

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CvA. NO. 140 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 NO. 4 OF 1976) CH. 1:01 OF THE
REVISED LAWS OF TRINIDAD AND TOBAGO**

AND

**IN THE MATTER OF THE APPLICATION BY
FELIX AUGUSTUS DURITY, RETIRED SENIOR MAGISTRATE
OF TRINIDAD AND TOBAGO, A PERSON ALLEGING THAT
THE PROVISIONS OF SECTION 4 AND 5 OF THE SAID
CONSTITUTION AND IN PARTICULAR SECTION 4 (a) AND (b)
AND SECTION 5 (2) (e) AND 5 (h) HAVE BEEN AND ARE
BEING AND ARE LIKELY TO BE CONTRAVENED IN RELATION
TO HIM FOR REDRESS IN ACCORDANCE WITH SECTION 14
OF THE CONSTITUTION**

BETWEEN

FELIX AUGUSTUS DURITY

APPLICANT/APPELLANT

AND

**THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO**

DEFENDANT/RESPONDENT

CORAM:

**M. Warner, J.A.
R. Nelson, J.A.
W. Kangaloo, J.A.**

APPEARANCES:

***Mr. S. Marcus S.C. for the Appellant, with him Ms. J. Hudson-Phillip
and Mr. B. Charles***

Mr. R. Martineau S.C. for the Respondent, with him Ms. R. Thorab

DATE DELIVERED:

17th JANUARY, 2003

I have read the judgment of Warner J.A. and I agree with it.

***R. Nelson,
Justice of Appeal***

I too have read the judgment of Warner J.A. and agree with it.

***W. Kangaloo,
Justice of Appeal***

Delivered by Warner J.A.

JUDGMENT

1. On February 24th 1997, the appellant Felix Augustus Durity issued proceedings for constitutional relief under section 14(1) of the Constitution of Trinidad and Tobago. The appellant claimed that certain decisions of the Judicial and Legal Service Commission (the Commission) in relation to him were ultra vires and of no effect.

The decisions were –

- (a) the Commission's decision to suspend him from the office of senior magistrate, and
- (b) its decision to enforce an award of costs made against him by this court in previous proceedings.

He claimed declarations that the Commission's decision contravened several provisions of the Constitution, that is to say -

the right to enjoyment of property, Section 4(a);

the right to protection of the law, Section 4(b);

the right to a fair hearing, Section 5(2)(e);

the right to procedural provisions for giving effect to the above rights, Section 5(2)(h);

and he also claimed damages.

2. The appellant's constitutional motion as well as a notice filed by the respondent came up for hearing before Sinanan J. The respondent in his

notice raised the following pleas; res judicata; abuse of process; limitation and delay. When the hearing began, it was agreed between the parties that a ruling be sought on these preliminary objections and if the substantive matter had to be argued, it would be continued before another court.

The first two pleas were determined by Sinanan J. in the appellant's favour. With regard to the third, and fourth pleas, the learned judge held that the appellant's cause of action arose in 1989, and accordingly the application was out of time; further, that the appellant was guilty of extreme and inordinate delay.

3. The appellant appealed the decision of Sinanan J. and by an order made on July 28th 1999, this court dismissed the appeal deciding only the limitation point, and gave its reasons on May 2nd 2000. By order of July 3rd 2000, the appellant was granted final leave to appeal to the Judicial Committee of the Privy Council. There was no appeal by the respondent against the judge's rulings on the first two pleas.

4. In relation to the limitation plea, the Privy Council held that the Public Authorities Protection Act Chap. 8:03 (now repealed) did not apply to constitutional proceedings. Their Lordships set aside the order of this court and remitted the matter to this court to continue the appeal in the light of their judgment. In the course of these present proceedings this court on October 9, 2002 granted the respondent leave to appeal against the judge's ruling that there was no abuse of process, pursuant to a notice

of application filed on July 28, 1999 but not heard prior to the earlier dismissal of this appeal.

This appeal therefore raises the following questions –

1. whether the maintenance of these proceedings constitutes an abuse of process because it concerns matters of fact and law directly related to the subject matter of the judicial review proceedings which were subsequently withdrawn (the respondent's cross-appeal).
2. whether the applicant is disentitled to relief on account of his undue and unexplained delay in instituting these proceedings (the appellant's appeal).

