Privy Council Appeal No 22 of 2008

The Honourable Patrick Manning and 17 Others *Appellant*

v.

Chandresh Sharma *Respondent*

FROM

THE COURT OF APPEAL OF
THE REPUBLIC OF TRINIDAD AND TOBAGO

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REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE
3rd June 2009, Delivered the 3rd August 2009

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Present at the hearing:-

Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Mance
Lord Judge
Sir Jonathan Parker

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*[Delivered by **Lord Scott of Foscote**]*

1. The Freedom of Information Act 1999 was enacted on 4 November 1999. It comprised four Parts of which the relevant Part for the purposes of this appeal is Part II. Section 2 of the Act says that the Act "comes into force on such date as is fixed by the President by Proclamation." Part II came into force on 30 April 2001.

2. The object of the Act, as declared by section 3(1), is "to extend the right of members of the public to access information in the possession of

public authorities". The means by which this is to be done is set out in sub-paragraphs (a) and (b) of section 3(1). The flavour of each sub-paragraph can be gleaned from the opening words of each:-

> "(a) making available to the public information about the operations of public authorities ….; and
>
> (b) creating a general right of access to information in documentary form in the possession of public authorities …."

Subsection (2) of section 3 is of some relevance to some of the submissions made both to the courts below and to the Board:

> "The provisions of this Act shall be interpreted so as to further the object set out in sub-section (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable costs, the disclosure of information."

3. Section 4 is a definition section. It defines "Minister" as "the Minister of Government to whom responsibility for information is assigned". "Public authority" is given an extensive definition, running to eleven lettered paragraphs each of which specifies a type of public authority. The breadth of the definition is exemplified by paragraph (k) which specifies

> "a body corporate or unincorporated entity –
>
> (i) in relation to any function which it exercises on behalf of the State;
>
> (ii) which is established by virtue of the President's prerogative, by a Minister of Government in his capacity as such or by another public authority;
>
> (iii) which is supported, directly or indirectly, by Government funds and over which Government is in a position to exercise control."

The "public authority" definition, read as a whole, demonstrates the intention of the legislators that the efficacy of the substantive provisions of the Act to enable citizens of Trinidad and Tobago to have access to information in the possession of public authorities should not be frustrated by executive manoeuvres.

4. Part II of the 1999 Act, entitled "Publication of Certain Documents and Information", starts with section 7. This section is central to the issues that have led to this litigation. Subsection (1) says that

> "A public authority shall, with the approval of the Minister –
>
> (a) cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago *as soon as practicable after the commencement of this Act* -" (emphasis added)

a number of statements. The types of statement, specified in eight sub-paragraphs, are clearly designed to cover comprehensively the sort of information that a public authority is likely to, or does, possess.

5. Paragraph (b) of subsection (1) places an updating obligation on public authorities:

> "(b) during the year commencing on 1st January next following the publication, in respect of a public authority, of the statements under paragraph (a) that are the statements first published under that paragraph, and during each succeeding year, [the public authority shall] cause to be published in the Gazette and in a daily newspaper circulating in Trinidad and Tobago statements bringing up to date the information contained in the previous statements."

6. Subsection (2) of section 7 says that the public authority need not publish "exempt information" i.e. information contained in documents referred to in Part IV of the Act. Part IV, comprising sections 24 to 35, protects from public scrutiny documents of the sort one would expect to receive protection, Cabinet documents, defence and security documents, law enforcement documents and so on.

7. Subsection (4) is important. It says that:

> "Where a statement has not been published in accordance with subsection (1), the Minister shall promptly give reasons, to be published in the Gazette, for the failure to publish."

The "Minister" on whom this statutory obligation is placed is the Minister "to whom responsibility for information is assigned" (s.4).

8. On 1 March 2005 Mr Chandresh Sharma, respondent before the Board, commenced judicial review proceedings based upon an allegation of failure by 167 public authorities to have made the respective statements required of them by section 7(1)(a) of the Act, a failure by 37 public authorities to have made the respective up-dating statements required of them by section 7(1)(b) and a failure by the "Minister" to give

the reasons, as required by section 7(4), for these failures by the public authorities to comply with their statutory obligations under the Act.

