THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal Number: CA S 00173 of 1999
High Court Action Number: S-728 of 1995

BETWEEN

RAMROUTEE MAHARAJ
OTHERWISE RAMROUTIE MAHARAJ
(ADMINISTRATIX OF THE ESTATE OF
MOTILAL MAHARAJ, DECEASED)
Applicant/Appellant

AND

ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO
Respondent/Claimant

PANEL:
N. Bereaux, J.A.
P. Rajkumar, J.A.
C. Pemberton, J.A.

APPEARANCES:
Mr. R. L. Maharaj, S.C. instructed by Ms. M. Narinesingh for the Appellant
Mr. N. Byam for the Respondent

Date Delivered: June 13th 2018

I have read the reasons for decision by Justice of Appeal Rajkumar and I agree with them.

N. Bereaux
Justice of Appeal

I also agree.

C. Pemberton
Justice of Appeal

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JUDGMENT

Delivered by: P. Rajkumar J.A.

Background

1. The applicant is the personal representative of Motilal Maharaj, now deceased. On October 25th 1989 the deceased, while employed with the Ministry of Agriculture, was attacked and gored by a bull. He sustained severe personal injury, was confined thereafter to a wheelchair, and was unable to work. He alleges that he sustained that injury as a result of the negligence of his employer.

2. At that time the law as to the limitation period for actions in tort against the State was to be found in the Public Authorities Protection Act, Act No. 34 of 1948 (PAPA) Under that Act the limitation period in actions in tort against the State was one year.

3. The Act which is the focus of this claim is the Limitation Act 1981 -Act No. 22 of 1981 (or "the 1981 Act"). The 1981 Act had been passed by both Houses of Parliament. It had received the assent of the President on 30th July, 1981.

4. However section 1(2) of the 1981 Act provided that "*this Act shall **come into operation** on a date to be appointed by the President **by proclamation** published in the Gazette"*.

5. By Section 80 of the Constitution of Trinidad and Tobago in proclaiming an Act of Parliament the President acts on the advice of the Cabinet[1] – (that is, the Executive).

[1] **80.** (1) In the exercise of his functions under this Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law, and, without prejudice

6. This appeal proceeded on the basis that the 1981 Act altered, to 4 years, the limitation period that applied to actions in tort against the State. The appellant contended that had the 1981 Act been proclaimed the deceased would have been able to institute proceedings against the State for damages in tort up to October 24th 1993 or thereabouts without the possibility of being met with a defence that his action was barred by statute. In fact however the 1981 Act was never proclaimed and never did come into operation.

7. Instead in 1997, Parliament enacted a different act - the Limitation of Certain Actions Act (or "the 1997 Act)". It came into effect on November 17th 1997. It **expressly** (by s.18) repealed the PAP Act. It provided a limitation period of four (4) years, from the date of the accrual of his cause of action, to commence an action in tort against the State. Accordingly, for actions in tort against the State since 1997 the limitation period of 4 years provided by the 1997 Act has been, and is now, applicable.

8. The applicant did not institute proceedings against the State within one year of the incident which caused his injury. He claims at paragraph 9 of his affidavit that he approached his lawyers and was advised in April 1992, (within four years of the incident which caused his injury), that his claim for damages for negligence in tort would be outside the one year limitation period then applicable by the Public Authorities Protection Act[2].

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to the generality of this exception, in cases where by this Constitution or such other law he is required to act—
(a) in his discretion;
(b) after consultation with any person or authority other than the Cabinet; or
(c) in accordance with the advice of any person or authority other than the Cabinet.

[2] At paragraph 8 of the grounds in support of his motion he claims he learnt of this in November 1993, outside the 4 year period. Ultimately however nothing turns on this discrepancy.

9. On June 17th 1995 the deceased commenced proceedings pursuant to s. 14 of the Constitution. Therein the appellant contends that if Act No. 22 of 1981 (the 1981 Act) had been proclaimed within a reasonable time after its passage it would have been in effect at the date of his injury. He would have been able to avail himself of a four year limitation period and commence proceedings for damages against the State. His claim would not have been statute barred.

10. He claims that as a result of the failure to have the 1981 Act proclaimed his right to enjoyment of property and his right to the protection of the law, had been contravened. Further, he claimed, in addition to monetary compensation:-

(a) A declaration that he was **entitled to have the benefit of the provisions of the Limitation Act No. 22 of 1981** by which he would have been entitled to commence proceedings against the State for damages for injuries he suffered as a result of negligence of the State **within four years** of the date of his injuries on the 25th October, 1989.

