

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
San Fernando**

Claim No. CV 2016-01460

Between

BISNATH MAHARAJ

Claimant

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on December 2, 2019

Appearances:

Mr. Anand Ramlogan, S.C., leading Mr. Gerald Ramdeen and Mr. Douglas Bayley instructed by Mr. Jared Jagroo, Attorneys-at-Law for the Claimant

Mr. Douglas Mendes, S.C., Mr. Michael Quamina, Ms. Kristal Madhosingh and Ms. Kadine Matthew, Attorneys-at-Law for the Defendant

JUDGEMENT

A. Introduction

1. This is a decision on liability in relation to a claim for constitutional relief brought by a former Director of the Strategic Services Agency (“the Director”). The Claimant claims that

the Defendant breached his constitutionally protected rights to due process, protection of the law and natural justice in its failure to give him an opportunity to be heard before or provide him with reasons for his termination from the post of Director.

2. The said post was established by Section 3(1) of the **Strategic Services Agency Act**, Chapter 15:06 (“the Act”). Section 4(1) provides for appointment of the Director by the President, however this is in practice effected pursuant to a Cabinet decision.
3. The Claimant served as a Police Officer for over thirty-four years attaining the post of Acting Assistant Superintendent of Police in the Trinidad and Tobago Police Service (the “Police Service”). He qualified as an Attorney-at-Law. His first appointment as Director of the Security Services Agency (“The Agency”) was pursuant to Cabinet Minute No. 847, for a period of two years with effect from April 17, 2012. His appointment was confirmed by letter dated April 18, 2012 from the Permanent Secretary, Ministry of National Security. The Claimant was informed that he would be granted leave of absence from the Police Service without pay on the grounds of public policy for the period of his appointment as Director.
4. On April 17, 2014, he was reappointed pursuant to Cabinet Minute No. 1081 for a further period of three years. This was confirmed by letter dated May 23, 2014 and an Instrument of Appointment was executed by the President on May 13, 2017. This second term of office was due to expire on May 13, 2017.
5. The undisputed facts relevant to the Claimant’s constitutional claim are as follows:
 - a. The Agency is established by the **Strategic Services Agency Act, Chap. 15:06** (the “Act”) which provides that it shall consist of a Director and Employees of the Agency.
 - b. **S.4 of the Act** governs the appointment of the Director. It states:

“[T]he Director shall be appointed by the President for a term not exceeding five years terminable at any time and shall be eligible for reappointment at the expiration of the term.”

- c. On November 13, 2015, the Minister of National Security wrote to the Claimant informing him that, by Instrument dated November 11, 2015, the President had revoked his appointment pursuant to S.4(1) of the Act, with effect from November 13, 2015.
 - d. No process was utilised in the revocation of the Claimant’s appointment. He was neither provided with any opportunity to be heard nor any reasons for his termination.
6. The Claimant contends that his constitutionally protected rights to due process, protection of the law and natural justice were breached due to the failure to give him an opportunity to be heard or a fair hearing before the decision to terminate was made by the Cabinet/the President.

B. Issues

7. The present decision is made only in relation to liability as the assessment of damages, if required, will be referred to a Master. In relation to these proceedings, there had been an application to cross-examine made by the Defendant. It was dismissed by Ruling dated May 7, 2019 as it was determined firstly, that the some issues outlined upon which to be cross-examined bore no relevance to the Claimant’s narrowed claim for constitutional relief in relation to the process followed by the Defendant. Secondly, it was determined that all other issues were relevant only to the assessment of damages. That aspect of the matter would be addressed by the Master.
8. The Claimant initially sought the following relief:

- i. A declaration that his right to the protection of the law in accordance with Section 4(b) of the Constitution has been violated and breached;
- ii. A declaration that his rights to not be deprived of the right to a fair hearing in accordance with the principles of fundamental justice in accordance with Section 5(2)(e) of the Constitution have been violated and breached;
- iii. A declaration that his termination/dismissal was unlawful and illegal;
- iv. Damages, including vindicatory damages;
- v. Costs;
- vi. Such further relief orders and directions or writs as the Court might consider just and/or appropriate as the circumstances of the case warrants.

