Privy Council Appeal No. 13 of 1993

(1) Evan Rees
(2) Garvin Scott
(3) The Honourable Mr. Justice Lennox Deyalsingh
(4) The Honourable Chief Justice Clinton Bernard
(5) Sir Isaac Hyatali
(6) Guya Persaud
(7) Kenneth Lalla
(8) Maurice Corbin and
(9) The Attorney General of Trinidad and Tobago *Appellants*

v.

Richard Alfred Crane *Respondent*

(and Cross-appeal)

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD SLYNN OF HADLEY
LORD WOOLF
LORD LLOYD OF BERWICK
SIR THOMAS EICHELBAUM

*[Delivered by **Lord Slynn of Hadley**]*

This is an appeal from a judgment of the Court of Appeal of Trinidad and Tobago dated 20th November 1992 which by a majority reversed much of the judgment of Blackman J. in proceedings in the High Court (a) for judicial review and (b) by way of motion pursuant to section 14(1) of the Constitution (Schedule to Act No. 4 of 1976 of the Parliament of Trinidad and Tobago).

The respondent to the appeal is, and has been since 1978, a judge, and since 1985 has been the senior puisne judge, of the High Court of Trinidad and Tobago.

The fourth appellant is the Chief Justice of Trinidad and Tobago and the Chairman of the Judicial and Legal Service Commission appointed under section 110 of the Constitution; the fifth to eighth appellants are members of that Commission. The first three appellants are members of a tribunal appointed by the President of Trinidad and Tobago to consider the position of the respondent in circumstances which are hereinafter explained. The ninth appellant is joined in particular to answer the claims made under the constitutional motion.

In brief the appeal is against orders of the Court of Appeal (Ibrahim and Davis JJ.A., Sharma J.A. dissenting):-

(i) on the application for judicial review (CA No. 58 of 1991) that the decisions

(a) of the Chief Justice and/or of the Commission to prohibit the respondent from presiding in court; and

(b) of the Commission to represent to the President that the question of removing the respondent from office ought to be investigated,

being *ultra vires*, should be quashed and that the Commission be prohibited from representing to the President that such question ought to be investigated; and

(ii) on the Constitutional motion (CA No. 59 of 1991)

(a) that the first three appellants be prohibited from proceeding as a Tribunal to enquire into the question of removing the respondent as a judge of the High Court;

(b) that damages be assessed by a judge in Chambers.

The respondent asked the Court of Appeal to find that there was actual bias on the part of the Chief Justice and that the Commission was biased in considering whether the question referred to above should be represented to the President for investigation.

Davis J.A. accepted that there was bias which vitiated the decision. Sharma J.A. roundly rejected that contention. Ibrahim J.A. found it unnecessary to decide the question in view of his judgment on the other matters raised. The respondent accordingly cross-appeals against the failure or refusal of the Court of Appeal to quash the suspension of the judge and the representation of the question on the ground of bias.

In Trinidad and Tobago judges of the High Court (part of the Supreme Court of Judicature) are appointed by the President acting in accordance with the advice of the Commission (section 104(1) of the Constitution). The Commission established under section 110 is composed of the Chief Justice, the Chairman of the Public Service

Commission, one person having prescribed judicial experience and two persons having legal qualifications. Its members are excluded from those members of Commissions who may be removed from office by the President.

A judge so appointed shall hold office in accordance with sections 136 and 137 of the Constitution. Section 136(1) provides an age limit at which judges must vacate office, but it also provides that the salary and other terms of service of a judge shall not be altered to his disadvantage after his appointment (subsection (6)).

Section 137 lays down a special code for the removal from office of a judge, which is at the centre of the arguments in this appeal. It provides:-

> "137.(1) A Judge may be removed from office only for inability to perform the functions of his office, (whether arising from infirmity of mind or body or any other cause), or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
>
> (2) A Judge shall be removed from office by the President where the question of removal of that Judge has been referred by the President to the Judicial Committee and the Judicial Committee has advised the President that the Judge ought to be removed from office for such inability or for misbehaviour.
>
> (3) Where the Prime Minister, in the case of the Chief Justice, or the Judicial and Legal Service Commission, in the case of a Judge, other than the Chief Justice, represents to the President that the question of removing a Judge under this section ought to be investigated, then -
>
> (a) the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, selected by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Prime Minister after consultation with the Judicial and Legal Service Commission in the case of a Judge, from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;
>
> (b) the tribunal shall enquire into the matter and report on the facts thereof to the President and recommend to the President

whether he should refer the question of removal of that Judge from office to the Judicial Committee; and

(c) where the tribunal so recommends, the President shall refer the question accordingly.