5. **Summary of Facts**

The primary facts are not in dispute. The circumstances which gave rise to the suspension and the present litigation are fully set out both in the judgment of Sinanan J. and in the judgment of the Privy Council. I propose to summarise the facts which are relevant to this appeal.

6. The appellant was appointed a magistrate in 1981 and a senior magistrate in 1986. On February 20th 1989, on the application of counsel, the appellant, then presiding in the Magistrates' Court, fixed bail in a larceny matter at \$25,000, by way of a cash deposit. Prior to the adjourned date of hearing, other counsel applied to a judge in chambers to

review that decision. The judge ordered that the order be varied to provide for bail with a surety, and he increased the sum to \$50,000. When the matter came up for hearing on the adjourned date of hearing before the appellant, counsel who appeared on February 20th, in the presence of counsel who appeared before the judge in chambers, informed the appellant that the application to the judge had been made without the authority of his client, and he applied to have the original order continued. The appellant continued the order of February 20th. The prosecution raised no objection.

7. By letter dated March 29th 1989, the Chief Magistrate, requested the appellant to comment on a publication which appeared in the Trinidad Guardian of March 21st under the headline ***“Magistrate reverses judge’s bail decision.”***

8. The appellant responded by providing a statement from counsel (the first), to the effect that he had not made any application on his client’s behalf for the variation of the first order and that it was he who had made the second application to restore the first order. By another letter of April 24th the appellant stated that he had acted ***‘judicially’*** and ***“in accordance with the authority vested in him as Inquiring Magistrate under the Preliminary Inquiry Act.”*** In this regard, I draw attention at the outset to Lord Nicholls’ observations that the appellant was exercising a ***“judicial function in good faith,”*** and further, that ***“a mistaken discharge of this function could not constitute the offence of***

'indiscipline' defined in regulation 84 of the Public Service

Commission Regulations." This regulation provides as follows –

"An officer who is alleged to be guilty of misconduct or who is alleged to be guilty of indiscipline by failing to comply with any regulation, order or directive for the time being in force in the Ministry of Department to which he is assigned, is liable to disciplinary proceedings in accordance with the procedure prescribed in these Regulations."

Lord Nicholls continued –

"a finding that Mr. Durity was guilty of 'misconduct' could hardly be made in this case without causing damage to the independence of the judiciary."

It therefore needs to be underscored that the Privy Council was questioning whether the disciplinary charge which was preferred against the appellant was cognizable.

9. To return to the narrative, by letter of August 10th 1989, the Commission wrote to the appellant informing him of their decision to suspend him from duty on full pay, on the following grounds –

- (a) that it had been reported to the Commission that he had reversed the judge's order, and
- (b) that it had similarly been reported, that he had remanded certain accused persons without their consent to dates beyond the statutory period (this further allegation was later withdrawn).

10. Regulation 88 of the Public Service Commission Regulations gives the Commission the power to suspend, if the Commission becomes aware of any indiscipline or misconduct, and the Commission were of the view that the public interest so requires. The Commission did not communicate any further with the appellant for the next two and a half years, another aspect of this case which the Privy Council has highlighted. In March 1992, the appellant's lawyers wrote to the Attorney General asking him to intervene, and at the same time forwarded a copy of the letter to the Chairman of the Commission.

11. On May 28th 1992, the Commission appointed a Master of the High Court to investigate the allegations of misconduct. The appellant gave his explanation promptly. On December 15th 1992 the Commission preferred a disciplinary charge against the appellant. It was alleged that he had conducted himself in such a manner as to bring the Judicial and Legal Service into disrepute contrary to his *'implied'* terms and conditions as a senior magistrate. The particulars of charge set out the incident already referred to where the appellant was alleged to have attempted without lawful authority to rescind the bail order of the judge in chambers. On February 18th 1993, the Commission appointed a judge of the High Court to hear the evidence and find the facts.

12. On March 16th 1993, the appellant sought leave of the High Court to apply for judicial review of the Commission's decision to prefer the charge and to appoint a Tribunal to hear the charge. Leave was refused.

He renewed his application before this court but he was not successful. His application at that hearing to amend his challenge to include the decision to suspend him also failed. He filed an application for special leave to appeal to the Privy Council, but he discontinued those proceedings in September 1995, when negotiations began between the parties to settle the dispute.

