

TRINIDAD AND TOBAGO

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

HCA No. S 1070 of 2005

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
TRINIDAD AND TOBAGO ENACTED AS THE SCHEDULE TO THE
CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO
ACT, CH. 1:01**

AND

**IN THE MATTER OF ORDER 55 OF THE ORDERS AND RULES OF
THE SUPREME COURT OF JUDICATURE, 1975**

AND

**IN THE MATTER OF A BILL ENTITLED “THE JUDICIAL REVIEW
(AMENDMENT) BILL, 2005” WHICH WAS INTRODUCED IN THE
SENATE OF THE REPUBLIC OF TRINIDAD AND TOBAGO AT THE
SECOND SITTING, THIRD SESSION, EIGHT PARLIAMENT ON
THE 17TH DAY OF MAY, 2005**

AND

**IN THE MATTER OF AN APPLICATION FOR REDRESS BY THE
TRINIDAD AND TOBAGO CIVIL RIGHTS ASSOCIATION AND
RAJH BASDEO PURSUANT TO SECTION 14 THE CONSTITUTION
FOR THREATENED CONTRAVENTION AND/OR
CONTRAVENTION OF SECTIONS 4 AND 5 OF THE
CONSTITUTION IN RELATION TO BOTH OF THEM**

AND

**IN THE MATTER OF THE DECISION AND/OR ACTION OF THE
CABINET OF THE REPUBLIC OF TRINIDAD AND TOBAGO TO
AMEND THE JUDICIAL REVIEW ACT, 2000 BY INTER ALIA
REPEALING SECTIONS 5(2)(B) AND 7 THEREOF IN
CONTRAVENTION OF SECTIONS 4 AND 5 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF THE DECISION AND/OR ACTION OF THE
CABINET OF THE REPUBLIC OF TRINIDAD AND TOBAGO TO
INTRODUCE THE JUDICIAL REVIEW (AMENDMENT) BILL, 2005
IN THE PARLIAMENT FOR THE PURPOSE OF IT BEING PASSED
INTO LAW BY A SIMPLE MAJORITY OF EACH HOUSE THEREOF**

AND

**IN THE MATTER OF THE CONTRAVENTION AND/OR
THREATENED CONTRAVENTION OF SECTION 54(1) AND 54(2)
OF THE CONSTITUTION IN THE EMPLOYMENT OF THE
LEGISLATIVE PROCESS FOR THE PASSAGE OF THE JUDICIAL
REVIEW (AMENDMENT) BILL, 2005**

AND

**IN THE MATTER OF THE INTENDED INTERFERENCE WITH THE
SUPERVISORY JURISDICTION OF THE SUPREME COURT AS “A
SUPREME COURT” BY THE INTENDED ALTERATION OF
SECTIONS 99 AND/OR 100 OF THE CONSTITUTION**

BETWEEN

**THE TRINIDAD AND TOBAGO CIVIL RIGHTS ASSOCIATION
RAJH BASDEO**

Applicants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

Before The Hon. Madam Justice C. Gobin

Appearances:

**Mr. Ramesh Lawrence Maharaj SC with Mr. Ravi Rajcoomar
and Mr. R. Harnanan and Mr. Allahar instructed
by Ms. V. Maharaj for the Applicants**

**Mr. Russell Martineau SC with Ms. K. Boodhan led by instructed
by Ms. N. Ali for the Respondent**

JUDGMENT

Background

1. The Judicial Act No. 60 of 2000 hereinafter called “the Act” provides for applications to the High Court for Judicial Review and for related matters.

