Hilary Term
[2025] UKPC 4
Privy Council Appeal No 0057 of 2024

JUDGMENT

Jaiwantie Ramdass (Respondent) *v* Minister of Finance and another (Appellants) (Trinidad and Tobago)

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

before

Lord Hodge
Lord Sales
Lord Stephens
Lady Rose
Lady Simler

JUDGMENT GIVEN ON
28 January 2025

Heard on 7 November 2024

Appellants
Douglas L Mendes SC
Michael S de la Bastide SC
Jerome Rajcoomar
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Anand Ramlogan SC
Kate Temple-Mabe
Mohammud Jaamae Hafeez-Baig
Aasha Ramlal
(Instructed by Freedom Law Chambers (San Fernando))

LADY SIMLER:

1. Introduction

1. The proceedings that have given rise to this appeal concern an application for judicial review by the Auditor General of Trinidad and Tobago, the respondent to this appeal, against the Minister of Finance ("the Minister") and the Cabinet, referred to together as "the appellants". The judicial review challenges the Minister's recommendation (accepted by the Cabinet) to appoint an investigation team whose members and terms of reference were determined by him. The investigation team is to report on the conduct of the Auditor General in response to an understatement by the Ministry of Finance ("the MoF") of revenue of $2.6 billion in the public accounts for the financial year 2023, as described below. The respondent contends that the Minister's decisions are tainted by bias and breach the constitutional protections for the Auditor General in sections 116 and 136 of the Constitution.

2. There is no dispute that the magnitude of the understatement of revenue by the MoF and the circumstances that led to it raise serious matters of public concern warranting a full investigation. The full terms of reference set by the Minister are recorded in para 17 below. The first three of those terms of reference are properly directed to the circumstances surrounding the understatement and are not challenged by the respondent. Indeed, the Board understands that an investigation has proceeded in relation to those terms of reference and there is no challenge to the investigation team members or their conduct. The respondent's challenge is limited. She seeks to quash as unlawful only those parts of the appellants' decisions that are concerned with the design and implementation of an investigation into her role and conduct as Auditor General in connection with the understatement.

3. There was an oral leave hearing at which James J was invited by the appellants to refuse leave to apply for judicial review. By a decision dated 3 June 2024, James J refused leave. He accepted the appellants' arguments that the application is not arguable because (1) the rule against bias does not apply to the Minister's decision to recommend the investigation and (2) the investigation is not, as a matter of law, precluded by sections 116 or 136 of the Constitution. The respondent appealed. The Court of Appeal (Mohammed, Rajkumar and Aboud JJA) allowed the appeal. It held that both grounds are arguable with a realistic prospect of success given the low threshold for leave, and, accordingly, it granted leave to apply for judicial review and remitted the proceedings to a judge of the High Court.

4. This appeal challenges that grant of leave by the Court of Appeal. It does not concern the merits of the decision to investigate, or to recommend an investigation to the Cabinet, or the desirability of the terms of reference relating to the respondent. The

appellants have yet to respond substantively to the judicial review claim and there has, as yet, been no duty of candour disclosure or, indeed, any disclosure at all.

5. The threshold for the grant of leave to apply for judicial review is low. Leave will be granted where there is an arguable ground for judicial review with a realistic prospect of success that is not subject to a discretionary bar or other knockout blow. Moreover, as the appellants accept, once leave has been granted, there is a correspondingly high threshold for overturning such a decision on appeal. Unless the Board is satisfied that leave should plainly not have been granted, the case should proceed to a hearing of the judicial review.

6. Having heard submissions from Mr Mendes SC on behalf of the appellants in this appeal, the Board concluded that it was unnecessary to hear submissions on behalf of the respondent. In view of the importance of these matters in Trinidad and Tobago, the Board announced its decision to dismiss the appeal. The Board is not satisfied that the Court of Appeal was plainly wrong to grant leave or that there is any knockout blow justifying the refusal of leave on either ground.

7. These are the Board's written reasons for reaching that decision.

2. The factual background

8. It is unnecessary for the purposes of this appeal to set out the full factual background to these proceedings, and sufficient to record the following essential facts.

