Hilary Term
[2019] UKPC 6
Privy Council Appeal No 0072 of 2017

JUDGMENT

Attorney General of Trinidad and Tobago (Respondent) *v* Maharaj (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lady Hale
Lord Kerr
Lord Wilson
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

11 February 2019

Heard on 30 October 2018

Appellant	*Respondent*
Richard Clayton QC Anand Ramlogan SC Tom Richards (Instructed by Alvin Shiva Pariagsingh)	Howard Stevens QC (Instructed by Charles Russell Speechlys LLP)

LADY BLACK:

1. This appeal concerns the Judicial and Legal Service Commission for Trinidad and Tobago ("the JLSC"). The composition of the JLSC is dictated by section 110 of the Constitution of Trinidad and Tobago ("the Constitution"). The Chief Justice and the Chairman of the Public Service Commission are members of the JLSC by virtue of section 110(2)(a) and (b). Section 110(2)(c) provides that there shall be such other members as may be appointed in accordance with section 110(3). Everyone agrees that *one* judge or retired judge may be appointed to the JLSC under section 110(3), specifically under section 110(3)(a). What is in issue is whether *more than one* may be appointed. The appellant contends that this is not permitted by section 110(3), whereas the respondent contends that it is. The answer to the debate depends upon the proper construction of section 110(3)(b) of the Constitution.

Section 110 of the Constitution and section 36 of the Interpretation Act

2. It will be convenient to set out immediately both section 110, and a further provision which has featured in the proceedings, namely section 36 of the Interpretation Act 1962.

3. Section 110 of the Constitution provides:

> "(1) There shall be a Judicial and Legal Service Commission for Trinidad and Tobago.
>
> (2) The members of the Judicial and Legal Service Commission shall be -
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> (a) the Chief Justice, who shall be Chairman;
>
> (b) the Chairman of the Public Service Commission;
>
> (c) such other members (hereinafter called 'the appointed members') as may be appointed in accordance with subsection (3).

(3) The appointed members shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition as follows:

(a) one 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 appeal from any such Court;

(b) two from among persons with legal qualifications at least one of whom is not in active practice as such, after the President has consulted with such organisations, if any, as he thinks fit.

(4) Subject to section 126(3)(a) an appointed member shall hold office in accordance with section 136."

4. Section 36 of the Interpretation Act provides:

"(1) Where a board is established under a written law, then, subject to any requirements with respect to a quorum, the validity of any act done in pursuance of any power of the board shall not be affected by -

(a) the presence at or participation in the proceedings at which the act was done or authorised of any person not entitled to be present at or to participate in the proceedings; but a Court may declare an act invalid if such presence or participation is not bona fide and the objection is taken promptly having regard to all the circumstances;

(b) any defect in the appointment or qualifications of a person purporting to be a member;

(c) any minor irregularity (not calculated to cause any prejudice, injustice or hardship to any person) in the convening or conduct of any meeting; or

(d) any vacancy in the membership of the board.

(2) In this section, 'board' has the meaning assigned to it by section 34(3)."

The facts

5. The relevant facts can be briefly summarised. On 6 June 2017, two new judges were to be sworn in, pursuant to advice tendered by the JLSC to His Excellency the President of the Republic of Trinidad and Tobago. It appeared to the appellant that, at the material time in the appointment process, the members of the JLSC were the Chief Justice and the Chairman of the Public Service Commission, plus two retired judges, one appointed to the JLSC under section 110(3)(a), and one under section 110(3)(b). Questioning whether this composition was proper under the Constitution, he filed a fixed date claim form, on the day before the swearing in, seeking a declaration that the appointment of retired judges as members of the JLSC is not permitted under section 110(3)(b). He also sought an urgent interim injunction to prevent the forthcoming appointment of the new judges pending determination of his claim.

6. In the early hours of 6 June 2017, Seepersad J granted an order requiring the JLSC to advise the President to refrain from appointing the new judges pending a further hearing in respect of the claim. On the same day, the Attorney General appealed to the Court of Appeal.

