[2024] UKPC 27
Privy Council Appeal No 0040 of 2022

JUDGMENT

Coomaravel Pyaneandee (Appellant) *v* Paul Lam Shang Leen and 6 others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Hodge
Lord Sales
Lady Rose
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
13 August 2024

Heard on 10 April 2024

Appellant
Rishi Pursem SC
Yves Hein
Arvind Hemant Sookhoo
(Instructed by Etude Dya Ghose (Mauritius))

Respondents
Alain Choo-Choy KC
Kamlesh K Domah
(Instructed by RWK Goodman LLP (London))

LADY SIMLER:

1. Introduction

1. This appeal arises out of a report prepared following a public inquiry into an issue of considerable public concern in Mauritius, namely drug trafficking. The report as published was critical of the appellant's conduct as counsel, among others, who had visited prison inmates (both convicted drug offenders and some on remand awaiting drug trafficking trials) and recommended an in-depth inquiry into their conduct. The appellant sought judicial review on the principal ground that the report was unlawful because he was not given a fair opportunity to understand the allegations made against him and to put forward his case in response, in the circumstances more fully described below. His application for judicial review was dismissed, and he now appeals to the Board.

2. On 14 July 2015, acting in the exercise of powers in section 2 of the Commissions of Inquiry Act 1944, the President of Mauritius appointed a Commission of Inquiry on Drug Trafficking in Mauritius ("the Commission", composed of the three named respondents) to inquire into and report on all aspects of drug trafficking in Mauritius, including its scale and extent, and the operational effectiveness of agencies involved in the fight against drug trafficking. The Commission was expressly mandated and empowered "to make recommendations as appropriate, including ... such action as is deemed necessary, to fight the problem of importation, distribution, and consumption of illicit drugs" in Mauritius. The Commission began its public hearings in November 2015 and completed its proceedings in March 2018.

3. The appellant was one of several lawyers summoned to appear before the Commission to answer questions. The summons described the subject matter to be addressed by the appellant at the hearing as being concerned with his "unsolicited visits to prisoners involved in drug trafficking and acts and doings amounting to perverting the course of justice". The appellant attended a hearing of the Commission on 7 August 2017 and gave evidence denying any wrongdoing.

4. On 27 July 2018, the report of the Commission ("the Report") was published. It included passages that were critical of the appellant, suggesting that he had had some involvement in attempting to pervert the course of justice and to shield drug traffickers, and recommended further in-depth investigation of his role.

5. By an application dated 18 October 2018, the appellant sought leave to apply for judicial review of the lawfulness of parts of the Report, contending that its findings in relation to him breached the rules of natural justice, were ultra vires, unreasonable and irrational, and should be expunged from the Report. Leave to apply for judicial review

was granted. The appellant sought a copy of the transcript of the evidence he gave to the Commission on 7 August 2017 ("the Transcript") both before and after proceedings were commenced. This was refused notwithstanding the fact that there was a conflict in the evidence given by the appellant and the respondents about what happened at the hearing, and the questions asked, and answers given.

6. By a judgment dated 28 May 2021, the Supreme Court of Mauritius (Honourable Judge D Chan Kan Cheong and Honourable Judge KD Gunesh-Balaghee, 2021 SCJ 167) dismissed the application for judicial review, holding that the Report contained no findings about the appellant but merely set out comments and observations which were not amenable to judicial review.

7. By order dated 15 November 2022, the Board granted the appellant permission to appeal that judgment.

8. In August 2023 the respondents disclosed the Transcript.

2. The statutory provisions applicable to commissions of inquiry in Mauritius

9. As stated, the Commission was set up pursuant to section 2(2) of the Commissions of Inquiry Act 1944 ("the COI Act"). The COI Act sets out the duties and powers of the Commission and the procedural safeguards that should be observed in the conduct of its inquiry.

10. Section 5(1) of the COI Act requires every Commissioner to make and subscribe to an oath to "faithfully, fully, impartially, and to the best of [his or her] ability, discharge the trust and perform the duties devolving upon [him or her] by virtue of the Commission". Section 6 empowers the President to appoint a secretary of the Commission, among other things, to "record the proceedings, to keep the papers and documents, to summon and minute the testimony of witnesses".

11. Section 7 (1) of the COI Act sets out the duties of the Commissioners:

> "The Commissioners shall, after taking the oath provided under section 5, make a full, faithful and impartial inquiry into the matter specified in the commission, and shall conduct such inquiry in accordance with the directions (if any) in the commission."

12. The Commissioners are empowered by section 9 of the COI Act to "make such rules for their own guidance and the conduct and management of proceedings before them [...], not inconsistent with the commission". They are vested with a wide range of powers to enable them to obtain evidence. For that purpose, they may summon and examine witnesses on oath: see section 10(1) of the COI Act. Section 12(2)(b) of the COI Act provides that "no evidence given before a Commission shall ... be admissible against any person in any civil or criminal proceedings, except in the case of a witness charged with having given false evidence before the Commissioner [...]."

13. Section 13 of the COI Act provides:

> "Any enactment relating to witnesses and evidence shall, subject to this Act, be applicable to all witnesses appearing, and to all evidence given, before the Commission."

14. Finally, section 14 of the COI Act provides for a right of legal representation to "[a]ny person whose conduct is the subject of inquiry under this Act, or who is in any way implicated or concerned in the matter under inquiry."

3. The appellant's role and attendance at the hearing before the Commission

15. The appellant has visual and hearing impairments. He has used braille since childhood and his left sided hearing is impaired. He is a barrister-at-law called to the Bar of Mauritius on 20 February 2001 and has been in independent practice in Mauritius since then.

16. By way of background to the appellant's involvement in the Commission's inquiry, the Board understands from certain (albeit incomplete) material available in the papers for this appeal, that a drug trafficking trial, *State v Velvindron*, took place between 2002 to 2003. A co-conspirator of Mr Velvindron, Mr Bottesoie, was also arrested and investigated for drug trafficking and implicated Mr Velvindron. Ultimately, Mr Bottesoie was charged with lesser offences (possession and supply of heroin) to which he pleaded guilty and was sentenced to 8 years' penal servitude. Mr Bottesoie was the main prosecution witness at the trial of Mr Velvindron, who was represented by counsel, Mr D Hurnam. During the trial, the reliability and credibility of Mr Bottesoie's evidence was subjected to a sustained attack by Mr Hurnam on Mr Velvindron's behalf. Mr Hurnam referred to the "fact that he [Mr Bottesoie] made allegations against barristers [including the appellant who was apparently named by Mr Hurnam] who had tried to influence him in changing his version" (see the judgment of the Honourable A. Caunhye in *The State v Velvindron* 2003 SCJ 319). Following the trial, and having sentenced Mr Velvindron, the judge (the Hon A. Caunhye) directed, "In view of the nature of the allegations which were made against some barristers in the course of the

present proceedings, the Master and Registrar shall cause a copy of the proceedings to be brought to the notice of the appropriate authorities for their attention and for any action which they may deem fit to take."

