REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S 046 of 2019
Civil Appeal No. S 047 of 2019

BETWEEN

MARCIA AYERS-CAESAR

APPELLANT

AND

THE JUDICIAL AND LEGAL SERVICE COMMISSION

RESPONDENT

PANEL:

P. JAMADAR, J.A.

G. SMITH, J.A.

DATE OF DELIVERY: Wednesday, 22nd May, 2019.

APPEARANCES:

Mr. R.L. Maharaj, S.C., Mr. R. Bissessar and Ms. V. Maharaj on behalf of the Appellant.
Mr. R. Martineau, S.C., Ms. D. Peake, S.C., Mr. I Benjamin, S.C., and Mr. I. Roach on behalf the Respondent.

JOINT JUDGMENT OF JAMADAR JA AND SMITH JA

INTRODUCTION

[1] On the 12th April, 2017 Marcia Ayers-Caesar (the Appellant) was sworn in as a Puisne Judge of the Supreme Court of Trinidad and Tobago, by the President of the Republic. The Chief Justice, Ivor Archie was present, as were the Registrar of the Supreme Court (Jade Rodriguez), the Administrative Secretary to the Chief Justice (Sherlanne Pierre), and members of the Appellant's family. The Appellant received her Instrument of Appointment from the President that very day. Immediately prior to her appointment as a Puisne Judge, she was the Chief Magistrate of Trinidad and Tobago.

[2] On the 27th April, 2017 (15 days later), the Appellant left the Hall of Justice in Port of Spain to attend at President's House for the purpose of tendering a purported resignation letter to His Excellency. This was just after having met, inter alia, with the Chief Justice, Sherlanne Pierre and Jade Rodriguez in the Hall of Justice (on the Chief Justice's request); which meeting followed an emergency meeting of the JLSC which the Chief Justice (who is ex officio chairperson) had convened and attended to discuss matters of concern involving the Appellant. When she arrived at President's House, her husband was already there, awaiting her arrival. She had been communicating with him and some of her close and trusted friends contemporaneously. She then proceeded to hand to the President the purported letter of resignation.

[3] However, in these proceedings, the Appellant contends that her resignation was in fact brought about by unconstitutional, illegal and unlawful actions by the JLSC, including the use of undue pressure, threats, duress, and coercion, and was therefore not a free and voluntary/volitional act.[1] Therefore, she seeks to

[1] Appellant's affidavit filed 12th April 2018, paragraph 9 (d) and (k).

challenge certain decisions and conduct of the JLSC and to have her purported resignation declared null and void (with consequential orders).[2] Ultimately, it is these two objectives that motivate this litigation. Clearly, if the cause of the Appellant's resignation is as she contends, then it is a matter which can arguably lead, with a realistic prospect of success, to the relief she seeks in these proceedings.[3] It is trite, that: "**The threshold for the grant of leave to apply for judicial review is low**". (**Maharaj v Petroleum Co. of TT** [2019] UKPC 21, at paragraph 3).

[4] These two procedural appeals arise out of the contentious resignation of the Appellant. In particular, out of her challenge to certain decisions and conduct of the Respondent. As Lord Steyn has so aptly explained, 'in law context is everything'.[4] Thus, the decisions and conduct under review and the applications which form the subject matter of these two appeals, must be considered in their context, which context informs the true meaning and significance of the impugned decisions and conduct, and bears upon the just and appropriate approach to be taken on these two applications. That context includes relief based on constitutional review. This action is therefore not just an administrative law judicial review claim.[5] In addition, the challenge though formally directed at the JLSC, in fact incorporates, as central, the conduct, actions and representations of the Chief Justice; behaviour which taken in context may arguably, to a standard of reasonableness, lead to the inference that he was acting presumptively as

[2] Appellant's affidavit filed 12th April 2018, paragraph 9 (q), (r), (s) and (t).

[3] See, **Sharma v Browne-Antoine & Ors**. (2006) 69 WIR 379, at page 388; per Lord Bingham, and **AG v Ayers-Caesar**, Civ. App. S 304 of 2017, per Jamadar JA, at paragraphs 25-28.

[4] **R (Daly) v Secretary of State for the Home Department** [2001] 2 AC 532, paragraph 28: "The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. … To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. **In law context is everything**."

[5] As against the Respondent, the Appellant claims declarations that invoke breaches to the protection of the law (section 4 (b), Constitution) and of section 137 of the Constitution. See, relief 1, 3 and 7, Fixed Date Claim Form.

chairperson of the JLSC, on its behalf and authoritatively as its 'ostensible agent' on the 27th April 2017 when he met with the Appellant.

[5] On the evidence filed in this matter, there is hard swearing and sharp disagreement as between the main contenders, a Chief Magistrate and Pusine Judge, the Appellant, on the one hand and the chairperson of the Respondent, who is the Chief Justice of Trinidad and Tobago, on the other. There is no apparent middle ground in their experiences and recollections of the matters in dispute between them. Both have supporting testimony. Both lay claim to corroborating documentary evidence. Each insists that the other is both mistaken and wrong, and that all of their assertions are accurate and right.

THE TWO APPLICATIONS

The Relevant Facts

[6] A summary of the relevant facts follows. First, on the 6th October 2017, the trial judge granted leave to review both decisions and conduct of the Respondent. This permission has not been challenged by this Respondent. It is therefore to be taken that the Respondent accepts, that the challenges to these decisions and this conduct meet the legal requirements to be reviewable in these proceedings.[6]

[7] Second, these impugned decisions and conduct were formulated by the Appellant based on the direct interactions of the Appellant in her dealings principally (but not exclusively) with the Chief Justice on the 27th April 2017 (taken in the factual context of what had transpired before and immediately after the Appellant's meeting with the Chief Justice and others at the Hall of Justice on the 27th April).