(4) Where the question of removing a Judge from office has been referred to a tribunal under subsection (3), the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge, other than the Chief Justice, may suspend the Judge from performing the functions of his office, and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Prime Minister in the case of the Chief Justice or the Chief Justice in the case of a Judge, other than the Chief Justice, and shall in any case cease to have effect -

(a) where the tribunal recommends to the President that he should not refer the question of removal of the Judge from office to the Judicial Committee; or

(b) where the Judicial Committee advises the President that the Judge ought not to be removed from office."

Reliance has also been placed on the provisions of the Constitution which recognise and protect fundamental human rights and freedoms, and in particular the following provisions:-

"4. ...

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

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

5. ...

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

...

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

...

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

The respondent had presided in court until 27th July 1990, the end of the current legal term. He then went abroad. Even before he left, and without his being informed, the Chief Justice decided that he would not be listed in the roster of judges dealing with cases for the law term October 1990 to January 1991. This decision was brought before the Commission on 19th July 1990 and was either adopted or agreed to by the Commission, again without his being informed before he left. Following his return early in September, and some two weeks before the new term was due to begin, the respondent looked at the list assigning judges for that term. He saw that he was not assigned to any court and was the only judge not so assigned.

He tried to meet the Chief Justice on several occasions but was unsuccessful until 8th October 1990, when he delivered a letter to the Chief Justice's secretary by hand and was then seen by the Chief Justice. He was told by the latter that a letter had been sent to him in August conveying a decision of the Commission, though the respondent says that he was not told its purport. Later on that day he was sent a copy of a letter dated 23rd August 1990 signed by the Acting Director of Personnel Administration, and subsequently he found in a pile of mail at his home the original letter of that date. It is not in dispute that the original letter was sent but that he had not seen it since he returned from abroad. The letter said:-

> "I have to inform you that the Judicial and Legal Service Commission, having considered complaints about your performance in court and doubts about your current state of health, has decided that you should cease to preside in court until further notice."

The respondent by letter dated 9th October to the Commission denied that there were any grounds for complaint against him, and protested that the decision was unlawful. The Commission's reply was to change the last part of the paragraph cited above from saying that the Commission "has decided that" to read "agreed with the decision of the Chief Justice" that "you should cease to preside in court until further notice".

At meetings on 15th, 25th and 26th October 1990 the Commission discussed the question of the respondent's ability to perform his office. Mr. Pierre, an official present thereat, deposed that at the first meeting the Commission decided that before it could make a representation to the President under section 137(3) of the Constitution "it was necessary for the Commission to have in its possession more detailed and specific evidence in support of the judge's inability to perform the functions of his office". At the second meeting the Chief Justice presented statistics and records relating to the respondent's performance in court and then left the

meeting when another member took the chair. The Chief Justice returned on 26th October when the members had had a chance to study the material but he did not take part in the discussion.

The Commission resolved that it would represent to the President under section 137(3) that "the question of removing the Honourable Mr. Justice Crane from his office of Puisne Judge ought to be investigated" and on 29th October it did so. On 22nd November the President appointed the first three appellants as members of the tribunal to enquire into the question pursuant to section 137(3)(a) of the Constitution. The respondent learned of this through a television report on that day and only received written notice on 30th November 1990 when he was told that a hearing would take place on 3rd December. By Instrument dated 23rd November 1990 the President pursuant to section 137(4) of the Constitution suspended the respondent from performing the functions of his office of a judge of the High Court. The respondent was handed a copy of this Instrument by a policeman in a public street at 4.00 p.m.

Before the President made these two orders the respondent had asked for judicial review and the hearings were proceeding on these very days. Leave was granted on 23rd November for him so to apply, the very day the President made his order of suspension under section 137(4) of the Constitution. The judicial review proceedings began on 27th November pursuant to the leave given and the constitutional motion was issued on 4th December 1990.

