mrs. Paul. She said that having been appointed investigating officer she sought to contact Mr. Noel Maloney, Ms. Paul and Ms. Carol Quan Chan. She obtained a statement from Mr. Maloney which is consistent with his written report summarized at paragraph 5(b). She also obtained a statement from Mr. Maharaj.

As to Mrs. Quan Chan, Mrs. Francis-Huggins stated that:

*“Ms. Quan Chan orally indicated surprise that the alleged incident could have escalated to that stage.”*

She received a report from Ms. Quan Chan on 2<sup>nd</sup> February, 2005 (Mrs. Francis-Huggins’ request for a statement was dated 29<sup>th</sup> December, 2004.) Her response was as follows:

*“I acknowledge receipt of your request for a report on an incident that you referred to as ‘misconduct’.*

*The said incident took place sometime ago and today I cannot recall ALL that was said on that evening, but generally, there was a discussion during which remarks were made that was uncomfortable to me.*

*I pointed this out to my Acting Director and was asked to submit a written report in support of a particular request. This was done and to me that was the end of the matter. To attempt writing a report at this time could lead to inaccurate reporting. However, that written report submitted in September, 2004, can be accessed through the Acting Director of the National Lotteries Control Board.*

*It is not now or had ever been my intention to make this into an external or public issue.”*

Mrs. Francis-Huggins deposed that she did not think it part of her function as investigating officer to request a copy of Ms Quan Chan’s report. Rather, it was the responsibility of Ms. Quan Chan to submit the report of 10<sup>th</sup> September, 2004



with her response of 2<sup>nd</sup> February, 2005. In my judgment the omission is of no moment because a copy of that report (10<sup>th</sup> September 2004) had already been submitted to the Commission under cover of the Applicant's letter of 18<sup>th</sup> November, 2004.

- (7) Mrs. Francis-Huggins deposes that she then tried to make contact with Ms. Paul (who lives in the U.S.A.). She deposes at paragraphs 7, 8 & 9 as follows:

*“I then made attempts to contact Ms. Rebecca Paul at telephone number 1-615-324-6501. I was able to speak with someone who identified herself as Ms. Rebecca Paul only on 4<sup>th</sup> January, 2005. I identified myself and the purpose of my call. The person responded hastily that she was unable to speak at this moment and would return my call.*

*After a day or two I called the same telephone number again. At this time I spoke to a person who again identified herself as Ms. Rebecca Paul and I again identified myself and the purpose of my call and requested a statement of her on the alleged incident. The person responded, “I never heard a thing.” I then responded by saying o.k. Thank you very much.*

*Shortly, thereafter I related the above conversation to Ms. Jeanette Renaud, Acting Executive Officer of the Statutory Authorities Service Commission (hereinafter referred to as “SASC”). Ms Renaud advised me that whatever was the response of Ms. Paul I should get it in writing and to still send the request for a statement to Ms. Paul. I contacted a person who identified herself as Ms. Paul's secretary who gave me the fax number. I informed this person that I was faxing a letter to Ms. Paul and to please ensure she responds to this letter*

*urgently. I thereafter faxed the letter addressed to Ms. Rebecca Paul at fax number 1-615-324-6537 on the said 7<sup>th</sup> January, 2005. I have received no response to this fax to date.”*

- (8) Ms. Francis-Huggins then submitted her report dated 3<sup>rd</sup> February, 2005 to Ms Jeanette Renaud, together with statements of Mr. Maharaj, Mr. Maloney and Ms Quan Chan. In contrast to his earlier statement in which he said that specific details “*are not recalled*”, Mr. Maharaj, in his statement to Mrs. Francis-Huggins dated 28<sup>th</sup> December, 2004, (three months after his first) was then able outrightly to deny the allegations. This was his response:

*“On the evening of Friday 2<sup>nd</sup> September, 2004 almost while I was leaving the office for home, I was asked by Mr. Noel Maloney to accompany him to a casual ‘get-together’ to bid farewell to Ms. Rebecca Paul. I reluctantly agreed.*