2. In particular S 5 (2) provides as follows:

“The Court may, on an application for judicial review, grant relief in accordance with this Act –

(a) to a person whose interests are adversely affected by a decision; or

(b) “to a person or a group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case”

3. The Judicial Review (Amendment) Bill 2005 hereinafter called “the Bill” was introduced by the executive in Parliament sometime shortly before the instant application was filed. On the face of it the Bill did not declare that it was inconsistent with Sections 4 and 5 of the Constitution. Its aim was to limit the categories of persons who may apply for Judicial Review by repealing Section (5) 2 (b) above. This is the section which gives the Court jurisdiction to deal with public interest litigation. The applicants are an incorporated body and an individual respectively who have the past (in the case of the first applicant) and who in the future intend to promote the public interest by bringing public interest litigation.

4. The Bill was read for the first time and placed on the Order Paper for sittings in the Senate. It is not in dispute that it formed part of the legislative agenda of the executive at the time when hearing of this matter commenced before me in July 2005. Indeed it remained so until 27th July 2005 when hearing of the matter continued and was eventually adjourned over the long vacation to 15th September 2005.

5. In the intervening period, before resumption of the hearing, Parliament was prorogued by proclamation contained in Legal Notice No. 219 of 7th September 2005.

The effect of Prorogation

6. The effect of prorogation according to May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (19th Edn) @ p. 260 is –

“At once to suspend all business until Parliament shall be summoned again. Not only are the sittings of Parliament at an end, but all proceedings are quashed, except impeachment by the Commons and appeals before the House of Lords. Every bill must therefore be renewed after a prorogation, as if it were introduced for the first time”.

Mr. Martineau for the Respondent submitted that as a result of this intervening event there was no longer any reason for the Court to hear this application. The Bill was no longer before Parliament. The issues raised were now rendered purely academic.

7. Counsel relied on the following passage from the dicta of Lord Slynn in the case of **R v Secretary of State for the Home Department ex parte Salem (1999) 1 A.C 450**

“The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

8. I have considered the dicta and find support in Lord Slynn’s statement for my decision to continue to hear and determine the application.

9. This is a public law matter in which there has been no dispute of fact. When the Court invited the Respondent to indicate what its position was with respect to the future of the Bill, Mr. Martineau took the view that the legislative agenda in terms of policy and timetable were matters purely for the government and not for the Court or for the applicant. Counsel felt that it was inappropriate for the Court to require such disclosure even if it were only for the purpose of informing a decision as to whether I should continue to hear the matter.

10. I am therefore left with no assurance from the Respondent that this matter is truly academic or theoretical as it would have been, if the executive were no longer pursuing the policy of the Bill. I cannot therefore satisfy myself that this issue will not need to be resolved in the near future. The turn of events may have rendered the issues hypothetical for the time being but not purely academic. The distinction is explained in **De Smith, Woolf and Jowell, Judicial Review of Administrative Action 5th Edn p. 812-813** in this way:

“a hypothetical question is a question which needs to be answered for a real practical purpose although there may not be an immediate situation on which the decision will have a practical effect.....

An academic question is one which need not be answered for any visible practical purpose, although an answer would satisfy academic curiosity.”

11. The issues raised in the litigation are of great public importance. Questions are raised as to the separation of powers, the rule of law, interference with the supervisory jurisdiction of the Courts and access to the Courts by individuals. This seems an appropriate case for me to consider the issues raised and to grant such advisory opinions or declarations as are justified.

The effect of the Bill

12. It is convenient here to deal with the general effect of the Bill. The explanatory note clearly indicated what the Respondent set out to achieve. It was expressed in the following terms:

“The purpose of this Bill is to limit the categories of persons who may apply to the High Court for relief respecting a decision of an inferior court, tribunal, public body, public authority or person acting in the exercise of a public duty or function in accordance with any law.

The Bill seeks to accomplish its purpose by repealing the provision permitting persons to apply for judicial review under the Judicial Review Act, 2000 where the relief sought would be justifiable in the public interest and by making the consequential amendments.”

13. The Bill itself repealed Ss. 5 (1) and (2) of “the Act” and substituted a new formulation of S. 5 (1) to provide as follows:

“(2) The Court may, on application for judicial review, grant relief in accordance with this Act to a person whose interests are adversely affected by a decision.”