(b) A further declaration that the Executive arm of the State **contravened his fundamental rights** guaranteed in the Constitution in **not causing the said Act to be proclaimed** and/or implemented although passed by Parliament since 1981.

Conclusion

11. At the date his injury was sustained, even though the 1981 Act, which prescribed a 4 year limitation period against the State, (as opposed to the one year limitation period against the State in the PAP Act), had been passed, the fact remained that the 1981 Act

required **proclamation** before it could come into operation, and it had not been proclaimed.

i. In this case the 1981 Act was passed by Parliament but not proclaimed. Given that the power of proclamation by the President is exercised on the advice of Cabinet (the Executive), Parliament conferred on the **Executive** a power to bring the 1981 Act into operation by advising its proclamation. It necessarily therefore conferred on the Executive the power to **decide the timing** of bringing it into operation by advising its proclamation.

ii. Parliament did not confer such a power on the Judiciary.

iii. Such a **power** was not the same as a **duty**.

iv. However that **power** was discretionary and permitted a variety of factors to be taken into account by the Executive in deciding the timing of proclamation.

v. Because of the **wide ambit of the discretion** afforded by the Legislature to the Executive in determining the **timing** of proclamation, that discretionary power was ***not to be read as imposing a duty*** *which, if not carried out, could be the subject of a mandatory order by a court directing it to appoint a day on pain of being in contempt of court.*

vi. The Interpretation Act s. 23[3] did not apply as s. 5(1) of the 1981 Act neither **authorized** nor **required** anything to be done so as to impose an obligation for implementation by proclamation within a reasonable time. As the trial

[3] ***23.*** *Where a written law* ***requires*** *or* ***authorises*** *something to be done but does not prescribe the time within which it shall or may be done, the law shall be construed as* ***requiring*** *or* ***authorising*** *the thing to be done* ***without unreasonable dela****y* ***having regard to the circumstances*** *and as often as due occasion arises.*

judge held, it merely identified the means by which the 1981 Act was to come into operation – by proclamation.

vii. Accordingly delay in proclamation, or even non proclamation, gave rise to neither **breach of statute**, nor **breach of** any **duty** to proclaim as there is **no such duty**.

viii. Even if it did – which it did not – unreasonable delay was to be construed "having regard to circumstances", and there was **no evidence** that the delay, or even the non-proclamation at all of the 1981 Act, was inappropriate in "*the circumstances*".

ix. Accordingly, (a) in the context of a wide discretion in the exercise of the power to proclaim, and (b) in absence of a **breach of statute**, or (c) in absence of a **breach of duty** to take steps to effect the bringing into operation of the 1981 Act by proclamation, there can be no breach of any constitutional right, because no basis for such a right has been demonstrated to exist.

x. There can be no breach of **the constitutional right** to **protection of the law** based on a right to rely on a limitation period in a statute that was not in force. Further there can be no breach of the **constitutional** right to protection of the law as there was in force a right to access remedies in law within a time frame, albeit a different one, that was provided by existing law – the PAP Act.

xi. There can be no **legitimate expectation** based on a **statute** that was **not in force,** especially as there remained in force the right to access remedies in law within a time frame that was provided by existing law – the PAP Act.

xii. Further, the wide **discretion** afforded to the Executive, as to the **timing** of implementation by proclamation, is **inconsistent** with the existence of any

such **legitimate expectation** that the 1981 Act would be proclaimed within any specific time period.

xiii. To grant the declaration sought would place the court in the position of giving effect to an un-proclaimed statute, contrary to the Legislature's intention. A court cannot ignore the consequence of the arguments – namely – there could be in effect two statutory regimes at the same time. This would be tantamount to **dictating to the legislature** that despite its having authorised the 1981 Act coming into effect upon its proclamation at the instance of the Executive, that requirement could be dispensed with and ignored by the courts.

xiv. It would also be tantamount to **dictating to the Executive**, (within whose discretion the timing of implementation had been entrusted), as to when the 1981 Act should have been proclaimed.

xv. Both would be incompatible with the judicial function and both would be a breach of the **separation of powers**.

xvi. It would also involve ignoring the legislation that was actually in effect at the time – the PAP Act. Ignoring existing legislation is also **incompatible with the judicial function.**

The reasoning of the trial judge which was to the same effect cannot be faulted.

