West Indian Reports /Volume 71 /Suratt and others v; Attorney General of; Trinidad and Tobago - (2007) 71 WIR 391

(2007) 71 WIR 391

Suratt and others v; Attorney General of; Trinidad and Tobago

[2007] UKPC 55

PRIVY COUNCIL

LORD BINGHAM OF CORNHILL, BARONESS HALE OF RICHMOND, LORD CARSWELL, LORD BROWN OF EATON-UNDER-HEYWOOD AND LORD MANCE

13, 14 JUNE, 15 OCTOBER 2007

Constitutional law – Constitution – Entrenched provisions – Judicature – Parliament enacting equal opportunities legislation – Legislation providing for creation of tribunal to determine complaints – Whether creation of and adjudication by tribunal unconstitutional – Equal Opportunity Act 2000 [T] – Constitution of Trinidad and Tobago, s 2.

The Equal Opportunity Act 2000 was passed by a simple majority of both Houses of Parliament of Trinidad and Tobago and was assented to on 20 October 2000. The Act defined discrimination, specified the fields in which it was not to apply and established an equal opportunity commission. Part VIII of the Act (ss 41–52) provided for the equal opportunity tribunal, which comprised a chairman and two lay assessors. Pursuant to pt VII of the Act the commission was to investigate complaints. Where feasible the commission might seek to resolve those complaints by conciliation, but where that could not be done the commission had to report and, with the consent of the complainant, initiate proceedings before the tribunal. Whilst the Act was subsequently brought into force, it was not implemented. The appellants, all persons claiming to be victims of discriminatory treatment prohibited by the 2000 Act, brought proceedings by way of constitutional motion, complaining of the government's failure to implement the Act. The principal issue for the Board was whether the creation of the equal opportunities tribunal by the 2000 Act, an ordinary Act of Parliament, was unconstitutional and thus void by virtue of s 2 of the Constitution of Trinidad and Tobago, as inconsistent with the fundamental principle of the separation of powers. The appellants' claims were dismissed at first instance and the Court of Appeal of Trinidad and Tobago held, inter alia,

that the 2000 Act did derogate from the jurisdiction of the High Court both generally because of the unlimited potential scope of its jurisdiction and specifically in relation to the jurisdiction enjoyed in respect of disputes between individuals and the state and was accordingly unconstitutional. The appellants challenged that decision.

Held – (Lord Bingham dissenting) The 2000 Act was not inconsistent with the Constitution of Trinidad and Tobago. Whilst the equal opportunities tribunal had been given a significant new jurisdiction under the 2000 Act, that jurisdiction had no equivalent in the existing Constitution, there was nothing expressed in the Constitution to preclude its creation, the Constitution expressly contemplated lesser judicial officers to fulfil unspecified functions, and there was nothing in the limited and specialised jurisdiction given to the tribunal which was so characteristic of the jurisdiction of a Supreme Court as to preclude its being given to a different body. It followed that the provisions of the 2000 Act were not unconstitutional in this respect. Moreover, it could not be the case that every Act of Parliament which impinged in any way upon the rights protected in ss 4 and 5 of the Constitution was for that reason alone unconstitutional. Legislation frequently affected rights such as freedom of thought and expression and the enjoyment of property. Those were both qualified rights which might be limited, either by general legislation or in the particular case, provided that the limitation pursued a legitimate aim and was proportionate to it. It was for Parliament in the first instance to strike the balance between individual rights and the general interest. Whilst the courts might on occasion have to decide whether Parliament had achieved the right balance, there could be little doubt that the balance which Parliament had struck in the 2000 Act was justifiable and consistent with the Constitution. Accordingly, the appeal would be allowed (see [47]–[49], [51], [57], [58], [59], below).

Hinds v R [1976] 1 All ER 353 and *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356 distinguished.

Cases referred to in opinions

Attorney General for Alberta v Attorney General for Canada [1947] AC 503, PC.

Attorney General for Ontario v Attorney General for Canada [1925] AC 750, PC.

Attorney General of the Commonwealth of Australia v R and Boilermakers' Society of Australia, Kirby v R and Boilermakers' Society of Australia [1957] 2 All ER 45, [1957] AC 288, PC.

Boodhoo v A-G of Trinidad and Tobago [2004] UKPC 17, [2004] 5 LRC 483.

Grant v R [2006] UKPC 2, [2007] 1 AC 1, [2006] 3 LRC 621, PC.

Hinds v R [1976] 1 All ER 353, [1977] AC 195, PC.

Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett [2005] UKPC 3, [2005] 2 AC 356, [2005] 2 LRC 840, [2005] 2 WLR 923, PC.

Jaroo v A-G of Trinidad and Tobago [2002] UKPC 5, [2002] 1 AC 871, [2002] 5 LRC 258, [2002] 2 WLR 705, PC.

Minister of Home Affairs v Fisher [1979] 3 All ER 21, [1980] AC 319, PC.

Mootoo v A-G (1979) 30 WIR 411, [1979] 1 WLR 1334, PC.

R v West Yorkshire Coroner, ex p Smith (No 2) [1985] 1 All ER 100, [1985] QB 1096, DC.

Appeal

The appellants, Kenneth **Suratt** (on behalf of himself and 14 others), Devon Garray, Davis Thomas, Dianne Arneaud, Abygail Arneaud, Rakesh Persad, and Ashton Ramsundar, appealed to the Judicial Committee of the Privy Council (Appeal No 84 of 2006) against the decision of the Court of Appeal of Trinidad and Tobago (Sharma CJ, Archie and Mendonca JJA) upholding the decision of Smith J, in proceedings brought by the appellants by way of constitutional motion, that the Equal Opportunity Act 2000 was inconsistent with the Constitution of Trinidad and Tobago. The facts are set out in the majority opinion of the Board.

Richard Clayton QC, Ramesh Maharaj SC and *Robert Strang* (instructed by *Collyer Bristow LLP*) for the appellants.

James Guthrie QC (instructed by *Charles Russell LLP*) for the Attorney General of Trinidad and Tobago.

The Board took time for consideration.

15 October 2007. The following judgment of the Board was delivered.

LORD BINGHAM OF CORNHILL.

[1] This appeal raises a question of great difficulty and importance. It is whether the Equal Opportunity Act 2000 ('the EOA' or 'the Act') is inconsistent with the Constitution of Trinidad and Tobago, which by s 2 of the Constitution is the supreme law, and so void. It was held to be so by Smith J sitting in the High Court and his decision was upheld by the Court of Appeal (Sharma CJ, Archie and Mendonca JJA) in a judgment of Archie JA with which the other members of the court agreed. The appellants challenge that conclusion.