7. At the hearing of the appeal, which took place that very day, 6 June 2017, the Court of Appeal heard full argument and was able to deal not only with the interim order made by Seepersad J, but also with the substance of the appellant's claim, which it dismissed. It concluded unanimously that section 110(3)(b) permitted the appointment of a retired judge. The court also examined the issue of whether section 110 required there to be five members of the JLSC for it to be properly constituted, and concluded, by a majority, that it did. However, all three members of the court were of the view that any breach of this requirement would have been cured by section 36 of the Interpretation Act, which would ensure the validity of the JLSC's advice, given that it had been quorate at all material times. Two members of the court said that they would also have relied upon section 36 in the event that, contrary to the majority's view, it was not permissible for a judge to be appointed under section 110(3)(b). They considered that section 36 would have validated the JLSC's decisions, notwithstanding that one of its members was a retired judge appointed under section 110(3)(b).

8. Two further matters need to be noted. First, the retired judge who had been appointed to the JLSC under section 110(3)(b) was Justice Stollmeyer, who had retired from the Bench and was not in active practice in Trinidad and Tobago (see paras 18 and 89 of the Court of Appeal judgments). Secondly, by the time matters came to court on

6 June 2017, there were, in fact, five members of the JLSC, Attorney Ernest Hendron Koylass SC having been appointed to it on 17 May 2017.

The reasoning of the Court of Appeal: meaning of section 110(3)(b)

9. In considering the meaning of section 110(3)(b), each member of the Court of Appeal weighed up the various construction arguments put before the court, their consideration including the literal meaning of the words of the section, the purposive construction proposed by the appellant, and the possible application of the maxim "generalibus specialia derogant" (ie special provisions override general ones, hereafter referred to simply as "the maxim").

10. Mendonça JA's view is summed up in para 42 of his judgment:

> "When the different factors are weighed, they overwhelmingly support a construction that allows for the appointment of retired judges under section 110(3)(b). The language of the subsection does not exclude the appointment of retired judges, nor does the language of section 110(3) as a whole permit the appointment of only one judge. Section 110(3)(b) permits the appointment of two persons with legal qualifications, at least one of whom must not be in active practice. Both criteria can be satisfied by a retired judge. There is nothing to displace the literal meaning of the provision."

11. He recorded (para 33) the appellant's argument that the clear purpose of the subsection was to ensure the input of attorneys-at-law in the exercise of the JLSC's functions, but commented that the appellant had provided no material that could identify that as the purpose of the section. Furthermore, he did not think the section itself supported the argument. He said (para 34) that if the purpose had been to secure the input of attorneys-at-law, it would be expected that there would be a requirement that attorneys-at-law participate in the JLSC's decisions, yet it was agreed that the JLSC could operate with a quorum of three members, and it could therefore operate without the presence of any of the members appointed under section 110(3)(b). He also drew support (paras 35 and 36) from the earlier 1962 Constitution and the report that preceded the current Constitution.

12. He got no help from the maxim because he did not consider that section 110(3)(a) was a specific provision and section 110(3)(b) a general provision. Neither was more specific or less general than the other, they were just different (para 40).

13. Bereaux JA could find no discernible intention to exclude judges from section 110(3)(b) when the words were capable of including them. Far from being persuaded by the appellant's purposive argument, he thought it highly undesirable that an attorney-at-law be appointed to the JLSC, for reasons he set out at para 90.

14. Rajkumar JA found nothing in the language of section 110 to exclude a judge from appointment to the JLSC under section 110(3)(b) and considered (para 139) that such an interpretation could potentially deprive the JLSC of a significant body of expertise. He shared Mendonça JA's view that the argument for a purposive construction was undermined by the fact that the JLSC could be quorate without the input of anyone appointed under section 110(3)(b) (paras 161 and 162), and also his view that section 110(3)(a) and section 110(3)(b) were specific rather than general (para 165 et seq).