9. However, the Claimant in submissions has narrowed his claim and is now only pursuing constitutional redress as outlined in (i) and (ii) above, as well as damages, costs and any further relief.

10. The issues to be determined have been narrowed during Case Management and by the submissions filed. The remaining issues are:

- a. Whether the Claimant's constitutional rights under S.4(b) of the Constitution were breached in light of the process used in his termination as Director of the Agency.
- b. Whether the Claimant's constitutional rights under 5(2)(e) of the Constitution were breached in light of the process used in his termination as Director of the Agency.
- c. Whether the Claimant's claim amounts to an abuse of process due to the availability of alternate remedies.

C. Law and Analysis

11. **Section 4(b) of the Constitution** recognises the right of the individual to protection of the law. It provides the following:

“4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: -

(b) the right of the individual to equality before the law and the protection of the law.”

12. As submitted by the Claimant, it is indeed well-established by cases such as **Rees v Crane [1994] 2 AC 173** that the right to protection of the law contained in S.4(b) also gives constitutional protection to the right to natural justice.

13. **Section 5(1)&(2)(e) of the Constitution** provides:

“5.(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and section 54, Parliament may not:

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations...”

14. Provision for enforcement of these rights and protections is contained in **Section 14(1) of the Constitution**:

“For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the

same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.”

15. The crux of the Defendant’s argument is that the Claimant was not entitled to any process of natural justice as it relates to the termination of his appointment. This is so, they contend, because no such process is set out statutorily and there is no ambiguity in the S.4(1) provision for the position being “terminable at any time”. They argue that the position of Director can best be described as “an instrument of the Minister of National Security” and interpretation of the legislation should be done in the context of Section 4(1). They submit that the provision regarding termination is in line with this unique function and, in the absence of any statutory underpinning, it is not open to the Court to imply a right to be heard.
16. The Defendant has, however, cited no authority to establish that by the Claimant being employed in an office that has a role in law enforcement and the fight against serious crime means he lost his right to due process. As pointed out by Counsel for the Claimant, the onus would be on the Defendant to prove that the Claimant was alienated from his constitutional rights due to the nature of his job.
17. The Defendant cites the UK decision of **R v East Berkshire Health Authority ex p. Walsh (1985) QB 152** as authority for the proposition that mere employment by a public authority is not sufficient to inject any public law element into an employment relationship. In that case, it was stated that employment by a public authority “only makes it more likely that there will be special statutory restrictions upon dismissal”. The Defendant submits therefore that as there are no special statutory restrictions outlined in the Act, no further requirement applies.
18. They also cite **Malloch v Aberdeen Corp. [1971] 1 WLR 1578** and **Johnson v Unisys Ltd [2003] 1 AC 578** which held that at common law there is no requirement for an employer

to hear his employee before dismissal and that any such requirement would have to be contained in the contract between the parties.

19. In light of these authorities, the Defendant submits that by the clear words of the statute, the appointment is “terminable at any time” and, as there is no room for implication of an entitlement to a fair hearing before termination, the claim for constitutional relief should fail.
20. However, these UK decisions concern private, employment law contractual disputes and therefore are not factually relevant to the present case. The Claimant’s case concerns a statutory office with important and sensitive functions. As the Claimant submits in his Reply submissions, this case is not concerned with a normal employer/employee contract of employment, it concerns the termination of the statutory office of “Director” of a State body.
21. The public law element is clearly established in the present case, and demonstrated through the appointment and termination of the Director of the Agency being done by Presidential Instrument executed pursuant to Cabinet decisions. These actions are not subject to any employment contract procedures as would have been applicable in the **Ex p Walsh** matter. Instead they are actions of the State impacting on a citizen holding Office in a position created by Statute.
22. Counsel for Claimant contends that constitutional rights govern the process to be applied for the Claimant’s termination. His closing submission sets out a detailed history of the development of the law relating to the application of the constitutional right to procedural fairness and protection of the law.
23. Counsel for the Claimant refers to the decision of Jones J (as she then was) in **Nizam Mohammed v AG CV2011-04918**, cited with approval by the UK Privy Council in **Sam**

Maharaj v Prime Minister [2016] UKPC 37, which explains the constitutional protections of S.4 and S.5 as follows:

“5. ... It is now accepted that the rights embodied in section 5 of the Constitution particularise in some greater detail what is included in the words “the due process of the law” and “the protection of the law” found in section 4 of the Constitution. Insofar as these proceedings are concerned both the Claimant and the Defendant do not dispute that what both sections provide is “constitutional protection to the right to procedural fairness.””

