Hilary Term
[2016] UKPC 2
Privy Council Appeal Nos 0014, 0015 and 0016 of 2015

JUDGMENT

Steve Ferguson (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent)

Maritime Life (Caribbean) Limited and others (Appellants) *v* The Attorney General of Trinidad and Tobago (Respondent)

Ameer Edoo (Appellant) *v* The Attorney General of Trinidad and Tobago (Respondent)

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

before

Lord Neuberger
Lord Mance
Lord Sumption
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

25 January 2016

Heard on 19, 20 and 21 October 2015

Appellants (1st, 3rd, 4th and 5th)

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Fyard Hosein SC
Rishi Dass
Annette Mamchan
James Segan
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Respondent (Attorney General of Trinidad and Tobago)

Peter Knox QC
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Appellant (2nd)

Michael Fordham QC
Sophia Chote SC
Vijai Deonarine
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Interested Party (Director of Public Prosecutions)

Ian L Benjamin
Samson Wong
Amirah Rahaman
Nalini Jagnarine
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Appellants: (1) Steve Ferguson
(2) Ameer Edoo
(3) Maritime Life (Caribbean) Limited
(4) Maritime General Insurance Company Limited
(5) Fidelity Finance and Leasing Company Limited

LORD SUMPTION:

1. This appeal arises out of an ill-fated attempt to introduce a statutory limitation period for criminal prosecutions in Trinidad and Tobago. The relevant statutory provision was in force for only two weeks before it was retrospectively repealed by a fresh Act of Parliament. These proceedings have been brought by a number of persons who would have been entitled to the benefit of limitation but for the repeal. Their case, in summary, is that the repeal was unconstitutional because it was a retrospective abrogation of vested rights, a legislative intrusion on the judicial function and directed specifically against the defendants in particular criminal proceedings. They also say that in the light of the prosecutor's involvement in promoting the repeal, the continuance of the prosecution would be an abuse of process.

The facts

2. The Administration of Justice (Indictable Proceedings) Act 2011 (the "Principal Act"), received Presidential assent on 16 December 2011. Section 34(2) of that Act provided (so far as relevant) that once ten years had passed from the date when an offence was alleged to have been committed, no proceedings were to be instituted for that offence and no trial for that offence was to be commenced. Under section 34(3), where criminal proceedings had been instituted or an accused had been committed for trial, whether before or after the commencement of the Act,

> "… a judge shall, on an application by the accused, discharge the accused and record a verdict of not guilty if the offence is alleged to have been committed on a date that is ten years or more before the date of the application."

There were exceptions for persons accused of offences of violence, sexual offences and drug trafficking offences specified in Schedule 6 of the Act and for cases in which the defendant had evaded justice. Section 1(2) of the Act provided that it was to come into force on a date fixed by the President by proclamation.

3. It had originally been intended to bring the Principal Act into force on 2 January 2013. However, in August 2012, the Minister of Justice proposed to advance the timetable, bringing certain sections into force earlier, including section 34. The Cabinet approved that proposal, and as a result a proclamation was published on 28 August bringing section 34 into force with effect from 31 August.

4. At that time there were at least 47 current prosecutions at various stages of progress towards trial for offences more than ten years old. These included two prosecutions known as "Piarco 1" and "Piarco 2". These cases had aroused strong feelings in Trinidad and Tobago for some years. They arose out of serious allegations of corruption in connection with the construction of Piarco International Airport in Trinidad. In summary, what was alleged was that the defendants had conspired to defraud the state of more than TT$1 billion by rigging the award of the construction contracts. The defendants in Piarco 1 included Mr Steve Ferguson, the first appellant, and two companies, the fourth and fifth appellants. They had been charged in March 2002 with common law conspiracy to defraud and offences under the Proceeds of Crime Act, the Prevention of Corruption Act and the Larceny Act, said to have been committed between 1996 and 2000. The defendants in Piarco 2 include all the present appellants. They had been charged in May 2004 with similar offences, said to have been committed between 1995 and 2001. Other defendants not party to the present appeals include the then Minister of Works and Transport, a senior civil servant in his ministry and two chairmen of the Airports Authority. The Piarco cases are said by the DPP to be the largest complex fraud and corruption cases ever prosecuted in the Caribbean Commonwealth.