[8] Third, the Respondent qua JLSC did not formally and in writing communicate with the Appellant on the 27th April, but did meet on that day to discuss the Appellant's

[6] See, **Sharma v Browne-Antoine & Ors**. (2006) 69 WIR 379, at page 388. See also paragraph 3 above.

appointment, her outstanding matters, and solutions to what it perceived as an issue. That meeting took place shortly before the Chief Justice met with the Appellant on that very day.

[9] Fourth, the Appellant has deposed to what she recalls was communicated to her by the Chief Justice and what transpired on the 27th April at her meeting with him and otherwise. In her principal affidavit of 19th July 2017, the Appellant explained in detail:

(a) The history of what transpired between herself and the Chief Justice leading up to the 27th April. In particular what had transpired at a meeting that he had summoned the Appellant to attend on Tuesday the 25th April with himself and the Acting Chief Magistrate,[7] a follow up meeting that took place on the 26th April with the Chief Justice, Ms. Pierre, the Acting Chief Magistrate and herself,[8] and the meetings that she had with the Chief Justice (and others) beginning at about 3.30 pm on the 27th April.[9]

(b) That at the meetings on the 25th and 26th April, the Chief Justice had expressly indicated that "he was trying to find a solution to the problem of the part heard matters",[10] and that she had left those meetings "under the impression that the Chief Justice was genuinely interested in finding a workable solution for dealing with my part heard matters."[11] No question of any formal resignation or 'withdrawal' as a judge arose.

(c) That it was only on the 27th April that the Chief Justice (in the presence of Ms. Pierre) "informed me that the JLSC had met in an emergency meeting earlier that day and had decided that I should return to the Magistracy in

[7] Paragraphs 27 and 28.
[8] Paragraph 44.
[9] Paragraphs 45 to 57.
[10] Paragraph 28.
[11] Paragraph 44(e).

order to complete my part-heard matters". And further, "that the JLSC had decided that I either tender my resignation as a Judge or the JLSC would advise the President to revoke my appointment as a High Court Judge".[12]

(d) Her interpretation and understanding of what the Chief Justice had communicated to her on the 27th April as being the decisions of the Respondent (JLSC). That is, "it was clear to me from what the Chief Justice said that a decision had already been made by the JLSC and that I had no choice but to resign as a High Court Judge or have my appointment as a High Court Judge revoked by the President".[13]

(e) Other communications of the Chief Justice on the 27th April that corroborated and confirmed her understanding of what had been decided by the Respondent (JLSC). That is: (i) the Chief Justice felt that he "was under pressure from the President", (ii) that "an appointment had already been sought for me to go to President's House later that day to deliver my resignation to the President", (iii) that "a media statement announcing my resignation was already prepared", and (iv) that "the Law Association would be issuing a media release supporting the resignation".[14]

(f) What in fact transpired thereafter, including: (i) the Chief Justice's confirmation of a contemporaneous telephone conversation with the President, that "the President ... was expecting me at 5.30pm that afternoon for the purpose of receiving my resignation",[15] (ii) the preparation and signing of both the resignation letter and media release in which she "had no role in the preparation and/or composition of either

[12] Paragraph 45.
[13] Paragraph 46.
[14] Paragraph 46.
[15] Paragraph 48.

document",[16] and (iii) her traumatic emotional and psychological states of distress, resignation and horror.[17] As she summarised it, "I was distraught and felt I had no choice but to sign the letter of resignation and media release and to accede to resigning since it was clear to me that my resignation had already been orchestrated and that this was a done deal".[18]

(g) How, following the signing of these two documents, she communicated contemporaneously with her husband, her priest, a magistrate friend and another close and trusted friend. And, she exhibited the contemporaneous social media messages that were exchanged. In all of these communications, one common thread was her assertion that "I had been asked to resign otherwise the JLSC would recommend to the President that my appointment be revoked".[19]

(h) How she left the Hall of Justice at about 5.10 pm "to attend President's House for the purpose of submitting the resignation letter to the President", called her husband who agreed to meet her there,[20] and while waiting to meet the President (who was speaking with the Chief Justice), told her husband, "I was given no choice but to resign otherwise the Chief Justice would get the President to revoke my appointment".[21]

(i) What transpired at the meeting with the President, including her distraught emotional and psychological state.[22]

---

[16] Paragraph 50.
[17] Paragraphs 46, 47 and 50.
[18] Paragraph 50.
[19] Paragraph 54. This is supported by affidavits filed by the Appellant's husband, her priest, and her magistrate friend.
[20] Paragraph 57.
[21] Paragraph 60.
[22] Paragraphs 60 and 61.

[10] Fifth, in a subsequent affidavit filed by the Appellant on the 12th April, on the directions of the trial judge, she deposed that the Chief Justice was at all material times acting on behalf of the Respondent when she was pressured and/or threatened into resigning, which was the true intention of both the Respondent and the Chief Justice acting on its behalf.[23]

[11] Sixth, this sworn testimony is as yet untested (though aspects are denied and alternative versions offered).

[12] Seventh, and as explained above, the Appellant has also exhibited contemporaneous documentary evidence (from the 27th April 2017), that supports and corroborates what she alleges in her testimony (evidence which has not been contested as being fraudulent). Taken as a whole, at this stage of these proceedings, this untested testimony and evidence of the Appellant, though not without some inconsistencies, is prima facie and arguably sufficient to support the Appellant's case.