14. Simply put, its aim was to remove the jurisdiction of the High Court to consider judicial review applications where such are brought by litigants acting in the public interest.

Prematurity

15. It must be remembered that when this matter commenced, the Bill was making its way through the legislative process. It had not been enacted. Mr. Martineau raised the issue of prematurity. He relied on the cases of

Methodist Church in the Caribbean and the Americas vs (2000) 59 WIR
1, Rediffusion (Hong Kong) Ltd v AG of Hong Kong 1970 AC 1136 and
Cormack v Cope 1974 13 CLR.

16. From these cases and especially the instructive passages cited by both sides in their submissions I have extracted the following principles which are summarized in the judgment of Lord Nicholls of Birkenhead in the “Methodist” case:-

- (i) The Court does have jurisdiction to consider a claim that a Bill if enacted would contravene the Constitution. This jurisdiction should be exercised sparingly.
- (ii) So far as is possible the Court should avoid interfering with the legislative process, the proper time to intervene is after the completion of the law making progress.
- (iii) In exceptional cases where it is necessary to intervene to provide the protection which it must under the Constitution, the Court may be required to intervene before enactment. An example of a case where exceptional circumstances are made out is where the consequences of an offending provision are immediate and irreversible and give rise to substantial damage or prejudice.

17. The question then was whether this was an exceptional case. This aspect of the matter is now truly academic since “the Bill” is no longer before Parliament, but having decided to continue to hear the case I see no reason not to indicate my findings.

Was this an exceptional case?

18. On this issue Mr. Martineau urged (using the phraseology from the “Methodist” case) that the consequences of the proposed amendments effected by the Bill were not irreversible and did not give rise to substantial damage or prejudice.

19. Counsel went further to speculate that if this Bill were to be enacted and then challenged in the normal course of things, the Applicants, if successful, could have their rights restored without any serious damage or prejudice. Once their rights were so restored, Counsel continued, if the applicants then wished to challenge decisions made during the period when they were debarred from so doing, no Court would refuse to extend the time for filing leave applications, He concluded that the applicants had not made out that this was an exceptional case. Counsel illustrated his example of a case where damage would be irreversible or which would give rise to substantial damage or prejudice as that involving a decision to carry out the execution of a prisoner.

20. The circumstances which give rise to the establishment of “an exceptional case” are clearly not confined to those where damage would be irreversible. Short of the extreme example cited by Mr. Martineau, however, it is not too difficult to envisage many scenarios where a decision by the executive, if left unchallenged by the public interest litigant could result in

immediate prejudice. Decisions of the executive which immediately put the public at serious risk in terms of health and safety and even inconvenience come to mind. It must be remembered that the beneficiary of public interest litigation is not the person who takes the trouble to challenge the decision. It is by definition, the public.

21. The enactment of “the Bill” would have denied the public interest litigant standing to challenge decisions such as these. Even if such access might have been restored eventually after a successful challenge, it is arguable the public could have been exposed to substantial damage and prejudice in the meantime. Had the issue remained live, I would have been inclined to the view that there was reason enough to hold this to be an exceptional case. Access to the Court to address public wrongs is an important safeguard for the protection of the citizenry. It goes without saying that denial of that access even for a limited time exposes the public to risk.

22. But I have found that there was a more compelling reason for intervention by the Court in this case. This was a Bill, the effect of which was plainly to interfere with the power that is vested under the Constitution in the Judiciary. That in itself in my view was sufficient to make it an exceptional case. It raised the issue of the legality of a policy of the Government which, if carried out, was capable of undermining the rule of law and the separation of powers. In these circumstances it would seem to me the Court would have

been abdicating its Constitutional responsibility if it did not seek to intervene even at the pre-enactment stage. The protection of the law intended to be afforded by the Constitution would not have been provided otherwise.

