

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO

H.C.A. No. S-326 of 1998

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD
AND TOBAGO BEING THE SCHEDULE TO THE
CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND
TOBAGO ACT 1976

AND

IN THE MATTER OF THE ACTION AND/OR NON ACTION
OF THE JUDICIAL ARM OF THE STATE IN CIVIL APPEAL
NO.77 OF 1989 **BETWEEN** JEROME BOODHOO PRESIDENT
AND KHEMKARAN JAGRAM SECRETARY SUIING ON
BEHALF OF THEMSELVES AND ALL OTHER MEMBERS
OF THE SANATAN **AND** DEO SOMAREE JAMMUNA.

AND

IN THE MATTER OF THE APPLICATION BY JEROME
BOODHOO PRESIDENT AND KHEMKARAN JAGRAM
SECRETARY SUIING ON BEHALF OF THEMSELVES AND
ALL OTHER MEMBERS OF THE SANATAN DHARMA
SUDHAR SABHA FOR REDRESS IN PURSUANCE OF
SECTION 14 OF THE CONSTITUTION OF TRINIDAD AND
TOBAGO FOR CONTRAVENTION OF THE JUDICIAL ARM
OF THE STATE OF THE SAID CONSTITUTION AND IN
PARTICULAR OF SECTIONS 4(a), 4(b) AND 5 IN RELATION
TO THE APPLICANT.

BETWEEN

JEROME BOODHOO President and
KHEMKARAN JAGRAM Secretary suing on
behalf of themselves and all other members of
the Sanatan Dharma Sudhar Sabha

Applicants

AND

THE ATTORNEY GENERAL
OF TRINIDAD AND TOBAGO

Respondent

Before: Hon. Justice Nolan Bereaux

Appearances:

L. Maharaj SC, S. Persad for Applicants

R. Martineau SC, A. McGowan for Respondents

JUDGMENT

By notice of motion dated and filed on 3rd April 1998, the applicants, Jerome Boodhoo and Khemkaran Jagram, suing on behalf of themselves and all other members of the Sanatan Dharma Sudhar Sabha, sought the following reliefs;

- (1) A declaration that the applicants' right to the enjoyment of property and the right not to be deprived thereof except by due process of law as protected by section 4(a) of the Constitution of Trinidad and Tobago was contravened by the judicial arm of the State (the Court of Appeal – Ibrahim J.A., Permanand J.A. and Gopeesingh J.A.) by reason of its omission and/or failure and/or neglect to hear and/or determine the applicants' appeal in civil appeal No. 77 of 1989 within a reasonable time.

- (2) A declaration that the applicants' right to the protection of the law and/or to equality before the law as protected by section 4(b) of the Constitution of Trinidad and Tobago was contravened by the reason of its omission and/or failure and/or neglect to hear and/or determine the applicants' appeal in civil appeal No. 77 of 1989.

- (3) A declaration that the applicants' right to equality of treatment from a public authority in the exercise of its functions was contravened by the judicial arm of the state (the court of appeal – Ibrahim J.A., Permanand J.A. and Gopeesingh J.A.) by reason of its omission and/or failure and/or neglect to hear and/or determine the applicants' appeal in civil appeal No. 77 of 1989 within a reasonable time.

- (4) A declaration that state and/or the judicial arm of the state (the court of appeal – Ibrahim J.A., Permanand J.A. and Gopeesingh J.A.) contravened the applicants’ constitutional rights to such procedural provisions as are necessary for the purpose of giving effect and protection of constitutional rights guaranteed to them in sections 4 and 5 of the Constitution of Trinidad and Tobago.
- (5) A declaration that the delay by the judicial arm of the state (the court of appeal – Ibrahim J.A., Permanand J.A. and Gopeesingh J.A.) in hearing and/or determining the applicants’ said appeal contravened the applicants constitutional right to a fair hearing of the appeal in accordance with the principles of fundamental justice as guaranteed to them in section 5(c) of the Constitution of Trinidad and Tobago.
- (6) A declaration that the decision of the court of appeal in ordering a de novo hearing of the applicants’ appeal by reason of the death of Gopeesingh J.A. without making any provisions and/or arrangements for payment of the applicants legal costs on a solicitor/client basis (or on such other basis as to the Court may seem fit) to permit them to retain attorneys to re-argue the appeal or to be paid the costs thrown away on the first hearing is unconstitutional.
- (7) An order of monetary compensation in favour of the applicants to be assessed by a judge in chambers or as the Court shall see fit or alternatively, that the state do pay to the applicants the legal costs on a solicitor/client basis of the aborted appeal or alternatively that the state do pay the applicants’ legal costs on a solicitor/client basis for re-arguing of the appeal or such other order as to the Court may seem fit.

