REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S 304 of 2017

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

And

MARCIA AYERS-CAESAR

Respondent

PANEL: **A. MENDONÇA, J.A.**
P. JAMADAR, J.A.
N. BEREAUX, J.A.

APPEARANCES: **R. Armour SC, R. Nanga, R. Heffes-Doon, Z. Haynes-Soo Hon and S. Maharaj for the appellant**
R. L. Maharaj SC, R. Bissessar and V. Maharaj for the respondent

DATE DELIVERED: 29 March 2018

DISSENTING JUDGMENT

Delivered by Bereaux, J.A.

Introduction

[1] This is an appeal from the decision of Harris J in which he granted permission to the respondent to file for judicial review of a *"decision"* purportedly made by His Excellency the President of Trinidad and Tobago. The subject of the challenge is the President's continued refusal to set aside her resignation and to reinstate her as a judge.

Relevant facts

[2] Up until 11th April 2017 the respondent held the post of the Chief Magistrate the most senior post in the Magistracy. As Chief Magistrate she presided over preliminary enquiries and criminal trials in respect of summary offences. On 12th April, 2017 she was elevated to the High Court bench as a Puisne Judge. At the time of her elevation she had a number of magisterial trials which were incomplete and they remained incomplete upon her elevation. The resulting public outcry about her incomplete trials ultimately led to the respondent signing a letter of resignation which she delivered to the President on 27th April, 2017. She contends that her resignation letter is not effective because she signed the letter as a consequence of undue pressure being put on her by the JLSC.

[3] Prior to her elevation on 12th April, 2017, the respondent had had discussions with the Chief Justice, who chairs the Judicial and Legal Service Commission (JLSC), about her outstanding cases. Based on information collated from the Magistracy's note taking unit, she submitted a list of some 28 cases which she considered she had to complete. However, a list compiled by the Acting Chief Magistrate after the respondent's elevation showed that there were fifty-two (52) cases which she had not completed.

[4] On 19th May 2017, she wrote the President informing him that the JLSC had unlawfully removed her from the office and contending that:

(i) The JLSC made a decision to recommend my removal to your Excellency the President, which decision was unlawful and outside its constitutional powers, because I was not guilty of misbehaviour, and further, it set at nought the fundamental protections in s. 137 of the Constitution.

(ii) In any event, for the same reasons, the consequent pressure put upon me by the JLSC to resign was unlawful and unconstitutional, as was the apparent orchestration of my removal by the Chief Justice on behalf of the JLSC (i.e. by arranging the appointment with your Excellency for me to take you the letter of resignation).

(iii) The JLSC acted in breach of the rules of natural justice in making a decision to seek my resignation, or putting me under pressure to resign without putting the case against me or even warning me of it, and without giving me any proper opportunity to respond.

(iv) Your Excellency's subsequent acceptance of my "resignation" was likewise unconstitutional, for all the same reasons.

The letter ended as follows:

> ***"Accordingly I do respectfully ask you to consider these matters and respond to me as a matter of urgency. I ask you to acknowledge that my removal from office was unlawful and unconstitutional and can have no legal effect."***

The letter was copied to the members of the JLSC.

[5] The President responded by letter of 14th June 2017 stating that he was legally advised that:

> ***"it would be inappropriate and outside my constitutional remit to comment on your letter of 19th May 2017 … or to accede to your***

requests … and in particular your request that I acknowledge that 'your' removal from office was unlawful and unconstitutional …"

The respondent has also maintained her position, expressed in letters of 8th and 25th May, 2017 to the JLSC, that she remained a high court judge and that the question of her *"purported resignation"* needed to be resolved.

The application for leave

[6] That question has not been resolved. The respondent applied for and was granted permission by Harris J to seek judicial review in respect of four purported decisions of the JLSC as follows:

(i) The decision of the JLSC made on 27th April, 2017 to seek her resignation as a high court judge.

(ii) The decision of the JLSC made on 27th April, 2017 to recommend to the President that her appointment as a High Court Judge be revoked if she did not agree to resign and the decision to communicate that threat to her as means of procuring her resignation.

(iii) The conduct of the JLSC on 27th April 2017, in pressuring her into resigning by threatening to make the recommendation if she did not resign.

(iv) The JLSC's decision of 27th April, 2017 to treat as effective her consequent resignation, although procured by such illegal pressure.

