THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S-050 of 2019
Claim No. CV 2016-02471

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant/Defendant

And

ANTARES KHAN
KENDELLE KHAN

Respondents/Claimants

APPEARANCES:
Mr. Fyard Hosein S.C, Mr. Roshan Ramcharitar, Mr. Vincent Jardine instructed by Ms. Savi Ramhit for the Appellant
Mr. Anand Ramlogan S.C., Mr. Gerald Ramdeen, Mr. Alvin Shiva Pariagsingh, Mr. Douglas C. Bayley, Ms. Alana Rambaran and Mr. Ganesh Saroop for the Respondents

PANEL:
N. Bereaux JA
P.A. Rajkumar JA

DATE OF DELIVERY: 28th February, 2020

I have read the judgment of Rajkumar JA and I agree with it.

…….

N. Bereaux

Justice of Appeal

JUDGMENT

Delivered by Justice of Appeal Peter A. Rajkumar

BACKGROUND

1. The instant procedural appeal concerns three orders ('the orders') made by the trial judge during the course of management of the instant action. The substantive claim is for relief in respect of alleged breaches of constitutional rights arising from conditions of detention at the Remand yard Golden Grove Prison between February 2012 and May 2015.

2. The three orders appealed are:
    i. Hard copy of the reports[1] forwarded by reference to websites to be filed by the defendant on or before the 22nd February, 2019. (The first order)
    ii. Permission is granted to the Claimant to issue witness summons for Mr. Daniel Khan, former Inspector to produce any record and/or finding on prison conditions at the Remand yard, Golden Grove during the period of the applicants' incarceration. (The second order)
    iii. Permission is granted to the Claimant to discontinue claim for Antares Khan with no orders as to costs. (The third order)

The trial judge made those orders in the course of dismissing the Claimants' application filed 27th April, 2019 which was refused with no orders as to costs.

ISSUE

[1] Those reports were i) Fifth Report of the Joint Select Committee on Human Rights Equality and Diversity 3rd session of the 11th Parliament 2017-2018 on the Examination of the Human Rights of Remandees at Remand Prison (the Human Rights Report) and ii) 1st report of the Joint Select Committee on Finance and Legal Affairs on an Inquiry into Criminal Case Flow Management in the Judicial system (the case flow management report), together referred to as the reports.

3. Whether a. the first order, b. the second order, or c. the third order, were properly made in the exercise of the trial judge's discretion, or whether they were, or any of them was, plainly wrong.

CONCLUSION

4. i. The decision of the trial judge to allow filing of the reports (the first order), was plainly wrong as a matter of law because the reports were inadmissible. This is especially so as no application had been made for this purpose. They were inadmissible for the following reasons:

   a. **relevance** - they were not relevant to the specific issues before the court as they included conclusions and opinions of another body;

   b. **potential conflict** – their admission into evidence carried the significant risk that their content and conclusions, if questioned, could result in a breach of Parliamentary privilege.

   c. **unfairness** – The reports, not being specially commissioned by experts or persons with specialized expertise, would constitute hearsay as to their opinions and conclusions. The conclusions therein were based on material not before the court, which i. constituted hearsay, and ii. would be unavailable for interrogation by the appellant as to 1. their weight, 2. relevance and 3. applicability to the specific claims being made, especially in relation to time, location and conditions of incarceration.

   ii. The trial judge had a discretion, afforded by wide case management powers under the Civil Proceedings Rules, to take judicial notice of the statutorily created post of Inspector of Prisons, and to order the issue of the witness summons, (the second order), for the former Inspector, especially given his willingness to attend and testify.

   iii. The order as to costs, (the third order), was within the discretion of the trial judge and may not be reviewed unless demonstrated to be plainly wrong. An appellate court's view that it would not have itself made such an order to award costs in those circumstances would be insufficient and irrelevant.

ORDERS

5. i. With respect to the first order the appeal is allowed.

ii. With respect to the second and third orders the appeal is dismissed.

Permission to issue a witness statement to the former Inspector of Prisons

6. With respect to the decision to grant permission to issue a witness statement to the former Inspector of Prisons it has to be demonstrated that the trial judge erred in the exercise of her discretion. An often used shorthand description of the ground of reviewability of that discretion is that the trial judge must be shown to be "plainly wrong"[2]. The post of Inspector of Prisons is created under the Prisons Act Chapter 13:01. In particular under Section 20 (c) the Inspector of Prisons is authorized to inquire into all matters relating to the prisons.

Prisons Act Chapter 13:01

20. The Inspector when inspecting any prison which he is required by the Prison Rules or by Rules made under this Act to inspect, may exercise all or any of the following powers:

(a) examine any person holding any office or receiving any salary or emolument in the prison;

(b) call for and inspect all books and papers relating thereto;

(c) **inquire into all matters relating to the prison; and**

(d) examine every prisoner or other person whom he finds in the prison and thinks fit to examine, either alone or in the presence of such other person as the Inspector thinks fit.

Under rule 3 of the Prisons Rules made under the Prisons Act the Inspector is required to visit the prison at least once per month. Rule 9 provides that he is required to submit a report to the relevant Minister every year.

[2] The longer version of the test is found in the well-known case of The Attorney General v Miguel Regis Civil Appeal No.79 of 2011 delivered 13th June 2011.

7. Because the post of Inspector of Prisons is created by statute, the trial judge was entitled to take judicial notice of the fact that there is such a post. Provision has been made by law for that specific official to be entrusted with examination of matters including those that were before her, and of which complaint was made. In those circumstances the trial judge was entitled to take note of the existence of Mr. Khan, a former Inspector of Prisons during the relevant period, and the possibility that he may have been in a position to provide material evidence in relation to the conditions in the prison to which those claimants would have been exposed at the relevant time. Whatever evidence the Inspector of Prisons may be able to produce, from whatever records he may have, would of course be a matter of weight.