12.

i. The deceased was not entitled to have the benefit of the provisions of the un-proclaimed Limitation Act No. 22 of 1981.

ii. The deceased could not found a legitimate expectation on an Act which had not come into operation.

iii. The State did not contravene any fundamental constitutional rights, either to enjoyment of property or to the protection of the law, as no fundamental right was contravened in not causing the 1981 Act to be proclaimed and/or brought into operation.

iv. The deceased would therefore not be entitled to damages.

Disposition and Order

13. In the circumstances the appeal is dismissed.

Analysis

Law

14. Some context for the arguments may be provided by the Statutes Act.

Sections 4 and 5 provide as follows: (all emphasis added)

> ***4.*** *(1) The date of the passing of every statute shall be the date on which the Bill for that statute receives the assent of the President.*
>
> *(2) The Clerk of the House of Representatives shall inscribe on every statute, immediately after the long title thereof, the day, month and year when the statute received the assent of the President, and such inscription shall be taken to be part of the statute.*
>
> ***5.*** *(1) Every statute that is not expressed to come into force or operation on a particular day, comes into force or operation immediately on the expiration of the date before the date of the passing thereof.*
>
> *(2)* ***Where a statute provides that it is to come into force or operation*** *on a* ***day or date to be fixed by the President by Proclamation****, or that it is not to*

come into force or operation until a day or date to be so fixed, any such Proclamation may —

(a) apply to the whole statute or any Part or section or other subdivision of the statute;

(b) be issued at different times as to any Part or section or other subdivision of the statute; and

(c) suspend until further proclamation or until a specified date, the operation of any provision contained in the statute.

Interpretation Act – section 23

23. *Where a written law* ***requires*** *or* ***authorises*** *something to be done but does not prescribe the time within which it shall or may be done, the law shall be construed as* ***requiring*** *or* ***authorising*** *the thing to be done* ***without unreasonable dela****y* ***having regard to the circumstances*** *and as often as due occasion arises.* (all emphasis added).

The trial judge construed this as not being applicable to the date of proclamation of the 1981 Act because s. 5(2) of the Statutes Act did not require or even authorise anything to be done.

15. Examination of that section of the Statutes Act confirms that this is the case. It merely recognises the fact that some statutes may come into force upon proclamation, either in whole or in part or in parts at differing periods, without **requiring** or **authorising** anything to be done to bring this about. There was therefore no breach of statute in failing to proclaim the 1981 Act "without unreasonable delay."

16. In the court below great reliance was placed on the case of **R v Secretary of State for the House Department, ex parte Fire Brigades Union and others [1995] 2 All ER 244** (the **Fire Brigades** case) decided by the House of Lords. Their Lordships had to consider whether the power given to the Secretary of State for Home Affairs (under s. 171(1) of the relevant Act), to bring into force statutory provisions relating to compensation for injury occasioned by criminal acts (the statutory scheme), **on a day to be appointed by him by statutory instrument,** imposed on him a **duty** to do so. Under those provisions compensation was assessable for injuries on the same basis as assessment for personal injury at common law. The statutory scheme was to replace a scheme under the royal prerogative which also provided for assessment of injury on the common law basis. However the Secretary of State failed to implement the statutory provisions. He instead decided to implement a different compensation scheme based on a flat rate tariff which did not take into account inter alia, individual circumstances of the victim, or special damages. The respondent union applied for judicial review of the continuing decision not to bring into force the provisions of the Act which provided for the statutory scheme of compensation.

17. The trial judge (at page 24) considered the **Fire Brigade** to be helpful to his analysis. I have considered that case and the passages that he set out to be equally of assistance. Because of their relevance and cogency, reference to some of those passages in extenso is unavoidable, in particular (a) where Lord Browne Wilkinson considered whether s. 171 imposed a **duty** or a **power** on the secretary of state to bring into force the sections necessary to implement the statutory compensation scheme, (b) Lord Lloyd underscored what was illegitimate in that case, and

emphasised the need to give effect to, and not to frustrate, legislative policy, and (c) Lord Nicholls emphasised the width and rationale of the discretion as to the timing of bringing into force the statutory scheme.