13. **Negotiations**

Copies of thirteen letters which passed between the appellant's, and the respondent's lawyers, were exhibited to the appellant's affidavit. The first letter exhibited was dated 6th October 1995.

14. I have gleaned from the extract of this letter that the initiative to negotiate came from ***"the other side."*** I make this observation because the appellant's attorney wrote –

"As the papers were in the process of being sent to London you spoke with us on or about 18th September, 1995 about the possibility of resolving this matter. We have spoken to our client and he has asked us to put forward these proposals for your consideration –

- (1) The withdrawal of the disciplinary charge against him and the revocation of his letter of suspension.***
- (2) That he be reinstated immediately.***
- (3) That he be paid reasonable compensation for the injury to his reputation, his anxieties, distress and inconvenience.***
- (4) The payment to him of his reasonable legal costs incurred to date and a waiver of the orders for costs made against him in these proceedings."***
(Emphasis mine)

15. It is to be noted that in this letter the appellant's lawyers claimed on the appellant's behalf, inter alia, ***“reasonable compensation for injury to his reputation, his anxieties, distress and inconvenience.”*** In a letter dated July 24th 1996, his legal representatives who were then, not the same as those who originally represented him wrote –

“Our client feels strongly that his constitutional rights have been breached and that he should be compensated for the damage he suffered especially to his reputation, by his suspension.”

16. These letters in my view indicate that although the appellant was at some stage willing to arrive at some compromise, he adopted a different stance when matters relating to costs were not resolved.

17. In May 1996 the appellant took early retirement with effect from 1st April 1997 and was granted leave to take up employment. The suspension order was formally lifted with effect from 1st May 1996 and the disciplinary proceedings were discontinued. Those, then, are the salient facts.

18. **The respondent's cross-appeal - abuse of process**

It is convenient to consider the respondent's appeal, first. Sinanan J. based his decision that there had been no abuse of process on the broad principle that an application for judicial review gave rise to a ***‘different cause of action from an action on a constitutional motion.’***

19. Mr. Martineau relied in the main on written submissions filed in the court below. The crux of counsel's argument was simply that it was an abuse of the process of the court to raise in subsequent proceedings, matters which should have been litigated in earlier proceedings. Further, that nothing prevented the appellant from bringing proceedings for constitutional relief in respect of his prolonged suspension. He contended that, if indeed, there was an abuse of power, the remedy was judicial review as there is no constitutional right "***not to have power abused.***"

20. Mr. Marcus has referred us to certain statements of principle enunciated in several authorities including ***Barrow v Bankside Members Agency [1996] 1 All E.R. 981*** and ***Johnson v Gore Wood and Co. (a firm) [2000] 1 All E.R. 481.***

21. I propose now to review some of the principles which I consider to be important to this case.

22. **The purpose of the rule**

In the **Barrow** case (cited above) at page 1983, Sir Thomas Bingham MR, as he then was, observed that the rule was a rule of public policy –

“based on the desirability in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.”

23. I pause here to state that the filing of one suit to obtain both constitutional relief and remedies by way of judicial review is cumbersome. Different procedural rules apply but there is no bar to raising constitutional issues in judicial review proceedings. Mr. Martineau has submitted that nothing prevented the appellant from seeking constitutional redress immediately upon his suspension, by filing separate proceedings. This issue will be addressed when I consider the issue of delay.

24. **Unjust harassment**

In **Johnson v Gore Wood** Lord Bingham, former Master of the Rolls made the following pronouncement at page 499.

“There will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. it is in my view preferable to ask whether in all the circumstances a party’s conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”

25. Two important principles emerge - it is imperative to examine all the circumstances and genuine claims must not be stifled. The judicial review proceedings did not end in a determination of the constitutional issue on its merits, because leave was never granted to the appellant to pursue his claim. None of the cases cited is therefore directly in point.

26. It is of relevance in my view, to take into consideration that when the appellant first applied for leave to apply for judicial review, he also sought an order directing the Registrar of the Supreme Court to give notice to the Attorney General of Trinidad and Tobago that the provisions of Section 4 (a), (b), (c) and 5 (2) (e) and (h) of the Constitution of Trinidad and Tobago '**have been, and are being contravened in relation to him.**'

27. As events turned out, leave was not granted in the High Court nor upon a renewed application to the Court of Appeal. Those proceedings were concluded in the Court of Appeal on the 30th November 1994. In refusing leave to the appellant to rely on breaches of the Constitution, the court held that the grounds of his complaint never formed part of his original application.