5. The committal proceedings were very long drawn-out, partly because of the complexity of the facts and partly because they involved a great deal of oral and documentary evidence and frequent adjournments. Those in Piarco 2 have still not been concluded. In 2006, while they were in progress, the United States had begun proceedings for the extradition of Mr Ferguson and one of his co-defendants, Mr Galbaransingh, to face trial in the United States on charges of money laundering and conspiracy to commit wire fraud arising out of the alleged manipulation of the bid process for the construction of the airport. The Attorney General ordered their extradition in October 2010, but his order was quashed by the High Court (Boodoosingh J) 13 months later, on the ground that the underlying allegations were substantially the same as those made in the prosecutions in Trinidad and Tobago and that it was in the public interest that they should be tried there.

6. On 6 September 2012, a week after section 34 of the Principal Act had come into force, one of the appellants' co-defendants, Mr Maharaj, applied to the High Court for a discharge under section 34(3). As it happened, on the following day, there was a hearing before the magistrate in the ongoing committal proceedings in Piarco 2. At the hearing the DPP drew the magistrate's attention to Mr Maharaj's application and asked for an adjournment of the committal proceedings for a week so that (in the words of his affidavit) he could "properly consider how the prosecution of Piarco 2 might progress in the light of section 34". The application was not opposed, and the magistrate adjourned until 14 September. Between 7 and 12 September, all of the present appellants lodged applications in the High Court under section 34(3). During the period of the adjournment, further applications were made under section 34(3), bringing the total number of such applications to about 42.

7. Once it was appreciated that the effect of bringing section 34 of the Act of 2011 into force was to entitle the Piarco defendants to a discharge without trial, there was a major public outcry. On 10 September the DPP wrote to the Attorney General complaining about the decision to bring section 34 into force. He said that he had not been consulted about it and was concerned that its effect was to prevent a trial of the Piarco defendants. He summarised the history of the Piarco prosecutions, the scale of the preparations for trial and the failed US extradition proceedings against Mr Ferguson and Mr Galbaransingh. He pointed out that one of the American defendants, a Mr Birk, had made a confession and would have pleaded guilty, giving evidence against the other defendants at the trial. He concluded:

> "I am sure that you would be as concerned as I am that the public would lose confidence in the criminal justice system if the proceedings against these defendants are summarily brought to an end in this way rather than by a trial in the Supreme Court of Judicature of Trinidad and Tobago, about which you expressed such confidence in December 2011.
>
> I would invite you to consider taking the following courses of action as a matter of extreme urgency to redeem what clearly must be the unintended consequences of the Proclamation of section 34 of the Act by the President on Independence Day:
>
> 1. Repeal section 34 of the Act with retroactive effect.
>
> 2. Alternatively,
>
> (a) Bring into operation section 27(4) of the Act by proclamation.
>
> (b) By Ministerial Order amend Schedule 6 to include the types of offences charged in Piarco No 1 and No 2."

Section 27(4) empowered the minister to amend Schedule 6 by statutory instrument.

8. On 11 September 2012, the DPP issued a press release in which he criticised section 34 and the timing of the proclamation bringing it into force. He complained that he had had only limited involvement in the decision to introduce section 34 into the Act and none at all in the decision to bring it into force. He also referred to the difficult

position in which he had been placed in view of the ground on which the US extradition application had been rejected. He concluded:

> "Hopefully the situation can still be retrieved and the ramparts of the state's right to prosecute these matters remain intact as they properly should."

9. On the same day, the Attorney General called the Prime Minister and told her that in his opinion section 34 should be repealed urgently. There were further discussions on that day between the Attorney General and the DPP, in the course of which the DPP urged him that any repeal would have to be retrospective if it was to affect the Piarco defendants. On 12 September, the DPP sent the Attorney General a draft bill to effect the repeal. On the same day, Parliament was recalled in emergency session. That afternoon, the Attorney General introduced the Administration of Justice (Indictable Proceedings) (Amendment) Bill in the House of Representatives. It was similar although not identical to the DPP's draft. The Attorney General made no secret of the fact that the immediate problem was the Piarco prosecutions. But he also pointed out that other current prosecutions were affected, as well as a number of current criminal investigations, some of them involving serious offences, including at least five other cases of alleged corruption. The bill was passed on the same day by the House and on the following day by the Senate. It received presidential assent on 14 September and was proclaimed at once. The Board will refer to it as the "Amending Act".