17. Consequent on that direction, the Major Crimes Investigation Team ("the MCIT") started an investigation. The appellant was called by the MCIT as part of the investigation. He gave a defence statement under warning in or around April 2004. He explained the circumstances which led him to meet Mr Velvindron (a letter of instruction from Mr Velvindron's brother) and his involvement with Mr Bottesoie. During the investigation, he was shown and questioned about numerous documents, and he responded to the questions asked. Following the investigation, he was neither charged nor contacted again. It was his understanding (at the time of his summons by the Commission) that the full file relating to the investigation was either with the office of the Commissioner of Police or the office of the Director of Public Prosecutions.

18. The appellant was required, by a summons dated 28 July 2017, to appear before the Commission on 31 July 2017 to give "evidence/explanation regarding [his] unsolicited visits to prisoners involved in drug trafficking and acts and doings amounting to perverting the course of justice". His request for a postponement was acceded to by the Commission, and his appearance was re-arranged for 7 August 2017.

19. On 7 August 2017 the appellant attended the Commission's inquiry and was accompanied by two personal assistants (Ms Shibnauth and Dr Hosier). It is his case that upon arrival and before the hearing commenced, he explained to the third respondent, the Secretary to the Commission, that he is deaf in the left ear and gradually losing his hearing ability in the right ear. He asked to have Dr Hosier by his side in case he could not hear the questions or if other assistance was required. The Commission accepts that it was made aware of the appellant's concerns, reassured the appellant that there would be no need for his personal assistants to be by his side, and informed him that should he have any difficulties in hearing or understanding the questions put to him, he should say so, and the Commission would put the questions to him again.

20. The Board now has the advantage of a copy of the Transcript (of the hearing on 7 August 2017). From the Transcript, the following main points emerge:

(i) The appellant mentioned his impairments and asked to give evidence in private. He was told there was no need for assistance, and if he needed help, he should ask. His request to give evidence in private was not explored.

(ii) The appellant was asked if he knew a prisoner called Rajen Velvindron. The appellant confirmed that he was not his client, but that he knew Mr Velvindron's brother in the period around 2003. He explained that he received a

letter from Mr Velvindron's brother (who was in Paris and had read certain things about Rajen Velvindron in the newspaper) asking him to visit Mr Velvindron in prison in relation to his welfare. He did so. The appellant said he gave a full statement to the police about this. He acknowledged that Mr Velvindron was then represented by Sir Hamid Moollan QC.

(iii) He was asked if he knew Mr Bottesoie and said he did. He had come across him in October/November 2002 when he was going to prison "fairly regularly" to see a client, Mr Betty. Mr Betty told him that a prisoner (Mr Bottesoie) was being held in solitary confinement, was from Rodrigues and asked him to check on him. The appellant said he did not know the name of the prisoner he was being asked by Mr Betty to see. The appellant spoke to Mr Bottesoie on welfare grounds and spoke to the welfare officer about his detention conditions. It was put to the appellant that Mr Bottesoie had given a different account: "he said … you went to talk to him although you were not his counsel, he doesn't know who sent you to talk to him and as if you were trying to pervert the course of justice by trying to tell him that he will get money if he changed his version."

(iv) The appellant said he was speaking from memory but "if you would look at the court record during the trial of Mr Velvindron, Mr Bottesoie was cross-examined by Mr Hurnam and was asked why I have come to see him and he said under cross examination, under oath during that time that in fact I never discussed the case with him, and Mr Chairperson this is the truth because I never, never. ... I was not aware of the details of his case, in fact if even we check the court records even then when I was introduced to him there were at least three to four prisoners in there that were either chatting among themselves or who were my clients, but I can't recall. But from my statement under warning I explained that very clearly the circumstances of my acquaintance with these two persons."

(v) The chairperson responded, "Well, so you are confirming what we have been aiming at that you have been going on unsolicited visits. He never requested you because his version is completely different. You tried to convince him to accept the gift which Mr Velvindron was going to give so that he does not implicate the latter. This is what he told us as well. Anyway, this is why you have been called …"

(vi) After some discussion about giving evidence in camera, the chairperson said, "Even Mr Hurnam who deponed pointed a finger at you?"

(vii) The appellant maintained his account, stating that his meeting with Mr Bottesoie had been brief, and that there were several prisoners there. He was a

newcomer to the Bar and curious to understand more about detention conditions. Mr Betty told him that Mr Bottesoie was "in serious trouble" and asked him to help him out. Later in the questioning the appellant said he had been traumatised when, during Mr Velvindron's trial, Mr Hurnam questioned Mr Bottesoie about the appellant's visit to him in prison.

(viii) The chairperson referred to the fact that Mr Bottesoie was described as a witness of truth in Mr Velvindron's trial, but no further questions were asked by him about this.

(ix) The appellant was then asked whether John Westley Augustin was his client and whether he appeared for him as it had been noted that he made a few visits to him. The appellant asked when this was, and was told, "a long time ago". The appellant said he could not remember him.

(x) He was asked about Dev Karan whose counsel was Mr Jagoo. The appellant struggled to recall.

(xi) The chairperson said that a visit to this person was reflected in the prison's book. He continued, "This is why I've been putting questions whatever questions I'm putting you are information that we gathered from the prison's book or from the complaint of Mr Bottesoie to court and in statement of Police and as well as what Mr Hurnam has told us."

(xii) The appellant asked to refresh his memory with statements he had given to the MCIT around February/March 2004 and said this would be a great help to him and the Commission. There was no response to this point.

(xiii) The appellant was asked if he had acted as counsel for Altaf Jeeva. It is clear from his responses that he thought Altaf Jeeva was senior counsel. When it was clarified that Mr Jeeva was a prisoner, the appellant said he did not know him. It was put to him that he had visited Mr Jeeva, as reflected in the prison records, in 2006. The appellant said he had no memory of this and did not know him. The appellant asked what Mr Jeeva had said about him and was told that Mr Jeeva had not said anything about him, but the inquiry had evidence that he (Mr Jeeva) was pressurised to change his statement. It was suggested to the appellant that he was not Mr Jeeva's counsel, and he was asked why he visited him. The appellant maintained that he did not know him or anything about this.

(xiv) The appellant was asked if he visited David Caunhye and said yes. Other names of prisoners were mentioned in combination: Brian Brussel, Westley

Augustin, Barlen Govinden and Altaf Jeeva (whose sister was said to have been arrested with him and had denounced her counsel). Their names were all said to appear in the prison visits book which barristers are required to sign. The appellant was then asked: "So, I don't know why you went to see him?"

(xv) The appellant responded that he was doing his best to give an explanation for events that occurred 15 years earlier, and "when I was giving my statement at the Police with the MCIT, that things very funny cropped up that there are people who were not my clients but yet were on the list of prisoners that I have allegedly visited, I honestly don't know this person, I have never met that person and I think only an investigation can actually reveal the truth." He again invited the Commission to look at his earlier statements to police.

(xvi) The chairperson said, "I have to put you the question because your name had been mentioned, I can't without giving you an opportunity to explain, make a report against you, this is why you have been called so that you told us you went there at the request of one Betty alias Dongo who was your client and you went to see Mr Bottesoie at his request, this is what you are telling us?" The appellant said this is what happened and denied Mr Bottesoie's version.