*At the ‘get-together’, Miss Paul and I were discussing the hostage crisis in Russia. Ms. Paul said it was an act of terrorism and drew a parallel between the unforgettable terrorists attacks that led to the destruction of the World Trade Center (“9/11”) and said that Islamic fundamentalism had to be carefully controlled because it posed a growing threat to the world. I agreed with her and mentioned that we had our own taste of Islamic fundamentalism right here in Trinidad during the attempted coup in 1990.*

*Apart from agreeing with Ms. Paul by saying that it was true that Muslim terrorists posed a serious threat to stability and peace, at no time did I ever say anything derogatory about Muslims.*

*I specifically deny making any generalized statements to the effect that ALL Muslims were terrorists and should be executed or raising any issue about Pakistan. In short, I deny the statements attributed to me by Mr. Noel Maloney and Ms. Carol Quan Chan in their letters dated September 9<sup>th</sup> and 10<sup>th</sup>, 2004.*

*The discussion on this matter lasted no more than two minutes and was very cordial. No one raised any objection to my comments at the time and we continued to enjoy a very pleasant evening hereafter. Ms. Paul and I continued chatting on many different topics and she even thanked me for the interesting conversation. At no time did she or her guest indicate any displeasure about what I said.*

*On or about mid-November 2004 I was personally contacted by Ms. Quan Chan about the statement dated September 10<sup>th</sup>, 2004. She dissociated herself [from] this statement and told me that she was being pressured into signing this document by her superiors because they wanted to make certain allegations of misconduct against me because of my pending court case.*

*On or about late November I was contacted by Mr. Maloney who apologized to me and told me that he was being pressured into making a complaint against me because 'they' wanted to fabricate disciplinary charges against me in case I won my court matter against the Statutory Authorities Service Commission. He further stated that 'they' were using previous allegations of serious misconduct that were made against him concerning the unauthorized claiming of personal vehicle upkeep and maintenance allowance to compel or enforce his co-operation. This disciplinary matter of his, he claimed, had been*

*‘compromised’ with some ‘assistance’ but ‘they’ were now promising to re-open same if he did not co-operate. I asked him who ‘they’ was and he stated he couldn’t tell me but they were ‘above him. I informed Mr. Maloney that this was blackmail and that he should report the matter to the police and stand the consequences of his own wrongdoing, if any.’*

- (9) According to Mrs. Francis-Huggins, at the time of submission of her report she had not seen any letter from Ms. Paul dated 14<sup>th</sup> January, 2005. She adds that:

*“The letter dated 14<sup>th</sup> January, 2005 only came to my attention when Ms. Renaud sent a copy thereof attached to her letter to me dated 28<sup>th</sup> June, 2005. To date I have not received a response from Ms. Paul to my request dated 5<sup>th</sup> January, 2005.”*

The Commission, having sought two opinions from its legal advisor, then informed the Applicant of its decision by letter dated 20<sup>th</sup> April, 2005.

- (10) The Commission’s decision as set out in its letter of 20<sup>th</sup> April, 2005 was obviously met with dissatisfaction by the management of the Applicant. Its attorney at law, Mr. Quamina, responded by letter of 1<sup>st</sup> June, 2005 requesting a copy of the investigating officer’s report and indicating that his client was bothered by the Commission’s finding that there was not sufficiently cogent evidence to prefer a charge against Mr. Maharaj.

