REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal 304/2017

IN THE COURT OF APPEAL

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

APPELLANT

AND

MARCIA AYERS-CAESAR

RESPONDENT

PANEL: **Mendonça, CJ (Ag)**
Jamadar, JA
Bereaux, JA

APPEARANCES: **Mr R. Armour SC, Mr R Nanga, Mr R Heffes-Doon and Mrs Z Hanes-Soo Hon for the Appellant**

Mr R. L. Maharaj SC and Mr R. Bissessar for the Respondent

DATE OF DELIVERY: March 29th2018

JUDGMENT

Delivered by A. Mendonça, CJ (Ag.).

1. On April 12th 2017, the Respondent, Marcia Ayers-Caesar, was sworn in as a Judge of the Supreme Court of Trinidad and Tobago. On April 27th 2017, the Respondent signed a letter of resignation and delivered it to the President of the Republic of Trinidad and Tobago (the President). On May 19th 2017, the Respondent wrote to the President explaining, according to her, the circumstances in which the letter of resignation came to be signed by her and delivered to him. In essence, she claimed that the letter of resignation was signed as a consequence of "unlawful and unconstitutional pressure" put upon her by the Judicial and Legal Service Commission (the JLSC). She further claimed that the JLSC "acted in breach of the rules of natural justice in making a decision to seek [her] resignation, in putting [her] under pressure to resign, without putting the case against [her] or even warning [her] of it and without giving [her] any proper opportunity to respond". She alleged that the subsequent acceptance of her resignation by the President "was likewise unconstitutional for all the same reasons". She called on the President to consider the matters contained in the letter and respond to her as a matter of urgency. She also asked the President to acknowledge that her removal from office was unlawful and unconstitutional and can have no legal effect.

2. The President replied to the Respondent's letter of May 19th 2017 by his letter of June 14th 2017. In that letter he acknowledged receipt of the Respondent's letter of resignation "which [she] personally handed to him" and in which she stated:

> "I hereby tender my resignation as a Judge of the Supreme Court of Trinidad and Tobago and at the same time forego any (superannuation) benefits that may have accrued."

The President also acknowledged that he had received the Respondent's letter of May 19th 2017. He then stated:

> "I am advised by Queen's Counsel that it would be inappropriate and outside of my constitutional remit to comment on your letter dated 19thMay 2017 and/or to accede to your requests contained therein and in particular your request that I 'acknowledge that' your 'removal from office was unlawful and unconstitutional and can have no legal effect'."

3. On July 20th 2017, the Respondent applied for leave to make a claim for judicial review. She named both the JLSC and the Attorney General as respondents to the leave application and the intended defendants to the judicial review claim, if leave were granted. The Attorney General was named as representing the State in respect of the decisions of the President of which the Respondent complained.

4. The essence of the Respondent's complaint against the JLSC is that on or about April 27th 2017, it decided to effect her removal from office and to do so by procuring her resignation. For that purpose it decided to put undue pressure upon her to resign by threatening to recommend to the President that her appointment as a Judge be revoked. She alleges that the Chief Justice on behalf of the JLSC then pursued this decision by requiring her to resign or else the JLSC will act as threatened and by notifying the President in advance of her impending resignation and fixing an urgent appointment for her to deliver to the President her letter of resignation**.** The Respondent claims that the JLSC acted ultra vires its powers, in breach of the rules of natural justice, unlawfully and unconstitutionally.

5. In relation to the President, the Respondent alleged that he participated in the unlawful pressure brought upon her to resign and agreed with it "in the actual or constructive knowledge thereof" that he would accept the Respondent's resignation, and then did accept it, or at least he knew or had constructive knowledge of the unconstitutional actions and unlawful pressure by the JLSC. Further, the Respondent maintained as against the President that in any event, she informed the President by the letter of May 19th 2017 of the unlawful pressure and unconstitutional action of the JLSC, and asked for his acceptance that her removal from office was unconstitutional and of no legal effect. The President, however, refused to do so and in so doing misdirected himself in law as to his powers under the Constitution.