8. The reasoning of the trial judge can be better understood when the context in which she made that order is appreciated. That order was made on an initial application dated the 27th April 2018 for:

   i) leave to amend the claim of the 2nd claimant to include relief on the basis of the present conditions of his incarceration at the Golden Grove Prison Arouca;

   ii) leave to adduce fresh evidence in support of his claim in terms of photographs and video footage of the prison conditions at the Golden Grove Prison; and

   iii) requesting that a site visit be made to the Golden Grove Prison.

   The trial Judge refused that application, but she made the order for the former Inspector of Prisons to be the subject of a witness summons in substitution for those orders which she refused.

9. A trial court has extensive case management powers[3]. The court was therefore entitled to consider whether, in substitution for a site visit by the court, an exploration as to whether or not the former Inspector of Prisons, (whose tenure encompassed the period during which the claimants were incarcerated), would have relevant knowledge. Any

[3] See for example Civ. App. 252 of 2015 Ayers Caesar & the AG v BS paragraphs 30 to 32 delivered 18th December, 2015 per Jamadar JA.

such evidence would of course be subject to cross examination, with the opportunity provided to the appellant/defendant to test that evidence, especially in the context of other evidence that would be available at trial.

10. Part 29(1) Civil Proceedings Rules (CPR) provides that the court may control the evidence by giving directions as to a) the issues on which it requires evidence, and b) the nature of the evidence it requires, and c) the way in which the matter is to be proved, by giving appropriate directions at a case management conference or by other means. With respect to the decision to allow Mr. Khan to be called as a witness, CPR Part 40(6)[4] covers this scenario. It provides that the judge may issue a witness summons requiring a party or other persons to attend the trial. In those circumstances an appellate court would be reluctant to micro manage the conduct of case management unless it could be demonstrated that the court had fallen into error to the extent of satisfying the test for reviewability of any discretion vested in the court at that stage. The trial judge rejected the initial application before her but crafted an order that addressed the subject matter of the application. It is a court driven regimen designed not to unnecessarily restrict the court's determination of the real issues in the case. In that context it cannot be said that the trial judge thereby descended into the arena, or failed to discharge the court's judicial function, or was plainly wrong in making the second order. With respect to the alleged comments or references made by the trial judge, this procedural appeal is not seeking the trial judge's recusal and there is therefore no need to further address them on this appeal.

The costs order on withdrawal

[4] CPR 40 (6) **Powers of the judge to summon witness**
40.6 (1) The judge may—
(a) issue a witness summons requiring a party or other person to attend the trial;
(b) require a party to produce documents or things at the trial; and
(c) question any party or witness at the trial.
(2) The judge may examine a party or witness—
(a) orally; or
(b) by putting written questions to him and asking him to give written answers to the questions.
(3) Any party may then cross-examine the witness.

11. The trial judge allowed the withdrawal of the claim of the first claimant with no orders as to costs. The circumstances in which that withdrawal came about are detailed in the submissions of the Attorney at Law for the appellant. It was only after a notice to cross examine the claimants that the claimants finally revealed that the first claimant was not available and was in fact "at large". He was facing a warrant of arrest or re arrest on a charge of murder, and was unlikely to be available for cross examination.

12. The trial judge was made aware of those matters. The withdrawal was at a stage when substantial resources had gone into responding to the case raised by him, as well as by his brother, the second claimant. The trial judge gave reasons for exercising her discretion in the way that she did, and in not making an order that he pay the costs occasioned by the withdrawal of the case on his behalf. She took into account, as she expressed it, that "while the State would no doubt have expended some time and effort in meeting peculiar allegations in this Antares' claim, because they both raised the same core issue, the withdrawal did not have any serious impact on the remainder of the case. The constitutional issue is still being pursued by one of the original Claimants". This was contested by the appellant who contends that there was additional material that was unique and tailored to the case of the first plaintiff/respondent, and therefore additional costs were occasioned by his involvement in the matter which he should be required to pay. Again this is a matter where the trial judge's discretion was applicable, and where an appellate court would not review that discretion so as to overturn it unless it could be demonstrated that the trial judge was plainly wrong.

13. The test has always been that the issue is not whether an appellate court would exercise the same discretion in a different way. It is whether or not the judge erred in principle and was plainly wrong in exercising the discretion in the way that she did. While there may have been good reasons for requiring withdrawal by the first claimant to be accompanied by an order that he pay the costs, the contrary view taken by the trial judge was one which was within the ambit of the discretion available to her at case

management. In those circumstances it cannot be said the exercise of that discretion was plainly wrong. Accordingly the appeal in respect of this order would also be dismissed.

The reports

14. The final order made by the trial judge was with respect to permitting the filing of the reports and their admissibility as evidence. Under Legal Notice 159 of 2018, which pre-dated the decisions of the trial judge in the instant matter, decisions with respect to the admissibility of evidence at trial or hearing are no longer matters that can form the basis of a procedural appeal. However these reports were not the subject of an application by any party. Because the issue is already included in the appeal before us, and extensive submissions made thereon, and it does in fact raise an important point of law, the issue of admissibility of the reports must be addressed. Counsel for the appellant had indicated to the trial judge that he had no objection to the court and the parties having access to, and referring to the reports, but that they should not be tendered into evidence on the points of relevance to the matters being adjudicated[5].

15. It is significant that the court noted in effect that the appropriate weight to be attributed to the reports would be a matter for further discretion and consideration. It is alleged the reports themselves are important because i) they deal with, inter alia, delays and case flow management, and accordingly with the length of time that the claimant/respondent could be expected to remain under those prison conditions of which complaint is made[6]. With respect to the human rights report on remand conditions, it is contended that this is significant because it deals with inter alia, a. the conditions of the prison in relation to, inter alia, accommodation and sanitation, and b. the improvements, if any, in relation to matters identified in previous reports[7].