10. It provided as follows:

> "2. This Act is deemed to have come into force on 16 December, 2011.
>
> 3. In this Act, 'the Act' means the Administration of Justice (Indictable Proceedings) Act, 2011.
>
> 4. This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution.
>
> 5. Section 34 of the Act is repealed and deemed not to have come into effect.
>
> 6. (1) Notwithstanding any law to the contrary, all proceedings under the repealed section 34 which were pending before any court

immediately before the date of assent of this Act shall, on the coming into force of this Act, be void.

(2) In this section and section 7, 'repealed section 34' means section 34 of the Act which is repealed by section 5.

7. Notwithstanding any law to the contrary, no rights, privileges, obligations, liabilities or expectations shall be deemed to have been acquired, accrued, incurred or created under the repealed section 34."

11. The present appeals are test cases selected from a larger number of constitutional motions lodged in the High Court during September and October 2012. The challenge to the Amending Act was mounted on five grounds:

(1) It was contrary to the principle of the separation of powers.

(2) It was specifically directed against the Piarco defendants, in particular those who had made applications under section 34(3) of the 2011 Act. As such, it constituted an interference by the state with the defendants' right to a fair trial and was contrary to the rule of law.

(3) It offended against section 4(a) of the Constitution, which protects "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law".

(4) It conflicted with the defendants' legitimate expectation that proceedings against them would be concluded at once.

(5) The continued prosecution of the appellants was an abuse of process because the DPP, by actively promoting the repeal of the 2011 Act, was acting contrary to the conventions governing the conduct of a prosecutor.

12. It will be apparent that there is a considerable measure of overlap between the first four grounds. The complaint that the legislation was targeted at the appellants is in reality an allegation that the separation of powers has been disregarded. The rule of law is an overarching principle that encompasses all four grounds. All of them, moreover, are put forward as grounds for annulling the Amending Act as exceeding the constitutional powers of the legislature. The fifth ground is different. It assumes the

validity of the Amending Act but contends that the conduct of the DPP made it abusive even so for him to proceed with the prosecutions.

13. The motions were dismissed by Dean-Armorer J and on appeal by the Court of Appeal (Mendonça, Jamadar and Smith JJA).

General principles: the separation of powers

14. Constitutional instruments fall to be interpreted in the light of a number of fundamental principles which are commonly left unstated but are inherent in a democracy and in conventions inherited from the period before they were adopted. The Constitution of Trinidad and Tobago follows what has been called the "Westminster model". It was adopted in 1976 when the country became a republic, but its essential features were derived from the previous Constitution adopted at the time of independence in 1962. They have subsisted through the various amendments that have been made since 1976. Trinidad and Tobago is, as the first article of its Constitution proclaims, a "sovereign democratic state". Its constitution provides separately for the existence and functions of the principal institutions of the state: legislature, executive and judiciary. It gives the force of law to constitutional arrangements concerning the relations between which in the United Kingdom have generally been governed by convention rather than law. It also entrenches certain fundamental rights and freedoms identified in section 4.

15. One of the fundamental principles of the Constitution is the qualified separation of powers. It is qualified because the "Westminster model" has never required an absolute institutional separation between the three branches of the state. But the relations between them are subject to restrictions on the use of its constitutional powers by one branch in a manner which interferes with the exercise of their own powers by the others. In *Hinds v The Queen* [1977] AC 195, 212-213 Lord Diplock, speaking of the Constitution of Jamaica, said:

> "… a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the

> constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively. …
>
> All Constitutions on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature. 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 …. What … 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 The Queen* [1967] 1 AC 259, 287-288."

The separation between the exercise of judicial and legislative or executive powers has been described as a "characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at para 50 (Lord Steyn); *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 at para 13 (Lord Bingham of Cornhill). In *Seepersad v Attorney General of Trinidad and Tobago* [2013] 1 AC 659, Lord Hope of Craighead applied these principles to the Constitution of Trinidad and Tobago. He observed at para 10:

> "The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle."

Due process and the rule of law

16. As applied to the autonomy of judicial functions, the separation of powers is an aspect of the rule of law. Recital (d) of the Constitution of Trinidad and Tobago recognises that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law". Section 4 gives effect to individual rights founded on the rule of law. It provides for "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law".

17. Like other provisions of sections 4 and 5 protecting fundamental human rights and freedoms, the right to due process may be overridden only under the procedure provided for by section 13. This allows for the enactment of legislation which is expressly inconsistent with sections 4 or 5, provided that it has been passed by a majority of three fifths of all the members of each house of Parliament, and that it is "reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual". The Amending Act was expressed to have effect even though inconsistent with sections 4 and 5 of the Constitution: section 4. It was also passed with the requisite three fifths majority in each house.