[2] The EOA was passed by a simple majority of both Houses of Parliament and was assented to on 20

October 2000. Part VI of the Act was brought into force in November 2000 and the remainder of the Act in January 2001. It was amended in May 2001, in a way immaterial for present purposes, by an Act passed by both Houses, again by a simple majority, and assented to in June 2001. But the EOA has not been

implemented. This, it appears, is because the government in power since December 2001 was advised that the Act was, or might be, unconstitutional. The appellants, all persons claiming to be victims of discriminatory treatment prohibited by the EOA, brought these proceedings by way of constitutional motion in May 2003, complaining of the government's failure to implement the Act.

[3] For historical reasons which it is unnecessary to explore, there is in the population of Trinidad and Tobago a degree of racial, religious and cultural diversity which, while enriching and strengthening the national life, has also been recognised as giving rise to problems of discrimination. Section 4 of the Constitution provides that the fundamental human rights and freedoms listed in the section had existed and should continue to exist 'without discrimination by reason of race, origin, colour, religion or sex', but it is common ground that this refers only to discrimination by the state on the grounds specifically mentioned. Harmful discrimination may, however, be exercised otherwise than by the state and on grounds, such as disability, other than those mentioned. In 1987 an eminent Constitution Commission was appointed, which reported in 1990 and considered the establishment of an Equal Rights or Equal Opportunities Commission, strongly advocated by Dr La Guerre. In January 1996 the Law Commission of Trinidad and Tobago published a Working Paper on Equal Opportunity Legislation, which included a comparative survey of such legislation in other jurisdictions. A Joint Select Committee of Parliament was appointed to consider this Working Paper, and it submitted its Report in November 1997. The Attorney General obtained the advice of leading counsel in England in June and July 1998, and in June 1998 the law commission reported on the constitutionality of the Equal Opportunity Bill 1998. While counsel for the Attorney General, resisting the appellants' challenge in these proceedings, insisted on the unconstitutionality of the EOA, he said nothing to disparage the objects of the Act. The government is seeking to achieve very similar objects in its Equal Opportunity Bill 2007, for which it will seek an enhanced parliamentary majority.

[4] The EOA is similar in many respects to comparable legislation elsewhere. In Parts II–V it defines 'discrimination' and specifies the fields in which the Act is and is not to apply. Part VI establishes an Equal Opportunity Commission, the function of which is broadly to promote the elimination of discrimination. Part VII deals with complaints, which the commission is to investigate. Where feasible the commission may seek to resolve these by conciliation, but where this cannot be done the commission must report and, with the consent of the complainant, initiate proceedings before the tribunal. The EOA arms the commission with powers appropriate for its functions, and no separate question arises

on the constitutionality of the commission. The issue arises on Part VIII, which in ss 41–52 provides for the Equal Opportunity Tribunal (the tribunal).

[5] The tribunal comprises a chairman and two lay assessors. Decisions of the tribunal in any proceedings are to be made and delivered by the chairman (s 44(7)) and the lay assessors are to assist the chairman in arriving at a decision (s 42(4)). The jurisdiction and powers of the tribunal are exercisable by the chairman and at least one lay assessor (s 44(1)). The tribunal may (subject to the approval of the President of the Republic) make rules to govern the procedure and practice of the tribunal, including costs (s 44(8)).

[6] The tribunal is to be a superior court of record and is to have, in addition to the jurisdiction and powers conferred on it by the Act, all the powers inherent in such a court (s 41(1)). Such powers, it is agreed, include a power to fine a contemnor or commit him to prison for contempt. In the case of a superior court of record at

least this power exists even where the contempt is not committed in the face of the court: *R v West Yorkshire Coroner, ex p Smith* (*No 2*) [1985] 1 All ER 100, [1985] QB 1096. The tribunal has jurisdiction to hear and determine complaints referred to it by the commission, to require persons to attend for the purpose of giving evidence and producing documents, and to make such declarations, orders and awards of compensation as it thinks fit (s 41(4)). A summons signed by the registrar for enforcing the attendance of a witness or the production of documents has the same effect as formal process issued in the High Court (ss 44(5), 45(3)). The tribunal has the same powers, rights and privileges as are vested in the High Court in relation to the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, 'the entry on inspection of the property' (sic) and other matters necessary or proper for the exercise of its jurisdiction (s 45(1)). Provision is made in s 48 for the recovery and enforcement of compensation and damages awarded by the tribunal on the filing of a certificate of the registrar as civil debts or as if they were High Court judgments. Fines are recoverable by the Registrar of the Tribunal, whose certificate is conclusive, and are paid into the Consolidated Fund (s 48(2), (6)). An appeal lies from the tribunal to the Court of Appeal, whether as of right or with leave, on grounds specified in s 50(2) of the Act, but subject to that the orders, awards, findings or decisions of the tribunal in any matter may not be challenged, appealed against, reviewed, quashed or called in question on any account whatever and the tribunal may not be subject to prohibition, mandamus or injunction in any tribunal on any account whatever (s 50(1)).

[7] The chairman of the tribunal is to be 'a Judge of status equal to that of a High Court judge' (s 41(2)). The parties are agreed that he need not be, and will not become, a High Court judge. He is to be appointed by the president acting in accordance with the advice of the Judicial and

Legal Service Commission (s 42(1)). This is the body which has the duty under the Constitution of advising the president on the appointment of judges other than the Chief Justice, and the EOA provides that the relevant provisions of the Constitution, including those pertaining to tenure and removal, shall apply to the chairman. The chairman is entitled to receive the same salary and allowances as a judge of the High Court, chargeable on the Consolidated Fund, and his conditions of service, other than those as to pension, shall also be the same (s 43(1), (2)). His salary, remuneration, allowances and other conditions of service may not be altered to his disadvantage during his tenure of office (s 43(5)). The office is pensionable (s 43(6)).

[8] The lay assessors are to be appointed by the president as persons appearing to him to be qualified by virtue of their knowledge of or experience in law, religion, race relations, gender affairs, employment issues, education, culture, economics, social welfare or human rights, having served in those fields or a combination of them for at least ten years (s 42(3)). They hold office for a renewable term of not less than three years, determined by the president (s 42(5)). Their appointment may be terminated by the president on the recommendation of the chairman, on any one of several specified grounds (s 42(7)). Their terms of service are to be prescribed by the president (s 43(3)) and they are to be paid such salary and allowances as may be recommended by the Salaries Review Commission and approved by the minister responsible for finance (s 43(4)). Their salary, remuneration, allowances and conditions of service may not be altered to their disadvantage during their tenure of office (s 43(5)). Their office is pensionable (s 43(6)).