9. On 31 January 2024, in accordance with the statutory deadline established by section 24 of the Exchequer and Audit Act ("the Act"), the Treasury Division of the MoF submitted the public accounts for the financial year 2023 to the respondent. The accounts included a statement of revenue figure of $61.89 billion. The respondent was required by section 25 of the Act and section 116 of the Constitution to examine and audit the public accounts and submit a report on her audit to the Speaker of the House of Representatives, the President of the Senate and the Minister by 30 April 2024 (or within such further period as might be determined by Parliament).

10. Following the submission of the public accounts to the respondent, the MoF identified an understatement of revenue for the financial year 2023 of $2.599 billion.

11. The respondent completed her audit but before her report could be submitted the MoF reported the understatement to her by phone call on 25 March 2024. By memorandum dated 28 March 2024, the MoF invited the respondent to allow an

amendment to the public accounts to reflect the understatement. A different amount ($3.379 billion) was specified in the memorandum, of which $2.598 billion was said to have been reconciled. Subsequently, a further memorandum dated 5 April 2024 from the MoF to the respondent stated that $2.599 billion had been reconciled but a further sum of $780 million was being checked. She was asked to note that the "variance was due to posting errors, including double booking of transactions and decimal point transposition errors which arose as a result of the implementation of the new Electronic Cheque Clearing System at the Central Bank as well as the Go Anywhere Platform which replaced the presentation of physical cheques for reconciliation".

12. A third memorandum dated 8 April 2024 from the MoF said that the reconciliation process was complete, and the variance was stated to be $2.599 billion. Thereafter, the MoF attempted to deliver a revised version of the public accounts for 2023, reflecting the understatement, to the respondent. The respondent initially refused to accept the revised accounts.

13. On 15 April 2024, the Attorney General issued a pre-action protocol letter to the respondent, threatening legal proceedings and calling on her to accept and consider revised accounts delivered to her on 15 April 2024, which contained a statement of revenue figure for 2023 of $64.49 billion (instead of $61.89 billion). The Attorney General's letter expressed the view that the respondent's refusal to receive or consider the revised public accounts was unlawful and irrational.

14. In response to the letter, the respondent accepted the revised public accounts and sent an audit team to the MoF to conduct an audit. Subsequently, on 24 April 2024 the respondent's audit report was submitted to the Minister, the President and Parliament. It contained a qualification stating that she had been unable to obtain sufficient appropriate audit evidence to form an opinion on whether all revenue had been fully accounted for and included in the public accounts.

15. On 26 April 2024 there was a debate in Parliament about whether the deadline for submitting the Auditor General's report and public accounts should be extended. It is common ground that, in the course of the debate, the Attorney General accused the respondent of acting in flagrant contravention of her statutory and constitutional responsibilities in refusing to accept the corrected materials from the MoF's Treasury Division as part of her audit; and the Minister said that the public looking on might describe the respondent's unwillingness to receive corrected documents as "bizarre" or "sinister". Parliament ultimately resolved to extend the time for the submission of the Auditor General's report under sections 24(1) and 25(1) of the Act to 31 August 2024.

16. By letter dated 28 April 2024 from the respondent's solicitors to the Minister, grave concerns were expressed about these (and other) statements, and questions were

raised and allegations made about the understatement and asserted backdating of the public accounts. On 29 April 2024, the Minister made a statement in the Senate rejecting the allegations made against him and Ministry staff as totally false. He announced that the matter required a full independent investigation, with findings to be reported to the Public Service Commission.