18. At **252b** to **253c** Lord Browne Wilkinson stated (all emphasis hereafter added):-

> "*The form of words to be found in section 171(1) is used in many statutes where Parliament considers, for one reason or another, that it is impossible to specify a day for the statutory provisions enacted to come into force. Therefore although the case before your Lordships turns on the construction of section 171(1) it cannot be construed in isolation. Such a widely used statutory formula must have the same effect wherever Parliament employs it. The words of section 171(1) are* ***consistent only*** *with the Secretary of State* ***having some discretion*** *.....* ***What is it then which suggests that there will come a time when that discretion is exhausted*** *and that, whatever the change of circumstances since the sections in question were passed by the Queen in Parliament, the Secretary of State becomes* ***bound*** *to bring the sections into force?* ***I can see nothing in the Act which justifies such an implied restriction on the discretion***. *Moreover I can foresee circumstances in which it would* ***plainly be undesirable for the Secretary of State to be under any such duty***.
>
> At page 252f: *Further,* ***if the argument of the applicants is right, there must come a time when the Secretary of State comes under a duty to bring the statutory provisions into force and accordingly the court could grant mandamus*** *against the Secretary of State requiring him to do so. Indeed, the*

applicants originally sought such an order in the present case. In my judgment it would be ***most undesirable*** *that, in such circumstances,* ***the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect****. That would be for the* ***courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation****. In the absence of clear statutory words imposing a clear statutory duty, in my judgment* ***the court should hesitate long before holding*** *that such a provision as section 171(1)* ***imposes a legally enforceable statutory duty o****n the Secretary of State.*

Power

At page 26: It does not follow that, because the Secretary of State is not under any ***duty*** *to bring the section into effect, he has an absolute and unfettered discretion whether or not to do so. So to hold would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the royal assent merely to confer an enabling power on the executive to decide at will whether or not to make the parliamentary provisions a part of the law. Such a conclusion, drawn from a section to which the side note is "Commencement," is not only constitutionally dangerous but flies in the face of common sense. The provisions for bringing sections into force under section 171(1) apply not only to the statutory scheme but to many other provisions….. …Surely, it cannot have been the intention of Parliament to leave it in the entire discretion of the Secretary of State* ***whether or not*** *to effect such important changes to the criminal law. In the absence of express provisions to the contrary in the Act, the plain intention of Parliament in*

conferring on the Secretary of State ***the power*** *to bring certain sections into force is that such* ***power*** *is to* ***be exercised so as to bring those sections into force when it is appropriate*** *and* ***unless there is a subsequent change of circumstances which would render it inappropriate to do so***.

At 253 c *"If, as I think, that is the clear purpose for which the* ***power*** *in s 171(1) was conferred on the Secretary of State, two things follow. First the Secretary of State comes under a clear* ***duty to keep under consideration*** ***from time to time the question whether or not to bring the sections*** *(and therefore the statutory scheme)* ***into force****. In my judgement he* ***cannot lawfully surrender*** *or release the* ***power*** *contained in s171 (1) so* **as to purport to exclude its future exercise e***ither by himself or his successors."*

19. In fact it was the attempt by the Secretary of State to so bind himself not to exercise the power he had under s. 171 that was found to be unlawful in that case. Lord Lloyd in his judgement accepted that the fact that Parliament had passed the legislation which allowed the statutory scheme of compensation but had not itself brought it into effect, could not be ignored. He stated at page 271 that:

"But quite apart from s171(3), I would construe s171 so as ***to give effect to, rather than frustrate, the legislative policy*** *enshrined in ss108 to 117,* ***even though those sections are not in force****.* ***The mistake which, if I may say so, underlies the dissenting judgment of Hobhouse LJ is to treat these sections as if they did not exist. True, they do not have statutory force. But that does not mean they are writ in water. They contain a statement of Parliamentary intention, even though they create no enforceable rights.*** *Approaching the*

matter in that way, I would read s 171 as providing that ss 108 to 117 ***shall come into force <u>when</u> the Home Secretary chooses****, and* ***not that they may come into force <u>if</u>*** *he chooses. In other words****, s.*****171 confers a power to say when, but not whether**.

…….The Home Secretary has ***power to delay*** *the coming into force of the statutory provisions in question; but he has no power to reject them* ***or set them aside as if they had never been passed****."* (Emphasis in bold mine)

Therefore Lord Lloyd recognised that the home secretary had power to delay implementation. However, in renouncing the statutory scheme the home secretary had exceeded his powers, in effect rejected the statutory scheme and therefore acted unlawfully.

20. In the instant case there is no issue of the Executive renouncing or rejecting the 1981 Act, although it clearly delayed implementation of a four year limitation period, in actions against the State, until the 1997 Act was proclaimed instead. It should be noted that in that case s. 171 (1), which allowed the statutory scheme to be brought into effect**, was itself in force**, but no order was made under it bringing the statutory scheme into effect.