[13] Eighth, the Chief Justice deposed that he did meet with the Appellant on the 27th April and did communicate to her that "the JLSC had met and considered the matter sufficiently serious to trigger disciplinary inquiry but had made no decision in that regard. Rather it was felt that she should be given the option of withdrawing from the High Court Bench and returning to the Magistracy to discharge her professional responsibilities by completing her part-heard matters".[24] This communication with the Appellant followed a meeting of the Respondent, JLSC, which the Chief Justice had convened earlier on the same day. He also deposed that at that meeting of the JLSC on the 27th April, he brought to the attention of its members the fact that the Appellant had left several matters

[23] Paragraph 9 (d), (k) and (q).
[24] Paragraph 46, affidavit of Ivor Archie, 22nd June 2019.

outstanding in the Magistrates court. And he explained, that as a consequence "the JLSC thought that ... the outstanding matters and her differing accounts about them were a serious matter for the administration of justice and sufficient to warrant a disciplinary inquiry. In addition there appeared to be a lack of full and frank disclosure on her part." Further, the Chief Justice deposed that "the JLSC decided to give the Claimant the opportunity to withdraw from the High Court Bench and return to the Magistracy to complete those matters."[25]

[14] Ninth, the Chief Justice however unequivocally denies any and all allegations of threat, pressure, undue influence, or coercion.[26] As well, his version of material events is at variance with that of the Appellant, and is corroborated by affidavits of Sherlanne Pierre and Jade Rodriguez. The Chief Justice has not explained what either he or the Respondent meant or intended, by the phrases 'option of withdrawing' or 'opportunity to withdraw from the High Court Bench', whether in the context of section 137 constitutional proceedings, or at all.

[15] Tenth, and in so far as alleged decisions of the Respondent made on the 27th April 2017 are at the heart of this matter, the Respondent caused to be filed in June 2018, several affidavits explaining its position and in particular exhibiting and disclosing (for the first time) the minute of its meeting of the 27th April.[27]

[16] Eleventh, Charles Victor Humphrey Stollmeyer was a member of the Respondent and at the meeting of the 27th April. He is a retired judge of the Court of Appeal of Trinidad and Tobago. He deposed that based on the fact of and number of part-heard matters the Appellant had outstanding at the time of her appointment, "that the Claimant's position was untenable".[28] Further, that he was of the view

[25] Paragraph 14, affidavit of Ivor Archie, 22nd June 2019.
[26] Paragraphs 4, 5, 15, 48, affidavit of Ivor Archie, 22nd June 2019.
[27] For example, affidavits of a member (retired Justice of Appeal Charles Victor Humphrey Stollmeyer), the Court Statistician (Karen Julien-Serrette), and of the Secretary of the JLSC (Coomarie Goolabsingh).
[28] Paragraph 9.

that "if the Claimant did not withdraw as a Judge then the JLSC might have to consider the possibility of invoking the procedure for removal of a Judge under section 137 of the Constitution".[29] However, "The JLSC made no decision to invoke such procedure".[30] CVH Stollmeyer has also not explained what he meant or intended by the phrase 'withdraw as a judge', in the context of section 137 constitutional proceedings, or at all.

[17] Twelfth, Ms. Goolabsingh, the secretary of the JLSC, explained that it was the Chief Justice who on the 27th April had summoned "an emergency meeting of the JLSC" for that very date. She was directed by the Chief Justice to inform members that the purpose of the meeting was to discuss "the number of part heard matters left behind by the Claimant". She was at that meeting and took the minutes.[31] She swore as follows: "Following discussions concerning the Claimant's part heard matters, the Commission decided to give the Claimant the opportunity to withdraw from the High Court and return to the Magistracy to discharge her outstanding responsibilities. If she declined to withdraw, the Commission would consider whether the matter should be referred under section 137 of the Constitution."[32] Ms. Goolabsingh has also not explained what she or the Respondent meant or intended by the phrase 'opportunity to withdraw from the High Court', in the context of section 137 constitutional proceedings, or at all.

[18] Thirteenth, the Minute of the Respondent's meeting of the 27th April reveals, inter alia, the following: (i) the meeting was "a Special Meeting", (ii) the Chief Justice sat as Chairman, (iii) the Chief Justice reported on his information with respect to the Appellant's part-heard matters and stated his opinion before inviting discussions as being, "that Mrs. Ayers-Caesar's position had become untenable,

[29] Paragraph 10.
[30] Paragraph 11.
[31] Paragraph 24.
[32] Paragraph 25.

however he wanted the Commission's views as to the course of action that would be warranted", (iv) discussions followed around the number of part-heard matters that were outstanding, whether the Chief Justice and the JLSC had been misled by the Appellant, whether the Appellant had to resign as Chief Magistrate in order to take up an appointment as a Judge, and about the Appellant's case management ability, (v) that three decisions were made.

[19] Fourteenth, these three decisions were recorded in the Minute as follows:

(i) "The Commission ***decided that*** the information before it triggered and met the threshold for disciplinary enquiry but considered also the need for the expediting of Mrs. Ayers-Caesar's outstanding part-heard matters."

(ii) "The Commission ***then decided that***: Mrs Ayers-Caesar be given the option of withdrawing from the High Court Bench and returning to the Magistracy to discharge her professional responsibilities; and"

(iii) "in the event she refuses to withdraw, the Commission would consider instituting disciplinary action in accordance with section 137 of the Constitution of Trinidad and Tobago."