6. In the application for leave, the Respondent identified the decisions of the JLSC and the President in respect of which she sought leave to make a claim for judicial review. In respect of the JLSC's decisions these are:

    a) On or about April 27th 2017, to seek the Respondent's resignation as a Judge of the Supreme Court;

    b) On or about April 27th 2017, to recommend to the President that the Respondent's appointment as a Judge of the Supreme Court be revoked if she did not agree to resign and to communicate that threat to the Respondent as a means of procuring her resignation;

    c) The conduct of the JLSC on April 27th 2017, in pressuring the Respondent into resigning by threatening to make the said recommendation [at b) above] if she did not resign;

    d) On April 27th 2017, to treat as effective the Respondent's consequent purported resignation.

    In respect of the President, the decisions were identified as follows:

i) On April 27th 2017, to agree to accept and then to accept the purported resignation of the Respondent as a High Court Judge in a letter of the same date;

ii) The continued refusal to set aside the Respondent's resignation and to reinstate her in her post as a Judge.

7. The application for leave was heard before Harris, J. He found that the decisions of the JLSC as set out above are reviewable and granted leave to make a claim for judicial review for the following relief against the JLSC:

i) A declaration that the impugned decisions of the JLSC were unlawful because it acted outside its powers and in breach of the Constitution, in particular, S 137 of the Constitution.

ii) A declaration that the impugned decisions of the JLSC were unlawful because it acted in breach of the rules of natural justice in giving the Respondent no notice of its charges against her and no opportunity to respond to such charges before it decided to take action against her.

iii) A declaration that the impugned decisions of the JLSC were unlawful because it acted in breach of the protections afforded by S 137 of the Constitution.

iv) A declaration that the impugned decisions of the JLSC were null and void and were of no effect.

v) An order of *certiorari* quashing the impugned decisions of the JLSC.

vi) An order that the JLSC recommend to the President that the Respondent be reinstated to the post of a Judge of the Supreme Court of Trinidad and Tobago.

vii) A declaration that the JLSC infringed the Respondent's constitutional right to the protection of the law guaranteed by S 4(b) of the Constitution.

viii) An order for payment of damages to be assessed for misfeasance in public office and breach of the Respondent's constitutional rights including compensation for loss of office and the benefits that go with it (if she is not

reinstated), and the award to include an additional award by way general or vindicatory damages.

8. In respect of the decisions of the President, the Judge noted that in relation to the decision at (i) of paragraph 6 of this judgment, the case of the Respondent was that in essence the President participated in the undue pressure put upon her and that in any event he was aware of the undue pressure and contrary to law went ahead and accepted her resignation on April 27th 2017. The Judge, however, found that the evidence did not establish the Respondent's case that the President participated in or had any actual or constructive notice of the unlawful pressure allegedly brought upon the Respondent by the JLSC. In the circumstances, he refused to grant leave in respect of that decision. With respect to the decision at (ii) of paragraph 6 (i.e. the continued refusal to set aside the Respondent's resignation and to reinstate her as a judge), he however, held that it is reviewable. He noted that here that the Respondent's claim was that even after she notified the President by letter of May 19th 2017 of the circumstances which she alleged surrounded her resignation, he failed to consider her position and reinstate her as a Judge. He held that the President's continued refusal upon receipt of the Respondent's letter of May 19th 2017, to set aside the Respondent's resignation and to reinstate her in her office as a Judge is reviewable, and granted leave to make a claim for judicial review in respect of that decision for the following relief:

    a) A declaration that the impugned decision of the President is null and void and of no effect.

    b) An order of certiorari to quash the said decision of the President.

    c) A declaration that the President infringed the Respondent's constitutional right to the protection of the law as guaranteed in S 4(b) of the Constitution.

d) An order for payment of damages to be assessed, for breach of the Respondent's constitutional rights, including compensation for loss of office and the benefits to go with it (if she is not reinstated), and the award to include an additional award by way of general or vindicatory damages.

