IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 22 of 2006

BETWEEN

GANGA-PERSAD KISSOON

APPELLANT

AND

THE HONOURABLE PRIME MINISTER
MR. PATRICK MANNING

FIRST RESPONDENT

THE PUBLIC SERVICE COMMISSION

SECOND RESPONDENT

PANEL: **I. Archie, C.J.**
M. Warner, J.A.
A. Mendonça, J.A

APPEARANCES: **Sir Fenton Ramsahoye, S.C. and Mr. A Ramlogan for the Appellant**
Mr. R. Martineau, S.C. and Ms. K. Clonielia for Respondents

DATE OF DELIVERY: July 8th, 2009.

I have read in draft the judgment of Mendonca J.A., I agree with it and do not wish to add anything.

I. Archie,
Chief Justice

I also agree.

M. Warner,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The facts material to this appeal may be briefly set out.

2. The Appellant was at all material times a public officer having entered the public service in 1970. In 1973 he was posted to the Valuations Division and progressed through the ranks. In 1998 he was appointed the Assistant Commissioner of Valuations.

3. In March, 2001 the Appellant applied for promotion to the office of Commissioner of State Lands (COSL) and in that year he was invited to a promotion interview and was interviewed along with other applicants. The interviews of the Appellant and the other applicants for the office of COSL were conducted by the Selection Board of the Service Commissions Department. The Selection Board forwarded its report on the interviews to the second Respondent, the Public Service Commission (the Commission). The report recommended that the Appellant, and another officer, Mrs. Elder-Alexander, should constitute the order of merit list from which permanent/temporary appointments could be made. The

Commission accepted the report of the Selection Board and established the order of merit list. The Appellant was number one on the list and Mrs. Elder-Alexander was number two.

4. In accordance with sections 121(3) to (5) of the Constitution the chairman of the Commission on November 5th, 2001 wrote to Mr. Basdeo Panday, the then Prime Minister, informing him that the Commission proposed to promote the Appellant to the office of the COSL and enquired whether he had any objection to the proposed promotion.

5. It is perhaps convenient to set out at this point sections 121(3) to (5) of the Constitution and they are as follows:

> *121(3) Before the Public Service Commission makes any appointment to an office to which this subsection applies, it shall consult the Prime Minister.*
>
> *(4) A person shall not be appointed to an office to which sub-section (3) applies if the Prime Minister signifies to the Public Service Commission his objection to the appointment of that person to that office.*
>
> *(5) Subject to subsections (6) and (7), sub-section (3) applies to the offices of Permanent Secretary, Chief Technical Officer, Director of Personnel Administration, to a head of department of government, to the chief professional adviser in a Ministry of government and to the office of Deputy to any of these offices*

6. It is common ground that section 121(3) applies to the office of the COSL.

7. In response to the Commission's letter of November 5th, 2001 the Commission was advised by the Permanent Secretary in the office of the Prime Minister that the functions of the COSL were vested in the Director of Surveys by Legal Notice 89 of 1990 and that parliamentary approval was necessary for the separation of those functions. As a consequence, the Commission decided that the office COSL could be not filled at that time.

8. In June, 2004 all relevant functions which were vested in the Director of Surveys by Legal Notice 89 of 1990 were transferred to the office of COSL.

9. On October 19th, 2004 pursuant to sections 121(3) to (5) of the Constitution, the Chairman of the Commission wrote to Mr. Patrick Manning, then as he is now, the Prime Minister, informing him that the Commission proposed to promote the Appellant to the office of COSL and inquiring whether he had any objection to the proposal.

10. The letter of October 19th, 2004 was forwarded by the Prime Minister to the Minister of Agriculture (the Minister) for his comments. The Minister replied by letter of October 22, 2004 indicating that he did not support the appointment of the Appellant to the office of COSL and outlined several reasons for that decision. These included: (1) that "considerable time" had elapsed since the interviews for the office of COSL were conducted; (2) that since then a number of initiatives had been undertaken by the Ministry in an attempt to enhance the land management systems in Trinidad and Tobago; (3) that the responsibilities assigned to the office of COSL had been significantly increased in its scope in relation to those which existed in 2001 when the interviews were conducted; and (4) a person appointed to the office must be visionary, committed and dynamic to lead the transformation effort. He suggested that the applicants for the office who placed first, second and third in the interviews held in 2001 should be re-interviewed.