17. On 7 May 2024, the Cabinet (chaired by the Minister who was acting as Prime Minister in the latter's absence at the time, and including the Attorney General) approved the recommendation of the Minister that an investigation team be appointed to investigate the following matters as identified in the investigation terms of reference:

> "(a) What circumstances led to the understatement of revenue in the public accounts for the financial year 2023 and what should be done to avoid a recurrence of same;
>
> (b) The efficacy of the new Electronic Cheque Clearing system introduced by the Central Bank of Trinidad and Tobago in 2023;
>
> (c) The efforts made by the officials at the MoF and its various Divisions to correct the understatement of revenue, and to advise the Auditor General of the understatement and provide her with an explanation, clarification and further information on same;
>
> (d) What was the response of the Auditor General to the efforts of the public officials described at (c) above and what action was taken by the Auditor General in relation to the understatement of revenue in the audit of the public accounts for the financial year 2023;
>
> (e) What are the facts in relation to the allegations and statements made by the Auditor General in her report on the public accounts with specific reference to the understatement of revenue in the public accounts for the financial year 2023;
>
> (f) Any other related matters; and
>
> (g) Findings and recommendations."

18. By pre-action protocol letter dated 12 May 2024, the respondent indicated her intention to bring a claim for judicial review against the appellants, challenging the investigation insofar as it relates to her conduct. The letter alleged that the Minister is a principal protagonist in this situation and that the investigation is nothing more than an attempt by him to distance himself from the "fiasco he created". By letters dated 15 May 2024 sent on behalf of the appellants, all allegations of wrongdoing were refuted.

19. By a claim form dated 16 May 2024, the respondent sought leave to apply for judicial review challenging the Cabinet's decision to approve and the Minister's recommendation to appoint an investigation team to investigate, make findings and recommendations and report to the Minister on the matters identified in (d), (e), (f) and (g) of the terms of reference.

20. The application for leave was refused by James J on 3 June 2024. By order dated 21 June 2024, the Court of Appeal reversed that decision but granted final leave to the appellants to appeal to the Board on 3 July 2024. During the currency of these proceedings the investigation team has not pursued any investigation into the conduct of the respondent by reference to the impugned terms of reference.

3. The respondent's ground for judicial review based on bias

21. It is common ground that both the Minister and the Cabinet are under a duty to act fairly in exercising their public duties and functions. The question raised by the respondent's judicial review claim is whether that duty extends to an obligation on them to be free from bias in making the decisions that are challenged by her.

22. The respondent's case is that the context and the background to the impugned decisions, together with the role assumed by the Minister (with approval of the Cabinet) in relation to the design and implementation of the investigation into her conduct, and the ongoing role that he will have in relation to it, make it arguable that the steps taken so far are vitiated by the Minister's bias. This is notwithstanding the role of the Cabinet in the decision making and that any findings that ultimately emerge from the investigation will be made by the members of the investigation team whose conduct and actions she does not challenge.

23. Although the courts below appear to have focussed on apparent bias, the ambit of the respondent's pleaded judicial review claim is wider. The pleaded claim of bias is of both actual and apparent bias (expressly pleaded in paras 109 and 116 of the claim form). Improper exercise of discretion (or improper purpose) is also pleaded (para 134(d) of the claim form) and appears to run with the bias claim as the following paragraphs of her judicial review claim form suggest:

"105. The Minister of Finance is charged with the ministerial responsibility for the Ministry of Finance. The investigation therefore concerns alleged errors and maladministration that occurred under and during his watch as Minister of Finance. He has publicly defended the action and conduct of the officials in his Ministry and has disingenuously sought to shift blame to the Auditor General.

106. The investigation has the potential to cause serious reputational harm and damage to the Applicant and the Office of the Auditor General. Given the vehemence with which the Minister of Finance has attacked the Applicant, both in Parliament and publicly, and the scathing, one-sided comments that he has made about her conduct, it is unreasonable and unfair for him to select and recommend the investigators which the cabinet approved, draft the terms of reference and have the investigators report to him. He is conflicted and there is a real risk of bias.

107. The investigation was initiated by a member of the Executive, exercising a public function, who was required to exercise that public function with impartiality, independently, and without pursuing any personal interest. The fact that the Minister bore personal ministerial responsibility for the errors of his department, and the fact that he had so vehemently criticised the Applicant and made clear statements indicating his view about her conduct, both indicate that he had a personal interest in the outcome of the investigation which he initiated. This offends against his duty to act fairly, and for the public good with impartiality and is therefore unlawful.