9. The Attorney General now appeals from the Judge's order granting leave to apply for judicial review in respect of the decision of the President. This is the only matter on appeal before the Court. He relies on five grounds of appeal. They are as follows:

i) The learned Judge was plainly wrong in failing to give any reasons for his decision that the President's continued refusal to set aside the Respondent's resignation as a Judge of the Supreme Court of Trinidad and Tobago and to reinstate her to that office is reviewable.

ii) The learned Judge was plainly wrong in finding that there was a decision of the President that was reviewable.

iii) The learned Judge was plainly wrong in failing to decide or appreciate that the President does not have the power to set aside the Respondent's resignation as a Judge (which took effect after the writing signifying the resignation was received by the President, pursuant to S 142 of the Constitution and does not have the power to reinstate her as a Judge).

iv) The learned Judge was plainly wrong in finding that it was arguable that the President continued to accept the Respondent's resignation subsequent to the receipt of the Respondent's letter of resignation, and was plainly wrong in granting leave to make a claim for judicial review, seeking such a declaration.

v) The learned Judge was plainly wrong in failing to appreciate that the Respondent's resignation took effect after the writing signifying her resignation was received by the President, and that the President has no power and thus made no decision to "continue to accept" the Respondent's resignation.

10. With respect to the first ground of appeal, Mr Armour, appearing for the Attorney General, submitted that the Judge failed to give any reasons for his decision that the President's continued refusal to set aside the Respondent's resignation as a Judge of the Supreme Court, and to reinstate her to that office is reviewable.

11. It was accepted by both parties that in this case, the trial Judge's failure to give reasons for his decision is a self-standing ground of appeal on which this Court can set aside the Judge's decision. There was, however, no disagreement that there was no obligation on a Judge to set out every reason that weighed with him in coming to his decision. The obligation is to give at least one adequate reason for his material conclusions, that is to say a reason that explains to the reader and the appeal court why one party lost and the other succeeded. The obligation of the Judge was explained in this way in ***Smith v Molyneaux [2016] UKPC 35*** (at paras 36 and 37):

> "**36.** The Board finally has to consider whether the judge gave an adequate reason for his finding of permission. It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded: see, generally, the decision of the Court of Appeal of England and Wales in *English v Emery Reimbold & Strick Ltd* [2002] EWCA 605; [2002] 1 WLR 2409, especially at paras 15 to 21. The judge does not have to set out every reason that weighed with him, especially if the reason for his conclusion was his evaluation of the oral evidence:
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> > "… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may

> be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. (*English v Emery Reimbold& Strick*, para 19 per Lord Phillips MR, giving the judgment of the court)"

12. The question, therefore, is whether there is at least one adequate reason for the Judge's conclusion that the impugned decision of the President is reviewable.

13. Mr Armour, in submitting that the Judge failed to give any reasons for his decision focused on paragraph 95 of the Judge's judgment. There the Judge said:

> "The second allegation of the President of his decision i.e. "the President's continued refusal to set aside the applicant's resignation and to reinstate her in her post as a Judge", for the reasons set out above is reviewable."

I agree with Mr Armour that it is difficult to discern from the "above" or in other words, what preceded that statement of the Judge, any reasons for the Judge's finding that the decision is reviewable. But, the judgment does not end there and I agree with Mr Maharaj, (who appears for the Respondent) that you cannot ignore what follows. The whole of the judgment should be considered.

14. It is plain from the reading of his judgment, that the Judge had in mind and applied the correct test for determining whether leave to make a claim for judicial review should be granted. Very early in his judgment, he referred to ***Sharma v Browne-Antoine &Ors (2006) 69 WIR 379***, which he described as "a *locus classicus*" as the test for the grant of leave. He then cited the following from the judgment of Lords Bingham and Walker (at pages 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* (4thEdn, 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."