The notice of motion has its genesis in the dismissal on 14th April, 1989 by Hamel-Smith J. (as he then was) of the applicants’ claim in H.C.A. No. 438 of

1987. In that matter the applicants sought a right of way over a strip of land measuring eight feet in width and approximately five hundred and twenty seven point seven feet in length. They also sought certain consequential injunctive relief.

The grounds upon which the notice of motion is founded flow entirely from the dismissal of their cause of action in H.C.A. 438 of 1987 and starting at ground 2, are as follows:

- (2) The applicants' subsequently filed amended grounds of appeal on the 31st March, 1992. The record of appeal having been settled was filed on the 10th May, 1991 and the appeal came on for hearing on the 20th March, 1996 when it was adjourned for a date to be fixed. The appeal was subsequently fixed for the 8th May, 1996 when it was called up before the Ibrahim J.A., Permanand J.A. and Gopeesingh J.A.. Hearing was adjourned to the 9th May, 1996 to allow parties an opportunity to discuss settlement.
- (3) On the 9th May, 1996 hearing commenced and continued on the 21st May, 1996 and 22nd May, 1996. On the 22nd May, 1996 leave was given to the respondents to file a written response to the applicants' response of 29th May, 1996. Judgment was reserved nevertheless on that date.
- (4) Thereafter no judgment was delivered and on the 12th January, 1998 the court of appeal issued a notice that the matter was listed for hearing "de novo" on Thursday 12th February, 1998 as a consequence of the death of the Honourable Mr. Justice Gopeesingh.
- (5) The applicants' paid substantial fees to their attorneys to prosecute their appeal and at 29th May, 1996 when judgment was reserved

the only work left for their Counsel to do was to attend court to take the judgment of the Court. Attorney on the record was also paid by the applicants for all the normal work required to that stage.

- (6) The applicants' attorneys on the record in the appeal, Messrs. Viziers were in the process of dissolution and not able to accept any new work, as a result, of which the applicants must find new attorneys on the record to re-argue the appeal. The applicants must also find new counsel as counsel formally retained is unable to accept a brief to re-argue the appeal.
- (7) The applicants' are unable to find the means to retain counsel and attorneys on the record to re-argue their appeal.
- (8) The applicants are entitled by the Constitution of Trinidad and Tobago and in particular by sections 4(a), 4(b) and 4(d) of the Constitution to a judicial machinery which can properly and effectively protect their rights. The machinery is not effective if the applicants have to wait on the Court for over 14 months after the hearing of an appeal and then have the appeal listed for de novo hearing because a judge of the appeal court died some 14 months after judgment was reserved.
- (9) The court of appeal, in embarking upon the hearing of the matter and refusing and/or omitting to hear and determine the appeal within a reasonable time deprived the applicants of the right to the enjoyment of property and/or to the protection of the law and/or to equality before the law and/or to equal treatment as guaranteed in sections 4(a), 4(b) and 4(d) of the Constitution of Trinidad and

Tobago and as further and better particularised in sections 5 2(e) and (h) of the said Constitution.

- (10) A reasonable time for the hearing and determination of such an appeal after it was commenced is the time for active, healthy and mentally alert judges with full and complete consciousness to hear the arguments and to read and consider the submissions in the case. A period of time which may dim their memory or cause them to lose their impressions of the submissions or to realise that they should have recused themselves for the hearing or to die before preparing a judgment or any period in excess of one year is an unreasonable time.
- (11) The lapse of over 14 months between the hearing of such an appeal and/or its determination is contrary to the principles of fundamental justice. such delay makes provision for giving protection and effect to the applicants' constitutional rights ineffective.
- (12) The Constitution of Trinidad and Tobago and in particular the chapter dealing with fundamental rights, imposes a fetter upon the exercise by the judiciary of the plentitude of its powers, so that it cannot exercise its powers lawfully if in exercising such power it contravenes the fundamental human rights guaranteed in sections 4 and 5 of the Constitution of Trinidad and Tobago.
- (13) The state in any event had a constitutional duty to put into place procedural provisions as would be necessary to protect the applicants right to have judgment in their appeal determined even though one out of three judges hearing the appeal has died.

- (14) The applicants are also entitled to have the de novo hearing of the appeal stayed until the state pays them all costs thrown away in the first hearing and/or until their legal fees are paid by the state for their second hearing.