The Constitution

[9] Chapter I of the Constitution, comprising ss 4–14, is concerned with the recognition and protection of fundamental human rights and freedoms. Reference has already been made to s 4, in which certain such rights and freedoms are guaranteed 'without discrimination by reason of race, origin, colour, religion or sex'. In attacking the government's failure to implement the Act, the appellants have invoked the right of the individual to the protection of the law (s 4(b)), the right of the individual to equality of treatment from any public authority in the exercise of any functions (s 4(d)) and the right to procedural protection of these rights

(s 5(2)(h)). But their main contention is that the EOA is not inconsistent with the Constitution and the government has failed in its public duty by failing to implement an Act duly passed and brought into force. The Attorney General for his part contends that the EOA does infringe the rights of the individual under ss 4 and 5 and so required (but did not obtain) the enhanced parliamentary majority stipulated by s 13.

[10] By s 13, an Act may expressly declare that it shall have effect even though inconsistent with ss 4 and 5 and, if any Act does so declare, it shall have effect accordingly unless it is shown not to be reasonably

(2007) 71 WIR 391 at 397

justifiable in a society that has a proper respect for the rights and freedoms of the individual. Such an Act is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House. The fatal flaw of the EOA, as the Attorney General argues, is that it contained no such declaration and obtained no such majority. The 2007 Bill, mentioned in [3], above, contains such a declaration in cl 3, and the government accepts the need for a final three-fifths' majority of the votes in each House.

[11] Section 14 makes provision for enforcement of the Ch 1 rights. It provides in sub-s (1) that if any person alleges that any of the provisions of the chapter has been, is being or is likely to be contravened in relation to him, then 'without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion'. This provision is supplemented by sub-s (4): where 'in any proceedings in any court other than the High Court or the Court of Appeal' any arguable question arises as to the contravention of any of the provisions of Ch 1, the person presiding in that court may and, if any party to the proceedings so requests, must refer the question to the High Court. By sub-s (2) the High Court has original jurisdiction to decide any application made under sub-s (1) and decide any question referred under sub-s (4). Thus a person complaining against the state of discrimination on a proscribed ground in the enjoyment of a right guaranteed by s 4 or 5 of the Constitution can proceed by ordinary action in the High Court, or by way of constitutional motion in the High Court (if appropriate) under s 14(1), or on the reference of another court to the High Court under s 14(4). Under the EOA such discrimination could be the subject of a complaint to the commission and, if referred with the complainant's consent to the tribunal, of decision by the tribunal. A complaint of discrimination against a party other than the state or on a ground not covered in s 4 of the Constitution can only be pursued, through the commission, on a reference to the tribunal.

[12] Chapter 7 of the Constitution is devoted to the judicature. There is to be a Supreme Court comprising the High Court and the Court of Appeal (s 99). The High Court and the Court of Appeal are to be superior courts of record, having all the powers of such a court (ss 100(2), 101(2)). The judges of the High Court and the Court of Appeal are to be appointed by the president acting in accordance with the advice of the Judicial and Legal Service Commission (s 104(1)). 'Judge' is defined in s 3 of the Constitution to include 'the Chief Justice, a Judge of Appeal and a Puisne Judge'. A judge, other than a temporary judge, holds office in accordance with ss 136 and 137 (s 106(1)). The broad effect of those sections is to give a judge security of tenure until the prescribed retirement age, to protect the judge against disadvantageous changes in his salary, allowances and conditions of

(2007) 71 WIR 391 at 398

service during his tenure of office and to permit his removal 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 misbehaviour, and only then when removal is recommended by both an independent tribunal and the Judicial Committee of the Privy Council. No office of judge may be abolished while there is a substantive holder of that office (s 106(2)). In addition to advising the president on the appointment of High Court judges and justices of appeal, the Judicial and Legal Service Commission has power under s 111 to appoint certain legal officers, including magistrates.

[13] Section 53 provides that the Constitution may not be altered except in accordance with the provisions of s 54. That section provides that Parliament may, subject to the provisions of the section, alter (an expression widely defined in sub-s (6)) any of the provisions of the Constitution. But in so far as it alters ss 101, 104, 106, 136 and 137 mentioned above, a Bill for an Act under this section may not be passed by Parliament unless at the final vote thereon in each House it is supported by the votes of not less than two-thirds of all the members of each House. Thus the provisions of the Constitution relating to the appointment, tenure and removal of High Court judges are entrenched by the need for a substantial parliamentary majority to alter them.

Hinds v R

[14] The central question in the present appeal is whether the provisions of the EOA which establish the tribunal are inconsistent with the Constitution. To answer that question both parties referred to *Hinds v R* [1976] 1 All ER 353, [1977] AC 195, a decision of this Board in which Lord Diplock gave the judgment of the majority (himself, Lord Simon of Glaisdale and Lord Edmund-Davies).

[15] The *Hinds* case concerned the Gun Court Act 1974, a Jamaican statute which re-allocated responsibility for trying firearms offences between three differently constituted court divisions, a Circuit Court Division, a Resident Magistrate's Division and a Full Court Division. The appellants had all been convicted in the Resident Magistrate's Division, to which there was held to be no constitutional objection, as there was not to the Circuit Court Division. But the majority thought it necessary to their decision (pp 210D, 211A) to review the constitutionality of the Full Court Division. This division, which had never sat (p 231G), was to be composed of three resident magistrates sitting together, and its jurisdiction extended to all non-capital offences previously triable only on indictment before a Supreme Court judge exercising the jurisdiction of a Circuit Court of the Supreme Court, if the offender was a person who had been in unlawful possession of a firearm. The majority held the Gun Court Act to be unconstitutional to the extent that it purported to confer on persons qualified and appointed

as resident magistrates a jurisdiction which under Ch VII of the Constitution of Jamaica was exercisable only by persons qualified and appointed as judges of the Supreme Court.

[16] In an attractive argument for the appellants, Mr Clayton QC submitted that the *Hinds* case does not govern the present case. He pointed out that the Gun Court Act related to the trial of serious crime, and involved the taking away from the Supreme Court and the allocation to magistrates, subordinate judicial officers not protected by the constitutional guarantees applicable to Supreme Court judges, of a jurisdiction previously exercisable only by the latter. These distinctions are clearly valid. The EOA is directed to the redress of civil wrongs. The focus of the Act is on the creation of new rights. No jurisdiction is taken away from the High Court, save perhaps at the choice and with the consent of the complainant. The present case is not on all fours with the *Hinds* case.

[17] The Attorney General's counter-argument rested on more general observations made by Lord Diplock in the course of his judgment, in which at the outset ([1976] 1 All ER 353 at 358, [1977] AC 195 at 210) he described the issues raised as of 'outstanding public importance'. The Board heard extensive argument over seven days.