The Minute does not disclose what the Respondent meant or intended when it used the phrases 'option of withdrawing' and/or 'refuses to withdraw' in the context of section 137 constitutional proceedings, or at all.

[20] Fifteenth, this Minute of the JLSC's meeting of the 27th April was only disclosed to the Appellant and her attorneys in the affidavit of Ms. Goolabsingh filed on the 22nd June 2018. This was so despite several written requests for it, from as early as the 21st July 2017 (and before the hearing of and decision on the inter parties application for leave for judicial review).

[21] Sixteenth, the Respondent's and the Chief Justice's media releases that are most directly relevant were as follows. On the 27th April the Chief Justice caused to be issued a formal media release on his behalf. It was intituled 'Chief Justice Responds to Former Judge's Press Statement'. It stated, inter alia, "Given Mrs. Ayers-Caesar's commitment to address her outstanding matters ... the JLSC has met and agreed to restore Mrs. Ayers-Caesar to the Magisterial Bench". The Minute of the Respondent's meeting of the 27th April does not disclose that any such specific decision was taken then or at all. And no other minutes of the Respondent have been disclosed averring to any such decision. Indeed, at that JLSC meeting of the 27th April, the position of the Appellant was as yet unknown (as to whether or not she was willing to 'withdraw from the High Court Bench' and to attend to her outstanding magisterial part-heard matters). Yet this was a contemporaneous and formal document issued under the authority of the Chief Justice, that asserted inferentially that the Respondent knew of the Appellant's decision to return to the magistracy and attend to her part-heard matters, and had decided to 'restore her to the Magisterial Bench'.

[22] Then, on or about the 9th May 2017, the Respondent itself issued a formal press statement. It contextualised its necessity as being: "The concerns raised in the public domain surrounding the appointment and subsequent resignation of former puisne judge Mrs Ayers-Caesar ...". It explained that: "The JLSC feels obligated to put on the record the factual matrix surrounding ... the unfortunate sequence of events that led to the resignation of Mrs Ayers-Caesar." It averred that it was on the 9th April 2017, that "the Chief Justice became aware that some disquiet had seeped into the public domain about Mrs. Ayers-Caesar's imminent elevation to the High Court Bench." And it documented the inquiries made by the Chief Justice leading up to the Appellant's swearing in as a Puisne Judge on the 12th April and what transpired after that event, including hitherto unknown details about the part-heard matters of the Appellant. It stated, "Had the JLSC been

aware of this state of affairs before April 12th, the Office of the President would have been requested to postpone the appointment of Mrs. Ayers-Caesar". It explained that it was the Chief Justice who caused an emergency meeting of the Respondent, JLSC to be convened on the 27th April. And that: "The JLSC was unanimously of the view that the discrepancy between the two lists (of the Appellant's part-heard matters) was large enough to call into question one of the bases upon which Mrs. Ayers-Caesar had been selected - her case management ability ...". Further, that "The JLSC was of the view that the situation was sufficiently grave to trigger a disciplinary inquiry but after some further discussion it was agreed the Justice Ayers-Caesar should be given an opportunity to return to the Magistracy to complete the matters that she had left unfinished." The release stated that, "Accordingly the Chief Justice summoned Mrs. Ayers-Caesar to a meeting on the 28th (sic) April 2017", and it was at that meeting that he "invited her to consider her options", and that she decided "to resign from the High Court as a means of acknowledging her default". Further, that "no promises were made" to the Appellant, and she was "offered the opportunity of explaining to the public why she was taking such action before the Chief Justice issued any public statement on behalf of the JLSC".

[23] From this press release of the Respondent, it is arguable that when the Chief Justice met with the Appellant after the JLSC meeting of the 27th April, he did so acting primarily in his capacity as Chairman of the JLSC, on its behalf and with its express agreement and in order to have facilitated its minuted intent. All of the prima facie evidence, taken in context, arguably with a realistic prospect of success, points, even if only inferentially, towards this conclusion. Therefore, what the Chief Justice represented and communicated to the Appellant on the 27th April, he arguably did in those capacities ("Accordingly the Chief Justice summoned Mrs. Ayers-Caesar ..."). Certainly this is what the Respondent represented to be the case and no doubt intended. And this is what the Appellant

also assumed to be so. What is also notable from the press release, is that it makes no specific mention of the Respondent's third decision, "... in the event she refuses to withdraw, the Commission would consider instituting disciplinary action in accordance with section 137 ...". This was clearly a material fact, that one assumes was also intended to be communicated, and omnia praesumuntur rite esse acta, should, arguably, have been fairly and frankly represented to the Appellant by the Chief Justice in his meeting with her on the 27th April.

[24] What is also arguable, if not apparent from this release of the Respondent, is that the media release of the Chief Justice (of the 27th April, above), was "issued" as a "public statement on behalf of the JLSC". Yet, the Chief Justice's media release did not refer to the actual 'decisions' that the Respondent had made on that day at its Special Meeting, and instead referred to a 'decision' that was not in fact disclosed in the Minute of the Respondent's Special Meeting of the 27th April, namely, a decision "to restore the Appellant to the Magisterial Bench".

[25] This then is the relevant factual matrix and context in which the two applications before the trial judge fell to be considered. A fair and impartial assessment of this information at this stage of the proceedings, demonstrates, material areas of significant dispute, prima facie internal inconsistencies in both parties' cases, and material areas of vagueness and/or ambiguity.