[5] See pages 8 to 9 of the appellant's submissions filed on April 24th, 2019.
[6] See paragraph 31 respondent's submissions
[7] See paragraph 28 of respondent's submissions

16. The reports are public documents and are to be found on the Parliamentary website. The Court was asked to consider, in the context of all the evidence before it, whether there is material admissible, and of sufficient weight, to support or to contradict the claims of the claimant/respondent as to the conditions of the prisons at the material time in which he, specifically was kept. Those conditions, for example, in relation to sanitation, or overcrowding, are matters that remain to be addressed on the entire evidence before the court at trial.

17. The trial judge expressly "*admitted the reports not as evidence as the truth of the matters stated there. (I) indicated I would be prepared to consider the observations and findings and to attach such weight as I considered appropriate. The contents relate to matters of public interest and have been made accessible to the public*". The appellant's position was that "while it had no objection to the parties and the court having access to the said reports the appellant was of the view that they should not/could not be admitted into evidence".[8]

18. However, because these were reports which emanated from Joint Select Committees of Parliament the issue of Parliamentary privilege arises. Both the issue of potential conflict between the courts and the legislature, and the issue of relevance, were matters which had to be considered when applying a discretion as to the admissibility of the reports.

Parliamentary Privilege

19. There are several aspects to the law of Parliamentary privilege. An examination of the content of Parliamentary privilege is therefore necessary to shed light on the implications of the trial judge's first order to admit the reports.

[8] Paragraph 23 of Appellant's submissions filed April 24, 2018

Inhibiting Freedom of Speech in Parliament

20. The reasoning in **R (on the application of Bradley and Ors) v Secretary of State for Work and Pensions** [2007] EWHC 242 (Admin) is applicable because, although the UK Bill of Rights 1689 does not directly apply in this jurisdiction, it reflects the common law in relation to the prohibition against **questioning** of the proceedings in Parliament.

21. In ***Bradley*** (supra) the question arose as to whether the **evidence** of the Ombudsman to a Select Committee, or the **report** of that Committee, should be taken into account where the issue was whether the Secretary of State had acted unlawfully in rejecting the recommendation of the Ombudsman. It was held by Bean J that:

    i. the evidence to the Select Committee, if permitted to be relied upon in court, would inhibit freedom of speech in Parliament, contrary to Article 9 of the UK Bill of Rights.

    ii. The report of the Committee was held to be inadmissible for a different reason, namely that the report of the Committee would not have been of assistance on the questions of law which had to be determined.

    Article 9 of the U.K Bill of Rights 1689 (Article 9) specifically provides as follows: *"That the freedom of speech and debates or **proceedings** in Parliament ought not to be impeached or **questioned** in **any court** or place out of Parliament"*. It can be readily appreciated that there would be the potential for conflict between Parliament and the Courts if proceedings in Parliament could be questioned in court.

    See paragraph 43 of the decision of Burnton J in the case of **Office of Government Commerce v Information Commissioner [2008] EWHC 737** where he explained that decision as follows (all emphasis added):

    > ***[43]*** *Nonetheless, **Bean J refused to take into account the Ombudsman's evidence to the PASC or its report**. He considered that **to admit the evidence** of the Ombudsman to **the PASC would inhibit the freedom of speech in***

***Parliament**, and therefore contravene **art 9 of the Bill of Rights**. In relation to the report of the PASC, he said:*

*"My view is that I should **not place reliance on the PASC report for an entirely different and more fundamental reason**, which is that, in the words of the Privy Council in Prebble, **the courts and Parliament are both astute to recognise their respective constitutional roles**. It is for the courts, not the Select Committee, to decide whether the Secretary of State has acted unlawfully in rejecting the findings and recommendations of the Ombudsman in this case. **I note and respect the views of the Select Committee but in the end they are not of assistance on the questions of law which I have to determine."***

This passage of the judgment of Bean J was not commented upon in Bradley in the Court of Appeal [2008] EWCA Civ 36.

The Content of Parliamentary Privilege

22. Article 9 above reflects the common law and is one manifestation of the wider principle of Parliamentary privilege. This, together with the content of the wider principle of Parliamentary privilege, is explained by Burnton J in his detailed and careful judgment in ***Office of Government Commerce*** (supra) from paragraph 31 onwards. The following principles may be extracted therefrom:

i. Article 9 is one aspect of the wider law of Parliamentary privilege - (see paragraph 31 ibid);

ii. The law of Parliamentary privilege has been statutorily codified in Australia by section 16 (3) of the Parliamentary Privileges Act 1987;

iii. Whether section 16 (3) (c) of the Australian statute actually represents the common law, despite the apparent endorsement of the entirety of section 16 (3), by the House of Lords in the case of **Hamilton v Al Fayed** [2001] App Cas 395 and the Privy Council in **Prebble v Television New Zealand Limited** [1995] 1 App. Cas. 321, may be a matter of debate[9]. However it is now settled and uncontroversial that

[9] See paragraphs 33, 34, 37, 60 and 64 of the case

paragraphs (a) and (b) of section 16 (3) of the Parliamentary Privileges Act 1987 of Australia are **declaratory of the common law**.

iv. Section 16 (3)(a) by itself would be sufficient for the purposes of this discussion because **section 16 (3)(a)** provides, reflecting the common law, that "in **proceedings in any court** or tribunal it is not lawful for evidence to be tendered or received, **questions asked**, or statements, **submissions** or **comments made**, concerning proceedings in Parliament, or **for the purpose of (a) questioning or relying on the truth**, motive, intention or good faith of anything forming **part of those proceedings in Parliament**;…".