21. Lord Nicholls, in explaining the **rationale** and **width of the discretion** to determine the timing of bringing the statutory scheme into effect, stated at pages 274c to 275 d:-

The commencement day provision

.... the purpose for which this common form provision exists is to facilitate bringing legislation into force. ***Parliament enacts legislation in the expectation that it will come into operation. This is so even when Parliament does not itself fix the date on which that shall happen. Conferring power on the executive to fix the date will often be the most convenient way of coping with the practical difficulty that, when the legislation is passing through Parliament, it is not always possible to know for certain what will be a suitable date for the legislation to take effect. Regulations may need drafting, staff and accommodation may have to be arranged, literature may have to be prepared and printed. There may be a host of other practical considerations. A wide measure of flexibility may be needed. So the decision can best be left to the minister whose department will be giving effect to the legislation when it is in operation. He is given a power to select the most suitable date, in the exercise of his discretion****.*

At page 28: *Thirdly, although the purpose of the commencement day provision is to facilitate bringing legislation into effect****, the width of the discretion given to the minister ought not to be rigidly or narrowly confined.*** *.... **The range of unexpected happenings is infinite.** In the course of drafting the necessary regulations, **a serious flaw in the statute might come to light**. An **economic crisis might arise**. The government might consider it was **no longer practicable, or politic**, to seek to raise or appropriate the money needed to implement the legislation for the time being. In considering whether the moment has come to appoint a day, **as a matter of law** the minister **must be able to take such matters into account.** Of particular relevance for present*

purposes, ***as a matter of law*** *the minister* ***must be entitled to take financial considerations into account when considering whether to exercise his power and appoint a day.*** *It goes without saying that the minister will be answerable to Parliament for his decision, but that is an altogether different matter.*

A duty to consider

*The next point to note is that in the present case the complaint is not about the exercise by the Secretary of State of the power given him by section 171(1). The complaint is about the non-exercise of the power****. A failure to exercise a power can only be the subject of complaint if the person entrusted with the power has thereby acted in breach of some duty*** *imposed on him, or* ***acted improperly*** *in some other respect.*

(275a) On its face the commencement day provision ***confers on the minister a power*** *to appoint a commencement day,* ***rather than imposing upon him a duty to do so****. In my view, this provision is* ***not to be read as imposing a duty*** *which, if not carried out, could be the subject of a mandatory order by a court directing him to appoint a day on pain of being in contempt of court. In the first place,* ***a legal duty to appoint would be substantially empty of content in view of the wide range of circumstances the minister can properly take into account in deciding whether or not to appoint a commencement day****. Secondly, and much more importantly****, a court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the*

legislature, not the judiciary. The courts must beware of trespassing upon ground which, under this country's constitution, is reserved exclusively to the legislature. *Clearer language, or a compelling context, would be needed before it would be right to attribute to Parliament an intention that the courts should enter upon this ground in this way.*

22. The trial judge relied heavily on the above cited passages. He therefore appreciated:-

(i) that there was a distinction between a **power** conferred on the Executive to bring legislation into effect, and a **duty** on the Executive to bring that legislation into effect within a mandatory time frame;

(ii) the several discretionary factors, entirely within the knowledge and control of the Executive, which would have weighed (a) against an enforceable duty being imposed on the Executive, or (b) against implying any fetter by the Legislature on the Executive re the timing of implementation of the 1981 Act.

23. A common theme in the judgments of the majority in the **Fire Brigade** case is that where Parliament confers a discretion on the Executive as to the timing of implementation of a statute that may be construed as a power, not a duty. The Executive has the power to decide when a statute is to be brought into effect as issues such as financial considerations or necessary administrative arrangements are within the knowledge and control of the Executive, not the Legislature.

24. It cannot therefore be considered an automatic breach of duty, far less a breach of a constitutional right, if that discretion to proclaim the statute or its converse, the discretion not to have the statute proclaimed, is not exercised within a defined time frame.

25. The **circumstances** must also be examined, (of even greater relevance if the Interpretation Act s. 23 had been held to be applicable), and it must be demonstrated that in the circumstances then prevailing it was not reasonable to refrain from causing the 1981 Act to be proclaimed or implemented.