(1) The Application to Amend (20th July 2018)

[26] The Appellant sought to amend the Fixed Date Claim Form in relation to the decisions sought to be reviewed:

(i) by inclusion of an alternative third decision, arising out of the June 2018 disclosure of the Respondent's Minute of its Special Meeting held on the 27th April. That decision (and proposed amendment) was formulated as follows:

"(bb) Alternatively, the decision of the First Defendant made on or about the 27th April, 2017, to communicate to the Claimant a threat that if she did not resign as a High Court Judge then it would represent (or consider representing) to the President that the question of removing her from office be investigated because the threshold for such representation had been met, as a means of procuring her resignation;"

(ii) by adding onto the existing paragraph (c) a consequential amendment, as follows (shown in bold italics):

"The conduct of the First Defendant on the 27th April, 2017 in pressuring the Claimant into resigning by threatening to make the said recommendation ***alternatively, representation (as in decision (bb) above)*** if she did not resign."

[27] Thus permission was sought to amend the Fixed Date Claim Form, to include for review in the alternative, an alleged decision of the Respondent, and to add consequentially to an existing one. This alternative claim concerns the desire to challenge this alleged decision of the Respondent, that the Appellant claims only came to her notice in June 2018, when the Respondent's witnesses filed certain affidavits in these proceedings, and when it disclosed for the first time its Minute of its Special Meeting of the 27th April (and despite multiple prior requests for this and all other relevant minutes). If the primary amendment (the proposed (bb)) is allowed, the consequential one (to (c)) follows quite naturally. It is also noteworthy, that the Appellant does not seek to amend the relief sought.

[28] In our opinion the trial judge was plainly wrong to refuse permission to make the amendments sought. Permission to make both amendments is granted, and the trial judge's orders in this regard are set aside, including his orders for costs.

[29] Judicial review in Trinidad and Tobago was placed on a statutory footing with the passage of the Judicial Review Act 2000 (JRA). At its heart is the review of decisions made by public authorities.[33] Procedurally, applications for judicial review "shall be made ... in accordance with (the) Act and ... as may be prescribed by Rules of Court".[34]

[30] Section 5 (4) of the JRA provides for amendments to an application for judicial review in relation to grounds pleaded and does not exclude the possibility of other amendments (as in this case, to the decisions challenged). This is easily understood, as in the normal course of events, the actual decisions of public bodies that are under challenge are usually communicated before any consequential action is taken. Thus the formal decisions under review are usually known in advance of a challenge (except, say, when the challenge is to a failure to make a decision).[35] What frequently occurs, is that subsequent to the decision and consequential action being taken, reasons and/or other information become available which broaden the scope of the initial challenge (set out in the grounds). Hence the desirability and statutory basis for permitting amendments to grounds, given that an important public policy objective of judicial review is good public administration.

[31] However, if a judicial review challenge is legitimately commenced, and subsequent to doing so, new or nuanced decisions that are relevant to the action are communicated for the first time to an applicant, the due consideration of a rules compliant application to amend to include such decisions, would not generally be contrary to the overriding objective of the CPR 1998. The principles

[33] Section 5, JRA 2000.
[34] Section 5, JRA 2000.
[35] Section 15, JRA 2000.

of dealing justly (Rule 1.1 (1)) and equality (Rule 1.1 (2) (a)) are apposite.[36] As is the duty of parties to assist in furthering the overriding objective.[37]

[32] In addition, the CPR 1998 expressly provides that in the management of an administrative claim (which includes both judicial and constitutional review)[38], a judge in furtherance of the overriding objective, may give any such directions as are required to "ensure the ... just trial of the claim",[39] and allow any amendments to an existing claim or even substitute "another form of application for that originally made."[40] In the context of judicial and constitutional review, these are intended to be permissively broad and wide, though not unlimited, powers. The constitutional imperative of a rights based approach to public law litigation, makes this demand particularly of judges sitting in constitutional review matters.[41] This is especially so, given that the main public policy objective of constitutional review is the upholding of the rule of law, and in particular, the generous fulfilment of the intent, benefits and promises of the fundamental rights and freedoms that are declared and guaranteed.[42]

[33] Significantly, Rule 56.12 (1) expressly provides that Parts 24 to 27 CPR 1998 apply, but is silent on whether Part 20, CPR 1998 (Amendments to Statements of Case) applies. In our opinion the threshold and hierarchical requirements of Rule 20.1 have no formal applicability to applications under Part 56, CPR 1998, particularly in relation to amendments to applications for judicial and constitutional review. Such applications are to be dealt with on general principles, bearing in mind the

[36] See Rule 1.1, CPR 1998.
[37] See, Rule 1.3, CPR, 1998.
[38] Rule 56.1, CPR 1998.
[39] Rule 56.12 (1).
[40] Rule 56.12 (2).
[41] **Minister of Home affairs and Another v Fisher** [1980] AC 319. Per Lord Wilberforce, "These antecedents … call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."
[42]See, Sir Stephen Sedley, 'The Rule of Law and Democracy', in World of All Human Rights, Universal Publishing, "Without a bedrock of inviolable Human Rights, law itself guarantees nothing."

overriding objective, as well as the principles and processes in Parts 24 to 27, CPR 1998,[43] and through the lenses of relevant public law principles.

[34] Leave has already been granted to review the decision of the Respondent, to "recommend to the President that the Claimant's appointment ... be revoked if she did not agree to resign and to communicate that threat ... as a means of procuring her resignation." The amendment seeks to include as an alternative basis of review, arising out of the disclosure on the Minute of the Special Meeting, the following decision of the Respondent: "Alternatively, the decision ... to communicate to the Claimant a threat that if she did not resign ... it would represent (or consider representing) to the President that the question of removing her from office be investigated because the threshold for such representation had been met, as a means of procuring her resignation." There is therefore nothing fundamentally inconsistent with the proposed amendment.