23. See Burnton J in ***Office of Government Commerce*** paragraphs 46 and 47:

> ***[46] These authorities demonstrate that the law of Parliamentary privilege is essentially based on two principles. The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers,*** *which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and* ***conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature.*** *These basic principles lead to the* ***requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the courts.***
>
> ***[47] Conflicts between Parliament and the Courts are to be avoided. The above principles lead to the conclusion that the Courts cannot consider allegations of impropriety or inadequacy or lack of accuracy in the proceedings of Parliament.*** *Such allegations are for Parliament to address, if it thinks fit, and if an allegation is well-founded any sanction is for Parliament to determine. The proceedings of Parliament include Parliamentary questions and answers to. These are not matters for the Courts to consider.* (all emphasis added)

(For the detailed discussion of Burnton J on the genesis of Parliamentary privilege, its codification in the Australian statute, the debate concerning the inclusion of section 16 (3) (c) within the ambit of Parliamentary privilege, and his conclusions thereon, see paragraphs 30 to 42 of ***Office of Government Commerce v Information Commissioner*** set out in the addendum hereto).

Admissibility of Parliamentary Reports – Principles

24. The issue of whether the trial judge was justified in permitting the admission of the reports into evidence is a matter of law, and not simply a matter of discretion. After careful analysis of the authorities, considered in greater detail below, the following principles can be extracted:

    i. Mutual respect between the legislature and the courts must be maintained. This requires the judiciary not to interfere with or criticize the proceedings of the legislature[10].

    ii. Questioning of the proceedings in Parliament would be a breach of Parliamentary privilege. The reports of committees of Parliament are included within the ambit of Parliamentary proceedings;

    iii. Questioning of such reports could also therefore give rise to a breach of Parliamentary privilege. Questioning may include allegations of inadequacy or lack of accuracy[11].

    iv. Challenging the evidence upon which such reports are based, or the potential for such challenge in court, could **inhibit free speech in Parliament**[12]. (This is the rationale of Article 9 of the UK Bill of Rights which reflects one aspect of Parliamentary privilege).

    v. Apart from the potential for breach of Parliamentary privilege, such reports are potentially **irrelevant**, because a court relying on such reports would be relying indirectly on **evidence** not before it. It would therefore fail to make its decision

[10] See paragraph 46 of Office of Government case.
[11] Paragraph 47 of ***Office of Government*** case cited above.
[12] See Bradley cited above.

only on the basis of the **evidence** and **submissions** before it, which are available to be tested or challenged. That would be contrary to its judicial function.

vi. Equally the **opinion** of a Parliamentary Committee contained in a report would be irrelevant to the issues on which the court itself is required to make its own determination, rather than defer to the opinion of any other body.

vii. Such a report may be admissible if its sole purpose is as evidence of historical facts or events and no questioning is involved. (See discussion of **Toussaint** in the addendum page 27 under the heading "Circumstances when reference to Parliamentary reports might be permissible". There is no suggestion however that this is the purpose for which the reports were being filed, especially because the appellant's case may involve such questioning.

viii. If sought to be admitted for another purpose however, it creates the dilemma identified by Burnton J at paragraph 58 of ***Office of Government Commerce***. For a party who wishes to contend that a conclusion in the report was not correct, it must either contend that it is wrong, or the evidence on which it is based is wrong, thereby 'questioning' the report, or the evidence, (thereby risking a breach of Parliamentary privilege). Alternatively such a party may refrain from challenging it out of concern about committing such breach despite wishing to not accept it.

ix. Equally if such a report were admitted into evidence the court would find itself in a similar dilemma. It could either a. **rely** on the report itself, placing the party seeking to challenge it in the position of potentially committing a breach of Parliamentary privilege or b. it may **reject** the report and in so doing, it would be passing judgment on it, and placing itself on course for a breach of Parliamentary privilege. The danger of such a breach is of course more apparent if the reports, or their conclusions, or the evidence upon which those are based, are questioned.

> Because of that danger a court, itself respectful of its constitutional role in line with the separation of powers, may consider itself inhibited, and refrain from any departure from the conclusions in the reports. In fact, even in accepting it, it would be passing judgment on it.

25. The trial judge considered that the reports contained material that was extremely relevant to the core issue in the case. The court considered its role as requiring it to make value judgments on prison conditions and whether they breached constitutional standards. It indicated it would be prepared to **consider the observations** and **findings (in the report)** and **to attach such weight** as it **considered appropriate**[13].

26. This immediately raises the real possibility of several of the undesirable scenarios identified above. The possibilities would include i. the court **relying** on the reports in whole or in part, or ii. **rejecting** their findings or conclusions in whole or in part. The latter will involve **questioning by the court itself**, which carries the potential for breach of Parliamentary privilege. If the court were to accept the reports in whole or in part, this would raise the possibility of **questioning by the appellant** of their findings or conclusions, if they wish to rely on contradictory evidence already introduced. Alternatively, the appellant, out of concern for a possible breach of Parliamentary privilege, may be inhibited from questioning the reports or their conclusions.

27. A court attaching such weight as it considers appropriate to the observations and findings in Parliamentary reports would be at risk of passing judgment on them. The authorities suggest that the doctrine of Parliamentary privilege has evolved to prevent precisely that situation, as reflected and codified in Article 9 of the UK Bill of Rights. The stated approach by the court also raises a concern about **possible** reliance upon a report based on

[13] Paragraphs 6 and 7 of the judgment

evidence and materials not before that court and not subject to interrogation and cross examination, contrary to the judicial function[14].

28. Because of the multiple and contradictory ways identified above in which admission of these reports could give rise to a breach of Parliamentary privilege, the trial judge was plainly wrong in admitting them into evidence, more so, because no regard was paid to the real issue of potential breach of Parliamentary privilege that could thereby arise.

Relevance

29. The principles identified above, extracted from the authorities, were discussed at length by Burnton J in the case of **Office of Government Commerce v Information Commissioner [2008] EWHC 737**in greater detail as set out hereunder. Burton J addressed and explained the circumstances affecting admissibility of a report of a Committee of Parliament. One of the critical matters which he identified as affecting the admissibility of such a report was its relevance. His careful and detailed reasoning on this issue, reflects logic and common sense, and is adopted in its entirety as set out hereunder (all emphasis added).