Four affidavits in support of the motion were filed on behalf of the applicants. All were deposed to by Mr. Jerome Boodhoo and were filed on 6th April 1998, 1st July 1998, 5th October 1998 and 7th January 1999 respectively. Two affidavits in opposition were filed on behalf of the respondent, the first deposed by Mr. Michael Denny then acting clerk of appeals was filed on 31st July 1998. The second, deposed by Mr. John Gonzalves, clerk of appeals was filed on 18th September 1998.

Evidence for the Applicants

The applicants' appeal against the decision of Hamel-Smith J. came on for hearing on 8th May 1996 before Ibrahim, Permanand and Gopeesingh J.J.A. It commenced on the following day and continued over a total of three days when on 22nd May 1996 judgment was reserved.

On 17th July 1997 before judgment could be delivered however, Gopeesingh J.A. died quite suddenly. It turned out as well that Ibrahim J.A. subsequently realised that he knew the brother of one of the parties quite well and recused himself from the de novo hearing.

Mr. Boodhoo states that after judgment had been reserved he kept in regular contact with Viziers (which was the firm of attorneys he had retained to act on behalf of his organisation) for a date on which judgment would be delivered. During the pendency of the judgment, the firm of "Viziers" was wound up. He was advised by Mrs. Lynette Maharaj that she would simply take the judgment of the Court when delivered, but if any, further work had to be done, new attorneys would be required.

Upon receipt of the notification of a 'de novo' hearing of the appeal, Mrs. Maharaj advised him that "Viziers" would no longer be able to stay on record and his organisation would have to retain new attorneys. She also advised that it was doubtful whether she would be able to appear to re-argue the appeal. She referred him to her new firm of Daltons but advised that he would have to deal with another partner of that firm which would be able to supply both counsel and instructing attorneys. He then held discussions with Mr. Shastri Persad, another partner in the firm of Daltons. Mr. Persad advised that Daltons would require at least twenty seven thousand five hundred dollars (exclusive of value-added tax) for the retention of instructing attorney and for counsel. These fees did not include junior counsel's fees.

On 12th February 1998 the matter came on for hearing before a court comprising Hosein, Permanand, Jones, JJA. Ms. Joan Samlalsingh, attorney-at-law, appeared on behalf of the applicants and sought an adjournment on the grounds the appellants because of their financial position had not been able to retain an attorney to re-argue their appeal. The appeal was adjourned to a date to be fixed, the Court was informed that the appellants were seeking the assistance of the Attorney General concerning their difficulty in funding resources to retain counsel afresh.

Mr. Boodhoo in his principal affidavit of 6th April 1998 asserts that at the previous hearing he had retained Dr. Fenton Ramsahoye S.C. and Mr. Ramesh Maharaj of counsel and that he had fully paid Mr. Maharaj and Mrs. Lynette Maharaj for the preparation and arguing of the appeal. He adds that his organisation, of which he is a trustee, does not have the funds for re-arguing the appeal and that it is their belief that since the re-arguing has arisen through no act or omission of their part, they ought not to shoulder the expense of the de novo hearing or to lose their right to experienced counsel or to render their right of appeal nugatory because their organisation cannot afford to pay attorneys to appear for it. At the hearing on 12th February, when this was told by Ms.

Samlalsingh to the court of appeal, the Court suggested that the applicants should approach the Legal Aid and Advisory Authority

The court of appeal adjourned the appeal to a date to be fixed to proceed on that date in the event that there was no settlement. The appeal was subsequently listed for hearing on 6th April 1998. Ms. Samlalsingh again appeared *amicus curiae* and informed the Court of the following

- (i) that the firm of Vizier which was on record for the applicants was on that same day applying to cease to act as the applicants' attorneys

- (ii) that the firm of Daltons (which in effect was the successor firm to Viziers) had filed the instant constitutional motion on behalf of the applicants and was on the same day (6th April) seeking a conservatory order to stay the hearing of the appeal until the motion was determined

She also sought an adjournment of the appeal on the same basis as she did on the 12th February 1998. The adjournment was refused and the appeal was dismissed for want of prosecution, with costs. The applicants applied for and were granted conditional leave to appeal to the Judicial Committee of the Privy Council against the dismissal of the appeal. The application was made by Mr. Shastri Persad. Mr. Boodhoo adds that pursuant to conditions attached to granting of leave to appeal by the court of appeal, security in the sum of five hundred pounds was deposited on behalf of the applicants. He states that fees for the application of final leave to appeal to the Board and for appeal will be required and that while the application for conditional leave was done on a 'pro bono' basis, they will be required to pay for Mr. Persad's services and that of english attorneys in the prosecution of their appeal before the Board. At present, they are required to pay a retainer to Daltons in the sum of five thousand dollars (exclusive of value added tax at a rate of fifteen percent.