11. On November 10th, 2004 the Prime Minister replied to the Commission indicating that he did not support the proposed promotion of the Appellant.

12. On receipt of the Prime Minister's letter, the Commission on December 6th, 2004 wrote to the Prime Minister proposing that Mrs. Elder-Alexander, number two on the order of merit list, be promoted to the office of COSL and enquired whether he had any objection to that proposal.

13. On receipt of the Commission's letter of December 6th, 2004 the Prime Minister again sought the comments of the Minister. On this occasion the Minister indicated that he had no objection to the appointment. The Minister's comments were forwarded to the then acting Prime Minister along with the letter from the Commission. By letter of December 8th, 2004, the acting Prime Minister wrote to the Commission indicating that he had no objection to the proposed promotion of Mrs. Elder-Alexander. Accordingly, the Commission promoted Mrs. Elder-

Alexander to the office of COSL with effect from the date of her assumption of duty, December 17th, 2004.

14. The Appellant was informed of the promotion of Mrs. Elder-Alexander on December 20th, 2004. On December 22nd, 2004 he made an application to the Commission under the Freedom of Information Act (FOIA), requesting copies of certain documents. Among the documents requested by the Appellant were the results of the promotion interviews. The Commission informed the Appellant that he could obtain copies of the results of his interview but not the documents relating to the other applicants' performance at the interviews. The Appellant has maintained that he has a right to copies of the results of the other interviews.

15. Pursuant to leave granted by Narine, J, the Appellant applied for judicial review of the decision of the Prime Minister to object to or veto the recommendation of the Commission that he be appointed to the office of COSL and the refusal of the Commission to provide the copies of the documents requested by him under the FOIA. With respect to the decision of the Prime Minister, the Appellant sought several heads of relief which essentially comprised an order of certiorari and declarations that:

(a) he was treated illegally and contrary to the rules of natural justice; and

(b) the Prime Minister acted illegally and/or unreasonably/unfairly in refusing to endorse the recommendation of the Appellant by the Commission for the promotion to the office of COSL.

With respect to the decision of the Commission regarding the documents requested by the Appellant under the FOIA, the Appellant sought a declaration that the failure/refusal by the Commission to provide copies of the requested documents is illegal and contrary to the provisions of the FOIA and an order of mandamus directing the Commission to provide the copies of the documents to the Appellant.

16. The grounds upon which the Appellant relied in respect of the challenge to the decision of the Prime Minister were identified in the statement of the Appellant filed pursuant to O. 53 of the Rules of the Supreme Court, 1975 as follows;

(a) the decision breached the principles of natural justice;

(b) the decision amounted to an arbitrary, unreasonable, irregular and improper exercise of discretion;

(c) it amounted to an abuse of process;

(d) it conflicts with the policy of Chapter 9 of the Constitution;

(e) the Appellant was deprived of a legitimate expectation;

(f) the exercise of the power by the Prime Minister was so unreasonable that no reasonable Prime Minister would have so exercised the power;

(g) the Prime Minister took irrelevant considerations into account or failed to take relevant considerations into account or accord them sufficient weight; and

(h) the Prime Minister failed to inform the Appellant of the adverse matters which operated against him in the mind of the Prime Minister and/or give him an opportunity to make representations on his own behalf to counter same.

17. The matter came on for hearing before Myers, J. At the hearing, the Judge granted leave to the Appellant to amend the Motion to include two additional heads of relief in respect of the decision of the Prime Minister, namely:

(1) a declaration that the constitutional veto vested in the Prime Minister by section 121 of the Constitution was unfairly and illegally exercised for an improper purpose, and

(2) a declaration that the constitutional veto was improperly/unlawfully delegated to the Minister.