[18] Lord Diplock observed ([1976] 1 All ER 353 at 358, [1977] AC 195 at 210) that a question of

constitutional validity cannot be resolved by considering the specific provisions at issue in a particular case, and he pointed out ([1976] 1 All ER 353 at 359, [1977] AC 195 at 211–212) that constitutions differ fundamentally from ordinary legislation passed by the parliament of a sovereign state:

> 'They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future.'

Because constitutions such as that of Jamaica (or Trinidad and Tobago) are ([1976] 1 All ER 353 at 359, [1977] AC 195 at 212) evolutionary, not revolutionary, and provide for continuity of government, the practice in drafting constitutions is to leave much to implication.

[19] At [1976] 1 All ER 353 at 360, [1977] AC 195 at 213 Lord Diplock made a statement from which both parties to this appeal sought to derive support:

> 'The chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government. It may, as in the case of the Constitution of Ceylon, contain nothing more. To the extent to which the
>
> *(2007) 71 WIR 391 at 400*
>
> constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new constitution came into force; but the legislature, in the exercise of its power to make laws for the "peace, order and good government" of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution (*Liyanage v R* ([1966] 1 All ER 650 at 658, [1967] AC 259 at 287, 288)).'

[20] Lord Diplock referred ([1976] 1 All ER 353 at 360, [1977] AC 195 at 213) to the provisions of human rights chapters commonly found in constitutions such as those of Jamaica (and Trinidad and Tobago), acknowledging that until amended by whatever special procedure is laid down for the purpose such provisions impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers. He added ([1976] 1 All ER 353 at 360–361, [1977] AC 195 at 213):

> 'Any express provision in the constitution for the appointment or security of tenure of judges of that court will apply to all individual judges subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the "court" in which they sit (*Attorney General for Ontario v Attorney General for Canada* [[1925] AC 750]).'

[21] Two further passages in Lord Diplock's judgment merit citation. In the first ([1976] 1 All ER 353 at 360–361, [1977] AC 195 at 214) he said:

> 'Where, under a constitution on the Westminster model, a law is made by the parliament which purports to confer jurisdiction on a court described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of the judicial power does not depend on the label (in the instant case "The Gun Court") which the parliament attaches to the judges when exercising the jurisdiction conferred on them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose
>
> *(2007) 71 WIR 391 at 401*
>
> the court to which the new label is attached? Does the method of their appointment and the security of their tenure

> conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature? ([*Attorney General of the Commonwealth of Australia v R and Boilermakers' Society of Australia, Kirby v R and Boilermakers' Society of Australia* [1957] 2 All ER 45, [1957] AC 288]).

Lord Diplock then ([1976] 1 All ER 353 at 361, [1977] AC 195 at 214) considered constitutional entrenchment, and said:

> 'The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.'

[22] The vice which the majority found in the Full Court Division was succinctly summarised by Lord Diplock ([1976] 1 All ER 353 at 367, [1977] AC 195 at 221):

> 'But more important, for this is the substance of the matter, the individual citizen could be deprived of the safeguard, which the makers of the Constitution regarded as necessary, of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.'

Lord Diplock acknowledged ([1976] 1 All ER 353 at 367, [1977] AC 195 at 222) that the answer to a constitutional challenge of this kind might not be clear-cut:

> 'As with so many questions arising under constitutions on the Westminster model, the question whether the jurisdiction vested in the new court is wide enough to constitute so significant a part of the jurisdiction that is characteristic of a Supreme Court as to fall within the constitutional prohibition is one of degree.'

Thus difficult cases will call for an exercise of informed judgment.

Conclusion

[23] The Board, like the courts of Trinidad and Tobago, is not concerned with the propriety and expediency of the EOA, but only with its constitutionality. The appellants are right that the EOA, unlike the Gun Court Act, creates new rights, not the subject of any existing jurisdiction. But the right of one is the liability and obligation of another, and the question is whether, consistently with the Constitution and without the imprimatur of an enhanced parliamentary majority, these rights, liabilities and obligations can be the subject of adjudication by the tribunal established by the EOA. In my opinion there are compelling reasons why they cannot.

[24] Section 41(1) of the EOA purports to establish the tribunal as a superior court of record vested with all the powers conferred on it by the Act and all the powers inherent in such a court. The powers conferred by the Act, as noted above, are extensive and potentially intrusive. Its inherent powers, denied to courts not of record, include a power to imprison for contempt, a potentially draconian power however rarely exercised in practice. Yet the Constitution provides for only two superior courts of record, the High Court and the Court of

Appeal, the members of each of which enjoy the strong entrenched protection of their tenure, remuneration and conditions of service which the Constitution affords. There is nothing in the Constitution to preclude the creation of a new superior court of record, but it is implicit in this constitutional scheme that the members of any such court will enjoy the measure of entrenched protection enjoyed by judges of the High Court and justices of appeal.

[25] The chairman of the tribunal, as is accepted, does not enjoy such protection. Although his status is equal to that of a High Court judge (s 41(2)), he is appointed in the same way (s 42(1)) and the EOA gives him the same tenure and other rights as a High Court judge, these terms may be abrogated or his office abolished by legislation enacted on a simple parliamentary majority. Thus he is potentially susceptible to pressure as a judge of the High Court or a justice of appeal is not, and there would be nothing unconstitutional in such legislation if (as the appellants contend) the EOA does not vary any provision of the Constitution.

[26] It is in my opinion evident from the terms of the EOA, contrary to the views expressed by the courts below, that the lay assessors are advisers to the chairman of the tribunal and are not themselves

decision-makers. But they are members of the tribunal (s 41(2)), at least one of them must take part in any exercise of the tribunal's jurisdiction and powers (s 44(1)) and they have the opportunity to influence the chairman's decision, even perhaps on questions of law (s 42(3)). Thus they may advise on liability, on the award of compensation (there being no statutory limit on the compensation which the tribunal may award) and on the committal or fining of a contemnor. Yet the lay assessors are appointed by the president, no doubt acting on the advice of the appropriate minister (s 42(3)), and not according to the procedure laid down for the appointment of judges. They do not enjoy the status, remuneration or tenure of judges. Their office enjoys no constitutional entrenchment. I can readily appreciate the benefit to a legally-qualified chairman of outside advice born of practical experience when difficult and sensitive decisions pertaining to discrimination have to be made. But nothing in the Constitution contemplates that persons in the position of the lay assessors under the EOA may be members of a superior court of record.