He contends these applications have all arisen directly out of the failure of the court of appeal to deliver judgment in a timely fashion.

Evidence for the Respondent

On behalf of the respondent, Messrs. Michael Denny and John Gonzalves sought to provide reasons for the delay in the hearing and determination of the applicants' appeal.

In summary the main reasons given are as follows:

- (1) Priority has been given by the court of appeal to appeals in capital cases since the decision of the Judicial Committee of the Privy Council in **Pratt and Morgan vs The Attorney General of Jamaica** in 1993. The result was that appeals in civil cases could not be heard promptly.
- (2) As at 1996, the average length of time between the filing of the record of appeal and the first hearing of civil appeals was 5 years. Between 1991 and 1996, the approximate number of appeals filed was 1,719 appeals of which 457 were determined leaving a balance of 1,262 appeals awaiting determination. These figures do not take account of magisterial and petty civil court appeals which between 1993 and 1996 numbered approximately 1,376. Between 1992 to 1996 there were only two divisions of the court of appeal to hear and determine all appeals.
- (3) In order to expedite appeals, de la Bastide C.J. upon his assumption of office on 31st May, 1995 had the lists of appeals fixed so that each day a new appeal was fixed and heard. It was rare for any appeal to exceed the one day period allotted.
- (4) Between May 1996 when judgment was reserved, and the date of his death, Gopeesingh J.A. had quite a full and busy schedule. He sat for a total of one hundred and ninety-six days in the court of appeal hearing a

total of six hundred and thirty-five appeals of which five hundred and seventy-four were determined. At the time of his death there were sixteen other cases heard before him which were not yet determined and which had to be re-assigned and relisted as a result of his death.

John Gonzales, the holder of the substantive post of clerk of appeals, gives better particulars of those other cases which were required to be heard de novo consequent upon the death of Gopeesingh J.A.. They in fact numbered fifteen and of those, four were reserved for decision prior to the applicant's appeal.

Reliefs (1), (2) and (3)

The applicants have sought six declarations in this constitutional motion. It is based on what is alleged to be an act or omission of the judicial arm of the state in the exercise of its functions. It raises the question whether in giving judgment, the courts of Trinidad and Tobago are bound by the Constitution to do so speedily and whether by failing so to do there is a breach of the applicants rights and freedoms under section 4. The complaint is against the 'process' and clearly, the issue comes within the ambit of the decision of the Privy Council in **Maharaj vs The Attorney General of Trinidad and Tobago** 1978 2 All ER 670 since "*the protection afforded [is] against contravention of those rights or freedoms by the state or by some other public authority endowed by law with coercive powers*" (see Lord Diplock at page 677 letter e).

It also raises the question whether under section 14(1) of the Constitution of Trinidad and Tobago, a court of first instance can enquire into the processes of the court of appeal or whether the dire warnings of Lord Hailsham's dissent in **Maharaj** have come to pass and "*a new and probably unattractive branch of jurisprudence*" has in fact arisen based on "*those judicial errors which do and those which do not, constitute a deprivation of due process of law*" (see Lord Hailsham at page 685 letters a to b).

However, it is readily apparent from an examination of the first three declarations sought that, as submitted by Mr. Martineau, they are misconceived. The applicants contend that the judicial arm of the state has contravened their rights under section 4(a), 4(b) and 4(d) of the Constitution by reason of its omission, failure or neglect to hear and determine the applicants' appeal within a reasonable time.

In effect the contention is that the applicants are constitutionally entitled to have their appeal determined within a reasonable time.

As the decision of the Judicial Committee of the Privy Council in *Director of Public Prosecution v Jaikeran Tokai* [1996] 3 W.L.R. 149 demonstrates, there is no such constitutional right.

In *Tokai*, it was held that the provisions of the Constitution of Trinidad and Tobago afforded a person charged with a criminal offence, the right to a fair trial but not the right to a speedy trial within a reasonable time.

At page 153 Lord Keith who delivered the judgment of the Board put the matter this way

“It is noticeable that this Constitution unlike those in other Caribbean countries and elsewhere, particularly the United States of America and Canada, does not include in the catalogue of fundamental rights and freedoms the right to a speedy trial or trial within a reasonable time. The only relevant rights are the right not to be deprived of life, liberty or property except by due process of law and the right to the protection of the law, which include, as section 5(2)(f) makes plain, the right of those accused of criminal offences to a fair trial.”