[35] It is very difficult to understand why this amendment was refused. Leave has already been granted to challenge an alleged decision of the Respondent, gleaned from the communications and actions (including the conduct) of the Chief Justice acting ostensibly as Chairman and on behalf of the JLSC, which it is contended included a threat as a means of procuring the resignation of the Appellant. The amendment makes essentially the same claim, except it is re-framed in terms of the content of the three decisions now disclosed in the Minute of the Respondent (hence, as an alternative decision for review). A Minute which was only disclosed in June 2018 (more than 12 months after the Appellant's challenge commenced).

[36] Also, it is palpably arguable with a realistic prospect of success, that what the Chief Justice in fact communicated and represented to the Appellant on the 27th April

[43] Rule 2.2 (2), CPR 1998 specifically defines 'civil proceedings' to include judicial and constitutional review applications. However the definition of Statement of Case (Rule 2.3) does not suggest that Fixed Date Claim actions for judicial and constitutional review are contemplated.

is, contextually, and for the purposes of public law, binding on the Respondent (irrespective of whatever it may have in fact decided 'behind closed doors'). This is because the Chief Justice, if when he met with the Appellant on the 27th April, he was acting as Chairman of the Respondent, on its behalf and with its authority for a particular purpose, then the Respondent is, for the purposes of this matter, arguably bound by his conduct, communications and representations. It would arguably be disingenuous, to say, that even if the Chief Justice was acting on behalf and with the express authority of the Respondent, and even if the Appellant acted in turn on that legitimate assumption to her detriment, the 'behind closed doors' decisions of the Respondent are consequentially unimpeachable irrespective of the conduct, representations and/or communications of the Chief Justice. It is not insignificant that the Respondent, having made the three decisions that it did at its emergency meeting on the 27th April, in the context of its perception of the urgency of the situation, choose never to formally and in writing communicate with the Appellant, or to summon her to a meeting with it (whether on the 27th April or at all); but instead, and by inference, intentionally permitted the Chief Justice who is its chairperson to meet with her that very day, and further, impliedly, countenanced the media release also issued by the Chief Justice that day.

[37] Moreover, when one examines substantively the three decisions of the Respondent (as recorded in the Minute made on the 27th April), one sees that it is imminently arguable, that a clear and unequivocal decision was that "the information ... **triggered and met the threshold** for disciplinary enquiry ..." into the Appellant as a judicial officer, pursuant to section 137 of the Constitution.[44] This was, one may argue, the primary decision. However, because of "the need for the expediting of (the Appellant's) outstanding part-heard matters", two further

[44] Emphasis mine. See affidavit of Charles Victor Humphrey Stollmeyer, paragraphs 10 and 11; affidavit of Ivor Archie, paragraphs 14, 15 and 46; affidavit of Coolmarie Goolabsingh, paragraph 25.

and consequential decisions were made. The first of these two consequential decisions, was to give the Appellant "the **option** of withdrawing from the High Court Bench **and** returning to the Magistracy" to complete her part-heard matters.[45] The second was contingent on the failure of the first. Thus, "in the event she refuses to withdraw", consideration would be given to "instituting disciplinary action in accordance with section 137".

[38] Several things are apparent on a plain and ordinary reading of these three decisions, in the context in which they are presented in the Minute. First, they are all interrelated. Second, the last (and third decision) was a contingency, and depended on the first (and primary decision) for its efficacy and on the failure of the second for its consideration. That is to say, because the section 137 threshold requirements had already been considered and determined to have been met, the consideration of whether or not to institute section 137 proceedings against the Appellant was not constrained by a determination of whether those proceedings could in law be commenced. That had already been decisively determined (the first and primary decision). Third, it is therefore prima facie arguable with a realistic prospect of success, that, if the Appellant was told that the JLSC had already considered and determined that the information it had 'triggered and met' the thresholds for instituting section 137 proceedings against her, but it was willing to give her 'the option' of resigning and returning to compete her part-heard matters, however, 'in the event' that she refuses to accept the terms of the option, then consideration would be given to actually instituting section 137 proceedings against her, that the Appellant could reasonably and arguably have felt pressured to accept the option, as the threat of invoking section 137 proceedings was immanently possible, if not probable.

[45] Emphasis mine.

[39] This third proposition is all that the proposed amendments seek to introduce. All arguable with a realistic prospect of success, in light of the leave already granted, in light of the recent disclosure of the Respondent's Minute of its meeting of the 27th April and the interpretations that can arguably be ascribed to it, in light the factual matrix and context of how the Respondent choose to deal with the Appellant and to communicate its decisions to her, and in the context of the unexplained meaning and intent of the phrase 'option of withdrawing from the High Court Bench'.

[40] The trial judge was plainly wrong because he apparently misunderstood the underlying factual matrix and context of this application (as explained above), and so misapplied the relevant test on this application. On the facts there is acute division. On the facts, based on the conduct of the Respondent, the Appellant is entitled and in a position to assert positively what the Respondent is deemed to have decided, communicated and represented to her, based on her interactions with the Chief Justice on the 27th April; as well as negatively to critique what the Respondent asserts as its decisions, representations, communication and conduct. The judge accepted without any reservations the Respondent's arguments and analysis.[46] He therefore accepted, inter alia, the inferences and conclusions at paragraphs 33, 39, 41, 43, 44, all of which are only arguable at this stage of these proceedings, as also explained above. In so doing, the judge fell into error, as he wrongly assumed that the Appellant could not challenge either the Respondent's decisions or their effects, as revealed in the Respondent's Minute of the meeting of the 27th April.