9. Mr Sharma is a citizen of Trinidad and Tobago and a Member of Parliament for the constituency of Fyzabad. He is a member of the Opposition party and was, under a previous administration, himself a minister. He joined Mr Patrick Manning, the Prime Minister of Trinidad and Tobago, and seventeen ministers of the Government as respondents to the judicial review proceedings. The 13th respondent, Senator Dr. the Honourable Lenny Saith, is the Minister of Public Administration and Information. He is the "Minister" as defined in section 4 of the Act. The respondents are the appellants before the Board.

10. The substantive relief sought by Mr Sharma in his judicial review application is an order

> "directing the Respondents to publish within 7 days the reasons for the continuing failure and/or refusal by the public authorities for which they are responsible to comply with the provisions in Part II of the [1999 Act]"

and, also,

> "a declaration that the continuing omission, failure of and/or refusal by the Respondents to perform their statutory duty under section 7(4) of the [1999 Act] is illegal and unlawful".

11. Bearing in mind, no doubt, that Part II of the 1999 Act came into force on 30 April 2001, that the section 7(1)(a) statements were required to be published "as soon as practicable after the commencement of this Act", that the judicial review application was not made until 1 March 2005 and that section 11(1) of the Judicial Review Act 2000 says that an application for judicial review "shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period.", the Board does not find it surprising that Mr Sharma sought, also, an order extending the three month period.

12. Mr Sharma's judicial review application came before Judith Jones J for consideration of the question whether leave to make the application, as required by section 6 of the 2000 Act, should be granted. She gave a written judgment on 25 October 2005 refusing leave. The judge examined in some detail two grounds of objection put forward by the respondents. Since the respondents before the judge are the appellants before the Board, their Lordships will, to avoid confusion, refer to them hereafter as 'the Government'. The first ground of objection related to

the standing of Mr Sharma to make the application. This issue, resolved by the judge in favour of Mr Sharma, has not been pursued before the Board and nothing more need be said about it.

13. The Government's second ground of objection related to delay. The judge referred to section 11(1) of the 2000 Act, cited above, and to section 11(2) which enables the court to refuse leave

> "if it considers that there has been undue delay in making the application and that the grant of relief would cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration."

She combined her consideration of the delay point with a point made on behalf of the Government as to when it was that the public authorities that had failed to publish the requisite section 7(1)(a) statements had become in breach of their statutory obligations to do so. The Government had apparently contended that no evidence had been produced to show when it was that it had become "practicable" for the public authorities to publish the statements. This appears to their Lordships to be a thoroughly specious point. Section 7 had become part of the law of Trinidad and Tobago on 30 April 2001. The judicial review proceedings had been commenced on 1 March 2005, nearly four years after Part II had come into effect. In his affidavit sworn on 1 March 2005 in support of his application Mr Sharma said that he had been charged by the Opposition with the responsibility for monitoring the implementation and operation of the Act and had "conducted extensive research on this matter". He gave the names of the organisations that he said were public authorities for the purposes of the Act and said that, of those, only thirty-seven had attempted to comply with section 7(1)(a) and none of the thirty-seven had complied with section 7(1)(b).

14. The judge, in paragraph 35 of her judgment, said that the use of the words "as soon as practicable" in section 7(1)(a) meant that "the time for publication of the initial statement [was] subjective to each public authority". If she meant no more than that the circumstances relating to the practicability of publication of the requisite statements might vary somewhat from public authority to public authority, the proposition is unexceptionable, but if she meant that it was open to each public authority to choose when it would be convenient to publish she was, with respect, plainly wrong. The language of the statutory obligation required publication "as soon as practicable". The notion that it would take as long as a year to become "practicable" would be difficult to accept, but the suggestion that, even after the expiry of, say, three years, evidence,

additional to the fact that publication had not yet taken place, would be needed to establish a breach, is, with respect to the judge, quite unacceptable. The maxim *res ipsa loquitur*, usually employed in relation to the question whether accidents have been caused by negligence, is, in their Lordships' opinion, applicable here. If the Government had, after three years of non-compliance by a public authority with its section 7(1)(a) obligation, sought an order of *mandamus* against the authority, it would be absurd to suppose that the authority could resist the order by saying that no evidence had been produced to show that it was in breach of the obligation. It would surely be up to the authority to show some good reason why it had not yet become practicable to publish. So, too, here.