108. The investigation offends against an established principle of procedural fairness, namely that no one may be a judge in his own cause. The Minister of Finance has made statements privately to the Auditor General, in Parliament and publicly, which pre-judge the matters under investigation. …"

24. The claim also pleads that the Minister is a holder of public office, and by initiating this investigation, both he and/or the Cabinet were exercising public functions to which the Code of Conduct set out in Part IV of the Integrity in Public Life Act Ch. 22:01 applies (para 111). The claim asserts that the Code imposes a duty on the Minister and/or the Cabinet to be "fair and impartial" in exercising their public functions. The respondent

relies on section 24(1)(a) of the Integrity in Public Life Act and section 20 of the Judicial Review Act, discussed further below.

4. The respondent's ground for judicial review based on a breach of the constitutional protections available to her

25. Irrespective of bias, the respondent contends that insofar as the investigation relates to the performance of her duties in office as Auditor General, the investigation is unlawful because it constitutes impermissible executive interference with the independence of her role. This challenge is based on section 116(6) of the Constitution which provides that the exercise of her functions as Auditor General shall not be subject to the direction or control of any other person or authority. The respondent argues that the investigation commissioned by the Minister into her actions and response to the understatement of revenue in the audit of the public accounts for the financial year 2023 is unconstitutional as interfering with her role and functions as Auditor General.

26. The respondent also relies on section 136 of the Constitution which affords the Auditor General security of tenure and provides by section 136(7) that the Auditor General can only be removed from office for inability to discharge the functions of his or her office or for misbehaviour and by section 136(10) sets out the exclusive procedure for removal. It provides that a decision to investigate her removal as a public officer can only be made by the President, on her own initiative or at the suggestion of the Prime Minister (section 136(8)) and the mechanism for doing so is through the appointment of a special tribunal under section 136(9).

27. Together the respondent contends that these provisions insulate the Auditor General from political influence or control, especially by Ministers whose departments' finances she is required to audit. She contends that her political independence is strengthened by the fact that she can only be removed from office pursuant to and in accordance with the procedure and safeguards set out in section 136 of the Constitution. Nonetheless, the respondent expressly accepts (consistently with the position established by *Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago* ("the *Law Association* case") [2018] UKPC 23; [2018] 5 LRC 704) that section 136 is not the only mechanism by which an Auditor General (or other public office holder) can ever be investigated. Rather, her case is that section 136 is the only means by which an investigation into the Auditor General's performance of her constitutional functions can be conducted by the executive.

5. The test to be applied by the Board in deciding this appeal

28. Having identified the essential grounds for the respondent's claim for judicial review, the Board turns to consider the basis on which leave to apply for judicial review will ordinarily be granted and the test to be applied on an appeal against such grant.

29. As is well-established, in deciding whether to grant leave to apply for judicial review, the court is concerned only to examine whether an applicant has an arguable ground for judicial review with a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see governing principle (4) identified in *Sharma v Brown-Antoine* [2006] UKPC 57; [2007] 1 WLR 780, para 14.

30. This is a low threshold. The leave stage is, after all, designed to protect public bodies against weak and vexatious claims. It is not designed for lengthy inter partes hearings but to enable a judge to decide whether a case is arguable on a relatively quick consideration of the material available: see *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 644A, per Lord Diplock. Nor, in the Board's view, is it intended to afford an opportunity to a public body, such as the Minister, to resist full consideration of matters that are likely to be of importance both to the public and the executive itself.

31. As the Board explained in *Attorney General v Ayers-Caesar* [2019] UKPC 44 at para 2, although wider questions of the public interest may have some bearing on whether leave should be granted, "if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage".

32. Once leave has been granted as it has here, the threshold on appeal for overturning that grant of leave is correspondingly high. The grant must be shown to be plainly wrong, or, as the Board described it in *Central Bank of Trinidad and Tobago v Maritime Life (Caribbean) Ltd* [2022] UKPC 37 at para 3, there must be some knockout blow:

> "In circumstances where leave to apply for judicial review has been granted, then ordinarily the preferred course is to proceed to a hearing on the merits, unless there is some clean knockout blow. On an appeal a very powerful - even an overwhelming - case presented on behalf of an appellant ordinarily will not suffice unless it amounts to a clean knockout blow."