In *Sieuraj Sookermany vs Director of Public Prosecutions* 1996 48 W.I.R. 348 at 352 letter (h), de la Bastide C.J. commenting on the absence of any provision in the Constitution of Trinidad and Tobago, of the right to be tried within a reasonable time as opposed to its express provision in the constitutions of certain other caribbean countries, stated as follows

“Its omission from the expressly recognised rights, however, suggests that they, the Constitution makers, did not wish either to create any such right if it did not exist, or to confirm and endorse it, it possibly it did. At any rate, the fact that the right has not been expressly given constitutional status ought at least to entitle a court to exercise a greater degree of flexibility when weighing a person’s claim that the right has been breached in relation to him, especially when (as in this case) the alleged breach is purely as a result of that type of delay which has been categorised as “systemic” or “institutional””.

While it is correct that *Tokai* was concerned with a criminal trial and the procedures which the trial judge can exercise in cases involving delay in prosecution, to ensure a fair trial, it is clear from the judgment of Lord Keith, at page 152 letter H, that the interpretation placed on section 5(2)(f) of the Trinidad and Tobago Constitution also involved a consideration of section 5(2)(e). Section 5(2)(f) refers to the right of those accused of a criminal offence to a fair trial, whereas section 5(2)(e) refers to the right of a person to a fair hearing in accordance with the principles of fundamental justice. This would include of course the entire civil court process. The *Sookermany* decision however, though also a decision relating to a delayed criminal trial, was directly concerned with the provisions of section 5(2)(e).

As such, reliefs (1), (2) and (3) fail *in limine*. However, in the event that I am wrong I propose to deal with counsel’s contention with respect to relief (1), that the applicants’ have been denied their right to property without due process. I

must also address their contentions that they have been discriminated against contrary to sections 4(b) and 4(d).

Whether Property Right Infringed

The applicants' complaint is that the failure to deliver the judgment within a reasonable time has deprived them of

- (a) their right of appeal which is a property right.
- (b) their monies spent in order to prosecute their appeal and which are not recoverable by reason of the fact that their appeal was not determined and they are now being called upon to re-argue their entire appeal at their cost which they can no longer afford, having spent substantial sums on the aborted appeal.

Mrs. Maharaj relied on the decision of the Court of Appeal in Civil Appeal No. 71 of 1987, **Patrice Kareem vs The Attorney General of Trinidad and Tobago**.

In that case, the question was whether the appellants' right to enjoyment of property were contravened when Abdul Kareem, the husband of the appellant was unlawfully killed while in police custody and while he was allegedly being restrained from escaping Davis J.A. found that

“ ‘property’ under [section] 4(a) of the Constitution means concrete as well as abstract rights of property or tangible as well as less tangible forms of property” (See page (26) of judgment.)

He added

“It cannot be doubted that a cause of action or a chose in action is a form of property that is to say, an abstract or intangible form of property. Thus on the evidence in this case, the deliberate concealment of the identity of the unnamed assailant by the police ... has effectively closed the door to these appellants pursuing their remedy under section 4 of the Compensation for Injuries Act Ch.

8:05 and in my view, amounts to a deprivation of the right to the enjoyment of property within the meaning of section 4(a) of the Constitution.”

While I agree entirely with the dictum of Davis J.A., by which I am in any event bound, I do not agree that there has been any deprivation of property in this case. The applicants’ argument on deprivation of property appears tied to their purported inability to meet the additional costs brought about by the necessity of having to re-hear the appeal. It appears also to be the argument that they have been deprived of moneys already paid to counsel in respect the previous hearing.

It is odd that the applicants’ complain that they have been deprived of their right of appeal when in fact they continue to pursue their appeal to the Judicial Committee after it was dismissed by the court of appeal for want of prosecution. The fact that they have come to some pro-bono arrangement with counsel on the application for conditional leave, demonstrates that their right of appeal is very much alive and the fault in this case may lie with the willingness (or unwillingness) of counsel to undertake pro-bono work, rather than with systemic delays.

Even more peculiarly, when the appeal came on for hearing on 6th April 1999, no point was taken before the court of appeal that by reason of the delay, the applicants’ case had been so prejudiced or so adversely affected by it as to render the appeal, meaningless. Rather, the complaint about delay turns on their inability to raise additional funds to pay their attorneys and was one of the reasons sought for an adjournment of the appeal. It is difficult for me to fathom why if the applicants have been deprived of their right of appeal, attorney would want to adjourn the appeal at all.