(xvii) The questioning concluded with the chairperson stating, "… we have your version, if ever you think that you come across your own statement if you want to tell us more, please do so. Okay?"

21. After the hearing on 7 August 2017, on the same day, the appellant wrote to the Commission and explained that due to his hearing impairment, he had not been able to hear and answer the questions properly. He requested the Transcript as a written record of the evidence he had given.

22. By letter dated 8 August 2017, the appellant also wrote to the Commissioner of Police to request copies of his statements taken as part of the MCIT investigation. He also requested that a full brief be sent to the Commission.

23. By letter dated 14 August 2017, the third respondent responded on behalf of the Commission to the appellant's letters. He said that the appellant had been told that if he did not hear or understand what was requested of him, he should tell the Commission and should have done so during the hearing and not afterwards. He said that transcripts are not provided to deponents, and if they were to be provided, it would take time and require payment of a fee. Finally, he provided information about the appellant's "unsolicited visits to prisoners to which reference was made at the Commission's hearing" as follows: (i) Mr J Bottesoie - 2 November 2002 (ii) Mr Velvindron - 15 November 2002 (iii) Mr Altaf Jeeva - 20 January 2006 (iv) Mr Kim Curun - 29 May

2006. Copies of the relevant entries in the prison visits book were not, however, provided. Further, the Board notes that no reference was made to visits by the appellant to Dev Karan, Brian Brussel, Westley Augustin or Barlen Govinden; and the appellant was not in fact questioned about Kim Curun.

24. By letter dated 18 September 2017, the office of the Commissioner of Police informed the appellant that the case file he had requested had been sent to the Director of Public Prosecutions on about 10 March 2017.

25. There was no further correspondence between the appellant and the Commission until after publication of the Report.

4. The Report

26. The Report was, as indicated above, published on 27 July 2018. Chapter 19 discussed the position of several lawyers. At para 19.5.3 the Report says:

> "19.5.3 BLACK SHEEP
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> The Commission has very strong reasons, in the light of the evidence adduced before it, to believe that there is a handful of barristers who may have acted and may still be acting in a most unethical manner, if not engaging in illicit activities such as obstructing the course of justice; intimidating witnesses; causing witnesses to diverge from their original statements/version thereby abstaining from incriminating certain drug barons; likely to have been using drug money to finance political campaigns; possibly money laundering the proceeds of drug trafficking in accepting wilfully tainted money; accepting cash beyond permissible amount and not accounting same in their VAT receipts and generally fostering incestuous relationship with drug tycoons. By their reprehensible conduct, they are branded by the public with all sorts of names."

27. The Report then devoted a section to each of these barristers. The passages of the Report concerning the appellant read as follows:

> "7. MR COOMARAVELL PYANEANDEE

> Counsel Pyaneandee visited Rajen Velvindron while latter was in prison when he was not his counsel. His explanations were to the effect that Mr Velvindron's brother from Paris requested him to visit his brother in prison in relation to certain issues pertaining to his welfare. Mr Velvindron was however already represented by Sir Hamid Moollan QC.
>
> The Commission found it quite unusual that Counsel also paid an unsolicited visit to Mr Bottesoie in prison. Latter under oath said that he never solicited Mr Pyaneandee to assist him and he did not know who had sent him either. Counsel explained that he had paid a visit to one of his clients Mr Betty and that this prisoner had told Mr Pyaneandee that Mr Bottesoie was being segregated and if he could help Mr Bottesoie out as he was in serious trouble. The allegation made by Mr Bottesoie against counsel is very serious, asking him not to implicate Mr Velvindron in return for financial reward. Mr Hurnam deposed and was very critical of the acts and doings of counsel in the present matter with documents in support. Mr Bottesoie is the same prisoner who had made complaints against Mr Gulbul who tried to convince him in return of cash not to implicate Mr Velvindron. The role of counsel Pyaneandee is very suspect indeed.
>
> As per the prison visitors' book for legal practitioner, Counsel on one occasion visited five prisoners including Mr Altaf Jeeva but he however told the Commission that had no knowledge of this and that he did not know Mr Jeeva. There was no reason for counsel to meet Mr Jeeva who had never retained his services. Was he acting as a spy for other more important drug dealers and the danger of such visits already pointed out by the Commission? The Commission recommends that an in-depth enquiry be instituted to look into the role of counsel which seemed to have tried to pervert the course of justice and trying to shield traffickers."

5. The affidavit evidence and efforts to obtain the Transcript

28. After the Report was published, the appellant renewed his attempts to obtain a copy of the Transcript. These efforts failed. Ultimately, he was told (by letter dated 14 August 2018 from the Office of the President which, by then, had custody of the Transcript) that legal advice had been obtained to the effect that it would not be

appropriate to provide any third party with transcripts or any other documents/annexes to the Report unless ordered to do so by the Supreme Court.

29. The appellant lodged an application (dated 23 August 2018) supported by an affidavit, seeking copies of the Transcript and other records of the Commission's proceedings that related (wholly or in part) to him. That application was subsequently withdrawn when the appellant lodged his application (of 18 October 2018) for leave to apply for judicial review, which itself included an application for a copy of the Transcript.

30. Leave to apply for judicial review was granted by order dated 5 November 2018 and the application for judicial review was lodged on 8 November 2018. It challenged as unlawful the following parts of the Report (referred to as "the impugned passages"):

> "(i) The Commission found it quite unusual that Counsel also paid an unsolicited visit to Mr Bottesoie in prison.
>
> (ii) Latter under oath said that he never solicited Mr Pyaneandee to assist him and he did not know who had sent him either.
>
> (iii) The allegation made by Mr Bottesoie against counsel is very serious, asking him not to implicate Mr Velvindron in return for financial reward.
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> (iv) Mr Hurnam deposed and was very critical of the acts and doings of counsel in the present matter with documents in support.
>
> (v) The role of counsel Pyaneandee is very suspect indeed.
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> (vi) As per the prison visitors' book for legal practitioner, Counsel on one occasion visited five prisoners including Mr Altaf Jeeva but he however told the Commission that had no knowledge of this and that he did not know Mr Jeeva.
>
> (vii) There was no reason for counsel to meet Mr Jeeva who had never retained his services.

> (viii) Was he acting as a spy for other more important drug dealers and the danger of such visits already pointed out by the Commission?
>
> (ix) The Commission recommends that an in depth enquiry be instituted to look into the role of counsel which seemed to have tried to pervert the course of justice and trying to shield traffickers."

31. The application for judicial review also included an application for an order:

> "directing the [Commission] to bring up before the Supreme Court of Mauritius an official copy of the Report of the Commission and all records, including records of proceedings and/or transcripts of proceedings and any other documents concerning the 'findings' as set out above and concerning my appearance and evidence before the Commission …".

32. Notwithstanding the latter application, the Transcript was not provided to the appellant, and the application for judicial review was resisted.