33. Accordingly, the Board is concerned only to examine whether the Court of Appeal's grant of leave to apply for judicial review is plainly wrong or there is some clear knockout blow that means leave should not have been granted.

6. The *Law Association* case

34. Before turning to the reasoning of the courts below it is helpful to explain in a little more detail the nature of the investigation at issue and the decision in the *Law Association* case which played an important part in the reasoning of the judgments below.

35. The case concerned a challenge to the conduct of an investigation by a committee of the Law Association into allegations against the Chief Justice on the ground that the Law Association had already formed certain adverse views of the Chief Justice's conduct. The investigation was being conducted to ascertain or substantiate the facts in relation to allegations that had been received by it, and then to obtain leading counsel's advice in relation to its findings before convening a meeting of its members to determine what course, if any, it should take. The decision could have no binding effect on the Chief Justice and the courts held that the committee of the Law Association should be viewed more realistically as a potential complainant, so that the Law Association had no quasi-judicial or adjudicative role.

36. In these circumstances Mendonça CJ (Ag) (in the Court of Appeal, with whom Jamadar and Bereaux JJA agreed) held that just as a criminal prosecutor or complainant is not required to satisfy the rule against bias set out in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, so too a complainant on the civil side, like the Law Association, would not be required to meet that test. Accordingly, the rule against bias was not applicable to the Law Association on the facts of that case (paras 101 – 103). Furthermore, the procedure for removal of a judge or the Chief Justice in section 137 of the Constitution did not preclude an investigation by any other party or body, including the Law Association.

37. On appeal, the Board agreed. Lady Hale distinguished the committee set up by the Law Association from a tribunal set up under section 137. At para 21 she observed that,

> "it had no constitutional status and its report would have no binding effect upon anyone (per Mendonça CJ (Ag) at para 72). The adverse consequences of construing the Constitution in the way suggested [on behalf of the Chief Justice] far outweighed any beneficial consequences: it was accepted that the media could investigate the Chief Justice's conduct, and that he was not immune from criminal prosecution. If the argument on behalf of the Chief Justice was accepted only certain citizens

> would be prohibited from inquiry; this would impinge upon their fundamental rights to freedom of thought and expression. Public confidence in the judiciary would be strengthened if the allegations were found to be baseless, and if they were not, then it would be right for the section 137 procedure to be invoked; and if there is no investigation, the allegations do not die or disappear - on the contrary, 'they may grow louder in volume' (per Mendonça CJ (Ag) at para 80)."

38. The Board held that the short answer to the argument that section 137 creates an exclusive procedure was that the Law Association committee's investigation was in no position to make findings of fact which were in any way binding upon the Chief Justice or upon any tribunal which might be established under section 137 of the Constitution (para 24). Moreover, the Board agreed with the Court of Appeal that the investigation by the Law Association could not be equated with a judicial or quasi-judicial determination of legal rights and liabilities to which the conventional rules of natural justice apply (para 35).

39. Significantly however, the Board made clear that, "Nor is it necessary for the Board to consider the more difficult question of the extent to which public bodies are required to be impartial in carrying out their statutory functions. This is because there are concurrent findings in the courts below that the matters relied upon by the Chief Justice are not such as to give rise to an appearance of bias on the part of the [Law Association], applying the test laid down in *Porter v Magill* (citation omitted): would a fair-minded and informed observer, having considered the facts, conclude that there was a real possibility that the [Law Association] was biased?" (para 35).