18. The Appellant's statement was also amended to include the following additional grounds in respect of the constitutional veto:

(a) it was exercised in bad faith for an improper purpose;

(b) the Prime Minister acted on instructions from an unauthorized person to whom he had in effect, unlawfully delegated the power of constitutional veto;

(c) the constitutional veto was improperly and illegally exercised to block the Appellant's promotion while facilitating that of Mrs. Elder-Alexander.

19. The Judge dismissed the application for judicial review. Unfortunately we have had no reasons from the Judge for his decision and he is no longer on the bench.

20. Before this Court, Counsel for the Appellant submitted that the Judge was wrong to have dismissed the application for judicial review. It was submitted on behalf of the Appellant that:

(1) there was no proper consultation within the meaning of section 121(3) of the Constitution. The section it was argued cannot be properly worked by a simple exchange of letters as occurred in this case. There must be an exchange of views between the Commission and the Prime Minister, so that if the Prime Minister has anything in mind that would lead to the rejection of the Commission's choice of candidate he should raise it with the Commission and ask what the Commission thinks of it. In other words, he must say why he is in disagreement and get the Commission's views on it;

(2) the veto was exercised for an improper purpose;

(3) there was an improper delegation of the veto by the Prime Minister to the Minister;

(4) the Appellant was denied natural justice. He was entitled to a hearing before the Prime Minister exercised the constitutional veto in relation to him;

(5) with respect to the Freedom of Information Act, it was submitted that the Appellant has a legal entitlement to the requested results of the interview of the application for the office of COSL under the FOIA..

21. With respect to the first submission that there was no proper consultation, Counsel for the Appellant referred the Court to certain cases where the meaning of "consultation" as used in various statutes was discussed. The authorities are all to the same effect but two of them were emphasized. The first is the ***Union of the Benefices of Whippingham of East Cowes, St. James and Derham v Church Commissioners for England [1954] AC 245*.** There, the question arose whether there was consultation with the parochial church councils within the meaning of section 3(1) of the Pastoral Reorganization Measure, 1949. In giving the advice of the Judicial Committee, Lord Parker stated (at p.254) that all that was necessary for there to be a consultation within the meaning of the measure was that there should be a "full and sufficient opportunity given to the members of the Council to ask questions and to submit their opinions in any reasonable way."

22. In ***Port Louis Corporation v Attorney General of Mauritius [1965] AC 1111***, the question was whether there had been consultation by the Governor in Council of Mauritius with the appellant as required by section 73(1) of the Local Government Ordinance 1962 of Mauritius. In considering what consultation required, Lord Morris of Borth-y-gest in delivering the judgment of the Privy Council stated at (1124):

> *"If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views… The local authority must be told what alterations of boundary are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or*

declined to express any views. The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think."

23. The value of the authorities cited by Counsel for the Appellant is questionable as they do not deal with consultation within the context of a constitutional veto as is the case in this appeal. In any event they do not support the proposition advanced by him that there must be an exchange of views between the relevant parties. What the authorities emphasize is that the opportunity to advance one's view must be given. On that basis it cannot be said that there was no consultation in this case. The Prime Minister was told by the Commission who it proposed to appoint to the post of COSL and was given particulars of the applicants. Each party had ample opportunity to express whatever views that were considered necessary.

24. It is however not necessary to determine in this matter the meaning of consultation within the Constitution and whether there was in fact such consultation, for the simple reason that this was not an issue before the trial Judge. The issue was not alleged in the statement or in the Motion or in any of the affidavit filed on behalf of the Appellant. The point was not argued in the Court below or in the written arguments before this Court. It arose for the first time in oral argument. It would be unfair to the Respondents to allow the point to be raised now. The issue is not a pure question of law. If Counsel is correct, and consultation within the meaning of section 121(3) cannot be "worked" by a simple exchange of letters as happened here but requires in fact an exchange of views as was submitted, then the question must be asked, did this occur. As Counsel for the Respondents stated, consultation may not take place only by written communication. There are other forms of communication by which parties may consult with each other. If therefore the point were in issue, Counsel for the Respondents would have had an opportunity to take instructions on the full extent of the consultation that had occurred and if necessary put evidence before the Court on affidavit. If the point were to be argued now it would deprive the Respondents of that opportunity which may prove to be critical.