And later in his judgment (at para 69), the Judge stated that, "if nothing else the common ground between all the parties is the reliance on ***Sharma v Browne-Antoine*** as representing a threshold test for leave. It is this test that the Court applied in disposition of this application…"

15. When the Judge specifically addressed the impugned decision of the President that is the subject of this appeal, he noted (at para 90) that the case for the Respondent was that upon receipt of her letter of May 19th 2017, detailing all the circumstances surrounding what the Respondent referred to as "her purported resignation", the President failed to consider her position and reinstate her as a Judge when he had the power so to do. He then stated that it was not in dispute that a failure to act can amount to a reviewable decision and noted that the

validity of the acts or the failure to act by the President are not immune from examination.

And at paragraphs 100 and 101, he said:

> "**100.** The fact that the Applicants letter of the 19th May 2017 was sent to and received by the President is not in dispute. What is in dispute is whether His Excellency the President, by not reinstating the Applicant at her request upon receipt of her said letter and his becoming aware of the allegations and requests therein, amounts to **(i)** a decision **(ii)** that is reviewable **(iii)** which was not a valid exercise of his authority – and he has misdirected himself in law and as to his powers under the Constitution.
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> **101.** This is a narrower issue in relation to his Excellency the President that has been taken by the Applicant in her Application for leave. It is subsumed in my view under the ambit of the existing application. It is the only issue that meets the threshold test in the courts view.

16. It is, I think, clear that the Judge found that applying the threshold test for leave to make a claim for judicial review, the impugned decision of the President is reviewable as the Respondent raised an arguable case with a realistic prospect of success whether the President "misdirected himself in law as to his powers under the Constitution". There are in my opinion, clearly identifiably reasons for the decision. I am, therefore, of the view that there is no merit in this first ground of appeal.

17. The other grounds of appeal may be taken together as there is a great deal of commonality and overlap among them. Before referring to the submissions made in relation to the grounds, it is convenient to set out the provisions of the Constitution and of the Interpretation Act referred to in the submissions.

The Constitution

> **104(1)** The Judges, other than the Chief Justice, shall be appointed by the President, acting in accordance with the advice of the Judicial and Legal Service Commission.

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.

142(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.

143(1) Where any person has vacated any office as established by this Constitution, including the office of Prime Minister or other Minister, or Parliamentary Secretary, he may, if qualified, again be appointed, elected or otherwise selected to hold that office in accordance with the provisions of this Constitution.

The Interpretation Act

39(1) Subject to the constitutional laws of Trinidad and Tobago, words in a written law authorising the appointment of a person to any office shall be deemed also to confer on the authority in whom the power of appointment is vested –

(b) power, exercisable in the like manner and subject to the like consent and conditions, if any, applicable on his appointment –

(i) to reinstate him on his suspension, or reappoint him on his removal, his resignation, the expiration of his office or otherwise;....

18. Mr Armour submitted that there was no reviewable decision of the President as found by the Judge, and the Judge erred in concluding that there was. He noted that the Judge found that the President was not aware of the alleged undue pressure brought upon her by the JLSC that led to the Respondent tendering her resignation, and there has been no appeal by the Respondent in respect of that finding. When, therefore, the Respondent tendered her resignation to the President in accordance with S 142(1) of the Constitution and it was received by him, the Respondent effectively resigned as a Judge and ceased to be a Judge. That was the effect of S 142(2) of the Constitution. The President's involvement came to an end upon his

receiving the letter of resignation. There is no provision in relation to the refusal by the President of a resignation received by him. It is therefore not arguable that the President made a decision refusing to set aside the Respondent's resignation as the Respondent contends.

19. Mr Armour further argued that although the Respondent, in her letter of May 19th 2017, made allegations in relation to her resignation, at this stage they are mere allegations, and the President does not have the power to act upon such allegations. There is no such power vested in the President. The validity or otherwise of the allegations is a matter for the Court. All that the President is required to do under S 142(2) is to receive the resignation and he has no further part to play.