7. The leave stage decisions of the courts below

40. In refusing leave in this case, James J held that the decision in the *Law Association* case was binding authority as to who can lawfully investigate the conduct of the Chief Justice and could not be distinguished when it came to determining the allegation that the investigation of the respondent is unconstitutional in this case. On bias, James J accepted that the principles of fairness are flexible and "can vary to suit the specific context of the decision-maker's activities and the nature of their functions" (para 55 of his judgment), but he held that they do not "attach to every decision of an administrative character as many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way" (para 56). Again, in relation to the bias ground, he regarded himself as bound by the *Law Association* case to hold that the Minister:

> "was not performing an adjudicative function in which he was acting as a sort of Judge. The Minister was not determining the

> Applicant's rights and liabilities nor was the Minister making findings of fact in doing so and even if he made such preliminary determinations, it was not binding on the investigators. On the contrary, he was performing his functions of management and application of the Executive power. The Minister was performing a mainly political role which involved his authority, and his duty, to choose the best course of action, from the standpoint of the public interest." (para 58)

41. Unlike James J, the Court of Appeal did not regard the *Law Association* case as necessarily determinative of the issues raised by either of the respondent's grounds for judicial review. It accepted that the investigation team is not determining any of the Auditor General's civil rights or liabilities or coming to a determination which is binding upon her, or upon any tribunal which may subsequently be appointed under section 136 of the Constitution. It also observed that the investigation team is not acting in any disciplinary capacity, nor could it. Accordingly, it accepted that the investigation team is not, in the conduct of its investigation, either a prosecutor or a decision maker in relation to any rights, liabilities or responsibilities of the Auditor General (para 43). However, the Court of Appeal held that, unlike in the *Law Association* case, the investigation in this case is by or at the behest of the executive, and that it is at least arguable that this makes a material difference in answering the question whether it is lawful for the executive to use a different mechanism for investigating the Auditor General than the one expressly prescribed for the executive by section 136 of the Constitution (para 48).

42. The Court of Appeal also regarded it as arguable that the *Law Association* case does not establish any hard and fast rule that the principles of natural justice (including the rule against bias) do not apply to investigations of the kind in this case. It considered it arguable with a realistic prospect of success that the direct involvement by the Minister in selecting, appointing and assuming responsibility for the remuneration of the investigation team and in establishing their terms of reference, makes a material difference to the question whether the rule against bias applies to his decisions. Significantly, the Court of Appeal considered it properly arguable that the decisions establishing terms of reference "for a matter in which his Ministry had a direct interest in the outcome, (and which is capable of being construed as apportioning blameworthiness as between the Ministry of Finance and the Office of the Auditor General)" and requiring the investigation to report to him "all in a parallel process which had been publicly expressed to be for purposes which included laying the ground work for the invocation of the section 136 procedure", could be vitiated if tainted by "the appearance of bias" (para 49).

43. For these reasons the Court of Appeal reversed the decision of James J and granted leave to apply for judicial review on all grounds.

8. Was the Court of Appeal plainly wrong and/or is there a knockout blow in relation to either or both grounds?

44. The appellants contend that the answer to both grounds for judicial review is a question of pure law amounting to a knockout blow in each case. They invite the Board to determine each of these questions finally on this appeal notwithstanding that the Court of Appeal declined the same invitation. The Board notes that the Court of Appeal took the view that to express any concluded view on matters of law would be premature and inappropriate at this preliminary stage of the proceedings.

45. Taking the constitutional ground first, Mr Mendes submits that the respondent's reliance on direct executive involvement in commissioning the investigation is a creative but misconceived attempt to side-step the reasoning of the *Law Association* case, which cannot be validly distinguished. Like section 137 in relation to investigations concerning the Chief Justice, section 136 specifies who may make representations for the setting up of a tribunal of investigation, and who may be on the tribunal, but does not provide that a decision to investigate the actions and conduct of the person holding the office of Auditor General may only be made by the President or the Prime Minister acting pursuant to section 136(8). Neither section 136 nor section 137 lay down an exclusive process by which such an investigation can be conducted. He contends that there is no basis for construing section 136 as preventing the executive from conducting an investigation into the conduct of the Auditor General as part of a broader investigation into matters relating to the preparation, submission and audit of the public accounts for the financial year 2023, when, to adopt the words of the Board in the *Law Association* case "any other body or individual" may investigate the conduct of the Auditor General (para 24).