33. Without the benefit of the Transcript, the appellant described the gist of the evidence he had given to the Commission on 7 August 2017, in his affidavit dated 8 November 2018, filed in support of his judicial review claim. He explained that he was having to rely on his memory of events dating back to 2002 and told the Commission the following. He described the circumstances in which he met Messrs Velvindron and Bottesoie. He pointed out that there had been a full investigation of these events by MCIT and that he had given a defence statement under warning in April 2004. He said that his defence statement to MCIT (given closer to the events in question) remained an accurate account of what had happened. As far as Mr Jeeva is concerned, the allegation dated back more than 11 years, and he said that he could not recall having met him. He said he told the Commission that he was confused because of the lapse of time and his confusion was exacerbated by his hearing impairment.

34. The appellant's affidavit also identified several matters that, on the basis of his best recollection and belief, were never put to him at the hearing. These included: Mr Bottesoie's allegation that he had never solicited the appellant's services to assist him and did not know who sent the appellant to assist him (para 35); Mr Bottesoie's allegation that the appellant had asked him not to implicate Mr Velvindron in return for financial reward (para 38); that the appellant was trying to pervert the course of justice and/or tried to shield drug traffickers (para 40); the evidence of Mr Hurnam, who according to the Commission was critical of the appellant (para 41); he was given no

opportunity to verify whether he had visited Mr Jeeva or to explain whether the visit was unsolicited (para 42); that there was evidence that he was acting as a spy for drug dealers (para 44). He also alleged that the Commission failed to show him the documentary evidence tendered before the Commission (and referred to in the Report) so that he could respond to it (para 51); and he challenged the Commission's failure to call for the earlier statement he made to police and the MCIT file.

35. Affidavits in response were filed by all three respondents. The respondents denied paragraphs 38 to 41 of the appellant's affidavit. Their essential position was that questions were specifically put to the appellant regarding the allegation made by Mr Bottesoie, he was confronted with the allegation of Mr Hurnam, and based on evidence on record, the Commission made comments, remarks and recommendations as opposed to findings.

36. Paragraph 44 was also denied by the respondents and they averred that, "during the hearing, Applicant was informed of the consequences of making unsolicited visits in prison and that he made such visits to prisoners Velvindron and Bottesoie who were both involved in the same case; Applicant was equally informed of his visit to prisoner Altaf Jeeva who was not his client; Applicant confirmed that those prisoners were indeed not his clients; and the Commission had a duty to recommend an in-depth inquiry as it did as to the role of Applicant and the purpose for the said unsolicited visits." They said the appellant had the opportunity to provide explanations in respect of his unsolicited visits to prisoners Velvindron, Bottesoie, Altaf Jeeva and Kim Curun, and in respect of the evidence given by witnesses; and that, at the end of the hearing, he was invited to submit any additional explanation which he wished the Commission to be apprised of, but he did not do so.

37. The essentials of the judicial review claim can be summarised as a challenge to the wording of the summons to attend the hearing of the inquiry (as indicating prejudgment of the facts) and to the inclusion of the impugned passages in the Report, as set out above. The appellant contended that the impugned passages contained findings by the Commission which are amenable to judicial review, and not merely comments or observations that are not ordinarily amenable. He also submitted that the court should intervene by way of judicial review where comments "more lethal than findings of fact" are made (see *Jugnauth v Balgobin* 2007 MR 156). Inclusion of the impugned passages was a breach of natural justice and the principles of fairness because the accounts of Mr Bottesoie and Mr Hurnam were not put to him, and he had no opportunity to cross-examine or challenge their (and other adverse) evidence. The impugned passages were also unreasonable in view of the Commission's failure to call for the MCIT file; and they were flawed because the appellant was denied the basic opportunity to defend himself.

6. The judgment of the Supreme Court in summary

38. The Supreme Court dismissed the application for judicial review. It held that the impugned passages in the Report did not amount to findings against the appellant by the Commission that were or would be amenable to judicial review. Rather, relying on *De Robillard v Yeung Sik Yuen* 1992 MR 218; *Feillafe v Matadeen* 2001 SCJ 279 and *Ramgoolam v Matadeen* 2001 SCJ 317, the court accepted the respondents' contention that they were, "at best a recital of evidence or observations against which no judicial review lies".

39. Nevertheless, and though not necessary in light of that conclusion, the Supreme Court went on to consider the substance of the appellant's complaints about fairness and breach of natural justice on the assumption that the impugned passages contained findings by the Commission against the appellant and were therefore subject to judicial review. It did so without the benefit of the Transcript. In reaching its judgment on these questions, it based its findings on the affidavit evidence submitted by the parties. The Supreme Court held:

(i) Although the appellant's summons could have been more felicitously drafted, it did not prejudge the questions to be answered by the appellant and was not indicative of bias.

(ii) The allegations of Mr Bottesoie and Mr Hurnam had been put to the appellant, and the appellant was given the opportunity to respond. In this regard the Supreme Court expressed the view that,

> "any conflict between the above versions [as set out in the affidavits] of the applicant and the Commission as to how proceedings were conducted before the Commission is more apparent than real. The language used by the applicant in his affidavit *('to the best of my recollection')* is uncertain and speculative and verges on a fishing expedition. On the other hand, the Commission has given a precise and detailed version of the proceedings in the course of which the applicant gave evidence before the Commission and of the tenor of his evidence. The Commission's version clearly shows that the allegations of Mr Bottesoie and Mr Hurnam and other material facts were put to the applicant and that the latter was given an opportunity to respond and did do so."

(iii) The appellant was treated fairly by the Commission in that he was confronted with the allegations made against him and given the opportunity to

give oral evidence, which he did, and afterwards to give additional explanations, if he so wished. The court bore in mind that the procedure to be adopted by the Commission was primarily a question for the Commission itself and held that the need for cross-examination did not arise.

(iv) The Commission was not unfair in not calling for the MCIT file. The Commission was mandated, in very broad terms of reference, to inquire into, and report on all aspects of drug trafficking in Mauritius. It was carrying out its own inquiry and listening to evidence de novo. It was primarily for the Commission to determine its own procedure and which evidence to call. The Commission chose to summon the appellant to give evidence and he was informed of the allegations against him and given an opportunity to respond. According to the appellant himself, he maintained before the Commission the version he had given in his defence statements to the previous inquiry.

(v) As for the appellant's hearing impairment, the court found that the Commission had not behaved unfairly in light of the appellant's own explanations in his affidavit, which showed that he understood the questions that were being put to him. The court added that the appellant did give his explanations, which shows that he must have understood the allegations made against him. Moreover, he was informed in his summons that he could be assisted by a legal adviser of his choice at the hearing.

7. The questions raised by the appeal

40. The appeal to the Board raises the following four questions:

(i) First, whether the Supreme Court erred in law when it held that the impugned passages did not amount to findings by the Commission that were amenable to judicial review?

(ii) Secondly, whether the Supreme Court erred in law when it proceeded to assess hotly disputed contentions made by the respective parties about the hearing before the Commission on the basis of their respective affidavits and the Report, but without the aid of the Transcript?