20. Further, Mr Armour submitted that while under S 104(1) of the Constitution the power to appoint a Judge is vested in the President, he can do so only on the advice of the JLSC and has no power to appoint a Judge in the absence of such advice. This is the effect of S 104(1) of the Constitution when read in conjunction with S 39(1) (b) (i) of the Interpretation Act. It is, therefore, for the JLSC to advise the President to reappoint the Respondent and only then can the President do so. There is no dispute that no such advice has been given to the President by the JLSC.

21. In the circumstances, Mr. Armour contended that it is wrong in law and in fact to say that by refusing to set aside the Respondent's resignation and reinstate her in her office as a Judge, the President has made a decision.

22. The core submission of Mr Armour, therefore, is that there was no decision by the President that is reviewable and this is so for essentially three reasons:

    i) The resignation of the Respondent from her office as a Judge takes effect on the receipt by the President of the letter of resignation;

    ii) The President on receipt of the letter of resignation is *functus* and has no power to act on allegations that the Respondent's resignation was obtained by the unlawful actions of the JLSC;

    iii) There is no power in the President to reappoint the Respondent as a Judge without the advice of the JLSC and there is, of course, no dispute that he has received no such advice.

23. Mr Maharaj, in reply to Mr Armour's submissions argued that the contention that the President was *functus* and had no further part to play, having received the Respondent's letter of resignation is wrong in law. The President has a power to reconsider and revisit his decision to receive the resignation and a duty to do so if a material flaw is brought to his attention. However, on receiving the Respondent's letter of May 19th 2017, the President chose to do nothing and that exhibited a misunderstanding of his powers. Further, Mr Maharaj argued that if the validity of the Respondent's resignation is a matter for the Court as the Attorney General contends, then the President is a proper Respondent to that action. In any event, the absence of a decision is not fatal to a claim in judicial review and the Court in the exercise of its common law jurisdiction can make declarations. The issues raised in this matter as to the powers of the President and whether he responded properly on receipt of the letter of May 19th 2017, from the Respondent, and if not, how he ought to have responded are important issues, not only for the parties before the Court, but for the public in general, and should be entertained by the Court.

24. In view of the submissions of the parties, the relevant issues in my view may be stated in this way:

    (i) Whether the President has the power to set aside the Respondent's resignation and to reinstate her as a Judge;

    (ii) If so, should he have exercised the power on receipt of the Respondent's letter of May 19th 2017 or was his response appropriate;

    (iii) If so, or in any event, should leave be granted to make a claim for judicial review?

25. In addressing these issues, it is important to bear in mind, that this is an appeal from leave granted by the Judge to make a claim for judicial review. The test to determine whether leave should be granted is as was stated by the Judge and which has been set out earlier in this judgment. The question, therefore, is whether 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. I may mention at this point that no one has raised any argument concerning a discretionary bar so that is not an issue in this appeal.

26. The first issue which I have identified at paragraph 24 raises a question as to the powers of the President. Does he have the power to set aside the Respondent's resignation? Implicit in that question it would seem to me is whether the President has the power to reconsider or revisit his receipt of the letter of resignation of the Respondent. As to the President's power to reinstate the Respondent in the office of a judge, Mr. Armour is of course correct to say that the President has no power to do so except on the advice of the JLSC. But this case is not really about appointing the Respondent to the office as a Judge in that strict sense. If, as the Respondent contends, her resignation was procured by unlawful means, then it is not a valid

and effective resignation. The effect of that is that she never effectively resigned and has remained a Judge. As was noted by Lord Bingham in **McLaughlin v The Governor of the Cayman Islands [2007] 1 WLR 2839**:

> "It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between public authority and the office holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal".

It is in that context that the impugned decision of the President not to reinstate the Respondent in her office as a Judge is to be viewed in this case. If, therefore, the President has the power to set aside the resignation and were to exercise it, the effect would be that the Respondent remained in office. It is in that sense that it can be said that the President has the power to reinstate the Respondent, notwithstanding the provisions of S 104(1) of the Constitution.