It is not disputed that the respondent was not told of the complaints which had been made or of the statistics or records provided for the Commission at its meeting nor was he told that the Commission had decided to make and had made the representation to the President.

By letter dated 3rd December 1990 from the secretary to the President the respondent was told that, the Commission having "represented to His Excellency that the question of removing you from office for inability to perform the functions of your office and/or misbehaviour [emphasis added] ought to be investigated", the tribunal had been appointed to inquire into the matter. The instrument of appointment of the tribunal enclosed with that letter referred to "inability to perform the functions of his office arising from infirmity of body and/or for misbehaviour [emphasis added]".

This was the first time the respondent had been told that these two aspects were included and he was told nothing of what had been represented to the President by the Commission.

The trial judge found that the Chief Justice and the Commission had acted *ultra vires* in suspending the respondent, yet relief was refused on this issue because the

judge thought that that act had been overtaken by the President's order suspending the respondent. The judge also refused the rest of the application. In the Court of Appeal the majority accepted that the suspension of the judge was unlawful and that there had been a breach of the rules of natural justice and of his constitutional rights. They did not decide the issue of bias in his favour.

The first question which arises, chronologically, is whether the decision not to include the respondent on the list of judges sitting in court between October 1990 and January 1991 was unlawful. This should be considered first on the basis that the decision was that of the Chief Justice (as the trial judge found on the evidence) and that the Commission merely agreed with it as they stated in their letter dated 16th October 1990. It is contended by the appellants that to do this was wholly within the competence of the Chief Justice who was responsible for the administration of the court over which he presided.

It is clear that the Chief Justice is not only President of the Court of Appeal (section 101(1)) and *ex officio* a member of the High Court (section 100(1)) but is also the head of judicial administration of Trinidad and Tobago. By the Rules of the Supreme Court 1975, made pursuant to the Supreme Court of Judicature Act, Chap. 4:01, the Chief Justice is given certain specific powers. Thus by Order 32 Rule 21 he may give directions relating to the listing of cases and by Order 34 Rule 4(1)(d) he may give directions providing for a judge to hear and determine any application made with respect to the lists and to have charge of the lists. There is an overriding provision in Order 1 Rule 10(2) that where the rules do not make express provision for the giving of directions by the Chief Justice and the Chief Justice is of the opinion that directions ought to be given, he may, subject to the provisions of the Rules, give such directions as he thinks fit with respect to any aspect of the practice or procedure followed in the Supreme Court.

Their Lordships accept that even outside these specific provisions of the Rules, the Chief Justice must have the power to organise the procedures and sitting of the courts in such way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of the backlog of reserved judgments in the particular judge's list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. It may also be necessary, if allegations are made against the judge, that his work programme should be rearranged so that for example he only does a particular type of work for a period, or does not sit on a particular type of case or

even temporarily he does not sit at all. Again this kind of arrangement can be and should be capable of being made by agreement or at least after frank and open discussion between the Chief Justice and the judge concerned.

The exercise of these powers, however, must be seen against the specific provisions of the Constitution relating to the suspension of a judge's activities or the termination of his appointment. It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways. The issue in the present case is thus whether what the Chief Justice did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.

Their Lordships agree with the majority in the Court of Appeal that what happened here went beyond mere administrative arrangement. Despite the fact that the respondent continued to receive his salary and theoretically (as has been argued) could have exercised some power, e.g. to grant an injunction if approached directly to do so, the respondent was effectively barred from exercising his functions as a judge sitting in court. He was left out of the October to January roster and there was no indication that he would thereafter sit again. It was in effect an indefinite suspension. This in their Lordships' view was outwith the powers of the Chief Justice. Such action was not retrospectively corrected by the subsequent order of the President. The suspension was wrongful as long as it lasted and the majority of the Court of Appeal were entitled and right to quash the Chief Justice's decision.

As the appellants accept, the Commission had no power or function in relation to the suspension or removal of a judge other than the powers laid down in the Constitution. Whether in this case they purported to confirm the Chief Justice's decision or whether they purported to suspend the judge themselves, they had no power to do so and their decision should, as the majority in the Court of Appeal considered, be set aside.