25. Counsel for the Appellant however submitted that it was the duty of the Respndents to make full disclosure so that in this case it can be inferred that what was said in the affidavit was

the full extent of what occurred and consequently, of what consultation that took place. In so saying, Counsel may have had in mind the following passage from the judgment of Sir John Donaldson M.R. in ***R v Lancashire County Council, ex parte Huddleston [1986] 2ALL ER 941,945*** where he said:

> *"Counsel for the council also contended that it may be an undesirable practice to give full, or perhaps any, reasons to every applicant who is refused a discretionary grant, if only because this would be likely to lead to endless further arguments without giving the applicant either satisfaction or a grant. So be it. But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure."*

26. Sir John Donaldson M.R. however, is not to be understood as saying that the respondent in a judicial review application must disclose every aspect of the decision making process once the applicant obtains leave for judicial review. I think this is made clear in ***R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 ALL ER 301*** where Lord Donaldson MR in referring to ***ex parte Huddleston*** said (at page 315):

> *"In **R v Lancashire CC, ex parte Huddleston [1986] 2 ALL ER 941 and 945**, I expressed the view that we had now reached the position in the development of judicial review at which public law bodies and the courts should be regarded as being in partnership in a common endeavour to maintain the highest standards of public administration, including I would add the hadministration of justice. It followed from this that, if leave to apply for the judicial review was granted by the court, the court was entitled to expect that the respondent would give the court sufficient information to enable it to do justice and that in some cases this would involve giving reasons or fuller reasons for a decision than the complainant himself would have been entitled to. Parker L.J. and Sir George Waller did not share my unease of the limited disclosure made by the council in that case, but I do not understand them to have disagreed with the principle."*

27. According to Lord Donaldson M.R. what was therefore required of a respondent was that he should provide sufficient information to enable the court to do justice. That was a position to which Parker L.J. and Sir George Waller agreed. In ***ex parte Huddleston*****,** Parker L.J. was clear that the onus on the respondent was limited to what was necessary to meet the challenge of the particular case. He said (at p. 947):

> *"In the vast majority of cases the authorities whose decisions are challenged will no doubt put before the court all that is necessary to enable justice to be done, for I agree that they have, or should have, a common interest with the courts in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected. I agree, therefore, that when challenged they should set out fully what they did and why so far as is necessary, fully and fairly to meet the challenge."*

28. Sir George Waller stated (at p. 947):

> *"The important matter in every case where judicial review is granted is to make clear that all relevant facts are considered, but this may not always require them all to be specified."*

29. The obligation therefore on the Respondents is to set out all relevant facts that are "necessary fully and fairly to meet the challenge" so as to enable the Court to do justice.

30. In this case there was no challenge as to the alleged failure to consult. There was therefore no obligation to disclose fully all information relating to such a challenge. It therefore cannot be inferred in this case that nothing else occurred other than what was identified in the affidavits filed on behalf of the Respondents.

31. Counsel for the Appellant submitted that the constitutional veto was exercised for an improper purpose. He argued that the Minister detailed several reasons to the Prime Minister why the Appellant should not be appointed. The Minister's reasons which were referred to earlier in this judgment were general in nature and were not directed only against the Appellant.

They would apply also to Mrs. Elder-Alexander. Yet, when the Commission indicated a mere two months later that it proposed to appoint Mrs. Elder-Alexander, the reasons "disappeared into thin air" and there was no objection to her being appointed. Counsel contended that the irresistible inference was the rejection of the Appellant and the appointment of Mrs. Elder-Alexander was all contrived - "a cook-up" as there could be no basis for the appointment of Mrs. Elder-Alexander.