In my judgment in order to demonstrate a “deprivation” of property within the meaning of section 4(a), the applicants would have to show that any possibility

for pursuing the appeal had been totally and completely destroyed by reason solely of the delay in giving judgment. The inability to proceed because counsel cannot be paid, if in fact true, reflects no “deprivation” of the right of appeal of the kind contemplated by section 4(a) or found by Davis J.A. in the *Patrice Kareem* decision.

Sections 4 and 5 of the Constitution are directed at state action. The purported impecuniosity of the defendants in my judgment is entirely the cause of applicants’ predicament and as opposed to any ‘delay’ in the delivery of judgment by the court of appeal. Unless that impecuniosity is somehow shown to be entirely the fault of the state, there can be no liability arising under the constitution.

Properly analysed, the argument seems to be this: the applicants have already expended those funds which they had on the first hearing of the appeal, and cannot find the additional funds for the re-hearing. A logical extension of that, for the purposes of this case, must be that it is the appeal and the payment of fees in respect thereof, which led to the applicants’ financial circumstances. That has not been argued before me, but of itself, cannot be a basis for constitutional relief. The fact remains that their inability to source those funds is a direct result of their financial position which is in no way related to state action. In this regard the applicants would have been in no different a position had the court of appeal ordered a re-trial. There is no constitutional right to have these funds already spent on the appeal, paid by the state.

Nor can there be any culpability attributable to the court of appeal. As the evidence of Mr. Denny indicates, the court of appeal faced with the Board’s decision in *Pratt and Morgan* concerning delays in capital cases, gave priority to hearing those appeals. In doing so, it was no doubt mindful of public interest concerns, in particular the public interest that persons found guilty of capital offences should not escape lawful punishment. Further, since May 1995, the

court of appeal sitting in two divisions, had sought to expedite appeals by listing and hearing appeals at a rate of one per day.

More specifically after the reservation of judgment in the applicants' appeal, and until his sudden death, Gopeesingh J.A. had a quite full and busy schedule. This no doubt arose from the manner in which appeals were listed since May 1995. He sat for a total of one hundred and ninety-six days hearing a total of six hundred and twenty-five appeals, of which a total of five hundred and seventy-four were determined. Moreover, the delay was compounded by his untimely death and the circumstances which required Ibrahim J.A. to quite recuse himself.

Consequently, the circumstances of this case are unlike those in *Patrice Kareem* in which there was culpability on the part of the state in the death of the deceased. It is also distinguishable from the decision in *The Attorney General of Trinidad and Tobago vs Jorsingh* Civil Appeal No. 108 of 1985 where the delay in giving judgment spanned six and half years between reservation and delivery of judgment.

In my judgment there has been no deprivation of property in this case.

Sections 4(b) and (d)

The applicants also contend in relation to sections 4(b) and (d) that they have been denied equality before the law and equality of treatment from a public authority. They contend that they are similarly circumstanced to all appellants who had their appeals heard by the court of appeal during the material period. Mrs. Maharaj submitted that the basis for determining whether their rights were infringed is not that others were in the same position, but that there were others who had their appeals heard in the same way and had their judgments determined. The sole example given was of the second *Jorsingh* appeal, which was an appeal against the assessment of damages consequent on the first *Jorsingh* decision, and which

the applicants contend was argued before the court of appeal in May 1996 and judgment delivered on 6th April 1998.

Mrs. Maharaj added that, constitutionally, absolute equality is not required but rather, a fair opportunity to obtain an adjudication on the merits.

In my judgment, on the evidence alone, this contention must also fail .The applicants have not discharged the burden of showing that they have been denied equality of treatment or equality before the law. The sole example given is that of the second **Jorsingh** appeal and while in my judgment, one example of discrimination, provided it is sufficiently compelling, can be sufficient to prove a breach of sections 4(b) and (d), the facts and circumstances of that case, including the panel of judges hearing the appeal were entirely different.

Moreover, in order to prove discrimination under sections 4(b) and 4(d) it is not sufficient merely to show a different treatment. Discrimination per se does not offend sections 4(b) and 4(d). The applicants must show that such different treatment was actuated by some intentional or deliberate motivation for which there can be no legal justification. So basic a principle requires no authority to buttress it. The evidence in this regard does not even remotely approach this standard of proof.

Right to a fair hearing/procedural provisions

I turn now to reliefs (4) and (5).

Relief 4 seeks a declaration that the state through its judicial arm contravened the applicants' constitutional rights to such procedural provisions as are necessary for giving effect and protection to their rights under sections 4 and 5 of the constitution.

Relief 5 seeks a declaration that the applicants right to a fair hearing of the appeal in accordance with fundamental justice, has been contravened.