The reasoning of the Court of Appeal: five JLSC members required?

15. As the respondent concedes before the Board that the Court of Appeal was correct to conclude that section 110 requires there to be five members of the JLSC, it is unnecessary to go into the court's reasoning for that conclusion. However, it is worth noting that, in dealing with this point and the related issue of validation under section 36 of the Interpretation Act, the judges pointed out that Trinidad and Tobago is a relatively small society, in which it can be difficult to find suitable people willing to be appointed to the JLSC, alluding to the practical difficulties that there would be if the JLSC could only operate with a full complement of five members. Rajkumar JA expressed a rather similar anxiety in arriving at his construction of section 110(3)(b), when he said, at para 139 that the appellant's construction of the provision "could potentially deprive the JLSC of access to a significant body of expertise".

The appellant's arguments before the Board in relation to the construction of section 110(3)(b)

16. The appellant's principal arguments can be broadly summarised as follows.

17. He argues, first, that section 110(3)(a) and (b) establishes two mutually exclusive categories of JLSC member, inviting attention to the two limb structure of section 110(3) which, it is said, suggests an intention to create two non-overlapping clauses. It is said that the reference, in each of the two sub-paragraphs, to appointment "from *among* persons" (italics added), demonstrates that two separate pools are being defined, with the number who can be appointed from each pool stipulated. The section 110(3)(a) pool deals with those who hold/have held judicial office, and limits the appointment of those within that category to one. Section 110(3)(b) is, in the appellant's submission, a much more broadly framed provision. Whilst it would be possible to squeeze a judge

into it, that would be to read section 110(3)(b) (wrongly) in isolation from section 110(3)(a), which is a specific provision and must take precedence in accordance with the maxim.

18. Secondly, it is said that the language of section 110(3)(b) is not designed for judges. It is unusual to speak of a judge being in active practice; a judge is an office-holder, as reflected in the wording of section 110(3)(a). Furthermore, the idea of a judge returning to practice would have been alien to those drafting the 1976 Constitution. When a judge retired from the Bench in 1981 and returned to private practice, it was sufficiently controversial for the Chief Justice to seek views on whether it was proper, and to call for legislation to regulate the position.

19. Thirdly, the appellant submits that there are sound reasons why judicial appointments commissions should include some non-judicial members, as is said to occur in a majority of Commonwealth countries. An active practitioner may have better insights into the realities of practice, and the practicalities of proposed appointments, than a retired judge. However, if the Court of Appeal's construction of section 110(3) is correct, it would be possible for all three appointed members of the JLSC to be judges.

The respondent's arguments before the Board in relation to the construction of section 110(3)(b)

20. The respondent emphasises that the starting point for interpretation is the wording of the section itself and cautions against paying inappropriate attention to other considerations such as context and purpose. The plain and unambiguous meaning of section 110(3)(b) is, in his submission, that two people who have legal qualifications must be appointed (which can plainly include a judge or retired judge) and at least one of them must not be in active practice. Nothing in section 110(3)(a), or in section 110 as a whole, requires a different reading, and it is of note that section 110(3)(b) is not limited expressly to attorneys, when it could have been.

21. In the respondent's submission, the two parts of section 110(3) overlap. They are not distinct pools, nor is section 110(3)(a) a specific provision, and section 110(3)(b) a general provision which cannot derogate from it. Section 110(3)(a) ensures that there will be at least one judge or former judge on the JLSC, but it does not set an overall limit of one, and a further appointment can be made under section 110(3)(b). It is impossible to go behind this on the supposed basis that the purpose of the provisions was to ensure the appointment to the JLSC of members of the legal profession rather than judges. Furthermore, in contrast to the appellant's construction, the respondent's interpretation does not constrain the President's ability to appoint eminently qualified and suitable people to the JLSC. There are, it is said, obvious practical benefits in having more than one retired judge on the JLSC, given the cumulative expertise that would

bring, and given the difficulties, referred to by the Court of Appeal, in finding suitable people to serve on it, in a small society such as Trinidad and Tobago.