23. In a further attempt to persuade me that I should refrain from intervening at this stage, relying on the decision in **Attorney General v McLeod 1984 32 WIR**, Mr. Martineau urged that so long as the applicants herein would have access to a Court (as no doubt they would have had), to obtain a declaration as to the invalidity of the Bill if enacted, then there could be no claim of breach of protection of the law.

24. I have previously agreed that in the context of a person seeking to challenge the validity of legislation this may indeed be so. But this is not a rigid rule. The instant case was not simply one where the validity of legislation was in issue, it concerned the legality of executive policy albeit contained in a bill. The protection of the law to which the applicants have availed themselves is access to the Court for a determination as to the legality of that policy.

Effect of Prorogation on the argument of prematurity

25. In his submissions Mr. Maharaj for the applicants had been careful to maintain that his challenge was not against the legislature. Rather, he emphasized, it was at all times against the executive for taking steps to engage

the legislative process. While “the Bill” was “alive” there may have been some force to Mr. Martineau’s argument that the introduction of “the Bill” and the steps that had been taken by the executive, (the first reading, the placing on the Order Paper, preparation for the second reading) were so integral to the legislative process, that the reliefs which were being sought were, in substance, reliefs against the legislature.

26. The effect of the prorogation however, was to return the policy contained in the Bill squarely to the domain of the executive. The attempt to clothe the government’s policy into legislation had now been stalled, it was now nakedly a matter for the executive. I may say here that even if the Bill had remained subject to the legislative processes, in the circumstances of this case and in the words of Lord Nicholls in the “Methodist case”, I would have found it an occasion when “parliamentary privilege had to yield to the Court’s duty to give the Constitution the primacy which it is due”.

Can the Court intervene in matters of executive policy?

27. Neither side has suggested that the Court has no jurisdiction to intervene. The Learned authors of the 5th Edition text Judicial Review of Administrative Action identify the role of the Courts and the limits in the following passages (p. 18 1-032).

“In articulating the standards of proper administrative practice in the way we have described, the courts have a clearly defined and authoritative role. It is for them to adjudicate both upon the scope of a power and the manner of its exercise. This role may be confidently

assumed by the courts. It is also a constitutional role under the democratic principle of the separation of powers. Courts like other institutions, including Parliament, are subject to institutional constraints and must take care not to trespass upon the decision-making functions best suited to other branches of government.

Courts should, however, avoid interfering with the exercise of official discretion when its aim is to pursuit of policy. Courts are not institutionally suited to engage in the task of weighing utilitarian calculations of social, economic or political preference. These tasks are best suited to institutions in the political arena. *Nevertheless, despite the important limitation on their capacity, courts are able, and indeed obliged, to require the observance of those principles that govern lawful public decision-making. In so doing they seek to reinforce representative government, not to oppose it – and to promote, not to undermine, the inherent features of a democracy.*”

28. What was being challenged here was the legality of the policy that was embodied in “the Bill”. Questions had been raised as to the impact of the policy on fundamental rights, the separation of powers and the rule of law. In confronting the issue of the legality of the policy, the Court is not entering the political arena, it is fulfilling its obligations under the Constitution to promote the separation of powers and the rule of law.

The core issues

29. I turn now to what appeared to me to be the core issues in the case. I have for convenience formulated the following two questions:

- (1) Does the attempt by the Government to promote legislation, the aim of which is to remove part of the supervisory jurisdiction of the Supreme Court, offend against the doctrine of the separation of powers?

- (2) Does the removal of access to the Court by the “public interest” litigant breach a right protected by S (5) of the Constitution?

They are not so distinct as they may first seem. In many respects they are two sides of the same issue. The natural consequence of removal of the jurisdiction of a Court is denial of access to those to whom it was previously available. Similarly the corollary of denial of access is in effect removal of jurisdiction when it existed before. It is therefore unavoidable that there would be some overlapping in considering the answers.

The First question

Does the attempt by the Government to promote legislation, the aim of which is to remove part of the supervisory jurisdiction of the Supreme Court, offend against the doctrine of the separation of powers?