18. What is comprised in due process has never been exhaustively defined. But it has always been taken to include the resolution of justiciable issues by courts of law without interference by the executive or the legislature. The classic statement of the principle is that of Lord Millett, giving the advice of the Board in *Thomas v Baptiste* [2000] 2 AC 1, 21-24. The Board declared unconstitutional administrative instructions published by the government of Trinidad and Tobago which laid down time limits for the execution of sentences of death, on the ground that it was contrary to the due process clause in the Constitution. This was because the time limits applied irrespective of any pending petition to the Inter-American Commission on Human Rights under an international treaty to which the state was party. Lord Millett said, at pp 21H-22A, 23D-E, 24C:

> "The due process clauses in the Fifth and Fourteenth Amendments underpin the doctrine of the separation of powers in the United States and serve as a cornerstone of the constitutional protection afforded to its citizens. Transplanted to the Constitution of Trinidad and Tobago, the due process clause excludes legislative as well as executive interference with the judicial process. … The right for which [the Appellants] contend is not the particular right to petition the commission or even to complete the particular process which they initiated when they lodged their petitions. It is the general right accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by

> executive action. This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4(a) of the Constitution. ... [T]he right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process."

Ad hominem legislation

19. The paradigm case of a statute which infringes both the separation of powers and the due process clause is a bill of attainder. Bills of attainder were legislative acts which convicted a person of an offence. The drafters of the United States Constitution forbade either the federal or the state legislatures to pass such bills, as a mark of disapproval of what they supposed to be the practice by the British Parliament, although in fact bills of attainder were already becoming obsolete in Britain. The last attempt to pass one was the Bill of Pains and Penalties of 1820, which sought to divorce Queen Caroline from the King and forfeit her titles and property on the ground of her adultery. It was highly controversial and was ultimately withdrawn before completing its passage through Parliament.

20. The objection to a bill of attainder is the same as the objection to any exercise by the legislature of an inherently judicial function. It does not have the essential attribute of law, which is its generality of application. The first requisite of a law, wrote Blackstone (*Commentaries*, Introduction, Section II), is that

> "… it is a *rule:* not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a *rule.*"

21. This passage from Blackstone was cited by Lord Pearce, giving the advice of the Privy Council in *Liyanage v The Queen* [1967] AC 259, 291, which is the leading modern authority for the proposition that under a written constitution based on the separation of powers, the legislature may not determine by statute the outcome of particular judicial proceedings. The facts were that in January 1962 there had been an abortive coup d'état in Ceylon, which had been discovered and frustrated by the

government at the last minute. A large number of individuals alleged to be responsible were arrested. Two months later, the Parliament of Ceylon passed legislation which authorised the detention without warrant of persons suspected of having waged war or conspired to wage war against the state, modified the elements of the offence, the mode of trial and the rules of evidence applicable to it, and prescribed a heavy minimum sentence for those convicted. The Act was expressed to be retrospective so as to cover an abortive coup d'état before it was passed. It also contained a sunset clause providing that it would cease to have effect after a year or (if later) after the conclusion of any legal proceedings arising from an offence against the state committed at about the time of the attempted coup. The Privy Council held the Act to be unconstitutional. Lord Pearce said at pp 289-290

> "It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. … That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state.
>
> But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."

Separation of powers: the test

22. Legislation may impinge upon judicial proceedings either directly or indirectly. Different considerations apply to each kind of interference.

23. Legislation impinges directly on judicial proceedings if the statute itself amounts to the exercise of an inherently judicial power. This may, for example, be because it determines innocence or guilt or the penalty to be imposed (see *Nicholas v The Queen* (1998) 193 CLR 173, esp at paras 15-16 (Brennan J), 74 (Gaudron J), 112-114 (McHugh J)), or it determines whether bail is to be granted (*State of Mauritius v Khoyratty* [2007] 1 AC 80); or it directs a court not to order the release from custody of "designated persons" who had entered Australia without valid entry permits (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1); or it authorises the exercise of a sentencing power by a third party such as an officer of the executive (*Seepersad v Attorney General of Trinidad and Tobago* [2013] 1 AC 659); or it pre-empts the outcome of judicial proceedings, like the timetable for executing sentences of death challenged in *Thomas v Baptiste*, *supra*. Direct interference with judicial proceedings is usually inherently contrary to the separation of powers and the rule of law. It is also a denial of due process.