[27] Lord Diplock (see [19], above) thought it implicit in a constitution such as that of Trinidad and Tobago that judicial power, however distributed from time to time, should continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter of the constitution dealing with the judicature. He may in that passage have been directing his mind to a jurisdiction which already existed. But he considered (see [20], above) that the rule should apply to all individual judges subsequently appointed to exercise 'an analogous jurisdiction, whatever other name may be given to the “court” in which they sit'. While the jurisdiction conferred on the tribunal is new in its application to private law relationships and its application to disability, this jurisdiction is clearly analogous to that which, under the Constitution, is the exclusive preserve of the High Court. In the first passage of Lord Diplock's judgment quoted in [21], above, he concludes by posing two questions. Both may properly be posed in the present case. The answer to the first is that the nature of the jurisdiction of the tribunal resembles but extends the anti-discrimination jurisdiction exercised by the High Court under the Constitution. The answer to the second question is no: the method of appointment and security of tenure of the members of the tribunal do not conform to the requirements of the Constitution applicable to judges who, at the time the Constitution came into force, exercised jurisdiction of that nature. The vice which Lord Diplock identified in the Gun Court Act (see the passage at [1976] 1 All ER 353 at 367, [1977] AC 195 at 221, quoted in [22], above) exists here also.

[28] To the extent that the answer to the present problem is doubtful, weight should be given to the judgment of the Trinidad and Tobago courts. A judge sitting in a local constitutional environment, in which he has grown up and with which he is familiar, is likely to have a surer

sense of what falls within the purview of the Constitution and what falls beyond than a court sitting many miles away. For this reason alone, in the absence of manifest error, the Board should be slow to disturb the unanimous conclusion of the local courts on a question of this kind, involving as it does a question of judgment and degree.

[29] I appreciate that a majority of the Board take a different view. But no assistance is in my opinion gained from considering what could or could not be done in the United Kingdom, which unlike Trinidad and Tobago has no entrenched constitution. Nor do I think it safe to draw analogies with the Tax Appeal Board, on the constitutionality of which the courts below expressed no opinion.

Minor points

[30] The judge and the Court of Appeal based their finding of unconstitutionality on reasoning to the effect set out above. But they also considered other points, of which brief mention should be made.

[31] Both the judge (paras 43–47 of his judgment) and the Court of Appeal (paras 48–53 of Archie JA's judgment) attached weight to the fact that the chairman of the tribunal was to be appointed by the president in accordance with the advice of the Judicial and Legal Service Commission. It was pointed out, quite correctly, that while the Constitution conferred power on this commission to advise on the appointment of judges and to appoint to certain other legal offices, it conferred no power to advise on the appointment of those who were not judges. This, although true, is immaterial. The function imposed on the commission under the EOA is not a constitutional function, but nor is it of itself unconstitutional. It is not of itself unconstitutional to confer an extra-constitutional power on a constitutional body.

[32] The judge (paras 41–42) and the Court of Appeal (paras 54–55) were concerned at the power to fine conferred on the tribunal, regarding this as a legislative power, although the Court of Appeal would have been willing to sever this provision from the Act had it been the only defect. In argument before the Board it was suggested that the power could only refer to contempt, and might even have been a drafting error. The latter explanation would be easier to accept if there were not three references to fines in the EOA (sub-ss (1), (2) and (6) of s 48), the last subsection being specifically directed to the disposal of fines received. But, as already noticed, the power to fine for contempt is in any event a power inherent in a superior court of record. The power to fine is relevant to the constitutionality of the tribunal, but does not of itself render the tribunal unconstitutional. If these references were the only defect in the EOA, I would in any event agree that they could be severed.

[33] Sections 17 and 18 of the EOA prohibit discrimination in the supply of goods and services and accommodation. It was argued for the Attorney General below that this restricted an individual's rights, guaranteed by s 4(a) of the Constitution, to enjoyment of property and

not to be deprived of it without due process, and so required a special parliamentary majority. The appellants replied that the rights protected by the Constitution are not absolute, that reasonable and proportionate qualifications of a protected right are not inconsistent with the Constitution, and that the qualification in the EOA, directed to promoting the aim of non-discrimination also embodied in the Constitution, was reasonable and proportionate. The judge considered the issue but declined to pronounce on it (paras 48–51). The Court of Appeal concluded that whether or not the qualification of the protected right was reasonable and proportionate an enhanced parliamentary majority was called for (paras 46–47). Given my overall conclusion it is unnecessary for me, and perhaps undesirable, to rule definitively on this point. I would, however, accept

that the rights protected by s 4 are not, at least in most instances, absolute. And reading the recitals to the Constitution, with their emphasis on human dignity and equality, I would need some persuasion that ss 17 and 18 infringe any right which the Constitution protects.

[34] A somewhat similar point was made on s 7(1) of the EOA which prohibits a person otherwise than in private from doing—

> 'any act which—(a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of persons; (b) is done because of the gender, race, ethnicity, origin or religion of the other person or of some or all of the persons in the group; and (c) which is done with the intention of inciting gender, racial or religious hatred.'

The Attorney General submitted below that this subsection restricted freedom of thought and expression protected by s 4(i) of the Constitution and so required an enhanced parliamentary majority. The appellants drew attention to the Sedition Act, which had been in force when the Constitution was adopted and so enjoyed protection under s 6 of the Constitution as an existing law. By ss 3 and 4 of the Sedition Act it was an offence (among other things) to engender or promote feelings of ill-will or hostility between one or more sections of the community on the one hand and any other section or sections of the community on the other. Thus s 7, the appellants contended, did little or nothing to extend the law. The judge did not decide this point but because of what he regarded as the vagueness of s 7 saw much force in the Attorney General's argument that it infringed freedom of expression (paras 52–54). The Court of Appeal held that s 7 altered the law, and that it derogated from the right to freedom of thought and expression to an extent to which the Sedition Act did not derogate, but only in relation to gender (paras 34–39). It therefore held that s 7 was not invalidated, but should be construed as if the reference to gender were absent. It is again unnecessary for me, and perhaps undesirable, to express a concluded

opinion. But for reasons similar to those given in [33], above I would be slow to hold that s 7 is invalid even to the limited extent held by the Court of Appeal.

[35] The EOA provides, in s 3, that ' “sex” does not include sexual preference or orientation'. The judge, noting that homosexual conduct and buggery remained serious criminal offences in Trinidad and Tobago, found that this exclusion was not unconstitutional (paras 64–65). The Court of Appeal held it was not a crime to have a homosexual or lesbian orientation, and considered that the exclusion was unjustified and unconstitutional (paras 40–45). It is not necessary for me to decide this point. But I would not understand 'sex' in s 4 of the Constitution to embrace sexual preference or orientation, and it is not obvious why a prohibition framed in less comprehensive terms than might be thought appropriate elsewhere should be thought to infringe the Constitution.