22. As to the appellant's point that there was no question of judges returning to practice when the Constitution was drafted, the Constitution is "always speaking" (see, for example, *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687), evolving to cover the changed position.

Section 110(3)(b): discussion

23. The interpretation of section 110(3)(b) is not without difficulty. Three general observations might usefully be made at the outset.

24. In the Court of Appeal, Mendonça JA felt that it was helpful to look at the previous Constitution (the 1962 Constitution), and the recommendations of the Report of the Constitution Commission in 1974 as to the composition of the JLSC. However, the Board does not find that these historical materials provide any clear assistance in the task facing it.

25. Similarly, the Board does not find itself assisted by a purposive approach to the interpretation of the provision. Like the Court of Appeal, it cannot identify, behind section 110(3)(b), a clear intent to ensure that the JLSC's decisions as to appointments are arrived at with input from members of the legal profession, rather than being made solely by judges and retired judges plus the Chairman of the Public Service Commission. Had the purpose been to widen the decision-making process in this way, as the appellant contends, one would have expected that provision would have been made to ensure that the lawyer members appointed to the JLSC under section 110(3)(b) participated in decision making. But as the Court of Appeal observed, section 110(3)(b) does not guarantee this outcome. The required quorum being three, the JLSC could properly conduct its business without the involvement of either of the members appointed under section 110(3)(b).

26. Finally by way of general observation, the Board recognises the need to approach section 110 in its proper context. It acknowledges that the 1976 Constitution was drafted at a time when judges were not expected to return to practice as lawyers when they retired from the Bench, and this is undoubtedly a material consideration in interpreting section 110, although it is not determinative of its meaning. The Constitution is not frozen at the point of drafting, and the court has to ascertain how section 110 applies nowadays, when judges can, and do, return to active practice as attorneys-at-law, albeit that they cannot appear as attorneys before the courts of Trinidad and Tobago for ten years after leaving the Bench (see rule 54 of Part A of the Third Schedule to the Legal Profession Act, cited by the Court of Appeal at paras 28, 71 and 147 of their judgments).

27. Turning directly to the disputed provision itself, the precise words of section 110(3)(b) itself are, of course, of central importance, but the sub-paragraph must be considered in conjunction with the rest of section 110(3), and in the context of section 110 as a whole.

28. The structure of section 110(3) is important. The legislature went to the trouble of separating the candidates for appointment to the JLSC into two distinct and separately described pools, and stipulating the number of appointments to be made from each pool. Had it been envisaged that there would be a significant overlap between the candidates in the pools, it might be thought that a different drafting technique would have commended itself, namely setting the basic requirement (say, "three persons with legal qualifications"), and then specifying the minimum number required from stipulated sub-categories of legally qualified person (one judge or former judge, one person not in active practice).

29. It is also necessary to note the way in which each sub-paragraph of section 110(3) begins. The same technique is used in both sub-paragraphs, but section 110(3)(a) is the one that matters for present purposes. It stipulates that there shall be an appointment of "*one from among* persons who hold or have held office as a Judge …" (emphasis added). This reference to "one from among" an identified group ("persons who hold or have held office as a Judge") is suggestive of an intention to impose a limit upon the number of persons from that group who can be appointed under section 110(3). The Board therefore finds some force in the appellant's argument that sub-paragraph (a) should be read as meaning "*only* one" from that pool, although it sees the argument as a factor contributing to the interpretation of the provision, rather than as definitive of it.

30. What can be gleaned from the precise wording of each of the sub-paragraphs of section 110(3)? The section 110(3)(a) pool is readily understood as encompassing judges and former judges of various specified courts. In speaking of "persons who hold or have held office as a Judge", the provision adopts the normal practice of referring to judges as office-holders. It is worth remarking immediately upon the contrast in language between this sub-paragraph and section 110(3)(b) which involves the concept of being "in active practice". It will be necessary to return to this in due course.