[41] As a consequence the trial judge misapplied the **Brown v Sharma** test of arguability. In this case, and as explained above, the amendments sought are necessary and to be allowed in order to deal with the matter justly. The Appellant

[46] Paragraph, 58.

only became aware of the formal decisions of the Respondent that were made at its meeting of the 27th April, 2017, in June 2018. The application to amend was made in July 2018. In the circumstances, it was presumptively prompt. On the totality of the unchallenged evidence that is available at this stage, there is no fault in the Appellant or her attorneys for not including this alternative decision and challenge initially. It was simply not possible until the Respondent's disclosures in June 2018. There are no material inconsistencies with any existing pleadings, and in fact the proposed amendments are consistent with the Appellant's challenges. There is also no evidence of prejudice to the Respondent that cannot be addressed by appropriate directions. And, the public interest and the interests of the administration of justice weight in favour of allowing these amendments and facilitating the inquiries that they raise in these proceedings.

[42] In any event, and as also explained above, this action also includes constitutional review based on an alleged breach of Section 4 (b), the protection of the law. The challenge under this head is not constrained by administrative law principles per se, but goes to the more fundamental nature and character of what was done. It raises questions about the conduct of the Respondent that reach beyond merely 'good administration', though principles of say, fundamental fairness and procedural fairness may overlap. At stake may be rule of law issues arising out of the constitutional propriety or impropriety of both what was done and how it was done in relation to the Appellant. Courts have taken a very nuanced approach to the issue of fairness in relation to the treatment of judicial officers, especially in the areas of judicial independence and the protection of the law constitutional guarantee.[47] The amendments sought also arise in this context and legitimately

[47]See for example, **Sam Maharaj v Prime Minister**, [2016] UKPC 37, where the Privy Council, in relation to the constitutional guarantee of the protection of the law, documented and approved "an expansive approach to its potential application" (paras 25-26, recognising the developmental jurisprudence of the CCJ), "a wide ranging interpretation of the ... provision" (paras 27-31, acknowledging evolutionary local jurisprudence), and included within its ambit "a right to be treated fairly", especially in relation to the treatment of judicial officers (para 32).

facilitate that constitutional inquiry in this case. The trial judge appears to have completely overlooked this aspect of the case. In so doing he was also plainly wrong.

[43] Indeed: "It is the task of the Judiciary to uphold the supremacy of the Constitution and thereby the rule of law." To "uphold ... constitutional values and ... constitutional limitations." Because "That is the essence of the rule of law." Therefore: "The rule of law requires that those exercising public power should do so lawfully. They must act in accordance with the Constitution and any other relevant law." This is why the courts are "the ultimate guardians of constitutional compliance." And this is also why, "courts should not abdicate their important function of constitutional adjudication."[48]

(2) The Application to Cross-examine (20th July 2018)

[44] The Appellant sought permission to cross-examine several of the deponents, in relation to particular paragraphs in their affidavits filed in support of the Respondent. The trial judge dismissed the application.

[45] In our opinion the trial judge was plainly wrong to refuse permission for cross-examination on any of the Respondent's evidence. Permission to cross-examine, limited to the deponents and paragraphs pursued on this appeal is granted, and the trial judge's orders in this regard are set aside, including his orders for costs.

[46] The trial judge's statement of the relevant legal principles was not altogether wrong,[49] except that he seemed to consider that this was a pure judicial review matter.[50] Clearly it is also a constitutional review matter. He was however right

[48]See **AG v Dumas** [2017] UKPC 12, at para 15, citing with approval, **Bobb v Manning** [2006] UKPC 22, and **State of Rajasthan v Union of India AIR** [1977 SC 1361, per Bhagwati J.
[49] Paragraphs 12 to 19.
[50] See for example, paragraphs 6, 7 and 11.

in the general opinion that in judicial review, cross-examination is exceptional, it may be permitted if there are disputes on central and crucial factual issues, and if it is necessary to assist in resolving them.[51] This is indeed so for both administrative and constitutional review. It is ordinarily so because in public law matters the primary facts are often not in dispute, or only in dispute on peripheral aspects. In part this is also because, public authorities are frank, forthright and transparent in their decision making processes (as they are always expected to be), and so the factual underpinnings which inform the bases for challenges are often not really in material dispute.

[47] However the trial judge was plainly wrong when he determined that: "On the test ... the Claimant's application for leave to cross-examine must fail. The conflict of fact is not central to any material issue. ... Cross-examination is not necessary ... to resolve the critical issues central to this judicial review. In addition, the areas of contention are not relevant or at best peripheral to the critical and central impugned decision and the grounds of challenge".[52] Quite the opposite is very much the case in these proceedings.

[48] First and as already explained, this is not only an administrative review claim. It is also a constitutional review. The significance, implications and imperatives of that have already been discussed above.

[49] Second, in so far as the trial judge completely adopted the Respondent's submissions,[53] his acceptance that, "... taking the Claimant's case at its highest, even if she is able to prove in cross-examination that her version of what the Chief Justice told her the Commission decided is correct ... this will not change or detract

[51] Paragraph 26.
[52] Paragraph 43.
[53] Paragraph 33.

from the decision of the Commission. Cross-examination is therefore irrelevant, unnecessary and cannot assist",[54] was plainly wrong.