He said:

*“My client’s concerns have been enhanced since the Guest of Honour at the event has brought to the Board’s attention her response to the investigator, which also confirms that the derogatory statements were made.”*

A copy of the letter of Ms. Paul of 14<sup>th</sup> January, 2005 was attached. Mr. Quamina did not indicate how that letter came into his or his client's possession. The contents of that letter were never before the Commission when it made its decision. The letter, addressed to Mrs. Francis-Huggins, states very tersely that:

***“This is to confirm that I heard Mr. Devant Maharaj make derogatory statements about Muslims at an official dinner organized by the National Lotteries Control Board, held in my honor, prior to my departure from Trinidad and Tobago in September, 2004.”***

The Commission acknowledged receipt of Mr. Quamina's letter promising a reply. Ms Borde deposes that neither the investigating officer's report nor a reply has been received by the Applicant.

- (11) Ms Renaud, in her affidavit which essentially outlines the procedural steps taken by the Commission, confirms that legal advice was sought by the Commission in coming to its decision as set out in the Commission's letter of 20<sup>th</sup> April, 2005. She does not deny that there was no reply to Mr. Quamina's letter nor does she deny that the investigating officer's report was not submitted to the Applicant. The tone of her response is to admit in effect, if not expressly, that no further action was taken by the Commission:

***“(a) because it was concerned about the doubtful value of the letter dated 14<sup>th</sup> January, 2005 as produced by the National Lotteries Control Board bearing the signature of Rebecca Paul in light of the contradictory statement alleged to have been given to the Investigating Officer that she, Ms. Paul, heard nothing.”***

(b) *because it was concerned whether a case once closed by written correspondence to an officer as was done in Mr. Maharaj's case, could be re-opened on the basis of information received in the manner hereinabove set out."*

(12) Mr. Maharaj, in his affidavit of 16<sup>th</sup> January, 2006, deposed that he has denied the charges and that *"at no time did I make the comments attributed to me"*. He stated that the allegations were part of a larger vendetta against him because *"I am not a supporter of the ruling Peoples National Movement which appointed the present Board"*.

He then goes on to make allegations against two of the *"complainants"* as to suggest that one had been intimidated into giving a statement and the other was a beneficiary of favourable treatment by the management of the Applicant (and must return the favour by making these allegations). He alleges as well that the disciplinary proceedings were motivated by the fact that he had succeeded in a previous high court action against the Applicant.

### **The Law**

(13) The short question then is whether the decision of the Commission is irrational. In **Council of Civil Service Unions vs Minister for the Civil Service** 1985 A.C. 374 Lord Diplock stated the doctrine of irrationality in these terms at page 410:

*"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

For the purposes of this judgment however, I shall put the test as being whether the Commission's decision was so unreasonable that no rational tribunal properly directing itself could have come to the conclusion that Mr. Maharaj should not be charged.

- (14) In examining whether the Commission's decision was irrational or unreasonable, I am not to substitute my own views for that of the Commission. The dicta of Lord Keith of Kinkel in two decisions of the House of Lords, cited by Mr. Thorne, are relevant. In **Lonrho plc v Secretary of State for Trade and Industry** [1989] 2 All E.R.609, the House of Lords held, upholding the Court of Appeal's reversal of the Divisional Court, that the Secretary of State had properly exercised his discretion to defer publication of a report on the ground that early publication might be prejudicial to a fraud investigation and to a fair trial. In that case the appellant had made allegations of fraud against the Fayed Brothers, shareholders of a company which had acquired the shareholding of another. The acquisition was made after the brothers had assured the Secretary of State about the bid and their intentions with regard to the company acquired. The allegations were investigated and a report submitted to the Secretary who sent a copy of it to the Serious Fraud Office (SFO). The Secretary refused to publish the report, having been advised by the Director of the SFO that immediate publication would seriously inhibit inquiries being made by him and seriously prejudice any trial which might take place thereafter.