Severance

[36] The courts below considered whether Pt VIII of the EOA, relating to the tribunal, could be severed from the rest of the Act. The judge rejected this possibility, holding that without the tribunal the Act would be an empty and unworkable piece of legislation (paras 67–70). The Court of Appeal agreed: if the offending provisions were excised, what remained would be a shell gutted of any meaning or effectiveness (para 56). I agree. The test of severability is that propounded by the Board in Attorney General for *Alberta v Attorney General for Canada* [1947] AC 503 at 518, applied in the *Hinds* case ([1976] 1 All ER 353 at 373, [1977] AC 195 at 228–230): can it be assumed that the legislature would have enacted what survives without enacting the part that is held to be unconstitutional? I would not for my part disturb the judgment of the Court of Appeal on this point.

Disposal

[37] I would dismiss the appeal. A majority of the Board hold otherwise, and the appeal will accordingly be allowed. Submissions on the form of the order (if this cannot be agreed) and on costs are invited in writing within 28 days. In closing, the Board would respectfully invite consideration by the Trinidad and Tobago authorities of the procedure to be adopted where a duly enacted statute is believed by the government of the day to be unconstitutional. The legislation may in such circumstances be repealed, or a procedure devised to seek the opinion of the court. It is not a desirable practice to leave the statute unimplemented until action is brought against the government by a private complainant seeking an order against the government to implement the statute after a delay of some years.

BARONESS HALE OF RICHMOND (delivering the judgment of the Board).

[38] The relevant provisions of the Equal Opportunity Act 2000 (the EOA) and of the Constitution of Trinidad and Tobago, together with

citations from the case of *Hinds v R* [1976] 1 All ER 353, [1977] AC 195 are set out in the opinion of Lord Bingham of Cornhill. As he explains, the most important issue in this case is whether the creation of the Equal Opportunities Tribunal (the tribunal) by the EOA, an ordinary Act of Parliament, is unconstitutional and thus void by virtue of s 2 of the Constitution. The creation of the tribunal is not inconsistent with any express provision in the Constitution, whether entrenched under s 54(2) or (3) or capable of amendment under s 54(1). Rather, it is suggested that the constitution of the tribunal, and some of its powers, are inconsistent with the fundamental principle of the separation of powers. It is implicit in all constitutions on the Westminster model that the judicial power of the state be exercised by a judiciary whose 'independence from all local pressure by Parliament or by the executive' is guaranteed in the manner contemplated by the constitution in question: see *Hinds v R* [1976] 1 All ER 353 at 367, [1977] AC 195 at 221.

[39] But that proposition does not tell us how this particular constitution contemplated that the independence of the holders of this particular judicial power should be protected. Section 99 of the Constitution provides that 'there shall be … a High Court of Justice … and a Court of Appeal with such jurisdiction and powers as are conferred on those Courts respectively by this Constitution or any other law'. Section 99 is not itself entrenched, nor is s 100, which provides who shall be the judges of the High Court and that it shall be a superior court of record. Sections 104 to 107, and ss 136 and 137, which deal with the appointment, terms of office and removal of High Court and other senior Judges, are entrenched and can only be altered with the consent of two-thirds of the members of each House of Parliament: see s 54(2).

[40] Clearly, however, the Constitution does not contemplate that *only* the High Court, staffed by judges enjoying the protection that High Court judges enjoy, shall exercise the judicial power of the state. Section 99 does not say this. Section 111 establishes the Judicial and Legal Service Commission to appoint, remove

and exercise disciplinary control over the officers to which that section applies. These are not listed in the Constitution but in the Judicial and Legal Service Act and other legislation (for example, s 4(2) of the Tax Appeal Board Act). The judicial offices listed in the second schedule to the Judicial and Legal Service Act include Chief Magistrate, Senior Magistrate, and Magistrate. These officers' judicial powers have their limits but nevertheless enable them to impose substantial terms of imprisonment.

[41] The question, therefore, is whether it is implicit in the Constitution that the powers to be exercised by the tribunal can only be exercised by people enjoying exactly the same protection as High Court judges. As Lord Diplock put it in the *Hinds* case [1976] 1 All ER 353 at 367, [1977] AC 195 at 222, 'the question whether the jurisdiction vested

in the new court is wide enough to constitute so significant a part of the jurisdiction that is characteristic of a Supreme Court as to fall within the constitutional prohibition is one of degree'. However, even if the answer to that question is 'no', there is still the question whether the protection given to the tribunal in this case is sufficient.

[42] In considering these questions, as with most constitutional questions, there is a balance to be struck. On the one hand, security of tenure and emoluments has been seen, since at least the Act of Settlement of 1701, as an important guarantee of the independence of the judiciary. (Indeed, the fact that the colonial judges did not enjoy such security was one of the grievances of the American colonies before independence.) On the other hand, the demands upon the legal system are increasing all the time and cannot all be met by judges of the High Court. It is not just that the volume of traditional areas of work has grown. No legal system can stay set in stone as it always has been. It has to move and develop with the times. The complexity of the modern world has seen the emergence of new problems which need new solutions. In the United Kingdom, for example, specialist jurisdictions have been set up to cater, not only for the myriad of disputes which may arise between citizen and state, but also for some disputes between private persons. The most important examples are disputes between employer and employee and between landlord and tenant, where a different way of doing justice is thought necessary because of the perceived imbalance in power and resources between the parties. It is common for such jurisdictions to include people who are not lawyers but have relevant experience or expertise or who are in some sense representative of each 'side' in the dispute.

[43] The problems addressed by the EOA are a case in point. Since the Second World War, it has been common for human rights instruments and constitutions to protect the citizen against discrimination by the state on grounds such as race or sex. In a separate and more recent development, ordinary statute law has prohibited discrimination on similar grounds by the suppliers of goods, facilities, services, accommodation, education and employment. This was controversial at first, but is now a well-accepted way of countering historic prejudice against particular groups or sections of society and helping to achieve greater equality of opportunity and participation in society for all. It is a common feature of such laws that they try to proceed by persuasion and agreement rather than by coercion. They tend therefore to have commissions charged with both general duties to work towards the elimination of discrimination and specific duties to receive and investigate individual complaints. They emphasise the importance of conciliation rather than adjudication. But in the last resort adjudication is available, often by a specialist body.