> ***[45]*** *However, like Bean J,* ***I refused to take into account evidence given to a Parliamentary Committee or its report*** *on the issue whether an increase in Air Passenger Duty had been imposed with retrospective effect or on other issues in the case before me:*
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> *"117 . . .* ***In general, the opinion of a Parliamentary Committee will be irrelevant to the issues before the Court*** *(as in R (Bradley) v Secretary of State for Work and Pensions [2007] EWHC 242 (Admin) . . . .*

The entirety of paragraph 117 is set out in the footnote below[15].

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[14] These reports are not of the same character as the expert report in **Rogers v Hoyle [2015] QB 265** which was considered admissible and even valuable by the Court of Appeal being the product of an investigation specially commissioned, and produced by persons having specialized technical expertise.

[15] *[117] In my judgment, the first two of these propositions are too widely stated. I see no basis for distinguishing between* ***what a Minister says*** *in the House of Commons (or the House of Lords),* ***which may be considered by the court*** *in a case such as* Toussaint*, and what he or she* ***says to a Select Committee****.* ***Whether what is said by an official should be received in evidence must depend on the circumstances:*** *what he says,* ***his authority,*** *and* ***the reason for which it is sought to rely on it****.* ***In general, the opinion of a Parliamentary Committee will be irrelevant to the issues before the court*** *(as in* R (Bradley) v Secretary of State

120 In my judgment, the Speaker's submissions, and the authorities to which I have referred, demonstrate ***the importance of identifying the purpose for which evidence of proceedings in Parliament is relied upon.*** *Like Bean J in Bradley, it is* ***the relevance of that material as well as its origin that the Court must consider****.* ***It is necessary to consider whether this material would otherwise be admissible on or relevant to the determination of the Claimants' substantive claims, before deciding whether its origin precludes their adducing it in evidence.***

121 Whether the increase in APD was retrospective is to be determined objectively, by reference to the terms of the provision effecting the increase and its practical financial effects. ***Whether a Parliamentary Committee did or did not consider it to be retrospective is, in my judgment, irrelevant to the legality of the increase, and on that account its opinion is inadmissible.***

122 ***Whether any witness gave a complete or an incomplete account of APD or its increase or the effects of the increase to a Parliamentary Committee is also irrelevant to the determination of the substantive issues before me.*** *It is for Parliament, not the Courts, to assess the completeness and reliability of such evidence.* ***This Court is not concerned with such matters, which do not affect or go to the lawfulness of the increase.***

124 The efficacy or otherwise of APD as an environmental measure is also, in my judgment, a question which, if relevant, is to be ***determined on the basis of evidence and argument before the Court****, and* ***not on the basis of the opinion of anyone whose evidence is not before the Court.*** *…….*

125 Thus, in the end, I do not think that the Parliamentary material referred to by the Claimants, which I have looked at de bene esse, as such advances their case."

[48] In my judgment, the irrelevance of an opinion expressed by a Parliamentary Select Committee to an issue that falls to be determined by the Courts arises from the nature of the judicial process, the independence of the judiciary and of its

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for Work *and* Pensions *[2007] EWHC 242 (Admin) and, as will be seen, the present case), and accordingly* ***I do not think it sensible to seek to consider the admissibility of such a report in a case in which its contents are relevant****.*

decisions, and the respect that the legislative and judicial branches of government owe to each other.

Exceptions

30. Burnton J accepted (at paragraph 49 ibid) that, as recognised in **Toussaint v AG of St. Vincent** [2007] UKPC 48 delivered 16th July 2007, per Lord Brown Wilkinson there would be situations when a court could receive evidence of proceedings in Parliament. One example being that where they were simply adduced as evidence of historical facts and no "questioning" would arise. (Emphasis added)

> ***[49]*** *However, it is also important to recognise the limitations of these principles. There is no reason why the Courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no* ***"questioning"*** *arises in such a case: see 35 above….*

See also addendum under the heading "Circumstances when reference to Parliamentary reports might be permissible".

31. In the instant case however it cannot be contended that the reports were being admitted simply for this purpose. Clearly the reports addressed matters upon which the respondents would seek to rely. If it were otherwise there would be no reason to seek to uphold their admission into evidence on this appeal. This exception would therefore not apply to permit their admissibility.

Requirement to decide matters judicially

32. A court is required to determine matters based on evidence, material, and argument before it. It is not appropriate therefore for a court to defer to another body in relation to the matters that it is required to so determine. See Burnton J loc cit at paragraphs 56 and 57 below (all emphasis added).

> ***[56]*** *Turning to the first decision under appeal, I understand that it was the tribunal that raised the question whether there was a report of a Parliamentary Select Committee relevant to the questions of the confidentiality or disclosure*

of gateway reviews. ***This created a risk of a breach of Parliamentary privilege by the tribunal.*** *More importantly* ***the tribunal erred in being influenced by the opinion of the Select Committee on Work and Pensions, for two reasons****.*

[57] First, as in Bradley and the Federation of Travel Operators cases, the opinion of the Select Committee was irrelevant to the decision of the tribunal. *What I said at paras 121 and 124 of my judgment in the latter case is mutatis mutandis equally applicable to the decision of the tribunal.* ***It was the duty of the tribunal to determine the issues before it judicially, on the basis of the evidence and arguments before the tribunal.*** *…*
The Select Committee had arrived at its view on the evidence before it, and not on the evidence that was before the tribunal. Indirectly, in relying on the opinion of the Select Committee, the tribunal relied on evidence that was not before it, and failed to make its decision only on the basis of the evidence and submissions before it.

Potential Dilemma for party to litigation

33. The potential dilemma faced by a party to litigation, such as the appellant in the instant case, was identified by Burnton J at paragraph 58 of ***Office of Government Commerce***. A party who wishes to contend that any conclusion in the reports was not correct must either
a. contend that it is wrong, or the evidence on which it is based is wrong, thereby 'questioning' the report or the evidence and risking a breach of Parliamentary privilege, or alternatively,
b. he may refrain from challenging it out of concern about committing such breach despite wishing to not accept it as explained by Burnton J (loc cit) at paragraph 58 (all emphasis added).