There was no appeal from that decision. The respondent were also granted permission to challenge one *"decision"* of His Excellency the President to wit: *the President's continued refusal to set aside her resignation and the reinstate her as a judge.*

The decision of the trial judge is the sole basis of the appeal in this case.

The respondent's claim

[7] In summary the thrust of the challenge to the alleged decisions of the JLSC is that the JLSC acted unlawfully and in breach of section 137 of the Constitution. The respondent states that a judge may be removed from office only in accordance with section 137 of the Constitution. There existed no proper grounds for removing the respondent from office. However, the JLSC decided to effect her removal from office, and to do so by procuring her resignation. For that purpose it decided to put pressure on her to resign by threatening to recommend to the President that her appointment be revoked unless she resigned and returned to the magisterial bench. The Chief Justice on behalf of the JLSC then pursued this decision (a) by requiring her to resign, or else the JLSC would act as threatened, and (b) by notifying the President in advance of her impending resignation and fixing an immediate appointment for her to hand in the letter of resignation.

The respondent contends that any problems caused by the existence of outstanding cases could have been solved, either by allowing her (without losing her status as a high court judge) to finish them, or by other arrangements. In any event, the JLSC acted in breach of the rules of natural justice, and the principles of fairness, in breach of section 4(b) of the Constitution and in further breach of the protections afforded by s. 137 of the Constitution because she was given no opportunity to be heard. The *"resignation"* was in effect a dismissal or removal from office by the JLSC as she was presented with no option but to resign, in the light of being told that the JLSC had already decided what to do about her alleged conduct.

[8] The argument continues that because the respondent's resignation was given as a result of unconstitutional action and duress, it was null and void, and she was and is entitled to revoke it. By her letter dated 19th May, 2017, she informed the President of the unconstitutional action and unlawful pressure, and asked for his acceptance that her removal from office was unconstitutional and of

no effect. The President by his letter of 14th June, 2017 however has refused to recognise that her resignation and removal from office were of no effect. In so refusing, he has misdirected himself in law and misdirected himself as to his powers under the Constitution.

The judge's decision

[9] Harris J applied the test in **Sharma v. Browne-Antoine & Ors. [2006] 69 WIR 379** for the grant of leave to apply for judicial review. His reasoning is not clear. I have gleaned it to be this:

(i) It is not in dispute that, in appropriate circumstances, a failure to act can amount to a decision which is capable of review or that a decision of the President made under the Constitution of Trinidad and Tobago in prescribed circumstances can also be the subject of review.

(ii) The impugned *"decision"* of the President is his decision not to act to reinstate the respondent, after he received the respondent's letter of 19th May, 2018 detailing all the circumstances surrounding her purported resignation. Whether non-reinstatement amounts to a decision which is not a valid exercise of his authority and is reviewable is a narrower issue than has been taken by the respondent in her application. It is subsumed into the wider ambit of the existing application but it is the only issue that meets the threshold test in the court.

But there is no clear statement as to whether on the facts there was an issue as to the breach of a duty by the President by failing to act or not.

Grounds of Appeal

[10] The appellant has appealed on five grounds. Grounds 2, 3, 4 and 5 all overlap. The ground of appeal can be summarised as follows:

(1) The judge failed to give any reasons for his decision that the President's continued refusal to set aside the respondent's resignation as high court judge and to reinstate her to that office was reviewable.

(2) The judge was plainly wrong in finding that there was a decision of the President that was reviewable.

(3) The judge was plainly wrong in failing to appreciate that the President does not have the power to set aside the respondent's resignation as a judge and does not have the power to reinstate her as a judge.

(4) and (5) The judge failed to appreciate that the President, and that the President has no power (and thus made no decision) to "continue to accept" the respondent's resignation.

Other than ground (1) I shall be dealing with the grounds of appeal together.

Summary of submissions

[11] Mr. Armour SC for the appellant submitted:

(i) As to the first ground, that the judge gave no reasons for granting permission under this head.

(ii) As to ground two, that under the provisions of section 142(2) of the Constitution there is no provision for the President's acceptance or refusal to accept the resignation. When the President receives the letter of resignation the President's involvement comes to an end. There was therefore no decision that is capable of being reviewed. The letter of 19th May 2017, merely contained allegations and the President has no power to act upon such allegations.