32. This submission is a reflection of the amended ground that "the constitutional veto was improperly and illegally exercised to block the Appellant's promotion while facilitating that of [Mrs.] Elder-Alexander]." The ground was added against the background of the Appellant contending that the Prime Minister in objecting to his appointment was discriminating against him on the ground of race. The allegations in the Appellant's affidavit which were intended to support that contention were struck out by the trial Judge and there has been no appeal from that order. What therefore the Appellant is left to contend is that the objection to his appointment was all contrived to facilitate the appointment of Mrs. Elder-Alexander as there could be no basis for the approval of her appointment over him. But that submission is simply not supported by the evidence.

33. The Minister in his letter of October 22, 2004 gave several reasons for objecting to the appointment of the Appellant. He pointed to the fact that a long time had elapsed since the applicant for the office of COSL was introduced. He then however referred to the issue of land management systems. He stated that a number of initiatives had been undertaken by the Ministry in an attempt to enhance land management systems in the country. He mentioned that the Government had already successfully obtained passage of a "legislative package including an Act governing land title and registration, land adjudication and land tribunal." He also referred to Cabinet having already approved the establishment of a land management authority which is intended to effectively manage the nation's land portfolio. The Minister then made reference to "government's thrust to distribute and effectively manage the large land holdings of the former Caroni (1975) Limited."

34. In his affidavit Trevor Murray, the acting Permanent Secretary in the Ministry with reference to the approval of Mrs. Elder-Alexander stated:

"3 During the year 2004 the Ministry of Agriculture, Land and Marine Resources has been restructured extensively and a Strategic plan for the ministry was produced in 2004….;

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

35. That was the unchallenged evidence relating to the Minister's objections to the appointment of the Appellant and his favouring of Mrs. Elder-Alexander. The evidence amounts to cogent and rational reasons why the Minister made the recommendation to the Prime Minister to object to the appointment of the Appellant and why he (the Minister) did not object to the appointment of Mrs. Elder-Alexander. The issue of land management that was evident when the Minister objected to the appointment of the Appellant was again operating in his mind when he supported the appointment of Mrs. Elder-Alexander. It is not correct to say that the "reasons disappeared into thin air" but while they operated to the Appellant's disadvantage they were to the advantage of Mrs. Elder-Alexander. They are not however the Prime Minister's reasons. In the case of the Appellant the evidence of the Permanent Secretary is that the Prime Minister considered the Minister's letter of October 22, 2004. While there is no direct evidence that the Minister's letter was considered in relation to the appointment of Mrs. Elder-Alexander, the evidence quite simply does not support any inference that the objection to the Appellant's appointment was contrived and that there was no basis for the appointment of Mrs. Elder-Alexander over him. On the evidence there is no possibility of drawing any inference adverse to the Respondents.

36. It was also submitted by the Appellant that there was an improper delegation by the Prime Minister of the constitutional veto. The effect of the submission is that the Prime Minister in effect allowed the Minister to exercise his veto which was for him alone to exercise.

37. There could be no objection, and there was none, to the Prime Minister consulting with the Minister before he exercises his veto. But what is required is that the Prime Minister must exercise his own independent judgment. There is no evidence that he did not do so. Indeed the evidence supports the contrary conclusion. The evidence is that when the Minister objected to the appointment of the Appellant he was of the view that the applicants for the office of COSL placed in the first three in the order of merit as a consequence of the interview process should be re-interviewed. The Prime Minister made no such suggestion to the Commission. There is no irresistible inference to be drawn form the evidence that the Prime Minister did not exercise his own independent judgment.

38. I turn now to consider the last submission made by the Appellant with respect to the exercise of the constitutional veto. This submission was that the exercise of the veto attracted the principles of natural justice so that the Appellant should have been allowed the opportunity to make representations on his behalf before the Prime Minister made the decision to object to his appointment to the office COSL. The answer to this question involves the construction of section 121(4) of the Constitution. The Constitution does not provide that the veto is subject to the principles of natural justice, so that if the section is to be so construed that must be read into it.