24. Direct interference with judicial proceedings is, however, rare. More commonly, legislation impinges on them indirectly by altering general rules of law in a manner which will in practice determine the outcome of particular proceedings or of particular issues in those proceedings, for example by changing the elements of an offence or a tort, or abrogating a special defence, or altering the rules of evidence or a relevant period of limitation, without any transitional provisions to ensure that current proceedings are unaffected. This kind of legislation gives rise to more difficult problems. It is general, not particular. In Blackstone's terms it is a law, not a sentence. There is, it is true, a presumption against retrospectivity, especially where the effect is to abrogate vested rights. But this is no more than a principle of construction. Once it is established as a matter of construction, mere retrospectivity does not violate the separation of powers or the rule of law, and is not contrary to due process. It is after all characteristic of all developments of the common law arising from judicial decisions. As Mason CJ observed in *Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 501, 536, "if the law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power".

25. In Australia, it has been held that legislation which indirectly impinges upon judicial proceedings by altering rights or defences in pending litigation without interfering with the judicial process itself is valid, even if it is nominatively directed at a single person and pre-empts current proceedings to which that person is a party. The principal decisions to this effect are *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth of Australia* (1986) 161 CLR 88, esp at pp 96-97 and *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372. In these cases the Plaintiff Trade Union had been struck off a statutory register by ministerial order. While an appeal was pending, legislation was enacted deregistering the union by name. Accordingly, the legislation not only impinged on current judicial

proceedings but did so in a manner which was as ad hominem as it is possible for legislation to be. Nonetheless it was held to be valid. The court distinguished between a case where legislation directed what a court should do, and a case where it pre-empted the court's decision by ordaining the result regardless of what the court did. As the principal judgment put it in the former case, "Parliament may legislate so as to affect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution" (p 96, per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ). This reasoning may reflect the particular characteristics of the Australian federal constitution, which protects the autonomy of the judiciary without limiting more generally the sovereignty of Parliament. But in the Board's view it is too widely stated to be true of the Constitution of Trinidad and Tobago and comparable written constitutions of the common law world. Legislation which alters the law applicable in current legal proceedings is capable of violating the principle of the separation of powers and the rule of law by interfering with the administration of justice, but something more is required before it can be said to do so. The "something more" is that the legislation should not simply affect the resolution of current litigation but should be ad hominem, ie targeted at identifiable persons or cases.

26. Legislation may be framed in general terms as an alteration of the law and yet be targeted in this way. The legislation considered in *Liyanage* was framed in general terms. It would have been valid if its operation had been wholly prospective. What made it invalid was the combination of three factors: (i) it influenced or determined how inherently judicial functions would be exercised, notably in the matter of the admission of evidence and the minimum sentence; (ii) it was retrospective in the sense that it applied to current judicial proceedings; and (iii) the sunset clause and the fact that the legislation dealt with specific issues in the criminal proceedings against the plotters of the coup. The critical factor was the third, without which the first two might have been unobjectionable. This was because it showed that the statute was directed at identifiable people or groups of people. The Board considers that targeting of that kind is the least that must be shown if it is contended that a statute which merely alters the law violates the principle of the separation of powers or the rule of law by impinging on the judicial function.

27. How is the court to ascertain a more specific purpose behind an Act of Parliament than its general terms would suggest? Although this question commonly arises in politically controversial cases, in the Board's opinion the answer does not depend on an analysis of its political motivation. The test is objective. It depends on the effect of the statute as a matter of construction, and on an examination of the categories of case to which, viewed at the time it was passed, it could be expected to apply. *Liyanage* itself is the classic illustration. The Board's conclusion in that case was that the legislation applied to a category of persons and cases which was so limited as to show that the real object was to ensure the conviction and long detention of those currently accused of plotting the coup. The reason why in such circumstances as these the statute will be unconstitutional is that the Constitution, like most fundamental law, is concerned with the substance and not (or not only) with the form. There is no principled distinction

between an enactment which nominatively designates the particular persons or cases affected, and one which defines the category of persons or cases affected in terms which are unlikely to apply to anyone else. In both cases, it may be said, as Lord Pearce said in *Liyanage* (p 290) that "the legislation affects by way of direction or restriction the discretion or judgment of the judiciary in specific proceedings".