46. The Board does not accept these arguments. Sections 136 and 137 of the Constitution provide an exclusive procedure for removal of those individuals holding public office to whom these provisions apply. They are the essential means by which their independence is secured, and their security of tenure is safeguarded. Plainly the Board accepts that the investigation team is not tasked with investigating whether the respondent should be removed from office; nor with determining whether there is sufficient evidence to warrant the initiation of a section 136 removal process, or to enable representations to be made to the President that a tribunal ought to be set up under section 136 to investigate the Auditor General. Nonetheless, there remains the possibility that the investigation team's report might be the first step in a sequence of measures culminating in the removal process being initiated under section 136 and might be seen as carrying very significant weight by a tribunal appointed under section 136(9) by the President to consider the question of removal, simply because it is an investigation instigated by the executive. Although the investigation team cannot act in a disciplinary capacity and its findings cannot be binding on the President, the Prime Minister or any tribunal set up under section 136, the findings it makes might indirectly present what is effectively a fait accompli in relation to questions about the Auditor General's removal.

47. The significance of an investigation commissioned by the executive and its implications for section 136 were not addressed in the *Law Association* case, and this distinction may be material in context. Accordingly, the Board is not persuaded that the Court of Appeal was plainly wrong to regard this ground as arguable.

48. Moreover, although the primary case advanced by the respondent is that *no* executive investigation can lawfully be commenced into her conduct outside the confines of section 136, it would be open to a court on judicial review, to conclude that although no such bright line rule applies, depending on the facts, this particular investigation is unconstitutional. In other words, the Board takes the view that this ground is not necessarily capable of being determined as a pure point of law but may itself also raise fact sensitive issues that can only be resolved at a full hearing.

49. Finally, this argument raises potentially important constitutional questions on which the Court of Appeal has yet to rule. The Board is therefore being invited to determine a constitutional question not only without the benefit of a decision from the court most familiar with such questions in their domestic context, but also in circumstances where the Court of Appeal plainly considered the point to be one that would benefit from fuller consideration and reflection. This too is a reason for rejecting the appellants' appeal on this ground.

50. Turning to the bias ground, Mr Mendes submits that the matters identified by the Court of Appeal are insufficient to give rise to the applicability of the rule against bias in this case since the impugned decisions are neither judicial, quasi-judicial, or adjudicative in nature, and they do not affect, still less determine, the rights of anyone. He contends that there is a hard and fast principle of law that the rule against bias does not apply to non-adjudicative decisions and is inapplicable as a matter of law to the Minister's decisions in this case. Even if the Minister's motives might have been political or self-interested, the fact remains that he merely made a recommendation to set up an investigation with the terms of reference specified. Moreover, the investigation team is itself independent, and the respondent has not challenged the appointment or independence of any of its members. This effectively wipes the slate clean and the rule against bias cannot apply in this situation. Notwithstanding these contentions, Mr Mendes did concede that since bias cannot be a proper purpose, if the respondent's case of bias includes an allegation of improper purpose, he could not resist the grant of leave on that ground.

51. The Board does not accept that the question whether the rule against bias applies in this case is a pure question of law. The rule against bias forms an essential requirement of procedural fairness or natural justice. It is well-established that what procedural fairness requires in any given situation depends on the specific facts and context of the individual case. Moreover, the authorities cited by the appellants make clear that, in deciding whether it is arguable that the rule against bias applies to the decisions that are

challenged in this judicial review, the question is not whether those decisions are of a certain type or category – whether judicial, quasi-judicial, or in some looser sense, adjudicative. Rather, the focus is on the facts of the case and the context in which the impugned decisions were taken. None of the cases cited by the appellants establish, as a matter of law, that the rule against bias can never apply in a non-adjudicative context, no matter the facts.

52. This is because in general, the exercise of public law powers by a public body is amenable to judicial review where the powers are exercised unlawfully, unfairly or for an improper purpose. Natural justice is concerned with the exercise of power. The requirements of natural justice certainly apply to acts or decisions which produce legal results that in some way alter the legal position of the complainant to his or her detriment. But these requirements may also apply in the case of a preliminary stage which may not itself involve immediate legal consequences but may lead to acts or decisions which do. The protection of procedural fairness might therefore be required throughout a process from the preliminary stage onwards, and in deciding whether a procedure is fair, consideration of whether each successive step is fair to the individual concerned may be necessary.