The applicants' complaints under these two provisions are effectively that their right to the protection of the law under section 4(b) has been infringed, since, section 5 does not stand on its own but merely particularises the rights already set out in section 4 of the Constitution.

With respect to the applicants right to a fair hearing, it was submitted that the principles of fundamental justice referred to in section 5(2)(e) were those which formed the common law of England at the time of commencement of the Constitution of Trinidad and Tobago and that these principles included the right to judgment and to have judgment rendered without unreasonable delay. A period of fourteen months (before the death of Gopeesingh J.A.) or twenty months (before notice of re-hearing was given) was a period of unreasonable delay in the circumstances of this case and also amounted to a deprivation of a fair hearing as no judgment was rendered. The period of unreasonableness, it was submitted, must be considered with regard to the following factors

- (1) the complexity of the appeal
- (2) the conduct of the appellants
- (3) the conduct of the relevant authorities
- (4) the length of the delay.

Mrs. Maharaj in this latter submission relied on judgment of Davis J.A. in **The Attorney General of Trinidad and Tobago vs Jorsingh** (supra) and a number of decisions from the European Court of Human Rights. I have already stated that the **Jorsingh** decision is distinguishable. As to the decisions of the European Court of Human Rights, I think it sufficient only to refer to dictum of Lord Diplock in **Ong Ah Chaun vs Public Prosecutor** 1980 3 W.L.R. 855 at 864 D where he warned against using inappropriate constitutional provisions to assist in the interpretation of the Malaysian constitution. In my judgment, the approach of

the European Court of Human Rights is to be viewed with caution since it is dealing with countries with far greater resources than Trinidad and Tobago and which are much more developed, and its judgments will reflect the standards and expectations of those societies.

In the context of Trinidad and Tobago and its resources, the period of time taken to deal with the applicants' appeal was not unreasonable. As the evidence of Mr. Denny shows, it is not out of keeping with what ordinarily obtains in Trinidad and Tobago. I am guided by the judgment of the Privy Council in *Mungroo vs R* 1991 1 W.L.R. 1351 at 1355 B that "*in determining whether the constitutional rights of an individual have been infringed, the courts must have regard to the constraints imposed by harsh economic reality and local conditions*".

As paragraph 15 of the affidavit of Mr. Denny indicates, the court of appeal has had to deal with a considerable number of appeals and since May 1995 appeals have been proceeding at a rate of one per day.

Further, Gopeesingh J.A. was himself involved in a considerable number of appeals which were occupying his full attention.

The fact remains that the resources available to deal with the number of appeals are such that in the context of Trinidad and Tobago delay is inevitable. It is not to say that delay is to be accepted and the continued efforts of the court of appeal to deal with the backlog and delays are well documented by the Chief Justice in his several addresses at the opening of the law term and are well known.

Nor is it, in my judgment, a sufficient basis to rely simply on the fact of delay to prove a breach of the applicants' right to a fair hearing. The applicants must demonstrate that the delay has so prejudiced or so adversely affected their appeal that it is not possible for the court of appeal to afford them a fair hearing. This must necessarily mean a deterioration in the quality of the evidence upon which

the decision is to be made. No such contention has been made before me, nor has the applicant demonstrated any prejudice.

I find that there has been no breach of the applicants' right to a fair hearing.

I turn now to section 5(2)(h).

Mrs. Maharaj submitted that due process of law includes the hearing and determination of the cause of action which in turn include the delivery of judgment. This was a procedural provision to be followed in order to give effect to the applicants' right to a fair hearing and to the processes of fundamental justice. She relied on the case of **The Attorney General of Trinidad and Tobago vs Ramnarine Jorsingh** (supra). The issue in that appeal was whether the applicants' rights under section 4(a), (b), (e) and (h) of the Constitution were violated by reason of a delay of six and half years in delivering judgment in industrial dispute before the Industrial Court in which the applicant was an interested party. Davis J.A. in delivering the judgment of the court of appeal had to consider the purport and intention of section 5(2)(h) of the Constitution and stated at page 11

“This section recognised that there exists in Trinidad and Tobago as part of its laws procedural provisions of the kind therein described and that citizens have a right to the enjoyment of these procedural provisions or a right to insist upon those procedural provisions being observed in order to give effect and protection to their fundamental rights enshrined in section 4 of the Constitution.”

He adds

“Can the delivery of judgment by a court of law be considered a procedural provision? It seems to me to be the ultimate

procedural provision. Ultimately there can be no justice without the delivery of judgment.”