28. Against that background, it may be reasonable to draw the inference that the applicant was from the inception always maintaining that his constitutional rights were infringed. The respondent was not therefore taken by surprise.

29. When therefore the appellant filed the instant proceeding, one may reasonably conclude that he did not do so as a result of decision to exploit a procedural technicality, nor was he putting forward a claim which he did not believe to be genuine. Certainly, in the absence of any limitation period and any determination on the merits, the constitutional issue remained alive.

30. **Conclusion**

In these premises, I do not consider that the maintenance of these proceedings constitutes an abuse of process. I would accordingly uphold the decision of Sinanan J. on this point and dismiss the respondent's appeal.

31. **Delay**

For convenience, the chronology of events is tabulated –

The First Phase

DATE	PARTICULARS
20/2/89	appellant fixed bail
3/3/89	Lucky J. varied bail
20/3/89	appellant continued bail

21/3/89 29/3/89 29/3/89	report in the Trinidad Guardian newspaper appellant required by Chief Magistrate to comment on report appellant replied to Chief Magistrate
6/4/89 24/4/89	second letter from Chief Magistrate to appellant appellant responds to letter

During this first phase, there was much activity, generated over a period of two months, and in respect of which no delay may be ascribed to any of the participants.

The Second Phase

DATE	PARTICULARS
17/8/89	appellant received letter of suspension from Commission
March 1992	appellant's lawyers wrote to the Attorney General seeking his intervention

The Commission's delay during the intervening period of two and one half years has not been explained. This factor has attracted the disapproval of the Privy Council.

The Third phase

DATE	PARTICULARS

28/5/92	Commission appointed Master to investigate charge
June 10, 1992	appellant responded
15/12/92	Commission preferred disciplinary charge

Another period of delay (approximately 6 months) arose on the part of the Commission before the charges were preferred and a period of two months before the tribunal was appointed. It is recognized that the inquiry function of the investigating officer is to gather material to enable the Commission to discharge its task of deciding whether a charge should be preferred. At this stage what was reported to the Commission against the appellant was merely in the nature of an allegation, and the Commission had the power to suspend if it was of the opinion that the public interest so required (Regulation 88(1)). Until the charges were laid it would not have been readily apparent that the charges could, in the appellant's view, have provided grounds for constitutional relief. As regards the suspension, in my view, it was not unreasonable that the appellant await the preferment of the charges rather than moving the court immediately on his suspension.

The fourth phase

DATE	PARTICULARS
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18/2/93	Commission appointed Deyalsingh J. as a disciplinary Tribunal to hear charges
16/3/93	appellant sought leave to apply for judicial review
30/11/94	application to amend refused in the Court of Appeal
26/7/95	application for leave to appeal refused by Court of Appeal
September 1995	appellant's special leave application to Privy Council (discontinued)

The appellant failed to file separate constitutional proceedings and no delay can be attached to the Commission during this phase in view of the filing of the judicial review proceedings.

The fifth phase

DATE	PARTICULARS
September 1995	negotiations began
May 1996	appellant took early retirement effective 1.4.97
1/5/96	Commission remove order of suspension
24/2/97	Constitutional proceedings filed

32. As indicated above, it was the appellant who took steps to revive the matter after it lay dormant between August 1989 and March 1992, by writing to the Attorney General to seek his intervention.

33. There are some pertinent observations which it is important to extract from the judgment of the Privy Council. In light of the judgment, this court must consider - whether the impugned decision or conduct was susceptible of adequate redress by timely application to the court under its non-constitutional jurisdiction; the effect of the prolonged suspension and the fact that it was a past and irreversible event; whether the existence of judicial review proceedings and the negotiations sufficiently explain the delay.

34. I do not accept Mr. Martineau's submission that the Commission's delay is of no relevance. While it is true that the Commission is '**not on trial,**' if one has to determine the explanation for the delay, consideration must be directed towards whether the delay is attributable to the inaction of either party, as well as whether there were inherent delays.