30. This litigation arose because of what the applicant contended was an attempt by the executive to remove part of the supervisory jurisdiction of the Supreme Court. The aim of the Bill was express.

31. In his submissions Mr. Martineau accepted the proposition that the doctrine of the separation of powers applies to our Constitution. He accepted the authorities cited by Mr. Maharaj which underline the importance of the doctrine including **Hinds & Ors v The Queen 1975 24 WIR 326, DPP v Mollison 2003 1 LRC 756, Brown v The Queen 1999 3 LRC 440,**

Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett PCA No.41 of 2004.

32. In DPP v Mollison (2003) 1 LRC 756, Lord Bingham refers to the decision in Hinds & Ors. V The Queen 1975 24 WIR 326 and I quote

“In his exposition of the principles underlying what he called ‘the Westminster model’ of Constitution, Lord Diplock referred ([1976] 1 All ER 353 at 359) to the basic concept of separation of legislative, executive and judicial power’ and observed:

“It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.”

He went on to observe (at 360):

‘What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: Liyanage v The Queen [1966] 1 All ER 650 at 658, [1967] 1 AC 259 @ 287-288.’

In accepting the argument of Counsel for the appellant in “Mollison” his Lordship concluded:

“In the opinion of the Board, Mr. Fitzgerald has made good his challenge to S 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary not the executive.”

No more needs to be said on the doctrine, save that adherence to it is fundamental to the rule of law.

33. While Mr. Martineau accepted the principle of the separation of powers enunciated and reinforced by the authorities cited above, he sought to distinguish the cases from this one on the facts. He argued that in the instant case, the Court's jurisdiction to entertain public interest litigation was being removed simpliciter. It was not being transferred to a Court or body comprised of persons who do not enjoy the security of tenure of members of the judiciary which guarantees the independence and insulation of the members of the Judiciary under the Constitution nor was the jurisdiction being transferred to the executive.

34. I am unable to accept that there is any difference. In both cases the assault on the doctrine of the separation of powers is perpetrated by interference by the executive with the jurisdiction of the Court through acts of trespass upon areas reserved exclusively unto the judiciary.

35. In "Hinds" Lord Diplock's analysis and conclusions as to the effect of the relevant provisions in the Jamaican legislation (p. 337 B to 338 F) further demonstrate why Mr. Martineau's argument in this regard was untenable and why I have accepted those of Counsel for the applicants. The relevant

sections of our laws mirror the provisions of the Jamaican statutes which Lord Diplock considered in that case. I have applied the reasoning in “Hinds” to this case and hold as follows (and here I must state that I am nearly adopting verbatim, and very humbly so, the words of Lord Diplock, while substituting the relevant sections of our laws).

The decision in “Hinds” applied

36. Section 99 of the Constitution supported by S 8 (1) of the Trinidad and Tobago (Constitution) Order in Council was meant to preserve in Trinidad a Supreme Court exercising the jurisdiction characteristic of such a Court. The provision is made an entrenched provision by S 15 of the Order in Council.

37. The characteristics of a Supreme Court so preserved by the Constitution are:

- (a) Unlimited original jurisdiction in all substantial Civil cases;
- (b) Unlimited original jurisdiction in all serious criminal offences;
- (c) Supervisory jurisdiction over the proceedings of inferior courts and public bodies.

38. The express aim of “the Bill” was to remove the jurisdiction of the Court in public interest litigation. This is a part of the supervisory jurisdiction of the Supreme Court. If as Mr. Martineau contended, Parliament can by an

ordinary law remove a significant part or any part of its supervisory jurisdiction, the result would be that what is left would be an institution without all of the characteristics of the “Supreme Court” which was intended by the framers of the Constitution to have been established. An important aspect of its character would have been lost.

39. I therefore hold that the executive cannot lawfully promote a policy which aims to remove even a limited part of the supervisory jurisdiction of the High Court. The objective of such a policy is to redefine the characteristics of the Supreme Court as contemplated by the Constitution.