The respondent's second line of attack - on the decision of the Commission to represent to the President that the question of removing the respondent from his office ought to be investigated, and the consequent appointment of the members of the Tribunal - is based firstly under the constitutional motion on the alleged breach of section 4(a), (b), 5(2)(e) and (h) of the Constitution, and, secondly, on the application for judicial review, on the basis that the Commission acted unfairly and in breach of the principles of fundamental justice. They did not notify the respondent that the question of removing him was being considered, nor did they give him any notice of the complaints made against him, nor did they give him any chance to reply to them.

Whether section 5(2) is relevant at all seems doubtful since it imposes a prohibition only on the Parliament of Trinidad and Tobago but the "protection of the law" referred to in section 4(b) upon which the respondent also relies would include the right to natural justice. A claim under the constitutional motion and on the application for judicial review thus in substance raise the same issue.

The appellants contend that proceedings under section 137 are in three parts which in combination are intended to protect, and sufficiently to protect, the independence of the judiciary. The Commission, however, merely initiates the process - it does no more than to represent to the President that a question ought to be investigated. It makes no decision or determination; it finds no facts; it does not even state an opinion. The Tribunal may "recommend" that the question of removal of the judge from office be referred to the Judicial Committee of the Privy Council, but it has no further power. It is only the latter which can advise the President that the judge ought to be removed from office when the President must act on that advice (section 137(2)).

Accordingly, it is said if the Commission represents to the President that a question of a judge's removal be investigated it is two stages away from the final advice which if in favour of removal inexorably leads to removal of the judge from office. When the Commission makes its representation whether the judge will be removed is unknown - the Tribunal may recommend that the question of removal from office be not referred to the Privy Council and the Privy Council itself may decide that the judge be not removed.

It is, thus, contended by the appellants that the real enquiry and fact finding come after the Commission has passed out of the picture and there is no causal link between the Commission's representation and the subsequent stages. The fact that the judge is suspended is not a penalty and implies no culpability. Moreover the decision suspends him not from office but from "performing the functions of his office". Such a course, it is said, is necessary in the public interest and the procedures should not be delayed by any obligation on the Commission to tell the judge that they are investigating his ability or behaviour, or to tell him what are the complaints made against him, or to give him a chance to deal with them. Moreover, there was no holding out to the respondent in this case that he would be given notice of any complaints or that he would be given an opportunity to deal with them so that no legitimate expectation of his can be said to be violated.

Their Lordships accept that section 137(3) envisages three stages, before the Commission, the Tribunal and the Judicial Committee of the Privy Council, and indeed there may be a prior stage since it is likely that

complaints will have originated with or been channelled through the Chief Justice.

It is also correct, as the appellants contend, that in a number of cases to which they refer it has been decided that in certain preliminary or initiating procedures there was no right on the part of an individual to know of complaints or to be allowed to answer them. That right may arise at a later stage and the appellants accept that a judge being investigated has a right to know of complaints, and to have an opportunity to deal with them, before the tribunal and before the Judicial Committee of the Privy Council. It thus falls to be decided whether in this case the right to be informed and to reply at a later stage dispenses with the obligation or duty to inform at the Commission stage.

Lord Lester of Herne Hill, for the appellants, cited many decisions of English and Commonwealth courts and of the European Court of Human Rights. It is sufficient to refer to examples of these. Thus in *Lewis v. Heffer* [1978] 1 W.L.R. 1061, officers of a constituency political party were suspended pending an enquiry. The Court of Appeal held that the rules of natural justice did not apply since suspension was a holding operation pending enquiry and "the suspension in such a case is merely done by way of good administration" (Lord Denning M.R. at page 1073). Geoffrey Lane L.J. regarded what happened in that case as "an administrative action which had to be taken immediately" (page 1078G):-

> "In most types of investigation there is in the early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at <u>that</u> stage demand that the investigator should act judicially in the sense of having to hear both sides. No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially, and the greater the importance of observing the maxim *audi alteram partem*."