(iii) Thirdly, if the impugned passages are amenable to judicial review, whether the court was wrong to hold that the impugned passages were not reached by the Commission without due observance of the law of evidence and in breach of the rules of natural justice?

(iv) Fourthly, whether the Supreme Court erred in law in failing to hold that the Commission ought to have catered for reasonable adjustments and/or adopted procedural accommodations to allow the appellant (in light of his hearing and sight impairments) a fair opportunity to give evidence in accordance with principles of natural justice?

8. The duties of candour and disclosure in judicial review

41. Before addressing these issues there is a preliminary point the Board considers it important to make concerning the duties of candour and disclosure owed by a respondent in judicial review proceedings.

42. The duty of candour in judicial review proceedings is well established in English law. A respondent to a judicial review claim is under a "very high duty … to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide": see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409, para 50, per Laws LJ. The duty is not new. It was described by Sir John Donaldson MR in 1986 as one requiring the respondent to place "all cards face upwards on the table": see *R v Lancashire County Council, Ex p Huddleston* [1986] 2 All ER 941, 945G.

43. The ordinary rules governing disclosure in civil litigation are not generally applied to applications for judicial review which characteristically raise questions of law against a background of agreed facts, so that disclosure is generally seen as unnecessary as a matter of English law and practice. But where a public authority relies on a document that is significant to its decision, it is generally considered good practice to exhibit the document as primary evidence. Any summary, however conscientiously prepared, may distort: see *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650, paras 2 and 4, per Lord Bingham of Cornhill.

44. There is a difference between the duty of candour and the duty of disclosure, but in the broadest sense, the latter is often unnecessary if the former duty is discharged to its fullest extent.

45. It is common ground that the same principles apply in Mauritius. Recently, in *Satyajit Boolell v The Independent Commission Against Corruption & Others* 2023 SCJ 53, in the context of an application for disclosure, the Supreme Court of Mauritius observed (at p13) that:

> "A perusal of the English authorities cited by Counsel only strengthens the view that disclosure of documents in

> judicial review proceedings is not automatic and is granted only when such order is deemed really necessary to resolve the matter fairly and justly. As the court held in [*R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123], there exists a 'self-policing' duty of candour and co-operation which would 'assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide' and which is a 'duty to disclose all material facts known to a party in judicial review proceedings'."

46. It is also important to emphasise that, like the duty of disclosure, the duty of candour is a continuing one: see *Tweed* (above). It includes a duty to reassess the viability and propriety of a respondent's case as the claim proceeds, and in the light of any evidence served.

47. Again, it is common ground in this case that the named respondents owe duties of candour to the Board, on behalf of the Commission. They were all accordingly under a "very high duty … to assist the [Board] with full and accurate explanations of all the facts relevant to the issue the [Board] must decide". Notwithstanding this "self-policing" duty of candour and co-operation, the Board was left struggling to work out precisely what had happened at the hearing before the Commission and seeking to do so on an unsatisfactory evidential basis. For example, the Board did not know (and was not told despite repeated asking) whether the Commission had the MCIT file (including the statements made in 2004 by the appellant) when questioning the appellant or at any time thereafter. The Board did not know what precisely Mr Hurnam said about the appellant or indeed, what documents Mr Hurnam produced to the Commission. These were all straightforward factual matters that could easily have been answered by the Commission. The duty of candour meant that the Board should have been assisted with full and accurate explanations. Mr Choo-Choy KC's inability (on instructions) to answer the Board's factual questions placed him in an unenviable and difficult position. The Board regrets the failure by the respondents to assist the Board in this way.

48. The Board will return to the question of disclosure of the Transcript below.

9. Are the impugned passages in the Report amenable to judicial review?

(a) The proper approach

49. There is no doubt that there has been an evolution in the law in Mauritius as to the availability and scope of judicial review in relation to reports made by a commission of inquiry established under the COI Act. In a series of cases starting with *De*

Robillard v Yeung Sik Yuen (for citations see para 38 above), the Supreme Court held that only those aspects of a report amounting to "findings" were reviewable, and that judicial review would not lie "merely in respect of observations or the use of particular words, however unfortunate they may be considered to be by the applicant. We conceive the purpose of a judicial review to be to correct or quash decisions or findings and not simply remarks used in the context of findings."

50. However, a broader approach was adopted in *Jadoo-Jaunbocus v Lam Shang Leen* 2021 SCJ 84, 2021 MR 333 (Supreme Court, Caunhye CJ and Devat J). In that case the Supreme Court held that as well as findings or decisions of a commission of inquiry being amenable to judicial review:

> "any decision, albeit a recommendation, which has the character or quality of finality in the decision-making process for the determination of the issue at hand by the commission would be a reviewable decision, subject to all the other conditions for judicial review being fulfilled."

This was held to include any conclusion reflected in the ultimate decision of a commission to recommend further enquiries or actions deemed appropriate by the relevant authorities.

51. The Supreme Court also recognised that courts, when dealing with judicial review of a commission of inquiry, had acknowledged "the considerable adverse consequences to reputation which can flow not only from findings of a Commission but also from certain types of allegations aired at, or information and evidence communicated to, the Commission", and that this might give rise to the need for the court to intervene where it is established that grounds for a judicial review remedy are made out. It continued,

> "The Court has thus intervened by way of judicial review with regard to comments or observations made by a Commission in particular where there have been found to be '*comments which may be construed as being more lethal than findings of fact'* [J*ugnauth v Balgobin* 2007 MR 156] or where the impugned observation or comment was found to be in fact an adverse finding on the applicant [*Rummun v Joseph* 2002 SCJ 291].
>
> It would therefore be in our view a somewhat artificial exercise in the present matter, in view of the final recommendations in the Report by the Commission *quoad* the

> applicant and which constitute the subject of the 3 complaints by the applicant, to dissect and break down their contents in order to categorise same into observations, findings or part observations/part findings, comments or impression.
>
> The proper test in our view is to find out whether there is any valid ground which would justify the granting of an appropriate remedy in respect of any of the complaints against those final recommendations made by the Commission where it is established that the complaint is founded for the Court to intervene on one of the grounds for judicial review."

52. The Board considers this broader approach to be correct. In other words, there is no strict rule that produces a dividing line as to amenability to judicial review between findings on the one hand, and observations, comments, or impressions on the other.

53. In the Board's view, the first question to be asked is whether a fair-minded, detached, and objective reader would conclude that passages in an inquiry report however they might be described (whether as findings, observations, comments, remarks, or recitals of evidence), either form a component part of an adverse decision affecting an individual or adversely affect an individual's reputation. If so, judicial review will be available as a remedy where the commission has acted without jurisdiction or otherwise irrationally, unlawfully, or unfairly in breach of the principles of natural justice. It is not appropriate to parse the impugned passages in a report sentence by sentence, as both parties sought to do in this case. Rather, the impugned passages should be read as a whole to see what is conveyed to the fair-minded reader.

(b) Did the Supreme Court adopt the correct approach?