[44] The need for such measures in the context of the history and society of Trinidad and Tobago is vividly explained by

Dr John La Guerre in his Reservations to the 1990 Report of the Constitution Commission (1987). The

commission agreed in principle with the need for an Equal Opportunity Commission but not for including such a body in the Constitution (Report, 1990, para 422). The matter was taken up by the Law Commission, which published a Working Paper on Equal Opportunity Legislation in 1996. This examined models elsewhere in the common law world. It recommended the establishment of an Equal Opportunities Commission with wide powers to promote the eradication of discrimination, conduct research and educational programmes, as well as to receive, investigate and conciliate individual complaints. The Law Commission discussed whether adjudication should be a function of the Commission, or a body within the Commission, or relegated to the High Court. It observed:

> 'In the context of the present state of the administration of justice in Trinidad and Tobago, it is always desirable to devise mechanisms to keep matters from cluttering the formal court system. Equally desirable is the need to give the Commission "teeth".'

The Board is familiar with some of the problems which may have led the commission to say what it did: see, for example, *Boodhoo v A-G of Trinidad and Tobago* [2004] UKPC 17, [2004] 5 LRC 483. The commission recommended that a tribunal be set up within the Equal Opportunities Commission and that at least one member of the commission should possess the legal qualifications of a judge of the High Court (p 40, recommendation 14). The problem with this, as Mr Geoffrey Robertson QC explained in an advice on the 1998 Equal Opportunities Bill, was that the commission was to be a party to all proceedings and could not be judge in its own cause. The new tribunal therefore had to be entirely independent of the commission. The decision could have been taken to increase the jurisdiction of the High Court to deal with these new claims, but for very understandable and sensible reasons it was thought that a new and specialist body would be preferable.

[45] It is a strong thing indeed to rule that legislation passed by a democratic Parliament establishing a new type of judicial body to adjudicate upon a new body of law is unconstitutional. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one: see *Grant v R* [2006] UKPC 2 at [15], [2007] 1 AC 1 at [15], citing *Mootoo v A-G* (1979) 30 WIR 411 at 414–416, [1979] 1 WLR 1334 at 1338–1339. On the other hand, the constitution itself must be given a broad and purposive construction: see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21 at 25, [1980] AC 319 at 328.

[46] Smith J, who heard this case at first instance, held the Act unconstitutional in this respect for two reasons. First, 'that the provisions of the Act as they affected the status of the lay assessors (and to a much lesser extent, the Chairman) are contrary to the principle of the separation of powers' (para 34 of his judgment). Second, 'that the attempt to vest concurrent jurisdiction in the tribunal to deal with discrimination by the State is an attempt to whittle away a significant jurisdiction of the High Court' (para 39 of his judgment). Archie JA, who gave judgment in the Court of Appeal, accepted that there could be new jurisdictions created whose members did not enjoy the same degree of protection as High Court judges. He gave the example of the Tax Appeal Board, 'a well-respected court with recognized specialist expertise', whose members are appointed in a similar manner to those of this tribunal (para 31 of his judgment). In his view the structure was not incapable of giving a fair hearing in accordance with s 5(2)(e) of the Constitution. 'However, it does derogate from the jurisdiction of the High Court both generally because of the unlimited potential scope of its jurisdiction and specifically in relation to the jurisdiction currently enjoyed in respect of disputes between individuals and the State' (para 32). Hence it was unconstitutional.

[47] However, Mr Clayton QC, for the appellants, has convincingly demonstrated that this new jurisdiction does not significantly derogate from the existing jurisdiction of the High Court. There are three main reasons for this. First, it remains open to a person who claims that his or her constitutional rights under s 4 of the

Constitution have been violated by discrimination by the state to bring that case before the High Court, either by writ or by constitutional motion. The tribunal can only hear and determine complaints referred to it by the commission (EOA, s 41(4)). The commission cannot refer a complaint under the EOA to the tribunal unless the complainant consents (EOA, s 39(2)). It cannot sensibly be argued that for a complainant to choose to bring her own case in the High Court rather than to rely upon the commission to take it before the tribunal is the sort of abuse of process at which the decision of the Board in *Jaroo v A-G of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 AC 871, [2002] 5 LRC 258, was aimed. Secondly, under s 14(4) of the Constitution, the tribunal may refer to the High Court any question of contravention of the rights in ss 4 or 5 of the Constitution and must do so if a party to proceedings before the tribunal so requests, unless the raising of the question is merely frivolous or vexatious. The respondent to any complaint before the tribunal could therefore have the matter referred to the High Court. Thirdly, the rights and obligations laid down in the EOA are much more specific and clearly defined than those in the Constitution. There is a clear definition of discrimination (ss 4 and 5) and of the circumstances in which an employer, an educational establishment, or a provider of goods facilities and services or accommodation shall not discriminate, along with some defined

exceptions and exclusions (Pts III, IV and V). The body of law which the tribunal will be administering may on occasions overlap with s 4 of the Constitution but in most cases it will not.

[48] Hence this case is a long way away from the *Hinds* case. The EOA is not taking away an existing jurisdiction of the High Court in an area of jurisdiction which has always been part of the core jurisdiction of a Supreme Court. It is not removing the trial of very serious crimes from the High Court to a bench of magistrates. It is not removing the trial of existing constitutional rights from the High Court except with the consent of both parties. This case is also a long way away from the recent decision of the Board in *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] UKPC 3, [2005] 2 AC 356, [2005] 2 LRC 840. The EOA is not setting up a new court with jurisdiction to hear and determine appeals from the Court of Appeal of Trinidad and Tobago and thus to overturn the decisions of the constitutionally protected judiciary. The tribunal will be subordinate to that judiciary. The EOA provides for a right of appeal from the tribunal to the Court of Appeal: s 50(2). Subordinating new jurisdictions to the jurisdiction of the ordinary courts of appeal has been regarded as an important safeguard of their independence since the Tribunals and Inquiries Act 1958.

[49] The courts below do not appear to have attached much importance to the provision that the tribunal 'shall be a superior court of record' (s 41(1)) although Archie JA does refer to 'the unlimited potential scope of its jurisdiction' (para 32). Jowitt's *Dictionary of English Law* (2 edn 1977, John Burke) p 493 provides a helpful explanation of what is generally meant by a superior court of record:

> 'Courts are of two principal classes—of record and not of record. A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memory and testimony, and which has the power to fine and imprison for contempt of its authority … Courts are also divided into superior and inferior, superior courts being those which are not subject to the control of any other courts, except by way of appeal.'

Thus the decisions of the tribunal, as a superior court, would not be subject to judicial review, unlike the decisions of inferior courts of record such as the English county courts (although these days appeal is regarded as the more appropriate method of challenge). And the tribunal would be able to punish for contempt of its authority, as can the English county courts. But the EOA clearly does not contemplate that the tribunal should have an unlimited or inherent jurisdiction. Its jurisdiction is limited by s 41(4), which provides:

> 'The Tribunal shall have jurisdiction—(a) to hear and determine complaints referred to it by the Commission; (b) to require persons

> to attend before it for the purpose of giving evidence and producing documents; and (c) to make such declarations, orders and awards of compensation as it thinks fit.'