In *Furnell v. Whangarei High Schools Board* [1973] A.C. 660 their Lordships' Board held by a majority (Viscount Dilhorne and Lord Reid dissenting) that when a sub-committee reported to a school board the result of its investigation, and the board suspended the teacher concerned without giving him an opportunity to deal with the charges made against him, there was no breach of natural justice. The teacher knew that he might be suspended "pending the determination of the charges against him".

Lord Morris of Borth-y-Gest, in giving the advice of the majority, said at page 679:-

"It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules: see the speeches in *Wiseman v. Borneman* [1971] A.C. 297. Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions."

In *Wiseman v. Borneman (supra)* the House of Lords held that, where section 28 of the Finance Act 1960 laid down a procedure which enabled the Commissioners of Inland Revenue by a certificate to refer to the tribunal, constituted for the purposes of the section, the question whether there was a *prima facie* case for proceeding against a taxpayer, natural justice did not require that the taxpayer should have the right to be represented by counsel at the tribunal's determination of that question or to see the Commissioner's certificate.

Lord Lester relies on what was said by Lord Reid at page 308E-F:-

"It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a prima facie case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party."

Lord Morris of Borth-y-Gest at pages 308 and 309 stressed the importance of observing the rules of natural justice. He added-

"The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair."

He continued:-

"... we were referred to many decisions. I think that it was helpful that we should have been. But ultimately I consider that the decision depends upon whether in the particular circumstances of this case the tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded."

Lord Guest at page 310G said:-

"It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent upon the question, the courts will

> imply into the statutory provision a rule that the principles of natural justice should be applied."

Moreover he took the view that a tribunal required to decide a preliminary point, which might affect parties' rights, like a tribunal entrusted with a final decision ought to be required to apply the rules of natural justice. On this latter point, Lord Wilberforce at page 317 took a similar approach to that of Lord Guest. He too stressed that the test was one of fairness in the circumstances.

The decision in *Wiseman v. Borneman* has been applied in many cases (e.g. *R. v. Birmingham City Council, ex parte Ferrero Limited* [1993] 1 All.E.R. 530 (on the basis of the need for immediate action in order to protect third parties); *Norwest Holst Ltd. v. Secretary of State for Trade* [1978] Ch. 201 (where it was held that there was no right to appear before the Secretary of the State on the question whether inspectors should be appointed under section 165 of the Companies Act 1948); *Parry-Jones v. Law Society* [1969] 1 Ch. 1 where it was accepted that a solicitor had no right to know what complaints were made under the Accounts Rules before a notice requiring him to produce documents for inspection was served; *R. v. Panel on Take-overs and Mergers ex parte Fayed and Others* [1992] B.C.L.C. 938 where the decision of the Executive of the Panel on Take-overs and Mergers, to institute disciplinary proceedings on the basis of a prima facie case, was held not to require the giving of notice.

By way of illustration from other jurisdictions their Lordships refer also to *Guay v. Lafleur* (1964) 47 D.L.R. (2d) 226 and *Le Compte, Van Leuven and De Meyer v. Belgium* (1981) 4 E.H.R.R. 1 at pages 18-19, paragraph 51.

It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the enquiry without observing the *audi alteram partem maxim* is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.

But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it, (see Judicial Review of Administrative Action (4th Edition) at page 199):-

> "Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage." (emphasis added)

In considering whether this general practice should be followed, the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All.E.R. 109, 118 (as approved by Lord Guest in *Wiseman v. Borneman (supra)* and by Lord Morris of Borth-y-Gest in *Furnell (supra)* to have regard to all the circumstances of the case:-

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

Plainly in the present case there would have been an opportunity for the respondent to answer the complaint at a later stage before the tribunal and before the Judicial Committee. That is a pointer in favour of the general practice but it is not conclusive. Section 137 which sets up the three-tier process is silent as to the procedure to be followed at each stage and as a matter of interpretation is not to be construed as necessarily excluding a right to be informed and heard at the first stage. On the contrary its silence on procedures in the absence of other factors indicates, or at least leaves open the possibility, that there may well be circumstances in which fairness requires that the party whose case is to be referred should be told and given a chance to comment. It is not *a priori* sufficient to say, as the appellants in effect do, that it is accepted that the rules of natural justice apply to the procedure as a whole but they do not have to be followed in any individual stage. The question remains whether fairness requires that the *audi alteram partem* rule be applied at the Commission stage.