54. The respondents contend that the Supreme Court took account of this evolution in approach to what is judicially reviewable in Mauritius in circumstances such as these. They rely on the fact that the Supreme Court cited *Jadoo-Jaunbocus* at pages 8 and 9 of its judgment. The Board rejects this submission. To the contrary, the Supreme Court was invited to and expressly applied the *De Robillard* distinction between findings of fact and other expressions, as the judgment makes clear. Indeed, the Supreme Court thought it pertinent to refer to a passage in *De Robillard* which held, "we are not prepared to say that judicial review would lie merely in respect of observations or the use of particular words, however unfortunate they may be considered to be by the applicant." The Supreme Court then proceeded to determine whether each extract (making up the impugned passages) amounted to a finding or not, defining a finding as a "conclusion reached as a result of an inquiry or determination of a disputed fact…".

Having done so, the Supreme Court concluded that the impugned passages contained no findings and were not amenable to judicial review in consequence.

55. For the reasons just given, that was too narrow an approach. Although the Supreme Court referred to *Jadoo-Jaunbocus,* it did so only after concluding that the impugned passages in the Report do not contain any findings by the Commission and hence were not amenable to judicial review. Having reached that conclusion, the Supreme Court indicated that it would consider the appellant's complaints, though it was not strictly necessary to do so, on the assumption that the impugned passages did amount to findings against him. In that context, it referred to *Jadoo-Jaunbocus* and the acknowledgment by the Supreme Court in that case that considerable adverse consequences to reputation can flow not only from findings of a commission but also from allegations aired at, or information and evidence communicated to, the commission, giving rise to the need for the court to intervene where a ground for judicial review is established.

(c) Are the impugned passages amenable to judicial review?

56. Here, read as a whole, the impugned passages contain a series of serious allegations (amounting to alleged criminal conduct) against the appellant that form the building blocks for the Report's ultimate conclusion that there should be a full investigation into the appellant's conduct. To put the same point another way, none of the allegations were mere comment or observations that led nowhere. They were allegations of unethical and/or criminal conduct made against an identifiable individual that led to the Commission's recommendation.

57. Thus, the appellant is identified in the Report as one of a handful of barristers strongly believed to have engaged in potentially unethical if not illegal activities. His role in making an unsolicited visit to Mr Bottesoie is described as very suspect indeed. The Commission states that there was no reason for him to meet Mr Jeeva who never retained his services and then poses the question, "Was he acting as a spy for other more important drug dealers" and expresses the view that he "seemed to have tried to pervert the course of justice and [was] trying to shield traffickers". These are all component parts of the recommendation for an in-depth inquiry into the appellant's conduct. While these (and other) comments are not expressed as conclusive findings, they are presented in a manner that is unfavourable and adverse to him. Further, had the Commission not given credence to these allegations, it would not have deemed it necessary to include them in the Report. In these circumstances, a fair-minded reader would think that there was sufficient substance in the allegations of unethical and criminal conduct to warrant a full in-depth inquiry. The conclusion itself has the necessary quality of finality. The impugned passages are liable to be acted upon by the police and are likely to influence any subsequent police investigation.

58. Moreover, it is artificial to distinguish between the recommendation for an in-depth investigation into the appellant's conduct and the earlier passages leading to it. Indeed, Mr Choo-Choy conceded that if the ultimate recommendation is judicially reviewable, as it must be, then the component parts leading to it cannot be immune from such review. The Board agrees.

59. Furthermore, as recognised in *Jadoo-Jaunbocus*, considerable harm to a person's professional standing and reputation can flow, not only from findings of a commission but also from allegations or adverse comment set out in an inquiry report, and this too may justify the conclusion that the impugned report is amenable to judicial review. There can be little doubt in this case, that the fair-minded reader would regard the impugned passages, read as a whole, as prejudicial to the character and reputation of the appellant. The allegations are presented in a one-sided manner, with brief or incomplete reference to the appellant's responses to them, notwithstanding that they are allegations of prima facie serious unethical and/or criminal conduct. For this further reason, the passages are amenable to judicial review.

60. Accordingly, the Supreme Court was wrong to hold that the impugned passages were a mere recital of the evidence before the Commission. That was too narrow an approach, even if the appellant's case below focussed on the distinction between findings and observations. The appellant was clearly challenging the manner in which the Report concluded that there should be a full inquiry into his conduct, and the way that certain passages were expressed. The Supreme Court ought to have concluded that the impugned passages are amenable to judicial review.

10. Should the Supreme Court have called for the Transcript?

61. The Board has already referred to the respondents' duties of candour and disclosure. As the respondents accept, these duties apply to public bodies in Mauritius, just as they do in England and Wales. They require a public body to disclose documents that are material to the determination of questions at issue in the judicial review, and if the public body fails to do so, the court should order such disclosure.

62. In this case, there was a clear and apparent conflict in the affidavit evidence about the hearing before the Commission on 7 August 2017. The respondents' affidavits denied many of the material averments made by the appellant in his first affidavit and maintained by him even after receipt of the respondents' affidavits. Once the conflict was appreciated, as it must have been, it should have been clear that the summary of the hearing given by the respondent deponents was liable to obscure or distort rather than clarify. The Transcript was the primary evidence in this regard. It was incumbent on the respondents to produce the Transcript. The Board goes further. It was incumbent on the respondents as part of this duty, to review matters raised by the judicial review

challenge to see whether other documents or information should properly have been disclosed. Had this been done, it is highly likely that witness statements and any documents obtained by the Commission from or concerning Mr Bottesoie and Mr Jeeva, from Mr Hurnam and from Mr Jeeva's sister would have been regarded as proper to disclose.

63. In the Board's view, the respondents' failure in this regard should have been corrected by the Supreme Court. At the very least, the Supreme Court ought to have required production of the Transcript.

64. Although the Supreme Court said that any conflict between the appellant's version of events at the hearing on 7 August 2017 and that given on behalf of the Commission was "more apparent than real", and further, that its role was not to resolve disputed issues of fact, there was a clear conflict, and the Supreme Court appears to have done that but without the benefit of the Transcript. For example, in resolving the appellant's "main complaint" of breach of the rules of natural justice, the Supreme Court reasoned that the language used by the appellant in his affidavit ("to the best of my recollection") is uncertain and speculative, verging on a fishing expedition. On the other hand, the Supreme Court described as "precise and detailed" the version of the proceedings given by the deponents on behalf of the Commission. The Supreme Court relied on the Commission's version as clearly showing that "the allegations of Mr Bottesoie and Mr Hurnam and other material facts were put to the applicant and that the latter was given an opportunity to respond and did do so".

65. Whether those allegations (and other material facts) were properly put to the appellant was a significant and material dispute in these proceedings. The dispute was capable of easy resolution by production of the Transcript. Moreover, in the Board's view, the Transcript does not support all the statements made by the Commission deponents in their affidavits. It could and should have been provided by the respondents and, in the absence of that, it could and should have been called for by the Supreme Court.

66. This does not mean that there was anything wrong in the Commission deponents serving affidavit evidence to explain what happened at the hearing and whether, as a matter of fact, the process adopted accorded with fairness and/or natural justice. To the extent that the appellant sought to suggest otherwise, the Board does not accept his submission.