The appellant ultimately challenged, inter alia, the Secretary's decision to withhold early publication as "*perverse*" and "*irrational*" and as being one, which no reasonable Secretary of State advised as to the facts and law could have reached. The Director of the SFO swore an affidavit in support of the Secretary's decision (which was also supported by an affidavit of the Director of Public Prosecutions) in which he deposed that:

*“to publish the report would be likely to prejudice the investigation” and “run the risk of prejudicing a fair trial.” He added that “there already had been considerable discussion in the media of the events which are the subject of the report” and “the topic had already aroused considerable public interest” and “with the publication of the report this discussion and interest would be considerably fuelled.”*

Lord Keith at page 616(d) having quoted verbatim the relevant paragraphs of the Director’s affidavits (which I have just summarized) commented:

*“In these circumstances the attack on the rationality of the decision of the Secretary of State cannot be sustained; even without the evidence of the two directors, it seems to me that the Secretary of State was entitled to take the view that early publication might be prejudicial to the SFO and to a fair trial.*

*It is true that the Divisional Court took a different view of the effect of early publication but the members of the Divisional Court had not read the report and knew nothing of the investigations of the SFO. The Divisional Court was also confident of the ability of a jury on the instructions of a judge to forget everything they had read and seen before the trial. But the Secretary of State, who had read the report and was advised by the SFO and officials and counsel of the DTI, who had also read the report, was obliged to consider the possible risks stemming from the early publication of this particular report relating to a notorious controversy which was bound to continue ...”*

*“The judgments of the Divisional Court illustrate the danger of judges wrongly though unconsciously substituting their own*



*views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion. The question is not whether the Secretary of State came to a correct solution or to a conclusion which meets with the approval of the Divisional Court but whether the discretion was properly exercised.”*

- (15) I deduce from that decision that the Court’s function is simply to examine whether the discretion of the decision-maker has been correctly exercised. Once the decision-maker has taken all relevant considerations into account and has come to a conclusion which can be supported on the evidence and on the law, it has properly exercised its discretion. The fact that I may disagree with its conclusion and would have come to a different decision on the evidence is not a reason for quashing the decision. It will be sufficient that there is some basis in fact for the conclusion arrived at.

The court has far more latitude in considering whether the decision-maker has taken all relevant considerations into account since what is relevant is a question upon which a court must ultimately decide. But within those parameters it will be for the decision-maker to attach whatever weight it considers appropriate to the facts which arise therein subject only to whether the decision is rational or reasonable. See **Tesco Stores Ltd v Secretary of State for the Environment & Others** [1995] 2 All E.R. 636 at 642© where Lord Keith said:

*“It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision-maker to attribute to the relevant considerations such*

*weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense.”*

The Applicant has not alleged any failure of the Commission to take account of a relevant consideration and the question of the weightiness of the facts was therefore one for the Commission alone. The approach then must be to examine whether there is a sufficient basis upon which the Commission could have concluded as it did or whether the decision on the facts was so outrageous or illogical that no tribunal properly considering the facts could have arrived at it.

### **Conclusion**

(16) It is necessary to examine the facts which the Commission had before it on or before 20<sup>th</sup> April, 2005 when it made its decision. These were:

- (i) Two statements of Devant Maharaj, the first dated 21<sup>st</sup> September, 2004 in which he did not deny making the remarks and was unable to recall specific details but spoke in general terms of the conversations which took place at the dinner.

The second statement dated 28<sup>th</sup> December, 2004, written to Mrs. Francis-Huggins as investigating officer in which, though made three months later, he was then able to deny making the statements and in which he alleged that Mr. Noel Maloney and Miss Quan Chan both told him that they were pressured into making the statement.

- (ii) The statement of Noel Maloney dated 9<sup>th</sup> September, 2004 which directly implicated Mr. Maharaj.

- (iii) The two statements of Miss Quan Chan, the first dated 10<sup>th</sup> September, 2004 which also directly implicated Mr. Maharaj. The second statement directed to Mrs. Francis-Huggins expressing misgivings about the way the matter has progressed.
- (iv) The report of Mrs Francis-Huggins to the effect that Miss Paul, who was seated at the same table as everyone else, had denied hearing any derogatory remarks made by Mr. Maharaj.
- (v) Legal advice from its attorney at law advising that there was no sufficiently cogent evident upon which to proceed.