One thing is abundantly plain in this case, namely that the appellants cannot rely on urgency or administrative necessity to justify not telling the respondent what was being complained of. The Chief Justice reached the opinion that the respondent should not continue to sit on

19th July but allowed him to continue to sit until 27th July. The question of a representation was not discussed by the Commission until 15th October and not decided until 26th October; the President of the Republic did not act on it until 22nd November. The respondent was back in Trinidad by 18th September 1990; there is no evidence that he could not have been contacted whilst he was abroad or that in the period between 18th September and 15th October the Chief Justice was not able to contact him. On the contrary they met on 8th October when the respondent was not told of the matters the Commission was to consider.

It is also in their Lordships' view clear that the Commission is not intended simply to be a conduit pipe by which complaints are passed on by way of representation. The Commission may receive isolated complaints of a purely administrative nature which they consider can be dealt with adequately through administrative action by the Chief Justice. Then they would no doubt not make a representation that the question of removal be considered. Indeed it may well in the public interest be desirable that such matters be dealt with quickly by the Chief Justice rather than that the full panoply of representation, tribunal and the Judicial Committee be set in motion. The Commission before it represents must, thus, be satisfied that the complaint has *prima facie* sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the Commission must act fairly.

In the present case the Commission did not simply act as a conduit pipe. On the contrary when it met on 15th October it decided that it needed "more detailed and specific evidence in support of the judge's inability to perform the functions of his office". When they received the information on 25th October they adjourned "to allow members to fully acquaint themselves with the material made available to them by the Chief Justice" (affidavit of Nigel Pierre).

It has not been shown that it was not possible for this material to be given to, and replied to by, the respondent or that unacceptable delay would have followed had such a course been taken.

Nor is it right to say that the Commission's action is analogous to the decision of a police officer to charge a defendant in a criminal process. The composition of the Commission and the nature of the process made what happened here more akin to a quasi-judicial decision.

The nature of the broad categories of complaint made in the present case is also a relevant factor in deciding what fairness demanded. It has been said that the Commission represented that the question of removal arose from "inability to perform the functions of his office" which itself derived "from infirmity of body and/or misbehaviour".

These are both serious charges. They might in whole or in part have been capable of rebuttal if the respondent had known what the precise complaints were. If it was said that he was physically ill, what was the illness, had it passed, what were its consequences for his ability to work, are all questions which might have been dealt with briefly and conclusively by the respondent's doctor or by an independent doctor. If the complaints were of his adjournment of cases, had he done so at the parties' request? Or was there a good reason for doing so? These are questions which could have been responded to by the judge and perhaps his associate or Registrar.

It is true, as the appellants contend, that a decision to make a representation is not itself a punishment or penalty and that the eventual dismissal requires two further investigations. That, in their Lordships' view, is too simplistic an approach in resolving the present questions. There was obviously considerable publicity for the decision to make a representation even if the detailed charges were not publicised. Indeed it was reported on the television news on 22nd November that the President had appointed a tribunal to investigate whether the respondent should be removed as a judge, apparently even before the respondent received from a policeman in the street a copy of the President's decision suspending him from office.

The fact that a representation was made, a tribunal appointed and the respondent suspended on the basis of bodily infirmity and misbehaviour were bound to raise suspicion or conviction that the Commission and even the President were satisfied that the charges were made out, in a way which subsequent revocation of the suspension would not necessarily dissipate. If the respondent had had a chance to reply to such charges and had been given the opportunity to do so before the representation was made this suspicion and damage to his reputation might have been avoided. If he gave no adequate reply then the matter could have gone forward without justifiable complaint on his part.

Moreover even in the absence of bias, the fact that the complaints were being made by a member of the Commission itself requires that particular attention should be paid to the need for fairness. It is indeed surprising that as between two colleagues, even accepting the need for the Chief Justice to take decisive action, if the circumstances required it, for the proper administration of his court, no indication of the complaints or opportunity to reply was given to the respondent before the Commission took its decision.