(iii) As to the third ground, there is no power in the President to set aside the resignation letter or to reinstate the respondent as a puisne judge. Any setting aside of the decision can only be made by the high court. The President appoints on the advice of the JLSC pursuant to section 104 of the Constitution. The respondent can be re-appointed to that position pursuant to section 143(1) of the Constitution. Any decision on the re-instatement or reappointment can only be made pursuant to

section 104 and section 143(1) of the Constitution.

(iv) As to the fourth and fifth grounds of appeal, the respondent had an unarguable case which did not meet the threshold set out in **Sharma v Brown-Antoine & others [2006] UKPC 57, [2006] 69 WIR 379**.

[12] Mr. Armour SC argued that in any event should the respondent succeed in the claim against the JLSC, the effect will be to set aside the resignation and her re-appointment as a puisne judge. The JLSC may then be required to advise the President to re-appoint the respondent. Only then can the President lawfully re-appoint the respondent.

The respondent submissions

[13] In reply Mr. Maharaj submitted that the President did have the power to reinstate and secondly even if he did not, it did not follow that he is not the proper respondent to this judicial review. He submitted that if the claimant's case against the JLSC is proven then the result will be that her resignation was null and void. She would be entitled to revoke the resignation and did so by her letter of 19th May 2017 to the President. He submitted further that for a resignation to be effective the essential assumption is that it was lawful and given voluntarily. It could only be on that basis that the President could accept a resignation. If it is not lawfully made the President is not bound to act on it. The respondent wrote to the President to tell him that her resignation was not given voluntarily and was not lawful. It was at least arguable that the President cannot lawfully respond by inaction, or by saying that it has nothing to do with him.

[14] As to his second contention, Mr. Maharaj submitted that even if counsel for the Attorney General were right that the President had no power to reinstate, it does not follow that the President is not the proper respondent to this judicial review claim. Since counsel for the Attorney General accepts that if the respondent makes out her case against the JLSC, the result will be that her resignation will be set aside, the Attorney General's position begs the question: if the validity of the respondent's resignation is properly a matter for the court, who

should be the proper respondents to such an action? The respondent submits that it must be the President (or the Attorney General on behalf of the President). He relied on three authorities to which I shall come.

Analysis and Conclusions

[15] That the validity of the acts of the President can be examined by a court of law is now well established. This is despite section 38(1) of the Constitution which provides that the President "*shall not be answerable to any Court for the performance of the functions of his office or for any act done by him in the performance of those functions*." Section 38(1) will not protect a purported determination from legal challenge that is ultra vires and therefore a nullity (per Lord Hodge at paragraph 34 in **Attorney General of Trinidad and Tobago v Dumas (2017) UKPC 12, [2017] 1 WLR 1978**, relying on **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147** and **Attorney General of Trinidad and Tobago v Phillip [1995] 1 AC 396 at 412E – G.** In so far as the respondent claims that the President may have acted illegally, his action or omission to act is open to judicial review.

[16] The threshold for the grant of leave has been quite firmly established in **Sharma v Brown-Antoine & others (supra)** at page 387-388:

> ***"(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern***

Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:

'... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733."

[17] In my judgment this remains the proper test. Kangaloo JA in **Steve Ferguson and Anor. v The Attorney General of Trinidad and Tobago (Civil Appeal No. 207 of 2010)** stated that it must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the court should exercise its discretion in refusing to grant leave. In my judgment that dictum lowers the bar and begs the question as to what is "*wholly unmeritorious*". Surely arguability will turn on the facts of each case.

[18] The question therefore is whether the judge was right that the claim of the respondent in respect of the President's alleged continued refusal to set aside her resignation met the threshold of arguability per **Sharma**.

[19] Mr. Armour submitted that the trial judge gave no reasons for his grant of

leave in respect of this purported decision. I agree. At paragraph 9 above I set out what I consider to be the judge's analysis of the issue of reviewability of the decision. But while he states that a failure to act can amount to a *decision* which is capable of review, he does not say whether any such decision fell to be made in this case and from what source it was derived. His holding that the claim had attained the threshold of reviewability is arrived at without any substantive reason being given for it. That holding is not a foundation on which the decision can stand.

[20] In the end the issue is whether there is any power in the President under the Constitution to set aside or re-instate the respondent in the manner contended for by the respondent. In my judgment there is no such power and the judge was plainly wrong in the exercise of his discretion to grant leave on this ground. The relevant provisions for the purposes of a decision in this case are sections 104(1) and 142 of the Constitution. Grounds 2, 3, 4 and 5 thus fall now to be considered.