28. Although approaching the issue from a different juridical tradition, the European Court of Human Rights has applied a similar principle in dealing with the circumstances in which a law couched in general terms may violate the right to a fair trial protected by article 6 of the European Convention. In *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293 it held that Greek legislation couched in general terms violated article 6 because it was passed in circumstances where it was evidently directed at determining the outcome of particular current proceedings between the state and the applicants: see paras 47, 49-50. In its subsequent decision in *National & Provincial Building Society v United Kingdom* (1997) 25 EHRR 127, at para 112, the court pointed out that not all legislation which affects pending proceedings violates article 6, and identified as the critical factors in *Stran* that the state had been engaged for nine years in litigation with the applicants, who had actually obtained an enforceable judgment against it. As the decision in that case illustrates, the mere fact that legislation retrospectively makes proceedings unwinnable is not enough to establish a violation of article 6. In *Zielinski v France* (1999) 31 EHRR 532, para 57, the court put the same point in this way:

> "… while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in article 6 preclude any interference by the legislature - other than on compelling grounds of the general interest - with the administration of justice designed to influence the judicial determination of a dispute."

Application to the present case

29. On 14 September 2012, immediately before the Amending Act was passed, the appellants enjoyed under section 34 of the Principal Act a vested legal right (i) not to be tried in the criminal proceedings which had been brought against them, and (ii) on application to the High Court to be discharged and have a verdict of not guilty entered in their favour. The effect of the latter right was that the passing of ten years from the alleged offence fell to be treated as an absolute defence. Accordingly, the effect of the Amending Act was to remove an accrued and unanswerable defence.

30. The first question is whether the repeal directly interfered with current criminal proceedings against the appellants in a manner inconsistent with the separation of powers. In the Board's opinion it did not. Section 5 simply altered the general law, by restoring it to what it had been before 31 August 2012. Section 6 on the face of it comes closer to being a direct interference with judicial proceedings, because it legislatively annulled valid applications by which the appellants had invoked the statutory jurisdiction of the High Court during the brief interval when section 34 was in force. But section 6 must be viewed in the context of the whole Act. Section 5 on its own would have been enough to achieve the legislator's purpose of ensuring that no one would be able to take advantage of the ten-year limitation period, since it deems section 34 never to have come into effect. Section 6 adds emphasis but nothing more. It is in reality a consequential procedural provision designed to ensure that effect was given to section 5 across the board, irrespective of the stage which those affected had reached in their attempts to take advantage of the repealed provision. Far from indicating the special character of the Amending Act, it underlines its generality. Parliament, having resolved upon a comprehensive repeal, could not sensibly have contemplated an arbitrary distinction between those who had been quick enough to make their applications during the brief period of a fortnight when section 34 was in force and those who had not, two categories whose position was for all practical purposes the same.

31. It follows that the challenge to the Amending Act on this ground can succeed only if it is shown that the terms, although framed generally, would in practice apply only to a limited category of people including the appellants against whom it can be said to have been targeted. But this is manifestly not the case. The Amending Act not only looks like general legislation. It is general legislation. It affects all cases to which section 34 would otherwise apply, past, present or future. This includes a very large number of persons and cases against which it cannot have been targeted. It is right to add that if the concern had been only or mainly with the appellants, the logical course would have been to amend Schedule 6 so as to add the offences with which they were charged to the list of those excluded from section 34. That was one of the options proposed by the DPP but it was not the one adopted.

32. There is no doubt that the outcry which followed the realisation that section 34 would entitle the Piarco defendants to a summary acquittal without trial, together with the concerns of the DPP, were the occasion for its repeal. But it does not follow that the Amending Act was targeted at the appellants. Sometimes the facts of a particular case simply exemplify the need for a general law.

33. Mr Beloff QC, who appeared for the appellants, sought to surmount this difficulty by extensive reference to the debates in Parliament which preceded the repeal. In the Board's opinion these debates, read as a whole, do not support his case. On the contrary, they tend to confirm the impression left by the background circumstances, that the perceived impact of section 34 on the Piarco prosecutions was no more than the

occasion for an altogether more general concern about the wisdom of the section. But there is a more fundamental reason for disregarding this material. Parliamentary debates may be admissible to prove facts from which the mischief of an enactment can be inferred, if this is not apparent from its terms. But that is not the purpose for which Mr Beloff is in reality seeking to use it. He relies on the debates as evidence of the motives of the legislators who spoke. This could be justified only if the Constitution posed questions which had to be answered by reference to the state of mind of individual Parliamentarians. In the Board's opinion, it does not. The test being objective, the motives of Parliamentarians are irrelevant. They are also inconclusive, because statements by individual Parliamentarians in the course of debates are not evidence even of the subjective thoughts of the whole body. For both of these reasons, in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, the House of Lords deprecated the use of Parliamentary debates to demonstrate the inadequacy of Parliament's reasons when legislation was alleged to be disproportionate and incompatible with the Human Rights Convention: see para 67 (Lord Nicholls of Birkenhead). "Different members", as he pointed out, "may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation".