27. Both parties were in agreement that S 142 of the Constitution cannot refer to a resignation that is not valid. I think that is a perfectly legitimate concession. It would seem to me that an invalid resignation must include a resignation that was obtained by duress, undue pressure, fraud, forgery or other unlawful means. It would be extraordinary if the effect of section 142 was to bring about the effective resignation of an office holder on the receipt by the President of such an invalid resignation. Such a resignation cannot properly be regarded as a resignation under the hand of the person appointed, elected or selected for any office established under the Constitution within S 142(1). Accordingly, S 142(2) that refers to the effect of the resignation can have no application in the face of such a resignation. S 142 of the Constitution, therefore, cannot be invoked to establish the effect of such an invalid resignation and that the President,

having received such a resignation, has no further part to play and can do nothing if he is notified that the resignation was invalid.

28. If S 142 does not provide an answer to the effect of the receipt of such an invalid resignation by the President, the question remains having received such a resignation what power, if any, he has to set it aside and to reinstate the Respondent in the sense described above. Of course, it has not been established at this stage of the proceedings whether the resignation was obtained by duress, unlawful pressure or other unlawful means as contended by the Respondent so as to make it invalid. That raises, therefore, another question, whether there is power in the President to do anything in the face of what are only allegations. Mr Armour contends that the validity or otherwise of the resignation is a matter for the Court and not the President.

29. Mr Maharaj, in contending that the President has the power to revisit and reconsider his receipt of the resignation letter referred the Court to ***R v Hertfordshire CC ex-parte Cheung, R v Septon Metropolitan Borough Council ex-parte Pau, The Times 4 April, 1986***, where Lord Donaldson said:

> "That is not to say that, having determined that the applicants were not qualified, the authorities had no power to reconsider their decision. I am sure that they had. 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 its 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".

It is clear from that, that the public authority has a power to reconsider its decision and a duty to exercise such power if it discovers that it had inadvertently denied a citizen a benefit to which she is entitled. What action should be taken is within the discretion of the public

authority; such discretion to be exercised in accordance with the requirements of good public administration.

30. Arguably, that can apply to the President in this case. It, therefore, seems to me, that it is arguable that he has a power to reconsider his decision to receive the resignation of the Respondent and a duty to do so if he discovers that in the exercise of his power, he may have received a resignation that has no legal effect, and so denied the Respondent the benefit of office of a Judge to which she was entitled. What action he should take is in his discretion to be exercised in accordance with the requirements of good public administration.

31. I believe it is arguable that Mr Armour's submission that the President can do nothing in the face of what are allegations and that it is for the Court to decide on the validity or otherwise of the allegations is not correct. If that submission is correct it would meant that the power in the President to reconsider the receipt of the resignation is in every case dependent on a decision of the courts that the resignation is invalid. It is arguable that that is to take too narrow and pedantic a view of the powers of the President to reconsider the receipt of a resignation. It is my view, arguable, that if the President has the power to set aside the resignation, implicit in that is a power to consider the circumstances in which the resignation was tendered to determine its validity. So that it is in my view arguable that the President has a power to determine the circumstances in which the Respondent's resignation was tendered and a duty to do so if circumstances are brought to his attention that would render the resignation invalid.

32. This brings me to the second issue, if the President has the power that I have concluded that it is arguable that he has, whether the response of the President in this case was appropriate in all the circumstances.