35. I would therefore begin by examining the respondent's delay in the context of Regulation 90 of the Public Service Commission Regulations. These Regulations have been adopted mutatis mutandis, by the Judicial and Legal Service Commission. (See Order 358 of 1984, Trinidad and Tobago Gazette, 23.02,84).

36. Regulation 90 sets out a schedule for the investigation of complaints. While departure from the prescribed time limits will not

necessarily nullify further proceedings (See *Herbert Charles v Attorney P.C. Appeal 26 of 2001*), the regulation envisages that the investigative machinery be used expeditiously not only in the interest of the parties but in the public interest. In fact, the matter ought to have been referred to an investigating officer *‘forthwith,’* once it appeared that the appellant may have committed an offence. (Regulation 90(1)).

37. It must be borne in mind that the appellant was a judicial officer exercising judicial functions. In *R v Chief Constable of Merseyside Police Ex parte Merrill [1981] WIR 1078 at 1088*. Lord Donaldson made the following observation in relation to the investigation of complaints against a police officer. ***“The public interest in complaints against police officers being fully investigated and adjudicated upon is undoubted, but it must be done speedily.”***

A fortiori, in my view, in the case of a magistrate who is suspended from carrying out his duties for an extended period. (See also dicta of Hamel-Smith J.A. in *Durity v Judicial and Legal Service Commission [1994] 47 WIR 424 at 428g*).

38. The short point is that a course of conduct in the management of the entire exercise had been established when no positive action was taken to progress the matter between the first and second phases and also during the third phase. I turn now to the matters raised by the Privy Council –

39. **Was the conduct susceptible of adequate redress by the court under its non-constitutional jurisdiction?**

In approaching this question, I am extremely mindful of the observations of Lord Diplock in **Harrikissoon v the Attorney General [1979] 31 WIR 348 at 349** to the effect that the right to apply to the High Court for redress under the Constitution is an important safeguard and ought not to be misused.

Accordingly, I must consider whether the application is frivolous, vexatious or an abuse of the process of the court.

The focus must be directed towards whether judicial review was the appropriate remedy. This question has a dual dimension because of the prolonged period of suspension about which the appellant complains. The respondent's argument is that this complaint has now been raised for the first time and that that was not the case the respondent had to answer.

40. Whereas the appellant has not expressly set out ***“prolonged delay”*** as a ground for his application, I think that it can reasonably be inferred from paragraphs 15 and 16 of his affidavit in support of his notice of motion, that the appellant was in fact complaining about the prolonged suspension.

41. This is how the matter was raised in the appellant's affidavit –

“During the period 17th day of August, 1989 to the 24th day of March, 1992, a period of about two and three-quarter years, I heard nothing from the Commission in respect of its decision to suspend me

from office. At no time during this period was I given any opportunity by the Commission to show cause why the said decision to suspend me indefinitely from office should not continue.

By letter through my then Attorney at Law, Mrs. Alice Yorke-Soo Hon I requested the intervention of the Honourable Attorney General Mr. Keith Sobion in the matter. By letter dated the 13th day of April, 1992 he acknowledged receipt of the said letter and promised to look into my complaint. There is now produced and shown to me marked "F.A.D.7" and 'F.A.D.8' respectively true copies of the letter of 24th March, 1992 and the acknowledgement of the letter from the Attorney General dated the 13th April, 1992."

42. It seems to me that in keeping with present trends, it will not be appropriate to adopt too pedantic an approach if the appellant's underlying reasons for making the application can be identified. Accordingly, it would be difficult to accept the contention that the appellant was not complaining about the prolonged period of suspension.

43. The constitutional issue allegedly arising out of abuse of power because of the prolonged suspension, or the lack of a cognizable charge, are not matters that could have been determined in the leave proceedings. At this stage, the court is concerned with the question of locus and carries out a brief preliminary examination to determine whether there is an arguable case.

Leave to apply for judicial review having been refused, constitutional proceedings are not an abuse of process.

44. **Judicial Review**

Certiorari exists to quash a decision which has already been made so that, it would not have been an appropriate remedy in respect of the prolonged period of suspension. There could be no question of removing the consequences of the decision.