[58] *In addition, in my judgment, there is substance in Mr Chamberlain's further submission, summarised at para 23(b)(i) above.* ***If a party to proceedings before a court (or the Information tribunal) seeks to rely on an opinion expressed by a Select Committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the Committee was wrong (and give reasons why), thereby at the very least risking a breach of Parliamentary privilege, if not committing an actual breach, or, because of***

the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. It indicates that a party to litigation should not seek to rely on the opinion of a Parliamentary Committee, since it puts the other party at an unfair disadvantage and, if the other party does dispute the correctness of the opinion of the Committee, would put the tribunal in the position of committing a breach of Parliamentary privilege if it were to accept that the Parliamentary Committee's opinion was wrong. As Lord Woolf MR said in Hamilton v Al Fayed at [1999] 1 WLR 1586G, the courts cannot and must not pass judgment on any Parliamentary proceedings.

Dilemma for the Court

34. Equally, if such a report were admitted into evidence, the court would find itself in a similar dilemma. It could either a. itself rely on the reports, placing the party seeking to challenge them in the position of potentially committing a breach of Parliamentary privilege or alternatively b. in rejecting the reports, or even in accepting them, it would be **passing judgment** on them and placing itself on course for a breach of Parliamentary privilege. As explained by Burnton J loc cit at paragraph 59.

> *[59] If it is wrong for a party to rely on the opinion of a Parliamentary Committee, it must be equally wrong for the **tribunal itself** to seek to rely on it, since it places the party seeking to persuade the tribunal to adopt an opinion different from that of the Select Committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the tribunal either **rejects or approves** the **opinion of the Select Committee** it thereby **passes judgment** on it. To put the same point differently, in raising the possibility of its **reliance** on the opinion of the Select Committee, the tribunal **potentially made it the subject of submission as to its correctness and of inference**, which would be a **breach of Parliamentary privilege.** This is, in my judgment, the kind of submission or inference, to use the words of 16(3) of the Parliamentary Privileges Act 1987, which is **prohibited**.*

35. After considering at paragraph 61 to 64 (loc cit) the circumstances (inapplicable to the instant case), in which a report may be legitimately referred to by a court, he concluded at paragraph 64 as follows (all emphasis added):

> ***[64]*** *….*
>
> ***What the tribunal must not do is refer to evidence given to a Parliamentary Committee that is contentious*** *(and it must be treated as such if the parties have not had an opportunity to address it)* ***or to the opinion or finding of the Committee on an issue that the tribunal has to determine. Nor should the tribunal seek to assess whether an investigation by a Select Committee, which purports to have been adequate and effective, was in fact so.***

CONCLUSION

36. The decision of the trial judge to allow filing of the reports (the first order), was plainly wrong as a matter of law because the reports, were inadmissible. This is especially so as no application had been made for this purpose. They were inadmissible for the following reasons:

a. **relevance** - they were not relevant to the specific issues before the court as they included conclusions and opinions of another body;

b. **potential conflict** – their admission into evidence carried the significant risk that their content and conclusions, if **questioned**, could result in a breach of Parliamentary privilege.

c. **unfairness** – The reports, not being specially commissioned by experts or persons with specialized expertise, would constitute hearsay as to their opinions and conclusions. The conclusions therein were based on material not before the court, which not only constituted hearsay, but which would be unavailable for interrogation by the appellant as to their weight, relevance and applicability, to the specific claims being made, especially in relation to time, location and conditions of incarceration.

ii. The trial judge had a discretion, afforded by wide case management powers under the Civil Proceedings Rules, to take judicial notice of the statutorily created post of Inspector

of Prisons, and to order the issue of the witness summons, (the second order), for the former Inspector, especially given his willingness to attend and testify.

iii. The order as to costs, (the third order), was within the discretion of the trial judge and may not be reviewed unless demonstrated to be plainly wrong. An appellate court's view that it would not have itself made such an order to award costs in those circumstances would be insufficient and irrelevant.

ORDER

37. i. With respect to the first order the appeal is allowed.

ii. With respect to the second and third orders the appeal is dismissed.

ADDENDUM

PARLIAMENTARY PRIVILEGE

[30] *The statutory basis of Parliamentary privilege is Article 9 of the Bill of Rights 1689:*

*"**the freedome of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".***

[31] *This is not, however, a comprehensive statement of the privilege. In Prebble v Television New Zealand Ltd [1995] 1 AC 321, [1994] 3 All ER 407, [1994] 3 WLR 970, Lord Browne-Wilkinson (for the Privy Council) held at 332D:*

*"In addition to article 9 itself, there is a long line of authority which supports a **wider principle**, of which article 9 is merely one manifestation, viz that **the courts and Parliament are both astute to recognise their respective constitutional roles**. So far as the courts are concerned **they will not allow any challenge** to be made to what is said or **done within the walls of Parliament in performance of its legislative functions** and protection of its established privileges . . . . As Blackstone said in his Commentaries on the Laws of England, 17th ed (1830), vol 1, p 163:*

'the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere'.'"

[32] *It is clear from the judgment of the Privy Council that, in relation to Parliamentary privilege, the law of New Zealand, which was the subject of the judgment, is the same as the law of England and Wales. In Prebble, the argument had been advanced (on the basis of the Supreme Court of New South Wales decision in R v Murphy (1986) 64 ALR 498) that Article 9 and the principle of*

Parliamentary privilege applied to prevent the deployment of statements made in Parliament only where the object of the proceedings was to render the maker of the statement legally liable. In Australia, the effect of Murphy had been statutorily reversed by ***s 16(3) of the Parliamentary Privileges Act 1987****, which provided "for the avoidance of doubt" that:*

"In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or ***for the purpose of – (a) questioning or relying on the truth****, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament."*

[33] *In the Privy Council's judgment in Prebble, Lord Browne-Wilkinson, at 333, referred to the Australian statute and said:*

*"****That Act****, therefore,* ***declares what had previously been regarded as the effect of article 9 of the Bill of Rights 1689*** *and* ***section 16(3) of the Act of 1987 contains*** *what, in the opinion of their Lordships, is the* ***true principle to be applied****."*

[34] *However, later in his judgment, at 337A, Lord Browne-Wilkinson used a* ***narrower formulation*** *of the rule:*

"For these reasons (which are in substance those of the courts below) their Lordships are of the view that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception such as exists in New Zealand in relation to perjury under section 108 of the Crimes Act 1961."