The consideration of these factors and their Lordships' conclusion on them are not based specifically on the nature of the judicial function or the fact that the respondent is a judge. A similar approach would apply *mutatis mutandis* to other persons who could rely on the

same considerations. But a judge, though by no means uniquely, is in a particularly vulnerable position both for the present and for the future if suspicion of the kind referred to is raised without foundation. Fairness, if it can be achieved without interference with the due administration of the courts, requires that the person complained of should know at an early stage what is alleged so that, if he has an answer, he can give it.

Their Lordships have been referred to the Report of the Committee of Investigation to the Canadian Judicial Council to be found in 28 Mcgill Law Journal 1982-3 page 380, and a report of the Senate Judiciary Committee hearing allegations against a judge in 1984 in the United States in both of which inquiries a judge was given, even during a preliminary enquiry, the opportunity to rebut what was being said against him. Reference has also been made to the rules of procedure of the Wisconsin Judicial Commission (see Wisconsin Law Review 1968-76, 563, 575), which it is said are typical of the rules in many states of the United States, where there is a clear requirement that, in the course of a preliminary investigation, and before a formal charge is made or hearing held, the judge be given an opportunity to respond either by making a personal appearance or by letter.

It might indeed be thought to be in the interests of the good administration of justice that such a course should be taken before unjustified charges are laid before the tribunal with its inevitable publicity not just for the judge but for the court system as a whole. As it is put by Sir William Wade in Administrative Law (6th Edition) (pages 496-7):-

> "As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the court can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration". (emphasis added)

Again at page 570:-

> "Natural justice is concerned with the exercise of power, that is to say, with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which

do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the persons affected."

The appellants concede that if the respondent had a right to be heard he was not heard. They do however rely on a number of earlier incidents to show that he must have known what was being said against him. Thus in December 1986 the Chief Justice complained that the respondent had dealt with an application by the Director of Public Prosecutions for a warrant of arrest and committal addressed to the Commissioner of Police when it ought to have been dealt with by a judge of the Civil Chamber Court. The respondent was required to make a full report in his own handwriting on the matter which he did. In 1989 the Chief Justice complained that in matrimonial proceedings the respondent had allowed counsel, who was ready and willing, to proceed in the place of another counsel who was ill. The respondent explained what had happened on the face of it satisfactorily.

In November 1989 there was a complaint that the respondent had not told the Chief Justice promptly that he had been taken to hospital. Again in June 1990 the Chief Justice insisted on the respondent trying a divorce case even though it seems that both parties had applied to the respondent for the hearing to be adjourned in the hope of disputes as to property being settled.

It is said that in all these incidents the respondent had sufficient notice of the allegations, or at any rate of the kind of allegations, made against him so that he knew perfectly well the sort of matters the Commission would take into account. Their Lordships do not accept this. In the first place if the respondent's version is correct he gave a satisfactory explanation in respect of a number of the incidents. In the second place it cannot be assumed that these were the, let alone the only, matters relating to the respondent's ability and behaviour of which complaint was made in August 1990. If natural justice required that he be given notice of the complaints before the Commission and an opportunity to deal with them, the way in which these various incidents were dealt with was not a compliance with that obligation.

Having considered all the points raised by counsel for both sides and the judgments and writings referred to therein, their Lordships are satisfied that in all the circumstances the respondent was not treated fairly. He ought to have been told of the allegations made to the Commission and given a chance to deal with them - not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply. Their Lordships accordingly agree with the decisions of the majority of the Court of Appeal on this issue.

The third issue raised relates to bias. The respondent contends that the various decisions taken were, in any event, vitiated by bias. In view of their conclusions on the first two issues which have been referred to, their Lordships deal more briefly with this allegation.

The allegation is in two parts. In the first place it is contended that there was personal animosity on the part of the Chief Justice which predisposed him against the respondent. There is certainly evidence of an acrimonious relationship between the two men and if the respondent's account (which was not challenged or answered) is accepted, the Chief Justice showed from time to time between 1986 and 1990 hostility towards the respondent. It is indeed unsatisfactory that the respondent was not told by the Chief Justice of his decision to suspend the respondent and to raise with the Commission the question of referring the matter to a tribunal. It is also curious to say the least that the respondent on his return had such difficulty in seeing the Chief Justice.