40. Lord Diplock also determined that the effect of S 21 (1) of the Jamaica (Constitution) Order in Council made S. 97 of the Jamaican Constitution, an entrenched provision. This affirms that the establishment of the Supreme Court by S 99 of our Constitution is entrenched by S 15 of the Trinidad (Constitution) Order in Council. It follows then that any Bill, the purpose of which was to change the jurisdiction of the Supreme Court (whether it says so expressly or not) must meet the procedural requirements prescribed by Section 13 of the Constitution. The question as to whether a bill is required to be passed by a special majority is not to be answered by looking to the form. It must always be a matter of substance. Were it otherwise a government with a bare majority (if it were so inclined) would be able to remove entrenched

fundamental rights and freedoms, guaranteed by the Constitution by manipulating legislative draftsmen.

The Second Question

Does the removal of access to the Court by the “Public Interest” litigant breach a right protected by S (5) of the Constitution?

41. The Respondent argued that Parliament was permitted by a simple majority to remove the jurisdiction of the Court to deal with Public Interest litigation because the right to bring public interest litigation was not part of the protection of the law.

42. Further, Counsel submitted that what was being sought to be removed by “the Bill” was a limited aspect of the Judicial Review in Public Interest Litigation jurisdiction. This, in any case, he contended did not amount to a breach of a fundamental right either to unimpeded access to the Court or to protection of the law because Public Interest Litigation was introduced by “the Act” in 2000. It did not exist before then.

Did Public Interest Litigation predate “the Act”?

43. Mr. Maharaj contended that “the Act” did not introduce any new. It simply codified the common law as it stood at the date of the enactment, and

that included the common law jurisdiction to deal with public interest litigation.

45. The term “public interest litigation” is not a term of art. It simply refers to that body of cases in which in the judgment of the Courts for more than one hundred and fifty years, strangers or persons who cannot in any sense be said to be personally aggrieved by a particular decision have been allowed to bring public wrongs to the attention of the Court.

46. In his Appendix I to his submissions filed on 3rd October 2005 Mr. Maharaj cited several passages from cases dating back to 1870 which showed that “public interest litigation” was entertained by the courts for well over a century. The Courts, recognizing the role of the public interest litigant in preserving the rule of law, developed an approach to the issue of standing (subject to certain strictures and safeguards to exclude busybodies and those with ill motive), to permit the public interest litigant to challenge decisions or policies or to bring matters to the attention of the Courts.

47. In **R v Justices of Surrey (1870) LR 5 QB 466** the Court decided that a party not aggrieved by a decision, but who had come forward as a member of the general public, could be entitled to relief. In **R v Thames Magistrates’ Court ex parte Greenbarn 1975 55 LGR 129** Lord Parker acknowledge that a stranger may apply for relief and when he did the remedy was a matter for

the discretion of the Court. In **R v Bull & Another ex parte Brooke 1922 TLR 537 – 539** the Court reiterated that a stranger was entitled to seek relief and that was a matter for the discretion of the Court.

48. The above and the several other cases referred to in Mr. Maharaj's appendix to his submissions of October 3rd 2005 establish that "public interest litigation" predates both our 1962 and our 1976 Constitutions.

49. The judges at common law conceived the test of standing. They developed and liberalised it over the years. They lowered the threshold in public interest cases to accommodate and encourage the public interest litigant. Public interest litigation has developed and is recognized as "a greatly valued dimension of the Judicial Review Jurisdiction."

50. In promoting "the Bill", what the executive was clearly attempting to do was to remove from the consideration and determination of the judiciary, this issue of standing in "public interest" litigation. Had the policy been carried out, (and here again I adopt the words of Lord Diplock in "Hinds" with some modification) "the public interest litigant whose access to the High Court has been recognized as part of the protection of the law, would be deprived of the safeguard which the makers of the Constitution regarded as necessary, of having important questions affecting the public interest considered and determined by a Court".