[21] Section 104 (1) provides that judges, other than the Chief Justice, shall be appointed by the President acting in accordance with the advice of the JLSC. The President has no discretion whatever in the matter. He must do what he is advised to do. Section 142 therefore provides:

> ***142. (1) Subject to the provisions of this Constitution, any person who is appointed or elected to or otherwise selected for any office established by this Constitution, including the office of Prime Minister or other Minister, or Parliamentary Secretary, may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed, elected or selected.***
> ***(2) The resignation of any person from any such office shall take effect when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorised by that person or authority to receive it.***

[22] Similarly, section 142(2) gives the President no discretion to refuse to

accept the resignation or to set it aside (or to return it to the author). The resignation takes effect once received by the President. The President has no power whatever to set it aside. Any question as to the invalidity of the resignation will be a matter for a court of law. No decision falls to be made by him and he made none. There is no decision to review. The respondent's contention that he made a decision to continue to accept her resignation is totally misconceived. At best there is a power of re-appointment under section 143 but such a reappointment is not at the discretion of the President. It would be exercised based on the advice of the JLSC pursuant to section 104(1).

[23] Further, the respondent in her letter made a number of allegations. The President is not a court of law empowered to enquire into allegations. Neither can he act on them and reinstate on the mere basis that they were told to him and he believes them to be true.

[24] Mr. Maharaj submitted that in any event the President is a proper party to these proceedings even if he had no power to re-instate. Given the outcome of this appeal it is not necessary to consider this issue except to say that had this appeal been a successful appeal, the matter would still have proceeded against the JLSC only and that a successful outcome for the respondent would still have obliged the President to act on the orders and directions of the court.

[25] Mr. Maharaj referred to the decision of Dyson LJ in **R (H) v Ashworth Hospital Authority [2003] 1 WLR 127** at para 46 in which that judge observed that a finding of illegality in respect of a decision already implemented still has effect because "*If the order is ultimately quashed it will be treated as never having had any legal effect at all".* I agree entirely but in that case there was never any doubt at all as to the power which was exercised. There is in this case. Secondly, a decision by the High Court that the resignation was illegal and of no effect because of the actions of the JLSC, would render the resignation null and void without any action or decision being required of the President.

[26] The decision in **Islington London Borough Council v Camp [2004]**

LGR 58 also cited by Mr. Maharaj is distinguishable as well. It is true that in that case no "decision" was made by the local authority and the matter was held to be reviewable. But there was a clear power to do an act under section 86 of the Local Government Act 1972 and there was no "omission" or "breach of duty" by the local authority charged with a duty under that section. The facts of that case required that the court interpret the provisions of section 86 before any decision could be made.

[27] Finally, Mr. Maharaj in support of his submission that the President has the power to reconsider his acceptance of the resignation letter, relied on **R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau, The Times 4 April 1986**. The facts of that case show that the decision is plainly distinguishable. The reconsideration which was required in that case arose from the fact that a later decision of the House of Lords had rendered erroneous a number of previous decisions taken by local authorities with respect to the granting of higher education awards for certain applicants. Further, there was a clear power and discretion to grant such an award and, no doubt, an inherent power to reconsider. In this case there is no power to set aside, far less to reconsider or reinstate, under section 142(2). As to Lord Donaldson's dictum that:

> ***"It would be strange indeed if a public authority which discovered that it had inadvertently denied a citizen a benefit to which he was entitled could not correct its error. Indeed, I think that it would have a duty to consider exercising this power, although I also accept that it would have a discretion as to what action should be taken. This discretion would have to be exercised in accordance with the requirements of good public administration."***

That dictum must be considered against the fact that there was power to grant the award in the first place. In my judgment any issue of reconsideration on the part of the President arises, if at all, extra-judicially. He may bring this to bear as a matter of the grace and prestige of his office, when he (or she) considers,

exceptionally, that some form of moral suasion is advisable. But there is no legal duty to do so and in any event that is not an issue which arises in this case. At the end of the day however he is bound to follow the law. He has no power whatever to set aside a resignation or to reinstate a resignation already accepted. In my judgment the contention is unarguable on the facts of this case.

[28] I would allow the appeal and order that costs be the appellant's costs in the cause.

Nolan P.G. Bereaux
Justice of Appeal