On the other hand it is to be assumed that the Chief Justice either accepted that the complaints made to him were sufficiently established, or that, at any rate, he considered that they were sufficiently serious to warrant reference to the Commission. If he so thought, he was entitled to refer the matter to the Commission. He had, even if in a hostile way, given the respondent an opportunity to deal with earlier complaints. The Chief Justice must have realised the seriousness of these complaints for the respondent and even if he failed to deal fairly with the respondent, by giving him notice of them and a chance to deal with them, it is not lightly to be assumed that he would allow personal hostility to colour his decision to suspend the respondent or to recommend to the Commission that the matter be referred to a tribunal. Having considered all the material before them, including the judgments of Blackman J. and the Court of Appeal, and despite the forthright views expressed by Davis J., their Lordships are not satisfied that "a real danger" of bias has been established (*R. v. Gough* [1993] A.C. 646).

In the second place, it is said that the Commission was biased in considering whether there should be a representation to the President. This claim was made partly because of the presence of the Chief Justice at their meeting, but also because, when the members came to consider whether there should be such a representation to the President, their minds were affected by the fact that they had already approved or authorised the suspension of the respondent from sitting in court, so that in effect they had prejudged the issue.

The respondent contends that, whilst the Commission had not considered that a representation to the President was necessary in July, by October the Commission was so satisfied, and yet nothing had happened in the meantime on which reliance could be placed in order to justify a

representation. True on 15th October the Commission asked for more detailed and specific evidence "in support of the judge's inability to perform the functions of his office" (emphasis added). Davis J.A. concluded that:-

> "There was undue haste in the making and communicating of the decision in question, and this undue haste was motivated by a desire to frustrate any attempt that [the respondent] might have made to challenge in court the first decision of the Commission, that is, the decision to interdict him."

There is some force in these contentions and it is particularly curious that the reference to "misbehaviour" came only in the letter of 3rd December 1990.

It has to be remembered however, that the Chief Justice was *ex officio* a member of the Commission and that, if complaints were made about a judge by others, it was not surprising or unusual that the Chief Justice should be the conduit pipe for the transmission of these complaints to the Commission. The Commission were right to ask for more information if they were not satisfied at the 15th October meeting as to the case against the judge and their Lordships do not attach significance in this context to the fact that they applied for material in support of his "inability" to perform the functions of his office. Even though the respondent should have been given the chance to deal with this material and to show his "ability" to perform the functions of his office it does not follow that there was bias. The Commission ensured that the Chief Justice did not continue as Chairman and there is no reason to assume that this was a charade. They also spent time in considering whether there should be a representation. Their professional backgrounds are such that an assumption of bias should not lightly be made, and the fact that they had agreed to the suspension does not mean that, on an investigation of fuller material, they were not capable of looking at the question of a representation afresh and fairly. Nor is it to be assumed that the Chief Justice unduly influenced them even though his view must have had considerable weight. In the absence of personal malice on his part there is no real evidence that they were improperly influenced. In all the circumstances their Lordships are not satisfied that the allegation of bias is made out. The cross-appeal therefore fails.

In the circumstances it is not necessary to deal with the alternative claim made by the respondent that his legitimate expectations were violated. Nor is it necessary to consider whether the fact that, in respect of decisions by other Commissions set up under the Constitution, different rules were adopted should have an influence on the decision in this case in the respondent's favour.

The appellants contend that the respondent's claim for damages should not be allowed. It was not available on the application for judicial review and is not specifically included in the claim on the constitutional motion. The respondent replies that damages can be claimed on an application for judicial review and the necessary particulars of the civil claim are sufficiently found in the allegation that constitutional freedoms were violated. Although in the Court of Appeal it was claimed that damages were, for those reasons, sufficiently set out so as to allow the Court of Appeal to give such relief, an application was made that the notice of appeal be amended so as to include specifically an order for damages.

The majority in the Court of Appeal accepted that the respondent was entitled to damages for the breaches of his rights which have been established and ordered that the case be remitted to the High Court for damages to be assessed. Their Lordships consider that the question of damages should be remitted to the High Court in accordance with the Court of Appeal's order.

Their Lordships accordingly dismiss the appeal and cross-appeal. The appellants must pay the respondent's costs before their Lordships' Board.