24. The learned judge examining what constituted procedural fairness concluded that an appropriate question would be: “[D]o the facts when examined objectively provide an example of ‘fair play in action’?” Citing the decision of Lord Mustill in **R v Secretary of State for the Home Department, ex parte [Doody] [1994] 1 A.C. 531** learned judge expounds on this test as follows:

*“It would seem to me that in considering the effect of these particular facts a good starting point is by reference to a statement of Lord Mustill which though long, to my mind, succinctly deals with the issues with which I have to grapple. In dealing with **what was required to achieve the minimum standard of fairness**, he says: “...what does fairness require in the present case? My Lords, I think it unnecessary to refer to by name or to quote from, any of the often cited authorities in which the courts have explained what is in essentially an intuitive judgement. They are far too well known. From them, I derive that (1) **where an Act of Parliament confers an administrative power there is a presumption that it will be exercised as a manner which is fair in all the circumstances.** (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which*

*creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) **Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he was informed of the case which he has to answer.*** [Emphasis added]

25. The Claimant also cites the **Judicial Review Handbook 6th Ed.** by Michael Fordham QC in assessing what constitutes natural justice. At 60.2.1 a useful formulation is set out:

“Natural justice as a flexi-principle... To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates”.

26. Counsel for the Claimant submits that it is clear from these authorities what is required in assessing how to protect the right to natural justice. It is not “a methodical, robotic and slavish evaluation of several rules or criteria, but rather a conceptual, intellectual appreciation of whether or not the facts amount to fairness in all of the circumstances”.

27. The Claimant’s case is that, even if the office of Director of the Agency may be considered an instrument of the Minister, the officeholder is adversely affected by any decision regarding his termination in a way that affects his livelihood and potentially his reputation. In such a circumstance, the words “terminable at any time” must be construed to intend a fair process of termination to be followed.

28. The Claimant's submission includes a full examination of the evolution of the concept of protection of the law at common law, from consideration as mere access to Courts in **AG v Errol McLeod PCA 24 of 1982** to the Court of Appeal decision in **Jason Bissessar v AG CA P136 of 2010** which extended the meaning of the phrase to include positive obligations on the State. The Court of Appeal in examining the right to protection of the law cites decisions of the Caribbean Court of Justice in coming to its conclusion as follows:

"[40] The trial judge was of the view that while there were "obvious flaws" in the manner in which the appellant's detention was administered, once access to the courts remained available to him, there could be no complaint about a breach of section 4(b). The judge erred in placing such a limited construction on section 4(b). "Protection of the law" under section 4(b) is not confined to a citizen's access to the courts. A far more expansive interpretation has been adopted by our courts.

[41] The dictum of the Caribbean Court of Justice in Attorney General of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ) per de la Bastide P and Saunders J is relevant. At para 60 of their joint judgment they say:

"... the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed."

Further, in The Maya Leaders Alliance v Attorney General of Belize [2015] CCJ 15 at para 47 the CCJ stated:

*"The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, **the***

concept goes beyond such questions of access and includes the right of the citizen to be afforded, 'adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy." [Emphasis added]

29. The Claimant cited **Lucas et al v The Chief Education Officer et al BZ 2015 CCJ 2**, where the dissenting CCJ judges further examined the scope of the protection of the law clause, determining that it should apply to an instance where a person is deprived of a right to be heard where allegations against them are to be made publicly:

"[138] ... The citizen must be afforded "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power".⁶¹ The right to protection of the law may successfully be invoked whenever the State seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial. There is therefore likely to be a breach of the right whenever a litigant is absolutely compelled to seek vindication under the Constitution for infringement by the State of a fundamental right. But even where no other fundamental right is impacted, the right to protection of the law may also be implicated when there is a violation of due process and a denial of the citizen's expectations of fairness, procedural propriety and natural justice...