34. The Board concludes that the Amending Act did not violate the principle of the separation of powers. The loss of a limitation defence which had existed for only two weeks was attributable to a legitimate change in the law, and not to a legislative intrusion upon the judicial function.

Due process and the rule of law

35. So far as the allegation of want of due process depends on the argument that it violates the principle of the separation of powers, it fails for the same reasons. But the appellants also say that a conviction in the current criminal proceedings would imperil their liberty and property, and that the due process clause of the Constitution means that an accrued right not to be tried and to a discharge and a verdict of not guilty cannot be removed by legislation. It can be removed only by judicial proceedings. The Board readily accepts that there may be vested rights relating to the conduct of criminal proceedings which could not be withdrawn by legislation consistently with section 4(a). As applied to the Amending Act, however, the argument fails, because it is not in reality the distinct point which it professes to be. The right to be acquitted and discharged without trial and irrespective of innocence or guilt is not as such a right protected by section 4(a) or any other provision of the Constitution. The loss of that right did not deprive the appellants of their liberty or property. It merely exposed them to a criminal trial in which they might or might not be found to have committed serious criminal offences. The fairness of that trial continues to be protected by the Constitution. If at the end of the process the appellants are convicted and sentenced, any adverse effect on their liberty and property will arise from a judicial proceeding. It will have occurred by due process of law.

Legitimate expectation

36. The argument based on legitimate expectation adds nothing to the appellants' other arguments. The Constitution does not protect legitimate expectations as such, and there must be some doubt whether, and if so when, breach of a legitimate expectation can ever, in itself, be the basis of a constitutional challenge to the validity of an otherwise regular law. But it is unnecessary to decide that question, because any relevant expectation in this case could not be legitimate in any legally relevant sense. The right to a defence of limitation was wholly statutory. Any expectation based on statute is by its nature defeasible. What Parliament gives, Parliament may take away provided that it does so consistently with the Constitution.

37. It follows that the Amending Act is a valid enactment.

Section 13

38. Section 13 of the Constitution provides:

> "13(1) An act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."

The section applies to any Act passed, as the Amending Act was, by a majority of three fifths of both houses.

39. In this particular case, the reasons which have led the Board to conclude that the Act was constitutional necessarily mean that it was justifiable in a society with a proper respect for the rights and freedoms of the individual. If the Board had concluded that the withdrawal of the appellants' rights under section 34 otherwise than by judicial decision was a violation of article 4(a), the Amending Act would have been justifiable under section 13, because a right to be acquitted and discharged without trial irrespective of innocence or guilt is manifestly not a normal and certainly not a necessary characteristic of a "society that has a proper respect for the rights and freedoms of the individual". If the Board had concluded that the Amending Act was ad hominem legislation, specifically targeted against the defendants in the Piarco cases, it would inevitably have followed that the resultant violation of article 4(a) of the Constitution was not "justifiable in a society that has a proper respect for the rights and freedoms of the individual". As it is, neither of these questions arises.

Abuse of process

40. As the Board has pointed out, this is the one argument advanced by the appellants which does not depend on the Amending Act being unconstitutional and void. The argument is that the DPP was in breach of the duties of impartiality and objectivity attaching to his functions as a prosecutor (i) by seeking an adjournment of the committal proceedings on 7 September 2012 without disclosing that he proposed to use the time to promote a repeal of section 34, and thereby unintentionally misleading the magistrate; and (ii) by then actively persuading the Attorney General to introduce a bill retrospectively changing the law. A prosecutor, it has been said, is not a partisan but a "minister of justice": *R v Puddick* (1865) 4 F & F 497, 499 (Crompton J). The DPP's alleged breach of that principle is said to make it abusive for him to proceed with the Piarco prosecutions, at any rate against these appellants.