[50] As explained above, one of the critical and central issues in this case, is what in fact was communicated and represented to the Appellant by the Chief Justice as the decisions of the Respondent (content) and how this was done (conduct), on the 27th April when he met with her. This is linked to the issue of whether the Chief Justice in meeting with the Appellant on the 27th April, did so on behalf and with the authority of the Respondent, and what are the legal implications of this. The resolution of these issues of fact are therefore both central and critical to the case for which leave has been granted and for which the amendments have been sought, as well as for the case for constitutional review.

[51] Third, if it is found that the Appellant's version of what transpired on the 27th April is the truth, then while this may not change what was in fact decided by the Respondent at its Special Meeting on that day, it could 'detract' from it, if it is also held to be constitutive of the decisions that are deemed to bind the Respondent (as between itself and the Appellant) in the circumstances of this case. An issue which is arguable with a realistic prospect of success in this case. Furthermore, what if it is found that the Chief Justice in fact threatened and/or pressured and/or otherwise forced or coerced the Appellant as alleged (or at all), at his meeting with her on the 27th April, and that when he met with her he did so for and on behalf of the Respondent and in furtherance of the purposes intended and decided at its meeting of the 27th April. What are the consequences, administratively and constitutionally? These are among the real and live issues in this case.

[52] Fourth, if the Appellant were to successfully make out her case on the facts, then it is arguable with a realistic prospect of success, that the Minute of the 27th April,

[54] Paragraph 26.

could be adjudicated as being unreliable as a contemporary and/or accurate record of the Respondent's Special Meeting of that date. Thus the trial judge was also plainly wrong, at this stage of the proceedings, to presume and/or conclude that the Respondent's Minute of the 27th April was unassailable in these proceedings.

[53] Fifth, in so far as the trial judge determined that the Respondent's decisions recorded in its Minute of the 27th April had "two limbs",[55] he was also plainly wrong. As explained above, there were in fact three decisions, and the first was arguably the primary decision in the context of the three and what the Respondent decided overall. This is also central and critical to the main issues and the claims of the Appellant. It goes to resolving what was the Respondent's real intent and purpose, both at its meeting and by its decisions of the 27th April, and to what was in fact communicated and represented by the Chief Justice (content and conduct) when he met with the Appellant on that day, and further, to whether the Appellant's experiences, interpretations and assumptions were reasonable and credible. It therefore also ties into what interpretations may or may not be reasonably given to the Chief Justice's communications and conduct at his meeting with the Appellant on the 27th April. The cross-examination of the Chief Justice and others on this issue may therefore assist the court in resolving the substance of both what was intended by the Respondent and what was in fact communicated by the Chief Justice, as well as in assessing the integrity and credibility of the competing versions of what happened. Needless to say, this is likely to be relevant and material to the issues of duress, coercion, threat, procedural impropriety, and the protection of the law, taken in the contexts of both section 137 and the factual matrix of this case.

[55] Paragraph 9.

[54] In our opinion, the limited cross-examination sought by the Appellant (as narrowed on appeal), is to be allowed in the exceptional and extraordinary circumstances of this case. There are real disputes of fact, on critical and central issues, and cross-examination is the only way that they can be resolved fairly and justly. The Minute of the Respondent of its Special Meeting of the 27th April does not resolve these issues of fact. It may even compound them. It certainly does not resolve the disputes over the allegations of the Appellant, which constitute the core of this case. That is to say, there is a material dispute as to the intent and content of the decisions of the Respondent, which is integrally linked to the conduct and communications of the Chief Justice. There is now also a dispute as to the meaning and effect of the decisions of the Respondent as recorded in its Minute of its Special Meeting of the 27th April, and consequential implications for the interpretation of the Chief Justice's said conduct and communications. The other contemporaneous documents suffer a similar fate. That is to say, cross examination is necessary if they are to assist in resolving the material disputes of fact.

[55] The summary of the relevant facts above is apposite. Context is indeed important. To deal with this administrative and constitutional review action justly, requires that the central issues of fact in dispute be resolved, and cross-examination is the only way to do so in the particular circumstances of this case. The amendments granted, make this an even more pressing need. The trial judge was plainly wrong to refuse it.

[56] Cross-examination is therefore permitted with respect to the following deponents and limited to the identified paragraphs in their respective affidavits (all filed in June 2018):

1. Ivor Archie: Paragraphs 4, 5, 14, 15, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56.

2. Coomarie Goolabsingh: Paragraphs 24, 25.

3. Sherlanne Pierre: Paragraphs 6, 10, 11, 15, 16, 17, 18, 19, 20.

4. Jade Rodriguez: paragraph 2.

CONCLUSION

[57] In summary, the amendments sought are granted. The Respondent will pay the Appellant's costs of this application certified fit for senior counsel, both on appeal and below. The application for cross-examination is also allowed to the limited extent agreed to before this court. The Respondent will pay the Appellant four-fifths of her costs below (the Appellant having abandoned on appeal, some of the subject matter originally sought to be subjected to cross examination) and her full costs on appeal, both certified fit for senior counsel. Both sets of costs are to be taxed by a Registrar in default of agreement.

[58] Two years have passed, and this matter remains undetermined. It is our hope, that it will be given the unconditional priority that it demands in the national interest, and heard and determined within as short a time as is reasonably possible. Robust and decisive case management is now required. This is possible without sacrificing both fairness and flexibility. Proactive judicial leadership is necessary. Judges are ultimately responsible for the management of each case and the flow of all cases in their docket. Part 1 of the CPR, 1998 is apposite.

P. Jamadar
Justice of Appeal

G. Smith
Justice of Appeal