Delay and Onus of proof

26. The appellant contends that (i) the onus is on the State to demonstrate that it was reasonable to refrain from causing the 1981 Act to be proclaimed or implemented, and /or (ii) that the failure of the State to address these circumstances in the affidavits, given prima facie unreasonable delay, means that **the Executive** has demonstrated no extenuating or explanatory or justifying circumstances. The trial judge's conclusion was to the contrary. He held that it was to be presumed that it was appropriate and reasonable in all the circumstances for the Executive not to bring the Act into force, and it was **for the Applicant to show that there existed a duty** or some compelling circumstances to mandate the exercise of the power conferred on the Executive to bring the Act into force.

27. As to the argument of denial of access to the court under the 1981 Act, the trial judge noted that the 1981 Act was **not in force and no rights could be acquired under it**. Accordingly he rejected that argument.

28. It should also be noted that the instant case is unlike the **Fire Brigade** case in that s. (171(1) (the commencement day provision) **was in force** and the criminal injury compensation scheme had been passed but remained "*in embryonic form*"[4] until the commencement day power had been exercised.

29. Although there is no explanation for the delay – (1981 to 1997) – in effecting that change, (and in fact for never proclaiming the 1981 Act at all), it can be inferred that some unknown part of that delay can be partly accounted for by the necessity of reviewing the legislation, in the process of selection of content for the 1997 Act by comparison with the 1981 Act and in considering whether to proclaim the 1981 Act or whether instead to redraft and pass the 1997 Act, as was eventually done.

30. To contend therefore, that there was a breach by the Executive in failing **to keep under review** the decision to proclaim and bring into operation the 1981 Act is not borne out by those inescapable inferences. Nevertheless on the face of it, it is correct that there has been unexplained inordinate delay in having the 1981 Act proclaimed. In fact it was never proclaimed, although the eventual passage of the 1997 Act did alter the limitation period of 1 year for actions against the State to 4 years and did achieve the same result in that regard.

31. However, the Executive does have the discretion to delay implementation of a statute unless or until it adjudges the circumstances to be appropriate. Therefore, even if it is accepted that the majority of the delay in proclamation, (and in fact the non-

[4] 274 b per Lord Nicholls

proclamation), of the 1981 Act remains unexplained by the State, this fact by itself does not give rise to any breach of duty or provide cause for complaint.

32. The case of **Suratt & Ors v The Attorney General** [2008] UKPC 38 provides some insight into the approach to be adopted in a case such as this. **Suratt** dealt with the issue of the non-implementation of the Equal Opportunities Act. This was an Act which, unlike the instant 1981 Act, had been passed and which **was in force**, but which was not being implemented.

33. In relation to its non-implementation the appellant sought to argue that their constitutional right to the protection of the law had been contravened. Their Lordships declined to explore this argument, because it would have made no difference to the relief they had granted, and for the reasons set out below in their judgement, (all emphasis added).

34. The Board explained:-

> *5. ... It is the appellants' contention that the **non-implementation of legislation which is in force** and to their advantage has violated their fundamental human right to "the protection of the law" under section 4(b) of the Constitution and that that right has not been satisfied by their entitlement to seek (as here they have) the Court's ruling that the legislation is indeed constitutional and so must be implemented. The respondent contends to the contrary essentially that access to the Courts in itself provides "the protection of the law".*

8. Against this background, and ***having heard no argument on the issue during the original hearing of the appeal, not all of their Lordships were prepared for full argument on the point at the subsequent hearing and certainly, at the conclusion of this further hearing, not all of their Lordships were of the same view on the issue****. However – and this will explain why the Board have chosen to deal with this issue and the section 14 issue together – their Lordships have all reached the clear view that,* ***whether or not the non-implementation of the Act is properly to be regarded as having deprived the appellants of the protection of the law,*** *the making of the declarations already made by the Board on 15 October 2007 provides the appellants in the particular circumstances of this case with proper and sufficient "redress" pursuant to section 14 of the Constitution.*

35. Despite declining to consider whether the right to protection of the law had been breached by non-implementation of the Act, the Board's further comments are enlightening.

@ paragraph 9. "No one has ever questioned the government's good faith throughout the course of these events. ***They need never, of course, have enacted this legislation or brought it into force in the first place.*** *Indeed, on the Board's findings,* ***they could have repealed it*** *(and still could) by a simple majority vote in Parliament.* ***Had they <u>waited</u> (<u>as convention perhaps dictates government would ordinarily have been expected to do</u>) until the Commission and Tribunal were already in place <u>before bringing the rest of the Act into force</u>, and during that interval been advised that the Act was***

not after all constitutional, no question of the appellants being denied the protection of the law would have arisen. *It is true that some two years elapsed before proceedings were brought to test the constitutionality of the Act and that these proceedings were brought by the appellants, not the government. And as Lord Bingham observed at para 37 of his judgment – expressing in this regard the view of the Board as a whole:*

"It is not a desirable practice to leave the statute unimplemented until action is brought against the government by a private complainant seeking an order against the government to implement the statute after a delay of some years. But that provides no sound basis for an award of damages."