41. The argument based on the adjournment of the committal proceedings can be shortly disposed of on the facts. It would be an abuse of process for a court to adjourn proceedings so as to enable the law to be changed adversely to one party, and improper for a party to invite a court to do so for that reason. But that is not what happened. In the first place, the DPP gave evidence by affidavit that he had applied for the adjournment on the ground that he needed time to consider the implications of section 34. He was not cross-examined on this statement, and both courts below have accepted it as true. There is no evidence that he had already resolved to promote the repeal of the section. So far as the record shows, he did not raise the possibility of repeal with the Attorney General until three days afterwards. Secondly there is no reason to believe that the adjournment of the magistrate's proceedings had any impact on the appellants' applications to be discharged under section 34(3). The magistrate was hearing evidence in the committal proceedings and not the applications under section 34(3). These had been brought in the High Court as required by the section, and their progress there was unaffected by the adjournment of the taking of evidence before the magistrate.

42. The argument based on the DPP's active promotion of the repeal has greater substance, but in the Board's view it also fails. Dean-Armorer J described the DPP's conduct as "unusual or even officious". In the Court of Appeal Jamadar JA thought the press release "unjustified" and clearly had reservations about the DPP's conduct generally. But neither the judge nor the Court of Appeal considered that he had exceeded the proper limits of his functions. The DPP's prosecuting functions are conferred on him by section 90 of the Constitution which is subject to section 76(2). The latter section provides that the Attorney General is to be responsible for the administration of legal affairs. The courts of Trinidad have interpreted these provisions as empowering the DPP to refer to the Attorney General matters of importance for the administration of criminal justice: see, in addition to the judgments below, *Dhanraj Singh v Attorney General and Director of Public Prosecutions* [2001] HCA S395. The Board for its part considers that the DPP's conduct was fairly described as "officious" by the judge and that the press release was ill-advised. It is entirely proper for the DPP

to consult or advise the law officers on matters relating to the operation of the criminal law, but this does not extend to campaigning for a change which will directly affect a current case which his office is prosecuting. It is, however, fair to say that he had been placed without warning or prior consultation in an embarrassing position, especially in the light of the outcome of the extradition proceedings and the stage which the proceedings had reached when section 34 was brought into force. In the unusual circumstances of this case, the Board is not prepared to disagree with the assessment of both courts sitting in Trinidad that his actions were within acceptable limits.

43. The Board is particularly reluctant to do so for an additional reason, which is that even if the appellants' criticisms of the DPP were justified, it would not follow that the continuance of these prosecutions was an abuse of process. The power to put an end to criminal proceedings on this ground exists to protect the defendants in criminal proceedings from injustice and to safeguard the integrity of the criminal justice system itself. An injustice sufficient to call for a stay of proceedings on the grounds of abuse of process can arise either because the fair trial of the defendant is not possible, or, in limited circumstances, because there has been such gross executive misconduct that it is unfair to put the defendant on trial at all: *R v Horseferry Road Magistrates Court, Ex p Bennett* [1994] 1 AC 42. There is no question of the first in this case. The effect of everything that has happened is that the defendants will be tried, and there can be no suggestion that their trials will be unfair. Even on the footing that the interests of the defendants were unfairly prejudiced by the repeal of section 34, the only basis on which the second could be supported is that the prejudice was the result of the DPP's conduct. The difficulty about this is that any supposed injustice was the result of Parliament's decision to pass the Amending Act. It is axiomatic that the legal consequences of a valid Act of Parliament cannot properly be categorised by the courts as an injustice for this purpose. Nor can the conduct of the DPP be treated as unjust simply because it may be thought to have brought the repeal about. In *Hoani te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308, an indemnity was sought against a statutory charge as damages for the defendant's breach of duty in promoting the bill. Viscount Simon LC, delivering the advice of the Privy Council, expressed the principle as follows, at pp 322-323:

> "It is not open to the court to go behind what has been enacted by the legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. … Before the court can accede to the appellant's claim for an indemnity against the charge imposed by section 14 of the Act of 1935, the court will require not only to find that the respondent board owed to the native owners the duty alleged, and that it committed the breaches of that duty which are alleged, but also that the enactment of section 14 was the reasonable and natural consequence of such breaches, and, even assuming the duty and breaches to have been established, the third and last essential step

for the appellant's success would involve an inquiry by the court of the nature prohibited ..."

Conclusion

44. These appeals will be dismissed.