15. In their Lordships' opinion, the only realistic reaction to the facts disclosed by Mr Sharma's affidavit is, first, that there is *prima facie* evidence that the public authorities identified, bar the thirty-seven, are in breach of their section 7(1)(a) obligations, that the thirty-seven are in breach of their section 7(1)(b) obligations and that the "Minister" is in breach of his statutory obligations under section 7(4).

16. Oddly enough the judge, in paragraph 46 of her judgment, appears to conclude that the evidence before her *did* show the public authorities to be in breach of their section 7 obligations and that Mr Sharma's application was an attempt "to force compliance with the Act". Their Lordships would agree but find that conclusion difficult to reconcile with what the judge had said in paragraphs 35 to 38 of her judgment.

17. The judge, having (apparently) concluded that Mr Sharma had failed to show that the public authorities were in breach of their section 7 statutory obligations went on to consider the Government's "delay" objection. She said that section 11(1) of the 2000 Act placed the burden on Mr Sharma "of proving that the application was made in a timely fashion" (para.39 of her judgment) and held that he had failed to discharge that burden (para.40). She therefore went on to consider whether to exercise the power to extend time and noted his submission that there was "a clear public interest in having this application for judicial review determined on its merits in order to vindicate the rule of law" (para.41). She was not impressed by this submission. She expressed her reasons in paragraph 44 of her judgment:

> "The publication of the reasons for non-compliance of the public authorities will not in my opinion provide any greater access by members of the public to information in the possession of these public authorities. The fact that it is a responsibility placed on the Respondents as Ministers of the

> Government does not, to my mind, make the duty one of great public importance. In my opinion, this is not such a matter of public importance as to found an extension of time for its application for leave to apply for judicial review."

18. Mr Sharma's application was therefore dismissed. He appealed and on 27 September 2006 the Court of Appeal allowed his appeal with costs and made an order granting him leave to make his judicial review application. The Government, pursuant to leave granted to them by the Court of Appeal on 15 October 2007, have appealed to the Privy Council.

19. No written reasons for allowing the appeal were given by the Court of Appeal when announcing that result. Written reasons were, however, provided in a judgment handed down on 15 May 2009, over two and a half years after the hearing of the appeal and over one and a half years after the grant of leave to appeal to the Privy Council. No indication has been given to the Board as to any change in circumstances relating to compliance by the public authorities with their statutory obligations under section 7 of the 1999 Act. No evidence contradicting that of Mr Sharma has been filed. No submission indicating any disagreement with the facts he has deposed to has been made to the Board, nor so far as their Lordships are aware was any such submission made to the courts below. It is now over eight years since Part II of the 1999 Act came into effect and, if the circumstances deposed to by Mr Sharma are unchanged, there has been a continued flouting by the executive of the will of the legislature so far as implementation of Part II of the Act is concerned.

20. In these circumstances their Lordships must express their regret that it has taken so long for Mr Sharma's application for leave to come to a final hearing and that it took so long before the Court of Appeal was able to produce written reasons for allowing his appeal. Having said that, however, their Lordships must express their complete agreement with those reasons which their Lordships have found of great assistance. In paragraph 18 of the written reasons the Justices of Appeal say that

> "The passage of such a long span of time from the coming into force of section 7 to the date of the application raises the inference that the statements must have been capable of being published well before the application for leave and that the obligation of the Minister under section 7(4) must have arisen".

Their Lordships agree.

In paragraph 21 the Justices of Appeal express the opinion that

> "a prima facie case of neglect under section 7(4) arises on the evidence requiring an answer from the [Government]".

Their Lordships share that opinion.

21. As to delay and the question whether time for making the judicial review application should be extended under section 11(1), their Lordships consider that in paragraph 26 the Justices of Appeal provide a complete answer to the judge's opinion that the complaints made by Mr Sharma lacked any great public importance. Their Lordships respectfully adopt that answer and agree that the judge paid "no sufficient attention to the fact that what was alleged is a continuing breach of a continuing duty".

22. The appeal will, therefore, be dismissed with costs.