(17) Mr. Mendes submitted that the Commission's decision is irrational because it:

- (i) did not take into account the fact that Mr. Maharaj was inconsistent in his responses firstly not denying the allegations and then doing so only when an investigating officer was appointed. That inconsistency raised questions as to his credibility.
- (ii) did not consider that no question was raised as to Mr. Maloney's credibility or the reliability of his evidence.
- (iii) did not consider that the evidence against Mr. Maharaj was not in conflict with other evidence.
- (iv) was "*flatly wrong*" in saying that Ms. Quan Chan had resiled from her earlier statement.

As to the alleged resiling by Miss Quan Chan he added that even if her evidence showed that she was unwilling to pursue the issue publicly (or was “brakes-ing” as he put it) she was not resiling.

- (18) Applying the dictum of Lord Keith in Lonrho the question is not whether the Commission was right to conclude that there was no sufficiently cogent evidence to prosecute Mr. Maharaj but whether it properly exercised its discretion. The fact that I consider that there was sufficient evidence to prosecute a charge against Mr. Maharaj is of no moment. It was for the Commission, in considering the evidence before it, to attach whatever weight to the respective statements as it thought fit. In my judgment it has done so. Can it be said that on the facts before it the Commission’s decision is so irrational that no properly directed Commission would have arrived at the same decision or, that its decision is so outrageous in its defiance of logic that no sensible person who applied his mind to the question would have come to the same decision? I think not. It seems to me that having regard to the evidence before it, it was open to the Commission to come to the decision it did.
- (19) As to Mr. Mendes’ submission at paragraph 17(i) to (iii), those were matters falling exclusively within the jurisdiction of the Commission. Questions of credibility and inconsistency in the evidence were all matters to be weighed by the Commission in considering the investigating officer’s report and the allegations against Mr. Maharaj.
- (20) Further, even if the Commission were wrong that Miss Quan Chan had resiled from her earlier statement the decision of the Commission cannot be found to be irrational. Miss Quan Chan, while not resiling from her previous statement was obviously not willing to testify in any disciplinary proceeding against Mr. Maharaj. Her reticence was a relevant consideration which the Commission would have been entitled to take into account. Ms Paul’s evidence as far as the Commission was aware, was that she never heard a thing.

- (21) We are thus left with the two statements of Mr. Maharaj and Mr. Maloney's. Certainly, Mr. Maharaj's two statements are inconsistent. The fact that he was non-committal in his first statement to the Director (Ag.) and, then three months later, could recall sufficiently so as to flatly deny the remarks is a serious indictment on Mr. Maharaj's credibility. But there is nothing in his first statement to suggest any admission of guilt and it was open to the Commission, taking a global view of the evidence, to conclude that Mr. Maloney's statement having regard to the standard of proof required, might not by itself be sufficient to sustain a charge against Mr. Maharaj even with his inconsistent statements. Mr. Maloney's statement and Mr. Maharaj's denial were also to be judged against the fact that Miss Paul was reputed to have said that she did not hear a thing. This, while seated at the same table as Mr. Maharaj, Mr. Maloney and Miss Quan Chan. It was for the Commission to weigh those matters and decide whether it was prepared, on that evidence, to put Mr. Maharaj through the oppression of disciplinary charges with the attendant damage to his reputation and career that such charges would bring.
- (22) Mr. Mendes submitted that the scheme of the Statutory Authorities Service Commission Regulations encompassed four procedural stages – (1) investigation, (2) decision to prosecute, (3) tribunal hearing, (4) decision and punishment. He added that the initial decision to prosecute is made by the Commission and this required only that the Commission satisfy itself that there is a prima facie case (as he submitted there was in this case). He added that a decision to charge had a lower threshold than a decision to acquit which is made by the disciplinary tribunal because the latter decision went to guilt and the standard of proof was beyond a reasonable doubt. In the former, the Commission simply had to be satisfied that there was a prima facie case. He did accept however that there would be cases where the Commission would have to decide on credibility as a preliminary to the institution of disciplinary charges albeit as an integral part of its

initial decision. He relied on the case of **R v General Council of the Bar ex parte Percival** – [1991] 1QB, 212.