[35] *In the result, the New Zealand Court of Appeal had been correct to stay an action in which one of the parties had sought to submit that statements made in Parliament were misleading or improperly motivated. Lord Browne-Wilkinson added this caveat at 337:*

"But their Lordships wish to make it clear that if the Defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or *any other questioning there is no objection to that course. (Italics added.)"*

One of the questions I have to consider is: what is meant by ***"other questioning"****, and what is the effect of this prohibition?*

[36] *The decision of the Privy Council in Prebble is consistent with the earlier decision of the Supreme Court of the Australian Capital Territory in Comalco Ltd v Australian Broadcasting Corporation (1983) 50 ACTR 1. In that case Blackburn CJ ruled that Hansard was admissible to show what had been said in the Queensland Parliament as a matter of fact, without the need for the consent of Parliament. He added:*

". . . I think that the way in which the court complies with Article 9 of the Bill of Rights 1689, and with the law of the privileges of Parliament, is not by refusing to admit evidence of what was said in Parliament, but by refusing to allow the substance of what was said in Parliament to be the subject of any submission or inference."

This would seem to be at least one of the origins of the formulation in para (c) of s 16(3) of the Parliamentary Privileges Act 1987. The other may have been the reference in the judgment of Brown J in Church of Scientology of California v Johnson-Smith [1972] 1 QB 522, [1972] 1 All ER 378, [1971] 3 WLR 434 to the submission of the Attorney-General:

"But the Attorney-General limited what he said about the probable attitude of Parliament to the use of Hansard by agreement by saying that Hansard could be read only for a limited purpose. He said it could be read simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person. But, he said, the use of Hansard must stop there and that counsel was not entitled to comment upon what had been said in Hansard or to ask the jury to draw any inferences from it . . . . But the general principle is quite clear I think, and that is that these extracts from ***Hansard*** *which have already been read* ***must not be used in any way which might involve questioning****, in a wide sense, what was said in the House of Commons as recorded in Hansard."*

The judgment of Brown J was approved by the House of Lords in Pepper v Hart.

[37] *Prebble was followed by the House of Lords in Hamilton v Al Fayed [2001] 1 AC 395, [2000] 2 All ER 224, [2000] 2 WLR 609. Lord Browne-Wilkinson (giving the only reasoned speech, with which the other members of the Appellate Committee agreed), perhaps unsurprisingly, expressly endorsed "the wide scope of Parliamentary privilege" as discussed in Prebble. He said, at 403:*

"In Prebble it was stated that section 16(3) contains the true principles to be applied, a view shared by the Joint Committee on Parliamentary Privilege (HL Paper 43-1) (1998-1999) which recommended a statutory provision confirming 'as a general principle' the traditional view of article 9, ie that it is a blanket prohibition on the examination of parliamentary proceedings in court.'The prohibition applies whether or not legal liability would arise: p 28, para 85.'

It is in my judgment firmly established that ***courts are precluded from entertaining in any proceedings (whatever the issue which may be at stake in those proceedings) evidence, questioning or submissions designed to show that a witness in parliamentary proceedings deliberately misled Parliament****. To mislead Parliament is itself a breach of the code of parliamentary behaviour and liable to be disciplined by Parliament: see Church of Scientology of California v Johnson-Smith [1972] 1 QB 522; Pickin v British Railways Board [1974] AC 765 at p 800 per Lord Simon of Glaisdale.* ***For the courts to entertain a question whether Parliament had been deliberately misled would be for the courts to trespass within the area in which Parliament has exclusive jurisdiction."***

[38] *It can be seen that, as in Prebble, Lord Browne-Wilkinson expressly endorsed the formulation of the rule in s 16(3) of the Parliamentary Privileges Act 1987 of Australia, including para (c) of the subsection, which makes no reference to misconduct. However, Hamilton v Al Fayed itself concerned an allegation of impropriety on the part of a Member of Parliament in Parliament, and in the second paragraph of the above citation Lord Browne-Wilkinson restricted his formulation to allegations that "a witness in parliamentary proceedings deliberately misled Parliament". But he continued, at 403H:*

"I have stressed this feature of parliamentary privilege because of the way in which this case has developed. As will appear, the Court of Appeal seem to have taken the view that parliamentary privilege is mainly relevant to cases where a party applies to strike out a court action on the grounds that the relief claimed in that action in some way trenches on conclusions reached in parliamentary proceedings. Although no doubt such cases may arise, they are, I believe, rare compared with ***those in which a party to litigation wishes to challenge the accuracy or veracity of something said in parliamentary proceedings.*** *In such a case, the other party does not apply to strike out the whole of the Plaintiff's action: the action will often be about something quite different to that under consideration in Parliament. The other party applies to prevent the giving of that specific evidence or the challenging of a particular witness.* ***If parliamentary privilege is held to exclude such evidence normally the only result*** *(serious though it may be) is that* ***the case is decided in the absence of that evidence."***

[39] *That* ***Parliamentary privilege does prevent a challenge to the accuracy or veracity of something said in Parliamentary proceedings is, I think, confirmed*** *by what he said at 407F:*

". . . ***The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. Thus, it is not permissible to***

challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee."

"Veracity" is apt to include accuracy.