33. It is, of course, not in dispute that the President received the letter of May 19th 2017. That letter outlined the circumstances, which, according to the Respondent, gave rise to her resignation. As I have explained earlier the Respondent claimed in the letter that the resignation was tendered as a consequence of undue pressure brought upon her by the JLSC and by other unlawful means. If the Respondent proves her case, the likely result would be to render her resignation invalid. Indeed, the letter raises very much the same allegations made against the JLSC and the issue as to the legitimacy or otherwise of the resignation will be determined on the hearing of the application for judicial review pursuant to the leave granted by the Judge in relation to the JLSC. In the face of the allegations of the Respondent of the circumstances in which the resignation was procured as communicated by her to the President, his response was his letter of June 14th 2017 to which I have referred earlier, setting out the last paragraph of that letter. It is clear from that letter that acting on the advice received from his legal advisors, the President was of the view that it would be inappropriate and outside of his constitutional remit to comment on the Respondent's letter of May 19th 2017 and to accede to her requests contained therein and in particular, her request to acknowledge that her removal from office was unlawful and unconstitutional and can have no legal effect. Insofar as I am of the view that it is arguable that the President has a power to set aside the resignation of the Respondent, which implies a power to revisit and reconsider the receipt of the Respondent's letter of resignation, it is of course arguable that the powers of the President were misconstrued or misunderstood by his advisors. Further, as I mentioned above, it is arguable that he has a

duty to exercise his power when the circumstances surrounding the resignation were brought to his attention by the letter of May 19th 2017. The response by the President to in effect, do nothing therefore, would not be appropriate in the circumstances. And as Mr Maharaj has pointed out, it does not matter that what is complained about may be described as inaction as that is equally reviewable as action taken by a public authority.

34. Mr Armour in the course of his argument asked what really is it being suggested by the Respondent that the President could have done. Is the Respondent suggesting that the President should have summoned the members of the JLSC and ask them to provide statements, or go to Cabinet for funding to initiate an investigation? He submitted that it only has to be examined to demonstrate that the President has no such power as the Respondent is contending. However, in view of what was said in ex-***parte Pau*** referred to earlier, arguably, the public authority has a discretion as to what action should be taken and that is to be exercised in accordance with the requirements of good public administration. Although it might be tempting to look back and say that anything the President did could not have avoided these proceedings, the fact is that one can never be sure what a timely intervention in a less adversarial setting might have achieved. If the President has the power, which I have said that it is arguable he has, then by not recognising it and taking appropriate steps, the Respondent was denied that benefit. It is as I said, arguable that to do nothing was not appropriate.

35. In coming to that conclusion it is to be borne in mind that when the President received the letter of May 19th 2017, these proceeding were not yet begun. Had proceedings been on foot, and there had been an acknowledgement by the President of the powers to reconsider his acceptance of the resignation, but a refusal to interfere as the matter is before the Court, it

might very well have been an appropriate response to do nothing. Certainly the appropriateness of the response would need to be considered in that context.

36. In view of the above in my judgement and in agreement with the decision of the Judge, the President in refusing to set aside the resignation of the Respondent and to reinstate her as a Judge upon receipt of the Respondent's letter of May 19th 2017 gives rise to an arguable ground for judicial review with a realistic prospect of success, that is to say whether he has misdirected himself as to his powers and duties under the Constitution.

37. The third and final issue is whether leave should have been granted in the circumstances of this case.

38. Mr Armour has argued that if the Court, on the hearing of the application as between the Respondent and the JLSC, were to find that the resignation was obtained by unlawful means as she contends, then it would be open to the Court to set aside the resignation or declare it to be null and void. In such an event it would follow that the Respondent's resignation is not effective and she remained a Judge. There would be no need to have the President in these proceedings and to call into question any action or inaction on his part.

39. While that may be so, it seems to me, that the President, through the Attorney General is the proper defendant to a judicial review application that challenges his decision. Further it is not in dispute that the Court may on an application for judicial review grant relief that is justifiable in the public interest. This is so even where the applicant, unlike the Respondent in this case, is not adversely affected by the decision or does not have sufficient interest in the mater to

which the decision relates (see Ss 5(2) and 7(1) of the Judicial Review Act). The issues raised in these proceedings as to the powers and duties of the President are of importance not only to the parties to these proceedings, and the office of the President, but to the general public as well. There are issues, therefore, of public importance and the public interest will be served in having the Court express its findings on them.

40. In view of the above, I would dismiss this appeal and hear the parties on the question of costs.

A. Mendonça
Chief Justice (Ag.)