39. In the making of administrative decisions affecting rights, interests and legitimate expectations there is a common law duty to act fairly. In this formulation "rights or interests" are not to be understood as referring only to a legal right or interest but any interest deserving of protection such as status, and the preservation of livelihood and reputation (see ***Kioa v West [1985] 159 CLR 550 and R v Secretary of State for Wales, ex parte Emery [1996] 4 ALL ER1)***. Thus in ***R v Secretary for the Home Department ex parte Fayed [1998] 1WLR 763*** the Court held that applicants for British citizenship were wrongly deprived of an opportunity to make representations before their applications were refused. The Court took into account that the refusal of the applications deprived them of the benefits of citizenship and could cast aspersions on their character (see pages 770 and 787).

40. Statute law now emphasizes the need for, inter alia, a public authority or person acting in the exercise of a public duty or function in accordance with any law to act fairly. Section 20 of the ***Judicial Review Act*** provides as follows:

> *"An inferior Court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner."*

If that is the extent of the position under the common law and the ***Judicial Review Act,*** it is in my view anomalous if the Constitution were to be construed in such a way as to provide any lesser entitlement.

41. The Court may read into a statute the necessary procedural safeguards to ensure the attainment of justice. This is so even if the act sets out a procedure to be followed. In that case the Court will require that procedure to be followed but will import additional safeguards if necessary in the interest of justice. In ***Lloyd v Mc Mahon [1987] 1ALL ER 1118, 1161*** Lord Bridge of Harwich said:

> *"…it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the Court will not only require the procedure prescribed by the statute to be followed, but will readily import so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of justice."*

42. In ***Kioa v West***, supra, in the High Court of Australia Mason, J. (at p. 585) said in relation to the construction of a statute:

> *"…the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interest of the individual*

and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations…

When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is; what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute replaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to enquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory provision and the interests which I have already mentioned."

43. Similarly, with respect to the Constitution, in my judgment one should start with the presumption that the principles of fairness apply unless there is a strong manifestation of contrary intention.

44. Counsel for the Appellant submitted that the Constitution is to be interpreted in accordance with its preamble. In particular he referred to the provisions in the preamble that speak of an opportunity for advancement on the basis of merit, ability and integrity and that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.

45. I agree that the preamble may be used as an aid to interpretation to the provisions of the Constitution. Indeed at e) it is provided that the people of Trinidad and Tobago desire that the Constitution should enshrine the principles of the preamble and make provisions for ensuring the protection in Trinidad and Tobago of fundamental rights and freedoms. While the provisions referred to do not go directly to establishing that section 121(4) attracts the principles of justice,

it is not possible to find in them any contrary intention that the rules of natural justice should apply to section 121(4). It is indeed impossible to say that the preamble would support any interpretation other than that in the exercise of a public duty or function it must be done in accordance with the principles of fairness.

46 Counsel for Respondents on the other hand pointed to the purpose of the veto. He referred to Lloyd G. Barnett, ***The Constitution of Jamaica*** [1977] (at p.117) where the author wrote:

> *"The 'power to make appointments to any office of Permanent Secretary on transfer from another such office carrying the same salary is …vested in the Governor General acting on the recommendation of the Prime Minister'. This provision was designed to ensure that while the Prime Minister could not control the promotion of Permanent Secretaries he would be able, because of the need for close collaboration between the Ministers and their Permanent Secretaries, to ensure that the Permanent Secretaries are assigned to a Minister with whom they are temperamentally capable of co-operating.* "

The author there is not referring to a provision similar to section 121(3). That provision is in fact similar to section 121(6)(a) of the Constitution which is not relevant to this case. More appropriate however is what is said in the Report of the Constitution Commission (1974) where it was recommended (at para. 228) that the Prime Minister retain his right of veto to various offices. It was stated:

> *"We recommend that the Prime Minister should retain his right of veto in respect of appointments to the offices of Permanent Secretary, Deputy Permanent Secretary, Chief Technical Officer, Deputy Chief Technical Officer, Chief Parliamentary Council, Director of Personnel Administration, Solicitor General, Commission of Police and the Deputy Commissions of Police. These officials are so directly concerned with the formulation of policy and the supervision of its implementation that they must be acceptable to the political chiefs with whom they must have a close working relationship. This does permit some measure of*

political influence in purely public service appointments but is necessary on purely practical grounds."