The powers in s 41(4)(b) and (c) are clearly intended to be used, and used only, in connection with the jurisdiction conferred by s 41(4)(a). If there were any doubt about that, these paragraphs should be interpreted so as to be in conformity with the Constitution. Their scope is in any event limited by the nature of the subject matter: they are concerned only with remedying discrimination as defined by the EOA in the circumstances prescribed by the EOA.

[50] This is definitely not 'part of the jurisdiction that is characteristic of a Supreme Court'. The subject matter, as already mentioned, was not traditionally the subject of adjudication at all, let alone by a Supreme Court. For what it may be worth, the equivalent discrimination jurisdiction in the United Kingdom is exercised either by the county courts or, in employment cases, by employment tribunals. There have always been courts of record with power to fine and commit for contempt which do not have the status and jurisdiction of a Supreme Court. The reality these days is that the right of appeal, rather than judicial review, is the way of correcting the errors of any court, inferior or superior. That is made available by s 50(2).

[51] Hence the Board would not accept that this new jurisdiction is so characteristic of a Supreme Court that it is implicit in this, or any other constitution on the Westminster model, that it *must* be exercised by a judiciary enjoying exactly the same protection as a High Court judge. The question remains whether the protection enjoyed by the tribunal is sufficient to afford the necessary degree of independence of the legislature and executive.

[52] The chairman of the tribunal is to be a judge of equal status to that of a High Court judge: s 41(2). He or she is appointed in the same way as a High Court judge and enjoys the same tenure and protection from removal: s 42(1) and (2). The only difference in their terms of office is that the Act does not guarantee the same pension rights. The more significant difference is that these provisions are not entrenched and could be repealed or amended by an ordinary Act of Parliament. However, this is true of all the other judicial officers whose status is not covered by the entrenched provisions of the Constitution. This includes the members of the 'well-respected' Tax Appeal Board, also constituted under an ordinary Act of Parliament, who might be thought to exercise a jurisdiction where independence of government was of particular importance. The tribunal chairman is given a status and terms and conditions of office which are far superior to those of a magistrate. It is very difficult to say that they are not a sufficient guarantee of his or her independence of local pressure.

[53] The lay assessors are much less well protected. Their status is not unlike that of the ordinary members of the Tax Appeal Board. They are

not appointed by or on the advice of the Judicial and Legal Service Commission. They serve for terms of not less than three years, but are eligible for reappointment. And their appointments may be terminated for cause by the president on the recommendation of the chairman. But their position in the tribunal is not such as seriously to call in question its independence. Their role is to assist the chairman in arriving at a decision: s 42(4). It is comparable to that provided for in s 70 of the Supreme Court Act 1981 in England and Wales and s 44(1) of the Constitutional Reform Act 2005, which sets up a Supreme Court for the United Kingdom to replace the Appellate Committee of the House of Lords:

> 'If the Supreme Court thinks it expedient in any proceedings, it may hear and dispose of the proceedings wholly or partly with the assistance of one or more specially qualified advisers appointed by it.'

These are, of course, ad hoc appointments enjoying much less protection than do the lay-assessors on the tribunal. But their role is the same: to assist the court in hearing and disposing of the proceedings. The decision remains that of the court. Section 44(7) of the EOA makes it clear that 'The decision of the Tribunal in any proceedings shall be made by the Chairman and shall be delivered by him'.

[54] There is, of course, the difference that the lay-assessors are part of the tribunal and that the chairman has to sit with at least one of them: s 44(1). The chairman is not entitled to choose to sit alone without the benefit of lay advice. But that does not alter the essential character of the role. It is difficult to see how the chairman's independence is compromised by having to have the benefit of the advice of a suitably qualified person who has the protection of an appointment of at least three years' duration which can only be prematurely determined for cause (as it happens, remarkably similar to the protection enjoyed by recorders of the Crown Court in England and Wales).

[55] Important though the role of the tribunal is, in the Board's view it is no more important or deserving of special protection than the role of the Tax Appeal Board, which enjoys the same status as a superior court of record, has a chairman and vice-chairman whose status is very similar to that of the chairman of this tribunal, and whose ordinary members' status is very similar to that of the lay-assessors on this tribunal, although the latter have a more subordinate role within the proceedings. The Board could not find this tribunal unconstitutional without casting doubt on the constitutionality of the Tax Appeal Board and we would be most reluctant to do this.

[56] In summary, therefore, the tribunal is given a significant new jurisdiction, but (a) this has no equivalent in the existing constitution, (b) there is nothing expressed in the Constitution to preclude its

creation, (c) the Constitution expressly contemplates lesser judicial officers to fulfil unspecified functions, and (d) there is nothing in the limited and specialised jurisdiction given to the tribunal which is so characteristic of the jurisdiction of a Supreme Court as to preclude its being given to a different body. The Board will therefore allow this appeal on this, the most important point.

[57] This is not, of course, to say that it would not be *desirable* for the tribunal to enjoy exactly the same protection as the High Court judges. But the way to produce this would not be the way proposed under the Equal Opportunity Bill 2007. This contains, in cl 3, the declaration contemplated by s 13 of the Constitution that 'This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution'. (This at once raises the question whether there is anything in the Bill or the EOA which is inconsistent with those two sections, as opposed to the fundamental principle of the separation of powers and independence of the judiciary, but that is another matter.) If passed by three fifths of the members of both Houses of Parliament, the Bill becomes law notwithstanding that inconsistency. But the tribunal will have no greater protection than it had before: that could only be achieved by amending the entrenched provisions relating to the senior judiciary.

[58] The appeal will also be allowed on the other points where the courts below found the EOA unconstitutional. It cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in ss 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to

decide whether Parliament has achieved the right balance. But there can be little doubt that the balance which Parliament has struck in the EOA is justifiable and consistent with the Constitution. Section 7 does impinge upon freedom of expression but arguably goes no further in doing so than the existing law; if it does go further, by including gender as well as racial or religious hatred, it is merely bringing the law into conformity with all modern human rights instruments, which include sex or gender among the prohibited grounds of discrimination. Sections 17 and 18 do impinge upon freedom of contract but in ways which are now so common in the common law world that it can hardly be argued that they are not proportionate to the legitimate aim which they pursue. Finally, adding to the role of the Judicial and Legal Service Commission in exactly the way contemplated by s 111 is not inconsistent with the Constitution.

(2007) 71 WIR 391 at 415

[59] For these reasons, therefore, this appeal is allowed as indicated in [37], above of the judgment of Lord Bingham. The EOA is not inconsistent with the Constitution of Trinidad and Tobago and should be implemented without further delay.

Appeal allowed.