31. Section 110(3)(b) is a great deal less accessible than section 110(3)(a), and the scope of the pool that it establishes is not easy to discern. The meaning of the provision must be assembled from a series of indicators.

32. Section 110(3)(b) appointments have to be from "among persons with legal qualifications at least one of whom is not in active practice as such". It makes sense to start with a consideration of what is meant by "legal qualifications" in this context. There was some discussion, but by no means full argument, before the Board about this.

During this, the question arose as to whether or not an academic law degree would suffice, with some suggestion that it would, in fact, be necessary to have a legal qualification that would entitle the holder to practise, but without a need for the person actually to have practised at any stage. Given the lack of full argument on the point, it would be undesirable for the Board to express a view as to the precise ambit of "legal qualifications" in section 110(3)(b), and it is unnecessary to do so for present purposes. The focus can be kept upon whether judges and retired judges satisfy the sub-paragraph.

33. The Court of Appeal was unanimous in accepting that a judge or retired judge is a person with legal qualifications. The appellant accepts that this is so, albeit grudgingly, conceding that "it would be possible for a judge to be shoe-horned within the literal meaning of the words in section 110(3)(b)." For its part, the Board has no difficulty in accepting that if one were to ask, in the abstract, the bald question, "Do judges have legal qualifications?", the answer would be in the affirmative. However, this is not the end of the story, as "legal qualifications" are only one element of section 110(3)(b), and can only be properly understood once attention is given to the rest of the sub-paragraph.

34. Section 110(3)(b) restricts the President's choice from the pool of persons with legal qualifications by stipulating that at least one of the two people appointed under the sub-paragraph must be "not in active practice as such". Of course, this requirement applies only to "at least one" of the two people, and section 110(3)(b) says nothing about the attributes of the second person to be appointed, other than that he or she must be a person with legal qualifications. However, it seems to the Board that an enquiry into what is meant by the requirement that at least one of the appointments be of a "person … with legal qualifications … not in active practice as such", is likely to shed light upon the whole of the section 110(3)(b) pool. There can be little doubt, from the stipulation that one of the people appointed must *not* be in active practice, that it was contemplated that the pool would include others who *were* "in active practice as such". Moreover, it is difficult to envisage, in this context, any "persons with legal qualifications" who are neither "in active practice as such", nor "not in active practice as such", therefore it seems probable that together these two categories make up the entire pool.

35. So, when the sub-paragraph requires that "at least one of [the persons with legal qualifications] is not in active practice as such", what is meant by "in active practice as such"? The words "as such" must refer back to "persons with legal qualifications", there being nothing earlier in section 110, or in the preceding sections, to which they can refer back. Accordingly, section 110(3)(b) is dictating that at least one of the pool (b) appointments is not to be "in active practice [as a person with legal qualifications]".

36. It is an awkward use of language to speak of being in practice as a person with legal qualifications. Legal qualifications would usually be seen as something a person

has, rather than something they practise. However, the concept can be made to work in relation to a lawyer without difficulty, given that it is entirely conventional to refer to a lawyer being "in practice", for example as an attorney, or perhaps an arbitrator.

37. Considerably greater difficulty is encountered in applying the wording to the judges and former judges who, on the respondent's construction, also fall within section 110(3)(b). The problem is at its starkest in relation to a serving judge whose appointment to the JLSC is contemplated under section 110(3)(b), as the respondent's construction of the provision would permit. It can be assumed, for the sake of argument, that the judge is a person with legal qualifications. But into which of the two pool (b) sub-categories does a serving judge fit? Is a serving judge a person who is "not in active practice as such"? Or is he *in* active practice by virtue of his judicial post?