47 In his book on ***The Public Service and Service Commissions,*** Kenneth R. Lalla stated (at p.28) that :

"…. the rationale underlying the vesting in the Prime Minister of a power to veto such appointments is clearly to afford the government of the day the quality and caliber of managers of its choice to implement and administer its policies effectively and efficiently…."

48. Nothing however in my judgment in relation to the purpose of the veto is inconsistent with the principles of natural justice.

49. Counsel for the Appellant also referred to ***Breen v Amalgamated Engineering Union [1971] 2 QB 175*** where Lord Denning, M.R**.** said that when a man seeks a privilege he need not be heard. He stated:

"If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation will be given."

50. However even in some privilege cases the Courts have ruled that the principles of natural justice apply. As was pointed out in ***De Smith's Judicial Review (6th ed.)*** (paras. 7-005-7-006) to exclude all such cases could lead to anomalies and injustice The fact therefore that the Appellant is seeking a privilege in the form of an appointment to which he has no entitlement is not sufficient to say that the principles of justice should not apply. The principles of fairness may apply where there is any interest deserving of protection. As the ***ex parte Fayed*** case demonstrates, it may apply where a person's reputation is at stake. So too in my judgment, the principles of fairness may apply where what is at risk is the person's career or livelihood. It is at risk not in the sense that it will come to an end. That is not what happens when the Prime Minister exercises his veto under section 121(3). Counsel for the Appellant argued that the Appellant in this case has forfeited the office of COSL as a consequence of the

veto. But that is not correct. The office is not his to have forfeited it. But what he may have lost is any chance of advancement as the facts of this case show. In that sense there is a risk to his career and livelihood. The fact of the matter is that the exercise of the veto under section 121(3) can have serious adverse implications to the person's career as it had in this case. In my judgment these considerations point clearly to an obligation of fairness.

51. It should also be noted that where the Commission decides a person should be appointed, the Commission has determined that he is the best candidate for the office. So that for example, if the appointment is one on promotion the Commission has considered the applicant's merit and ability and has considered a number of other factors under Regulation 18 of the ***Public Service Commission Regulations*** including the applicant's general fitness for the position and the evaluation of the applicant's overall performance as reflected in his annual staff reports. Of course the applicant has had an opportunity to further his cause. He knows the criteria he has to meet. He may have attended interviews, submitted letters of recommendation and commendation. It is anathema to that process that at the final hurdle he should fail without knowing why and having had an opportunity to make representations.

52. It was submitted by Counsel for the Respondents that the requirements of fairness must be balanced by the needs of the administrative process in question (see ***Inuit Tapirisat of Canada v Leger (1979) 1 SCR 311).*** It was submitted that to require the Prime Minister to engage in a fairness hearing every time he exercises his veto in respect of the many offices which are subject to the veto may seriously delay and compromise the administration of government The Court should therefore be slow to impose undue administrative burdens on the Prime Minister. In this regard Counsel referred to ***R v Law Society, ex parte Curtin,*** The Times, 3rd December, 1993 (at page 7) where it was said:

> *"Moreover if it were to rule that fairness in this context requires the full panoply of an oral hearing, it would in my view make the present regulatory system under section 12(1) less effective, or at least greatly increase the administrative burdens on the Law Society. It would also cause considerable delays in the area where expedition is essential. Fairness is more important than convenience, but in this case, fairness does not demand an oral hearing."*

53. In the ***Law Society*** case it is apparent from the above quotation that the issue before the Court was whether an oral hearing was necessary. The Court held that fairness did not demand an oral hearing. So too, here, in my view what is required is an opportunity to make relevant representations. I do not believe that fairness will generally require the "full panoply of an oral hearing". It would be a very exceptional case where that is required. In those circumstances, it is unlikely that there would be undue burdens placed on the Prime Minister such as to seriously delay and compromise the administration of government.