11. What did the rules of natural justice and fairness require in this case?

67. As a Commission set up under section 2(2) of the COI Act, section 7(1) required the Commission to "make a full, faithful and impartial inquiry into the matter specified

in the commission, and shall conduct such inquiry in accordance with the directions (if any) in the commission." Section 13 required the Commission to abide by the law of evidence in relation to all witnesses appearing before the Commission. Accordingly, it is common ground that the Commission was obliged to act in accordance with the rules of natural justice.

68. What do these rules require as a matter of procedural fairness in an investigative jurisdiction such as this? The starting point is that the procedure of a commission of inquiry such as this one is primarily a question for the Commission itself. Various considerations may affect that in addition to fairness, including the requirement of effectiveness, speed, economy, and practicality: see *R (Hoffman) v Commissioner of Inquiry* [2012] UKPC 17, paras 37 and 38. The standards of fairness are neither immutable nor are they to be applied identically in every situation. They must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the commission is acting and the subject-matter under consideration. Nonetheless, although it is impossible to lay down rigid rules, fairness is a standard to be applied by the court. The fact that it is such a flexible standard and must accommodate such a wide and differing variety of circumstances, simply means that one cannot be too prescriptive.

69. That said, as Lord Mustill made clear in his often-quoted speech in *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531, 560:

> "(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

70. In the Board's view there is an obvious relationship between the nature and extent of the investigative process adopted by a commission of inquiry and the terms of the report it ultimately makes. The more finality there is in the conclusions reached by a commission and reflected in its inquiry report and the greater the strength of their expression, the more there is required to be done by the commission to ensure that the process is fair; and vice versa.

71. Accordingly, while the procedure of a commission of inquiry is primarily a question for the commission itself and while there is no obligation on a commission of

inquiry to give advance notice of the specific matters to be addressed or advance disclosure of the evidence to be relied upon by the commission, where a commission proceeds without adopting such procedures, it ought to recognise the corresponding limit that places on the nature of the findings it can properly make and the degree of finality with which they are expressed. As Mr Choo-Choy accepted here, the more specific the allegations about a particular individual were and the more finality there was in the expression of such findings in the Report, the more the Commission was required to do to satisfy the principles of fairness and natural justice.

72. Accordingly, in deciding what fairness required in this case, the Board starts by considering the terms of the summons, what transpired at the hearing and the precise terms in which the Report is expressed. Given the terms in which it was expressed, the Board then considers whether there was a basis for the allegations made and whether the procedure adopted was one that accorded with principles of fairness and natural justice.

73. The Board has set out the terms of the appellant's summons to attend the hearing and summarised the nature of the questioning at that hearing (by reference to the Transcript, at paras 3 and 20 above). It seems to the Board that together these documents demonstrate that the Commission had formed a clear view in advance of the hearing on 7 August 2017 that the appellant was one of a group of barristers involved in potential criminal or unethical conduct, who had made unsolicited visits to drug offenders in prison in circumstances amounting to perverting the course of justice. This conclusion is supported by the terms of the summons itself, which is far from neutrally expressed. Moreover, it is supported by what the Commission said subsequently in the Report itself. For example, having referred to a handful of barristers responsible for "reprehensible conduct" in para 19.5.3, in para 19.5.4, the Commission notes that it "would not have called these barristers had it not received information of potential breaches of the Code of Ethics. Most of the barristers were summoned by the Commission based on evidence of communication with prisoners." Further, the terms of the appellant's questioning by the Commission tend to confirm that they had formed the view in advance of the hearing that he had made certain identified unsolicited visits to identified drug offenders. This is significant because it shows that the Commission knew before the hearing precisely what allegations it wished to put to the appellant. It must therefore have known that the allegations dated back many years, with asserted prison visits dating from 2002 to 2006. In turn, the Commission can be taken to know that memories fade, and that to confront an individual with vague allegations about long-distant events, without warning, particulars, or any form of disclosure, was unlikely to be conducive to uncovering the facts.

74. The Board has referred above at paras 56 - 59 to the terms of the Report and the strength with which certain serious allegations were expressed. It is sufficient to reiterate the fact that the Commission expresses the view, for example, that the appellant "seemed to have tried to pervert the course of justice and [was] trying to shield traffickers".

75. Given all these considerations, fairness required that the evidence, the allegations and the Commission's expressed view should not have been published in the Report in these terms without the appellant having been provided in advance with copies of the prison visitor's legal visits book, any witness statements (if available in writing) of Messrs Bottesoie, Hurnam and Mr Jeeva's sister, together with the "Hurnam documents" (whatever they were). Given the appellant's sight problems, his personal circumstances made this even more important. The Board recognises that a clearly formulated statement given to the appellant in advance, setting out the gist of each allegation might have been sufficient if the Report had been expressed in more balanced and qualified terms. Likewise, witness statements, documents and/or the gist of the allegations provided at the hearing itself might have been sufficient provided the appellant was given the opportunity to read and digest them before being questioned. The failure to afford the appellant any of these opportunities put him at a disadvantage when he gave evidence and was a breach of the standards of fairness and natural justice in this case.

76. The Board has several further concerns about the Report and the procedure adopted by the Commission.

77. First, in relation to the allegation made by Mr Bottesoie, the Transcript shows that the gist of this allegation was put to the appellant during the hearing, namely, that he had visited Mr Bottesoie in prison and asked him not to implicate Mr Velvindron in return for a financial reward. But the account given by the Commission in the Report of the appellant's response to the allegation is incomplete and unbalanced. It omits to mention that Mr Bottesoie was questioned in Mr Velvindron's trial about this allegation and denied on oath that the appellant had made any such approach. It omits to mention the MCIT inquiry which investigated this allegation, and in which the appellant had cooperated fully and provided a full statement, which resulted in no charge being brought against the appellant. It omits to mention that, on the appellant's account, he was visiting a client (Mr Betty) who asked him to see another prisoner (who turned out to be Mr Bottesoie) then being held in segregated conditions, and that the appellant said he had spoken with a prison welfare officer at the time.

78. The appellant complains that the full MCIT file should have been called for by the Commission and that he should have been permitted to cross-examine Mr Bottesoie. The Board does not agree. A mini trial was unnecessary and would have been disproportionate in the circumstances. However, the failure to pursue obvious avenues of enquiry (including by obtaining access to the MCIT file if the Commission had no such access) meant that the Commission should have been more cautious about how it expressed its concerns in the published Report: to assert that the visit to Mr Bottesoie was suspicious was unjustified in these circumstances, as was the one-sided recital of the evidence implicating the appellant in relation to Mr Bottesoie, with little or inadequate reference to the appellant's own exculpatory account. Without obtaining access to much better evidence that was likely to be available in the MCIT file, the

Commission should have tempered the conclusions it reached in the Report about these allegations.