36. Therefore delay in bringing a portion of the Act into force pending administrative arrangements would not, without more, amount to a denial of the protection of the law. Further, if during that period of delay, advice had been received that that Act was unconstitutional, then the government need not have brought it into effect. In that case no breach of the constitutional right to the protection of the law could be said to have occurred.

37. Further, the Board's statements were all made in the context of a statute **that was in force** but not implemented. It is recognized therein that:-

i. a statute need not be brought into force in the first place, or

ii. if it is brought into force its implementation could be delayed pending administrative arrangements or

iii. if it is brought into force it could yet be repealed,

all without triggering a breach of the constitutional right to protection of the law.

38. In this case the 1981 Act had **not been** brought into force or operation in the first place. Therefore, in relation to a statute which has **not been brought into operation** this would be all the more reason why there can be no constitutional right to protection of the law if its implementation is delayed.

39. Further, this is consistent with the observations of the majority in the *Fire Brigade* case, that once there is a **discretion** given to the Executive as to date of commencement of an Act, even in relation to an Act which has been enacted by the Legislature, then this gives rise to a **power**, not an enforceable duty.

40. Such a **power** would be to recommend implementation **when** it is **appropriate**, unless there is a subsequent change of circumstances, which would render it inappropriate to do so.

41. The trial judge held that it was for the Applicant to show that there existed a duty or some compelling circumstances to mandate the exercise of the power conferred on the Executive to bring the Act into force. This had not been done. This must be so because if the Executive had a **discretion** as to when to seek to have the 1981 Act implemented[5], then, in the absence of some material demonstrating or raising the issue that the discretion is not being properly exercised, the courts could hardly seek to review that discretion. It would therefore not be enough to merely assert that delay – even of 16 years or more – raises the inference or presumption that the discretion is not being appropriately exercised.

[5] by advising that it be proclaimed

42. There cannot be such an inference without an examination of the considerations for example, budgetary, financial or administrative, that led to the decision not to recommend proclamation. In the absence of any of these matters being raised directly by the appellant for examination, there can be no presumption that they were inapplicable, or that the discretion available to the executive was accordingly not properly exercised.

43. Indeed as the trial judge found, if any presumption may have been applicable, it would have been the presumption of regularity. In the absence of clear authority it is difficult to extract any principle that delay simpliciter, of whatever period, in proclaiming legislation, raises the inference of an inappropriate or wrongful exercise of discretion by the Executive to delay implementation of legislation passed by Parliament.

44. In fact given the possible reasons for delay in implementation - e.g. a fatal flaw in the Act subsequently discovered, some of these may never be rectifiable. Therefore in such cases there may never come a time when it would be appropriate to implement.

45. That is why any proposition that excessive delay in implementation of legislation raises an inference that the executive discretion is being abused, cannot be correct. If delay cannot be used as a prima facie indication of breach of duty, abuse of discretion, or wrongful exercise of discretion, then neither can it be an indicator of something far more serious – a contravention of a Constitutional right. Therefore delay in implementation of legislation simpliciter cannot be equated with a contravention of a Constitutional right.

46. As demonstrated by the observations in the **Fire Brigade** case, and in **Suratt** above, delay in implementation is yet compatible with a proper exercise of a discretionary power not to implement legislation unless it is appropriate in the prevailing circumstances.

47. It may therefore be concluded, as did the trial judge, that the party alleging that a constitutional right has been infringed must establish more as there can be no such breach merely based on an inference from the delay in seeking proclamation.

Legitimate expectation

48. In relation to the claim of legitimate expectation the trial judge found that until the Act was commenced, the provisions of the Public Authorities Protection Act were operative. Therefore it was inconceivable that the Applicant had any legitimate expectation in relation to the limitation period in the 1981 Act between the 25th October, 1989 (accrual of the cause of action) and the 23rd June, 1995, when the constitutional claim was filed.