45. Apart from the fact that the appellant received his full salary and allowances during the period of suspension, damages can only be awarded if they could have been awarded in an ordinary action. A claim for damages could not have been made in isolation on the law as it stood at the time of the judicial review application. Accordingly, I am of the view that the impugned conduct was not susceptible of adequate relief under its non-constitutional jurisdiction.

In any event, on the refusal of leave, the appellant had to all intents and purposes exhausted his judicial review remedy, and so was entitled to seek constitutional relief.

46. **Explanation for the delay**

I must now consider whether the existence of judicial review proceedings and the negotiations sufficiently explain the delay. I have already referred to portions of the letters written on the appellant's behalf which demonstrate that the appellant was persistent in his claim that there was a breach of the Constitution. It is also evident that the parties had arrived at an agreed position, except that there was disagreement on costs. The primary explanation appears to be that the negotiations did play a significant role in the conduct of the proceedings. In my view, the

Commission's delay must weigh heavily in that it set the rhythm for the conduct of the matter. While this conduct does not justify the appellant's delay; it would certainly have contributed to it.

47. The instant case can be distinguished from the case of **Warris v the Comptroller of Customs and Excise and the Attorney General H.C.A. 2554 of 1990** where the applicant first raised an alleged contravention of the Constitution in 1990 in respect of seizure of goods which took place in 1984. I mention this case because it is frequently cited and relied upon in this jurisdiction in constitutional matters where the issue of delay is raised. The court in dismissing the notice held that the delay was unexplained.

48. It is to be expected that in a matter of this nature, some delay was inevitable - the question however, is whether it was so inordinate to deny the appellant relief. The primary focus of Section 14 of the Constitution is to provide the mechanism for protecting the rights of the citizen. Undoubtedly, proceedings ought to be maintained while the matters are fresh in the minds of those who testify and when all the evidence is available. In the instant case, however, I think the respondent may find it difficult to raise prejudice since the questions raised involved in the main, an examination of the chronology of events and a number of other collateral factors. There has not however been much disagreement on the major issues of fact. Moreover, I do not gather from the negotiations that

the appellant was in any way waiving his '**right**' to bring these proceedings.

49. As I have indicated, a critical part of the appellant's case is that the charge is not cognizable. In their judgment the Privy Council has observed that ***'the continuation of a suspension from office even if lawful at its origin may be an abuse of power.'***

50. It seems to me that this is consistent with the approach in **Thakur Persad Jaroo v The Attorney General Privy Council App. No. 54 of 2000** where Lord Hope said -

"As for the meaning of the expression 'due process,' in Boodram v Attorney General of Trinidad and Tobago [1996] AC 842, 854 Lord Mustill said that it had two elements which were relevant to that case, where the appellant was asserting his constitutional right to a fair trial. First, there was the fairness of the trial itself. Secondly, there was the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. In the present context, a broader meaning is appropriate. Here too it has two aspects. First, there is the right to protection against the abuse of power. Secondly, there is the requirement that when powers are exercised by the State against the individual they must be exercised lawfully and not arbitrarily."

51. In remitting this matter for determination, I perceive that the task of the court at first instance has been simplified. The Privy Council has underscored the point that the appellant was exercising a judicial function in good faith; and faith a mistaken discharge of this function could not constitute the offence of indiscipline as defined in Regulation 84.

There has been no suggestion that the appellant acted outside or in excess of his jurisdiction.

52. The authors of *Wade and Forsyth (8th Edition)* at page 722 cite the classic statement of Lord Moulton in *Everett v Griffiths [1921] A.C. 631 at 695* –

“If a man is required in the discharge of a public duty to make a decision which affects by its legal consequences the liberty or property of others and he performs that duty and makes that decision honestly and in good faith it is my opinion a fundamental principle of law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public and then to leave him in peril by reason of the consequences of that decision, provided that he acted honestly in making that decision.”

53. As the Privy Council has emphasised, the facts of this case raise a serious issue to be tried. Accordingly, I am of the view that delay alone ought not to hinder the appellant’s claim to constitutional relief.

54. I would therefore allow the appeal and remit the matter to the High Court for a determination of the appellant’s Notice of Motion dated February 24th, 1997.

55. The respondent will pay the appellant’s costs of this appeal, certified fit for senior counsel. The respondent’s cross-appeal is dismissed with no order as to costs.

Margot Warner,
Justice of Appeal