79. Secondly, as regards the so-called allegation made by counsel, Mr Hurnam, the Transcript demonstrates that even the gist of Mr Hurnam's allegation against the appellant was simply not put to him, still less was he provided with a copy of Mr Hurnam's statement (if he made one) or the documents the Commission said that Mr Hurnam had produced to support the criticism he made of the appellant. The Report states that "Mr Hurnam deposed and was very critical of the acts and doings of counsel in the present matter with documents in support" but all that was put to the appellant at the hearing is that Mr Hurnam had "pointed a finger" at him. Even now, the Board remains unclear as to precisely what Mr Hurnam said and whether he was giving independent evidence of the appellant's alleged wrongdoing or merely repeating what he had heard from someone else. Given that his client was Mr Velvindron, it is unlikely that Mr Bottesoie would have spoken to him directly. Moreover, the fact that the appellant expressed himself, during the hearing on 7 August 2017, as having been traumatised by this allegation is entirely explained by the fact that Mr Hurnam had cross-examined Mr Bottesoie during Mr Velvindron's trial and suggested that the appellant had offered him a financial reward in return for not implicating Mr Velvindron. This apparent knowledge of what had happened during Mr Bottesoie's cross-examination is no substitute for being told, in advance, precisely what was being alleged against the appellant by Mr Hurnam, and what documents Mr Hurnam had produced in support. Having failed to put even the gist of this allegation to the appellant, to set it out in the Report and to assert in consequence that the appellant's role was "very suspect indeed" was unfair. It should not have been done.

80. Thirdly, in relation to the Jeeva allegation, while as a matter of fact there may have been no obvious reason for the appellant to visit Mr Jeeva in prison if he was not instructed to act for him, the appellant was confronted with an allegation that he made an unsolicited visit to Mr Jeeva in 2006 (some 11 years earlier) without any advance warning or opportunity to consult his own records. Indeed, he was not given a precise date for the visit until after the hearing and was never shown a copy of the prison visits book. As he explained repeatedly at the hearing, and unsurprisingly in these circumstances, he had no recollection of this name. The Board notes that other names were also put to the appellant as the names of prisoners visited by him but were not identified in the subsequent letter giving details of prison visits relied on, nor referred to in the Report. There has been no explanation why.

81. The Board considers that at the very least, the gist of the Jeeva allegation should have been put to him in advance of the hearing, and he should have been shown the prison visits book or provided with a copy of the relevant entry. None of that having been done, it was unfair to characterise (as the Commission did) his denial of the visit to Mr Jeeva as if he had been caught out in a lie. Moreover, to go on to suggest (in the context of the Jeeva allegation) that he had resorted to unsolicited prison visits to drug

convicts as a spy for more important drug dealers, was unsupported by any evidence identified by the Commission and was never even put to the appellant. This statement should not have appeared in the Report.

82. The respondents' reliance on the fact that the appellant could have but failed to produce any further evidence or information after the hearing, despite being provided with the dates of the asserted visit to Mr Jeeva, does not assist the respondents. The Transcript indicates that the appellant was reassured by the Commission members that there was no suggestion by Mr Jeeva's sister that he was one of those said to be responsible for pressurising Mr Jeeva to change his evidence, and no specific allegation was made against him in relation to this prisoner. In the circumstances, the Board considers that the appellant could not reasonably have foreseen that this particular criticism would emerge in the Report, still less could he have foreseen that it would do so in the terms expressed. The duty was on the Commission to ensure an appropriate standard of fairness was applied. It was not incumbent on the appellant to provide information on matters that were not foreseeably relevant or required before the Report itself was published.

83. Finally, while the appellant does not challenge the Commission's recommendation for a full in-depth inquiry into unsolicited visits by lawyers to drug offenders in prison per se, he is justifiably critical of the terms in which it is expressed in relation to him, namely, that he should be investigated for "seem[ing] to have tried to pervert the course of justice and [shielded] drug traffickers". Neither allegation was put to the appellant at any time. The Board has not been shown the evidence relied on by the Commission to substantiate either that he was trying to pervert the course of justice or that he shielded drug traffickers. In the absence of any apparent evidential foundation for these allegations, they should not have appeared in the Report.

84. The Supreme Court held that the appellant was properly notified of all matters concerning or affecting him and was given a full and proper chance to respond. It held that he was confronted with the allegations made by the relevant prisoners or on his or her behalf, and given the opportunity to give oral evidence, which he did, and afterwards to give additional explanations, if he so wished. Bearing in mind that the procedure to be adopted by the Commission was primarily a question for the Commission itself, the Supreme Court concluded that the appellant was treated fairly by the Commission. As for the MCIT file, the Commission was mandated, in very broad terms of reference, to inquire into, and report on all aspects of drug trafficking in Mauritius. It was carrying out its own inquiry and having decided to summon the appellant and informed him of the allegations against him and given him an opportunity to respond, the Supreme Court found no merit in the appellant's contention that the Commission was unfair in not calling for the MCIT file.

85. As the Board has explained, it does not accept those conclusions. The Board has set out its concerns about the Report and the procedure adopted by the Commission. In the circumstances of this case, it is satisfied that the appellant was not informed of the gist of the case which he had to answer or shown the relevant material in relation to the allegations identified above. The Commission did not afford the appellant a fair opportunity to give worthwhile evidence and make worthwhile representations on his own behalf. So far as the MCIT file is concerned, if the Commission did have a copy of the MCIT file, or access to it, and intended to rely on matters contained within it in support of criticisms made in the Report about the appellant, copies of the relevant parts should have been provided to the appellant so that he could comment on them. However, as the Board has already indicated above, if the Commission did not have access to the MCIT file, it was under no duty to obtain it or provide the appellant with copies.

12. Was there a failure to make reasonable adjustments for the appellant?

86. Just as questions of procedure are very much questions for the Commission to decide, so too is it a question for the discretion of the Commission as to what if any reasonable adjustments or accommodations are to be made for a witness. The Commission is best placed to form a view about what is reasonably necessary by way of adjustment in the particular circumstances, having seen or communicated with the affected individual and having a better feel about the particular situation.

87. A request to have an assistant sitting next to a sight and/or hearing-impaired witness might provide comfort and reassurance. On the face of it, it appears capable of easy accommodation. If so, the Board finds it hard to see why it should not have been accommodated absent good reason to the contrary.

88. On its own however, the Board does not consider that the failure to make adjustments in the appellant's case renders the Commission's actions unlawful. The Transcript reflects the appellant's broad ability to hear and answer the questions. On the odd occasion where there was difficulty or confusion, the question was repeated. Rather, the Board sees this issue as an aspect of fairness and natural justice which the Board has already addressed.

13. Conclusion

89. For all these reasons the Board accepts the case advanced on behalf of the appellant that the impugned passages in the Report are amenable to judicial review. Further, the procedure adopted by the Commission in relation to the appellant did not accord with the principles of fairness and natural justice in the respects set out above. The Board accordingly allows this appeal.

90. Further, the Board declares that the impugned passages (containing comments in some cases, and findings in others, but all leading to the conclusion that there should be an in-depth investigation into the appellant) identified by the Board above and published in pages 232 to 233 of the Report of the Commission of Inquiry on Drug Trafficking are in breach of the principles of fairness and natural justice. The Board orders that they should be disregarded and a link to this judgment be inserted on page 232 of the Report as it is published on the internet.