49. The trial judge therefore held that legitimate expectation cannot arise in relation to a statute that has not been brought into effect. In so doing he was expressing a view that had been reflected in the decision of the House of Lords in **R v Kebilene [2002] A.C. 326** where it had been held, in a self-explanatory passage, (summarizing from the headnote to that case at 327), "*since Parliament had expressly provided that the central provisions of the Human Rights Act 1998 were* ***to take effect not on enactment*** *but at such date as the Secretary of State might appoint, it would be* ***contrary to the legislative intention*** *if those provisions were to be treated as though they had immediate effect; and*

that, ***accordingly the act <u>did not give rise to any legitimate expectation</u> that , prior to its taking full effect , the Director would exercise his discretion to consent to a prosecution in accordance with article 6(2")***.

50. The appellant claims a legitimate expectation that he would have had the benefit of a 4 year limitation period. The Appellant's submission on this issue was that he "*relied on the Privy Council case of* ***Paponette v the Attorney General of Trinidad and Tobago, Privy Council Appeal No. 9 of 2010,*** *which decided that where the unlawful frustration of a legitimate expectation of substantive benefit interferes with Section 4(a) of the Constitution, namely the Claimant's right to the enjoyment of property and his right not to be deprived thereof except by due process of the law (he) is entitled to redress under Section 14 of the Constitution".* However there is no factual basis in this case for the existence of any legitimate expectation, save for the bare fact that the 1981 Act had been passed.

51. That fact by itself could not create any expectation that the 1981 Act would have been proclaimed and would have been in effect at the time of, or even within, 4 years of his injury. At the time of his injury, and in fact until 1997, the limitation period in force and in effect against the State was one year. At the time of his injury the 1981 Act had already been passed but had remained un-proclaimed for 8 years. The basis for any expectation, far less a legitimate expectation, that the 1981 Act would have been proclaimed, is not sufficiently explained, far less established.

52. In fact the appellant was in communication with the Ministry of Agriculture in pursuing his claim for workman's compensation 1 year after his injury. Prior to that inquiry there is no suggestion that he had been led to believe by any act or omission of

any one that the limitation period was 4 years. In fact there is no suggestion that it was his knowledge of the status of the 1981 Act, passed but not proclaimed, that led him to delay exploring litigation until after the 1 year period had passed.

53. Even if he had been informed of the 1981 Act he could hardly have been legitimately advised to ignore the then existing one year Limitation period against the State and rely on the existence of the un-proclaimed 1981 Act, without some further representation. There is no evidence or assertion of any such representation. In the circumstances a claim based on a legitimate expectation has not been substantiated.

54. The Appellant submits that he *"relies on Section 4(b) of the Constitution because the Claimant was by the non-proclamation of the Act denied access to the Court to have his claim for negligence determined; he was therefore denied a remedy given by the Act"*. Again factually the appellant cannot claim to have been denied access to the court when he always had access to the court, like every other litigant, to file a claim within one year. The trial judge so found based on an application of the principles in A.G. v Mcleod[6]

55. It cannot therefore be the case that the appellant is entitled to the declaration that he seeks. In fact in **Wilson v Dagnall** [1972] 2 All E. R. 44 an analogous situation was considered by the UK Court of Appeal. Legislation was passed which came into effect on August 1st 1971. It governed assessment of damages under the Fatal Accidents Act, and dispensed with the need to discount damages awardable to a widow by taking into account her prospects of remarriage. It came into operation after the fatal accident on

[6] [1984] UKPC 2

October 5th 1969, after filing of the claim on March 19th 1970, and after hearing of the assessment of damages on July 27th 1971.

56. The majority declined (Lord Denning dissenting), to treat that legislation as being applicable to, or governing, that assessment, and based their conclusion on the construction of the statute and the obligation of the court to give effect to what Parliament had provided. There would in the instant case be even less basis than in **Wilson v Dagnall** for **treating the 1981 Act as if it had been in operation** as in the instant case the 1981 Act was not brought into effect. Further no action was instituted and no damages were awarded for any action in tort.

57. Finally the declaration sought, that the appellant *was* ***entitled to have the benefit of the provisions of the Limitation Act No. 22 of 1981,*** would be inconsistent with the law that was then actually subsisting- which provided for a limitation period of one year in actions in tort against the State. A court cannot ignore the consequence of the arguments – namely – there could be in effect two statutory regimes at the same time – one provided for by the subsisting legislation – **Public Authorities Protection Act**, and one provided by the un-proclaimed 1981 Act.

58. For the reasons set out above and summarised at paragraphs 11 and 12 the appeal must be dismissed.

Disposition and Order

64. The appeal is dismissed.

Peter A. Rajkumar

Justice of Appeal