53. Where the issues in a case are fact-sensitive, then leave to proceed to a full hearing should be granted unless the legal position is so clear that the allegations of fact, taken at their highest, do not support an arguable legal case.

54. The respondent's case taken at its highest is that the Minister has gone much further than merely making a recommendation to Cabinet that an investigation take place. Like the Court of Appeal, the Board regards it as significant that the Minister not only recommended the investigation but also selected and recommended the investigation team; set the investigation's terms of reference; is responsible for remuneration of the investigation team; and has required that the investigation team report to him. Notwithstanding his own role as Minister of the department responsible for the understatement, and the fact that the investigation is capable of apportioning blame as between his department and that of the Auditor General, his conduct is not targeted for investigation in any of the terms of reference whereas the conduct of the Auditor General is. It is arguable that this has the appearance of a one-sided investigation seeking to deflect attention or blame away from the Minister.

55. It is also significant that the respondent relies on actual and apparent bias, together with improper purpose (see para 23 above). These arguments run together and cannot be easily separated. As Mr Mendes realistically accepted, the appellants have no knockout blow in relation to a pleaded case of improper purpose. These are fact sensitive questions, and whether on the facts of this case, the Minister acted with bias and in that sense, an improper purpose, is a question that can only be determined at a full hearing, with all

relevant disclosure in accordance with the proper discharge of the Minister's duty of candour.

56. Moreover, the significance for this claim of the fact that the appellants are each under a statutory obligation to act fairly and impartially in exercising their public functions and duties may yet have to be addressed. The obligation arises from section 24(1)(a) of the Integrity in Public Life Act Chap 22:01 which provides that any person exercising a public function has an obligation to "be fair and impartial in exercising his public duty" and section 20 of the Judicial Review Act Chap 7:08 which requires that any person acting in the exercise of a public duty or function "shall exercise that duty or perform that function in accordance with the principles of natural justice or in a fair manner". The respondent contends that these statutory duties of fairness and impartiality encompass a duty to act without bias. Whether that is right was left open in the *Law Association* case, and there is no other jurisprudence on this question. Here too, the Board does not have the benefit of any judgment from the local courts on this question assessed in light of the particular socio-economic and political culture as it affects Trinidad and Tobago.

57. These considerations lead the Board to the conclusion that it is properly arguable that the rule against bias applies to the impugned decisions taken by the appellants concerning the design and setup of the investigation in this case. Whether it does apply can only be determined at a full hearing.

9. Conclusion

58. Accordingly, none of the arguments raised by the appellants cross the high threshold required for the Court of Appeal's grant of leave to be reversed. The appellants have failed to establish a knockout blow to either ground or to demonstrate that the Court of Appeal was plainly wrong to grant leave to apply for judicial review. On the contrary, the respondent's case on both grounds is arguable, with a realistic prospect of success.

59. The Board has emphasised the low threshold for meeting the test of arguability and the need to demonstrate what is a clear knockout blow in resisting the grant of leave to apply for judicial review. The significance of this is that a public body seeking to resist the grant of leave for judicial review of its acts or decisions ought generally to be able to demonstrate a knockout blow in a summary way without the need for extensive investigation of and argument on the knockout point relied on. In a case such as this, where wider questions of the public interest may have some bearing on whether leave should be granted, it is unfortunate that the so-called knockout blow relied on by the Minister has not only led to extensive argument in the domestic courts, but also to this second appeal. It might have been thought preferable for this case to go forward to a full judicial review hearing so that the serious allegations of unlawful conduct made by the

respondent could be fully investigated, considered and determined on their merits. To borrow from the words of Mendonça CJ (Ag) in the *Law Association* case, it might be thought that public confidence in the appellants would be strengthened if the allegations are found to be without merit; but if there is no investigation, the allegations do not simply disappear; on the contrary, they may simply grow louder in volume.

60. For all the reasons given above, the appeal is dismissed. The respondent's judicial review claim therefore proceeds on all grounds.