38. Bereaux JA considered that "a person in 'active practice' could … include a sitting member of the judiciary. He … is practising his profession albeit from a judicial perspective." However, the Board considers that it is straining language to describe a judge's office in this way. Not only is it not normal to speak of a judge as being "in/not in active practice", it is also not the language used in the immediately preceding sub-paragraph, which adopts the conventional language of holding office as a judge.

39. It is no easier to categorise the judge as "not in active practice as [a person with legal qualifications]". He is actively using the very legal qualifications that serve as his passport to section 110(3)(b) in the first place. Yet, on this analysis, some way has to be found whereby he can still be classed as not in active practice as a person with legal qualifications. The only way to satisfy that condition is to draw a distinction between practice as a lawyer, on the one hand, and carrying out a judicial role, on the other, the former being "in active practice as [a person with legal qualifications]" and the latter not. In the Board's view, there is no mandate for introducing sub-divisions into section 110(3)(b) in this way.

40. The Board considers that the difficulty exemplified by this attempt to categorise a serving judge as either in, or not in, active practice as a person with legal qualifications, adds significant weight to the argument that it was not intended that judges should be included within section 110(3)(b) at all.

41. The Board finds a further indicator in the fact that section 110(3)(b) makes pool (b) appointments to the JLSC subject to consultation by the President "with such organisations, if any, as he thinks fit". The reference to consulting with "organisations" brings to mind professional organisations, and it contrasts with section 110(3)(a), which has no provision for consultation. Although not a strong signal, given that the President need not consult with any organisation, this tends against construing section 110(3)(b) to include judges.

42. Putting together all of these various considerations, and paying attention to the two-part structure of section 110(3), the Board concludes that it is section 110(3)(a) which deals with judges and retired judges, and that they are not within the scope of section 110(3)(b).

43. It should be understood that the context for the litigation in this case was the appointment of a judge who had retired from the Bench and not subsequently returned to practice, see para 8 above. The Board has not, therefore, concerned itself with the position of a judge who, after retirement from the Bench, starts to practise again as a lawyer. It should not be taken to have expressed any views as to whether or not such a retired judge would be eligible for appointment to the JLSC under section 110(3)(b).

Section 36

44. It is unclear to the Board to what extent any point concerning section 36 is still pursued, and if so, to what end. The appellant's primary position in relation to section 36 is that it is not material to the proceedings before the Board. The section is concerned with the validity of particular acts done by a board (which would include the JLSC), and the appellant does not impugn the validity of any of the JLSC's acts. All that he seeks is a declaration as to the meaning of section 110 of the Constitution. The respondent relied upon section 36, in the Court of Appeal, in challenging the interim injunction granted by Seepersad J. The Court of Appeal agreed with him that, so long as the JLSC is quorate, any relevant defect in its constitution would be cured by section 36, including any vacancy in the membership or deficiency in a member's qualifications. However, as the issue of interim injunctive relief has now fallen away, it seems that the respondent agrees with the appellant that section 36 has no relevance to the proceedings before the Board.

45. The Board accepts that section 36 is likely to have a role in the event that a particular act of the JLSC is challenged on the basis of an alleged defect in its composition but, in the absence of a specific challenge, considers it undesirable to express any further view about its operation.

Number of JLSC members required

46. The Board would endorse the view of the majority of the Court of Appeal, now no longer challenged by the respondent, that section 110 requires there to be five members of the JLSC, namely the two ex officio members named in section 110(2)(a) and (b), and three members appointed by the President under section 110(3).

Conclusion

47. For the reasons set out above, the Board would allow the appeal against the Court of Appeal's decision in relation to section 110(3)(b) and would make a declaration that there cannot be appointments to the JLSC under that sub-paragraph of either serving judges or former judges in retirement. The parties are invited to submit an agreed draft of the precise declaration that they propose should be made to reflect this, or, in default of agreement, each side may offer the court a separate draft, accompanied by a short supporting submission.

48. The Board would also make a declaration that section 110 requires the JLSC to comprise five members.