*[139] The majority asserts that the appellants' right to the protection of the law was guaranteed by their ability to institute proceedings for libel or slander against anyone who had defamed them. In my view this misses the point. The complaint of the ladies is not so much that their reputations were damaged by specific words uttered by any particular individual but that rather, in relation to them, **the respondents engaged in an indiscrete and unfair process, facilitated all and sundry in unfairly and publicly criticising them, published a report that was extremely critical of them without affording them natural justice and unlawfully suspended them immediately following all the public criticism.**" [Emphasis added]*

30. This was followed by **Quincy McEwan v AG of Guyana [2018] CCJ 30** and **Nervais v the Queen [2018] CCJ 19** which as outlined by the Claimant, expanded the purport of the "protection of the law" clause. In **McEwan**, it was considered that protection of the law required that a criminal statute include fair notice and certainty in its application and that ambiguity in the law would amount to a breach of that provision. In **Nervais**, the court also considered the ambit of protection of the law clause to be very wide, "the same as due process" and "one of the underlying core elements of the rule of law".

31. Finally, the recent decision of the Privy Council in **Jamaicans for Justice v Police Service Commission & anor [2019] UKPC 12**, cited with approval the CCJ judgments above and an expansive definition was outlined at [24]:

"[24] The Board is also disposed to accept that the right to equality before the law, like the right to the equal protection of the law, affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power."

32. Counsel for the Claimant, having set out this evolution of the constitutional principle of protection of the law in the common law, submits that the circumstances of the

Claimant's termination amounted to a breach of such protection and did not meet the requirements of procedural fairness guaranteed under S.4(b) and S.5(2)(e) of the Constitution.

33. Indeed, it is patent in my view that there was manifest unfairness in the way the Claimant was terminated. The Defendant, at paragraph 6 of its reply submissions, submits that the Claimant is relying on cases involving offices for which there are special protections in the statutory process for their removal. However, the principles of natural justice outlined in these cases are not specific to the circumstances of each office. Although the protection required may be greater in cases involving Judges, for example, the fundamental principles of natural justice are universal protections guaranteed by the Constitution.

34. It is also noteworthy that, as highlighted by the Claimant in Reply submissions, the claimant in **Nizam Mohammed** was not a contracted employee but was held to be entitled to the benefit of procedural natural justice. This protection would equally, if not more readily apply to this Claimant. The present Claimant should have been given information on his termination and an opportunity to be heard as a matter of procedural fairness.

35. The wording of the Act, though clear that termination could occur at any time, does not delve into the procedure to be followed in effecting such a termination. As the Claimant submits, it must have been the minimal intention of Parliament that the provision "terminable at any time" be construed as requiring basic procedural fairness and observance of the rules of natural justice. In the circumstances of this case, this would include a right to be heard and to be made aware, as far as practicable, of any allegations against him/causes for termination.

In any event, the Act does not provide that the Director could be dismissed at any time with or without just cause and without any opportunity to be heard. This is an inference being "read in" by the Defendant.

D. Abuse of Process

36. The Defendant, citing **Sam Maharaj v Prime Minister [2016] UKPC 37** and **Durity v AG [2008] UKPC 59**, argues that a constitutional claim should only be brought where it can be shown that judicial review was not available as a remedy or where the outcome of such an application was uncertain. They submit, therefore, that the Claimant, having failed to put forward any reason why judicial review would not have been an effective or timeous remedy to redress the failure to afford him natural justice, should not be allowed to pursue this constitutional claim.
37. However, several decisions support the argument of the Claimant in reply submissions that the existence of a parallel remedy, such as judicial review, is not an absolute bar to the filing of a constitutional motion.
38. In **Jaroo v the Attorney General [2002] UKPC 5**, Lord Hope (at paras. 31 to 39) discussed the circumstances that justify the bringing of a constitutional claim. In that case, the existence of significant factual dispute made it more appropriate to have been pursued by an ordinary civil action. The Court explained:-