…

[41] It is common ground before me that paras (a) and (b) of s 16(3) of the Parliamentary Privileges Act 1987 of Australia are declaratory of the common law. The controversy in this case concerns para (c), which literally applied would prevent any reference to a Parliamentary proceeding notwithstanding that there was no (sic) any allegation of impropriety or inadequacy or inaccuracy*. Mr Chamberlain submitted that the Privy Council's and House of Lords' endorsement of the whole of s 16(3) is an essential part of the reasoning of Lord Browne-Wilkinson in both Prebble and Hamilton v Al Fayed, and therefore constitutes part of the ratio of both decisions.* ***Mr Pitt-Payne submitted that the wide formulation in s 16(3) was unnecessary to both decisions****, and that the ratio of both decisions is to be found in Lord Browne-Wilkinson's own narrower formulations, which were confined to allegations of misconduct in Parliamentary proceedings****. I tend to the view that Mr Pitt-Payne is right on this,*** *but* ***I also agree with Mr Chamberlain that the search for the ratio may be academic, since it is in any event clear that the formulation in s 16(3) received the authoritative endorsement of both the Privy Council and the House of Lords. However, in Prebble itself Lord Browne-Wilkinson narrowed the scope of the rule by limiting it to cases in which there is some "questioning" of a Parliamentary proceeding.***

[42] Whether s 16(3)(c) represents English Law *was subsequently considered by Bean J in R (Bradley and others) v Secretary of State for Work and Pensions [2007] EWHC 242 (Admin), and by me in R (Federation of Tour Operators) v HM Treasury [2007] EWHC 2062 (Admin). The substantive issue in Bradley was whether the Secretary of State had acted unlawfully in rejecting a recommendation of the Parliamentary Commissioner for Administration, commonly referred to as the Ombudsman.* ***The question arose whether the Court could take into account the evidence*** *of the Ombudsman to* ***the Public Administration Select Committee*** *("PASC") of the House of Commons or* ***the report of that Committee****.* ***Bean J referred to Prebble****.* ***He considered that the ratio of the case was to be found in the narrower formulation of Lord Browne-Wilkinson*** *at 337A cited above. Bean J said, in a passage that was not the subject of comment when the case went to the Court of Appeal [2008] EWCA Civ 32:*

"32 Sub-sections (a) and (b) of the section cited from the Australian statute are uncontroversial. ***But sub-section (c), if read literally, is extremely wide****. It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in R v Secretary of State for the Home Department ex parte Brind [1991] 1 AC 696, and to which no objection has been raised in the present case), or to resolve an ambiguity in legislation (Pepper v Hart [1993] AC 593), or to assist in establishing the policy objectives of an enactment (Wilson v First County Trust Ltd [2004] 1 AC 816). It would also prohibit reliance on reports of the Joint Committee on Human Rights, which, as Mr Lewis' submissions rightly state, have been cited in a number of appellate cases in this jurisdiction: a very recent example is R v F [2007] EWCA Crim 243 at paragraph 11. As Lord Nicholls of Birkenhead observed in Wilson:*

'there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative as the will of Parliament, and without in any other way encroaching upon Parliamentary privilege *by interfering in matters properly for consideration and regulation by Parliament alone'.*

I therefore do not treat the text of sub-paragraph (c) of the Australian statute as being a rule of English law."

[60] *In Bradley, as mentioned above, Bean J said that s 16(3) (c) of the Australian statute does not represent the law of England and Wales. I would prefer to say that if given a broad literal interpretation it is an over-general statement of the law. It must be interpreted somewhat narrowly, in the sense to which I have referred in para 58 above, and as subject to the exceptions or qualifications to which Bean J himself referred. This is consistent with its endorsement by the Privy Council in Prebble and by the House of Lords in Hamilton v Al Fayed, and the approval in Prebble (sic) the Privy Council of the decision in Comalco.*

Circumstances when reference to Parliamentary reports might be permissible

The purpose for which Parliamentary proceedings, including a Parliamentary report is sought to be admitted could also be relevant. This point was explained in the case of **Toussaint v AG of St. Vincent** [2007] UKPC 48 delivered 16th July 2007, Lord Brown Wilkinson stated as follows:

> "*Their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament*

without *any accompanying allegation of impropriety or any* ***other questioning*** *there is* ***no objection to that course***." (All emphasis added)

The decision in Toussaint was further explained by Burnton J in **Federation of Tour Operators & Ors v Her Majesty's Treasury and Ors** [2007] EWHC 2062 (Admin) which was cited in his later judgment in ***Office of Government Commerce v Information Commissioner [2008] EWHC 737*** as follows:

> ***[44]*** *In my judgment in the Federation of Tour Operators case I referred to the decision of the Privy Council in Toussaint v The Attorney General of Saint Vincent and the Grenadines [2007] UKPC 48, [2008] 1 All ER 1, [2007] 1 WLR 2825 to which the Chairman of the tribunal also referred in his letter of 4 October 2007. I said:*
>
> *"115 Toussaint clarifies, and in my view limits, the exclusion resulting from an allegation of impropriety. It establishes that* ***it is proper for a Claimant to rely on evidence of what was said by a Minister in Parliament*** *to show what was the motivation of the executive's action outside Parliament, in that case the compulsory purchase of Mr Toussaint's land. He alleged that the compulsory purchase was discriminatory or illegitimate expropriation: an allegation of impropriety. He was* ***entitled to rely on the Minister's statement*** *to show what was the true motivation for the compulsory purchase. It is to be noted that Mr Toussaint* ***did not allege that the Minister had misled Parliament****;* ***to the contrary, it was alleged that what he said to Parliament disclosed his true motivation.*** *The allegedly wrongful act in that case was not the statement to Parliament, but the compulsory purchase to which it related: see paragraphs 19 and 20 of the judgment of the Judicial Committee. Mr Toussaint was similarly entitled to rely on what the Minister said to Parliament in support of his allegation that the purpose stated in the declaration for compulsory purchase was a sham: paragraph 23."*

…….

Peter A. Rajkumar

Justice of Appeal