- (23) Having examined the regulations and the Statutory Authorities Act, Chap. 24:01, I am satisfied that the submission is without merit and that the decision in **ex parte Percival** is to be confined to its own facts. It is true that a decision by the Commission to proceed to charge an officer requires less involved consideration of the facts comprising the allegation than that of a disciplinary tribunal considering the actual evidence of the charges. But a decision to charge a public officer is still a quite serious matter which requires the Commission properly to direct its mind to the facts which comprise the allegations. It seems to me that in every case in which allegations of misconduct arise, the Commission will be required to examine the substance of the allegations and to decide on their credibility before proceeding further. That credibility question will vary from case to case (and from stage to stage) and, depending on the facts which arise in each case, the depth of its consideration will also vary.
- (24) But it is an issue which must always be addressed at each stage up to and including the appointment of a tribunal. I do not consider that it is right or necessary to equate the Commission's role in that exercise as being required to find a prima facie case. In **ex parte Percival** the decision maker was the Professional Conduct Committee of the General Council of the Bar of England and Wales which had decided not to prefer charges of professional misconduct against a barrister, preferring instead the lesser charge of breach of professional standards. By the provisions of rule 3(e) (viii) of the Code of Conduct for the Bar of England and Wales it was expressly provided that the committee may direct the preferment of a charge if a prima facie case of professional misconduct was made out. What was a "*prima facie case*" was also specifically defined in paragraph 7 of the Code. The facts of the present case are distinguishable. The governing regulations do not expressly require the Commission to find that there is a prima facie case of misconduct. Moreover, the Commission is not a prosecuting

authority which must sit and weigh facts legalistically. There must be some conviction on the Commission's part as to the sustainability of any charges which may be preferred against the officer in question. I am not prepared to accept that the basis of such sustainability must necessarily be equated to or described as a "prima facie" case in the strict legal sense. In this case the Commission was not persuaded, after the investigating officer's report, that it was necessary to proceed to a tribunal. I cannot, having regard to all the facts before me, conclude that that decision was irrational (however much I may disagree). In my judgment there is a sufficient basis on the evidence to support such a conclusion and I cannot interfere.

- (25) That is enough for me to dispose of this application but there are two matters on which I must comment. Firstly, Mr. Mendes rightly did not pursue whether Ms. Paul's 14<sup>th</sup> January letter (which under normal circumstances would have been a relevant consideration) should have been or should now be considered by the Commission. I say "*rightly*" because that letter was not before the Commission at the time of its decision and the facts surrounding how it came into the Applicant's possession would have raised more questions than answers.
- (26) Secondly, Mr. Ramlogan sought to argue (even though Mr. Maharaj belatedly denied making the statements) that the remarks, even if true, were expressions of his constitutional right to free speech and could not in any way form the substance of a disciplinary charge. While I shall venture no firm opinion on the correctness of such a submission (if only because it is unnecessary), I shall say only that constitutional rights are not absolute and anyone who is prepared publicly to express such outrageous, extremist and bigoted views should also be prepared to suffer the natural consequences which flow from their expression. Where made in the course of official duties, an employer would be entitled, as a natural consequence and in the exercise of its own constitutional rights and freedoms, to insist on his separation from its employment subject only to the terms of the contract of employment or conditions of service.

The notice of motion is dismissed. The Applicant shall pay the respondent's and interested party's costs.

It remains only for me to thank all three counsel for their very helpful submissions especially those of Mr. Thorne with which I have essentially agreed.

**NOLAN P.G. BERAUX**  
**Puisne Judge**

**26<sup>th</sup> June, 2006**