51. Mr. Maharaj further submitted and I agree with him that the applicants right to protection of the law would also be breached when the result is viewed from another perspective. Prior to the commencement of the Constitution, a private citizen had a legal right to access the Courts to bring public interest litigation and to have the issue of standing determined by the Court. The question then is what became of that right after the Constitution came into force.

52. The answer is to be found in the judgment of Lord Diplock in **Thornhill v AG 1979 31 WIR 984** wherein he stated as follows:

“In contrast to Section 2, Section 1 as has already been pointed out, deals not only with rights and freedoms that prior to the commencement of the Constitution had been enjoyed by the private citizen de jure as a matter of legal rights, but also with those that he had enjoyed de facto only as a result of a settled policy of abstention from interference by the executive or a settled practice as to the way an administrative or judicial discretion had been exercised. In respect of rights and freedom in this category what Section 1 does by declaring that they will continue to exist, is to convert them into rights and freedom which henceforth are to be enjoyed not simply defacto but also as a matter of legal right the contravention of which a legal remedy is provided by Section 6”.

53. The defacto right of the public interest litigant to access the Court and to have the matter of standing considered by a judge in his discretion or judgment was converted to a right protected by Section 4 of the Constitution.

I therefore hold that the removal of the access to a court by a public interest litigant is a breach of the right to protection of the law.

54. The passage from Lord Diplock's judgment above in my view also answers Mr. Martineau's submission that the right to access the Courts which is protected, is access limited to the enforcement of the individual's civil rights. Prior to the commencement of the Constitution as the old cases cited by Mr. Maharaj demonstrate, it was the individual who accessed the Court. While the ultimate beneficiary of the litigation was likely to be the public, the right of access which was converted and protected by Section (4) was the right of the individual..

55. The final submission of Mr. Martineau's which must be dealt with is one which proposed that if "the Bill" were to be enacted, the common law "sufficient interest test" would still apply, so that persons who were adversely affected by decisions would still have access to the Courts. I accept that there would no doubt be instances where there would be challengers with "sufficient interest" in matters generally affecting the public interest. But what is clear is that "strangers", the "pure" public interest litigants such as the applicants in this case would never satisfy that threshold if the proposed amendment had been allowed.

56. I consider that the role of the bona fide public interest litigant in a relatively young democracy such as ours is critical to the maintenance of the rule of law. This is more so at a time when for the most part the population is crippled and consumed by fear for personal safety, protection of family and property. When in this environment there are still to be found persons who are genuinely public-spirited who can emerge out of the state of paralysis to act with the intention to promote the rule of law, they ought to be encouraged. If they are shut out either on technicalities by judges or by overstepping of the executive, we may as well pave the road to tyranny. The public interest litigant is the watchdog that may yet prove to be more valuable to us as a society than the one that actually barks. In saying this, I wish to make it clear that there has been no suggestion of any improper motive on the part of the executive, for the policy in “the Bill”.

57. Mr. Maharaj has indicated that in the light of the prorogation of Parliament the only relief which he now pursues is the declaration at paragraph (a) of the Notice of June 14, 2005. I have expressed my opinion on the other aspects of the matter that may be hypothetical for the time being. The Court therefore declares as follows:

- (1) That the action of the Cabinet of Trinidad and Tobago to introduce the Judicial Review (Amendment) Bill 2005 in the Senate of the Parliament of the Republic of Trinidad and Tobago, and in taking action to engage the legislative process to present the said Bill in Parliament is unconstitutional in that it amounts to a contravention and/or threatened contravention of

the Applicant's right to protection of the law as guaranteed to them by Section 4 (b) and 5 (2) (h) of the Constitution.

58. The Respondent is ordered to pay the applicants costs fit for Senior Counsel and junior Counsel.

Dated this 7th day of November 2005

CAROL GOBIN

JUDGE