“31. Section 14 (1) of the Constitution declares that, without prejudice to any other action with respect to the same matter which is lawfully available, a person may apply to the High Court for redress by originating motion in such circumstances. This procedure enables the person who seeks a quick judicial remedy to avoid the delay and expense which a trial of the case by means of an ordinary civil action will involve. As the appellant had received no reply to his solicitor’s letter of 22 April 1988, their Lordships are disposed to think that he could not reasonably have been criticised at the outset for reading the constitutional route as the best way to make rapid progress in his efforts to obtain the return of the motor car.

“36. Their Lordships wish to emphasise that the originating motion procedure under section 14 (1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law.” [Emphasis added]

39. This was further clarified in **Siewchand Ramanoop v the Attorney General of Trinidad and Tobago [2005] UKPC 15** by Lord Nicholls of Birkenhead:

*“25. In other words, **where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate.** To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.*

*26. That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But **“bona fide resort to rights under the Constitution ought not to be discouraged”**: Lord Steyn in *Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307*, and see Lord Cooke of Thorndon in *Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.*”
[Emphasis added]*

40. It is clear that what is required to bring a constitutional claim is a genuine issue about the breach of a claimant's constitutional rights and no significant factual dispute.

41. A similar analysis of the factors to be considered in assessing whether a constitutional claim amounted to an abuse of process due to an available alternative remedy was undertaken in the Court of Appeal decision of **AG v Dion Samuel CA P.181 of 2013**. The Court examined the provisions of the statute that governed the procedure to be adopted in termination of a military officer and concluded that no adequate remedy was contained therein. Thereafter, it examined the alternate recourse of judicial review and concluded as follows:

"58. In relation to judicial review, it is doubtful that such a procedure could provide any relief without recourse to constitutional principles..."

59. ...In the circumstances it seems to me that judicial review proceedings would not provide the remedy for the complaints of the Respondent unless of course recourse were had to the Constitution. In that event it is the Constitution that provides the remedy. There is in essence no alternative remedy.

60. Further, it would seem to me that the Respondent would not be able in judicial review proceedings to recover damages as he did in these proceedings. In those circumstances also judicial review proceedings would fall short of providing an effective or proper remedy."

42. As submitted by the Claimant at paragraph 11 of reply submissions, this case strikes at the very heart of the right to procedural fairness and the rule of law. Absolutely no process was followed in dismissing the Claimant from his position. This contravenes the principles of procedural fairness and the rules of natural justice.

43. There is also no express provision made in the Act for any recourse by the Director to challenge, by judicial review, a decision made to terminate him. Further, the only grounds for judicial review would lie in unconstitutionality or breach of natural justice. These

grounds involve essentially the same exercise to be undertaken by this Court in assessing the constitutionality of the decision in this constitutional claim.

44. Finally, as highlighted by the Court of Appeal in **Dion Samuel**, damages may not have been recoverable in judicial review as they may be in the constitutional claim.

45. It is my finding that Judicial Review was not an appropriate alternate recourse. This claim, therefore, is not an abuse of process.

E. Conclusion

46. In conclusion, the termination of the Claimant in the way effected by the Defendant was unfair due to the failure to utilise a process that included natural justice. The decision was not arrived at fairly as the Claimant did not have an opportunity to be heard or the reasons for his dismissal. This amounted to a breach of rights protected by the Constitution under S.4(b) and S.5(2)(e).

47. It is therefore ordered as follows:

- i. A declaration that the Claimant's right to the protection of the law in accordance with Section 4(b) of the Constitution has been violated and breached;
- ii. A declaration that the Claimant's rights to not be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations in accordance with Section 5(2)(e) of the Constitution have been violated and breached;

- iii. The Defendant is to pay to the Claimant damages, including vindictory damages to be assessed by a Master, if not agreed.
- iv. Costs fit for Senior Counsel to be assessed by the Registrar, if not agreed.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC 1