54. The Prime Minister should not act arbitrarily or out of spite or with mala fides. If, he objects to an appointment under section 121(4) of the Constitution he is expected to act rationally. These considerations are not relevant to this case. I have rejected the submission that the veto was exercised for an improper purpose and questions of spite, mala fides and irrationality do not arise. What this case is about however, is the obligation of fairness in the exercise of the veto in section 121(4). That obligation requires that before the veto is exercised in relation to an applicant who is proposed by the Commission for appointment he is informed of what there is against him and given an opportunity to make representations on his behalf. This is required in all cases. That however is not to say that there may be exceptional cases where the rules of natural justice may be excused or modified, such as where there are national security concerns, but this case is not such a case. Certainly in this case the obligation of fairness was not discharged as the Appellant was not informed of what there was against him and given an opportunity to make representations. As I have indicated, since the Appellant attended the interview in 2001 he heard nothing of the appointment to the office of COSL until he learnt that Mrs. Elder-Alexander was appointed.

55. There is evidence of what the Prime Minister considered when he objected to the Appellant's appointment. According to the evidence he considered the Minister's letter of October 19th, 2004 and the letter from the Commission proposing the appointment of the Appellant in which particulars relating to the Appellant were enclosed. I have indicated that it cannot be concluded from the evidence that there was no basis for the objection to the appointment of the Appellant and the appointment of Mrs. Elder-Alexander over him or that the objection to the Appellant's appointment was contrived. The fact of the matter, however, is that the reasons for the Prime Minister's decision are not known and even if it may be inferred that he must have considered, as he was entitled to do, that the Appellant was not suitably

qualified for the appointment given the Government's intention to improve the land management system, it does not exclude the application of the principles of fairness. It is not an answer in this case, and indeed it would be a very rare case where it is, to say that to have heard the Appellant would have made no difference. As Lord Denning stated in ***Annamunthodo v OWTU [1961 AC 945, 956***

> *"Mr. Lazarus did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudice by it. Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice a person affected by their decision can always seek redress in the Courts."*

And as Megarry J. so vividly expressed it in ***John v Rees [1970] Ch. 345, 402:***

> *"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained.; of fixed and unalterable determinations that, by discussion, suffered a change."*

As the principles of fairness were not applied to the Appellant, he is entitled to succeed on that basis.

56. So far as the relief that ought to be granted to the Appellant is concerned, Counsel for the Appellant indicated that he is not at this stage pursuing an order of certiorari in view of the time that has elapsed since the exercise of the veto, and the appointment of Mrs. Elder-Alexander and the proximity to retirement of the Appellant. He indicated that the Appellant would be satisfied with a declaration that the decision was made contrary to the rules of natural justice and an order as to damages. In my judgment the Appellant is entitled to a declaration and I am prepared to make a declaration that the Prime Minister acted contrary to the rules of natural justice by making a decision to object to the Appellant's promotion without informing him of the factors that militate against him and affording him the opportunity to make representations in his favour. On the question of damages however, there is no claim for

damages as is required by section 8(4) of the ***Judicial Review Act*** and I therefore decline to make an order as to damages.

57. The first Respondent, the Prime Minister, shall pay to the Appellant the costs of the appeal as well as the costs in the Court below to be taxed There shall be no order as to costs as between the Commission and the Appellant.

58. There remains the outstanding issue of the application of the Appellant under the FOIA. That application in my view is of no practical value and is purely of an academic nature in the context of this case. I therefore do not propose to decide the issue in this appeal.

Dated the 8th day of July 2009.

A. Mendonça
Justice of Appeal