Section 5(2)(h) was also considered by the Judicial Committee of the Privy Council in case of **The Attorney General of Trinidad and Tobago vs Whiteman** 1991 2 A.C. 240. That was a case in which the Board had to consider whether a citizen, when detained by police, had the right to not only to communicate with a legal advisor but also the right to be informed of that right. Lord Keith delivering judgment for the Board commented as follows, at page 247 F to 248 A

“In this case, the right conferred by section 5(2)(c)(11) upon a person who has been arrested and detained, namely the right to communicate with a legal adviser is capable in some situations of being of little value if the person is not informed of the right. Many persons might be quite ignorant that they had this constitutional right or, if they did know, might in the circumstances of their arrest be too confused to bring it to mind. Section 5(2)(h) is properly to be regarded as intended to deal with that kind of situation as well as other kinds of situation where some different constitutional rights might otherwise be at risk of not being given effect and protection. There are no grounds for giving a restricted meaning to the words “procedural provisions”. A procedure is a way of going about things and a provision is something which lays down what the way is to be. Given that there are some situations where the right to communicate with a legal adviser will not be effective if no provision exists for some procedure to be followed with a view to dealing with these situations, there is a clear necessity that such provision should be made so section 5(2)(h) gives a right to such provision. Their Lordships further consider that by necessary implication, there is a right to have the procedure followed through. A procedure which exists only on

paper, and is not put into practice, does not have practical protection.”

I understand the Board’s decision in *Whiteman* to be this

- (1) Section 5(2)(h) is intended to address situations where some other constitutional rights may be at risk of not being given effect and protection.
- (2) Where constitutional rights will not be effective if no provision exists for some procedure to be followed with a view to dealing with them, then there is a clear necessity that provision for such a procedure should be made. Section 5(2)(h) gives a right to such provision.
- (3) By necessary implication, the right to such provision includes the right to have the procedure followed through, since a provision which exists only on paper and is not put into practice does not have practical protection.

As the dictum of Lord Keith indicates, section 5(2)(h) is an aid to the fundamental rights set out in sections 4 and 5. It is part of “the protection of the law” encompassed in 4(b).

The applicants contend that they are entitled by the Constitution to a judicial machinery which can properly and effectively protect their rights and that the state has a constitutional duty to put into place procedural provisions as would be necessary to protect their right to have judgment in their appeal determined.

I understand Mrs. Maharaj’s argument to be this; it is the duty of the state to provide the machinery which will make the entire process far more speedy and efficient. If the system is itself the problem then it ought to be remedied. A failure to provide the remedy would render the state itself liable. The Constitution guarantees a right to a procedure which gives effect to the citizen’s fundamental

rights. A failure to provide a proper and effective procedure is a breach of section 5(2)(h).

But the Constitution itself does not provide for a speedy process but for a fair one. As such, any ineffectiveness in the procedure to give effect to that right must be that it fails to permit a fair hearing.

The issue of speed and efficiency is rooted in matters of public policy and public interest and, while it is of extreme importance to our democracy is thus a matter to be addressed otherwise than by constitutional relief.

The question is whether there is a procedure which gives effect to the applicants right to a fair hearing having regard to the death of Gopeesingh J.A. and the necessity for Ibrahim J.A. to recuse himself.

It seems to me the answer is, as Mr. Martineau submitted, that there is. That procedure is the re-hearing of the appeal. It is unfortunate that the applicants will be required to incur additional costs but there is no duty on the state to provide for the applicants costs in those circumstances, moreso because there is no culpability to be ascribed to it. The answer to that may lie in social legislation. That is a political rather than legal issue. To the extent that the delay may have affected the quality of the applicants' appeal then it is a point to be raised in the appeal itself before the court of appeal or the Judicial Committee of the Privy Council.

This approach is consistent with the decisions of the Privy Council in *Tokai* and *Nankissoon Boodram vs The Attorney General of Trinidad and Tobago* 1995 47 W.I.R. 459 and the decision of the court of appeal in *Sookermany*. It is also consistent with the decision in *Rex Goose vs Wilson Sandford and Co* The Times Law Reports, 17th February 1998, which was referred to me by Mrs. Maharaj.

I find that there is a procedure for dealing with the appellants appeal in the circumstances of this case and that procedure is effective for protecting and giving effect to the applicants' rights under sections 4 and 5.

In the result, there has been no breach of the applicants right to the protection of the law. The applicants have thus failed to demonstrate any breach of their rights. The notice of motion is dismissed. I will make no order as to costs.

Dated this 16th day of August 1999.

Nolan Breaux
Judge