IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO 2007 HCV 0351

IN THE MATTER OF THE EDUCATION ACT 1965 AND THE EDUCATION REGULATIONS 1980

AND

IN THE MATTER OF THE SCOTIABANK FOUNDATION SCHOLARSHIP

AND

IN THE MATTER OF PART 56 OF THE CIVIL PROCEDURE RULES 2002

BETWEEN	KRISTI CHARLES (By her mother and next friend Cleopatra Charles)	CLAIMANT
AND	MARIA JONES (Permanent Secretary of the Ministry of Education)	FIRST DEFENDANT
AND	THE MINISTER OF EDUCATION	SECOND DEFENDANT

Andre Earle and Anna Gracie instructed by Rattray Patterson and Rattray for the claimant

Nicole Foster Pusey and Stephany Orr instructed by the Director of State Proceedings for the first and second defendants

APRIL 3, 4, 7, 8, 10 and April 25, 2008

JUDICIAL REVIEW - LEGITIMATE EXPECTATIONS - FAIR HEARING - MANDAMUS - CERTIORARI - UNREASONABLENESS - PRECEDENT FACT - DAMAGES IN ADMINISTRATIVE LAW - EDUCATION ACT 1965 - EDUCATION REGULATION 1980 - EXAMINATION CHEATING - EXERCISE OF DISCRETION

SYKES J

1. This is an amended application for administrative orders of mandamus and certiorari. Miss Kristi Charles (Kristi), by an amended fixed date claim form, wishes an order of mandamus requiring Maria Jones and/or the Minister of Education to advise Scotiabank Jamaica Foundation (the Foundation) that she received the highest marks for girls in the Grade Six Achievement Test (GSAT) held in March 2007. She is also asking for an order of certiorari quashing the decision of Maria Jones and/or the Minister of Education not to award her a scholarship. Finally she is seeking an order of certiorari to quash the decision of Maria Jones and/or the Minister of Education to advise the Scotiabank Jamaica Foundation that someone other than her received the highest results for girls in 2007 GSAT examination. Kristi, at the time she sat the GSAT, was a student at Saints Peter and Paul Preparatory, reputed to be a leading private school providing primary education.

2. This application for judicial review arose because the Ministry of Education (MoE) concluded that Kristi was the beneficiary of examination fraud albeit that she, according to the MoE, was an unwitting and innocent party. The MoE confirmed her GSAT grades but declined to consider her eligible for any scholarships awarded by the Government of Jamaica. Her name was not sent to the Foundation where she might have received the Foundation's scholarship for the best performing female student.

The GSAT

3. The GSAT is administered by the MoE. It is an examination that is used to place students from the primary education system into publicly funded

or supported secondary schools. The examination was introduced in 1999 and replaced the then Common Entrance Examination which was an examination designed to ensure that only the best performing candidates entered what could be called traditional high or grammar schools. These grammar schools were perceived, rightly or wrongly, as offering a better quality of education and so, understandably, the competition to enter these schools was fierce and intense.

4. It was felt that reform was needed. Part of this reform included the introduction of the GSAT. Another part of the reform was that all secondary schools (grammar, comprehensive, and schools known as new secondary schools) were to be regarded as high schools. There was no more distinction between grammar schools and other schools at the secondary level. A further plank of the reform was that all children from the primary education system would be placed in a high school. The students were placed, according to their performance in the GSAT and the availability of space, at the school chosen by the candidate. Thus the best ranked students went to the more sought after secondary schools.

5. It appears that the underlying philosophy of the MoE is that all children are to receive secondary education and if all schools are high schools then all children are supposed to receive, ostensibly, the same quality of education. So much for the theory. The reality is that some schools are perceived to be more desirable than others. To misquote George Orwell, in the eyes of the MoE all secondary schools are equal but in the eyes of parents some are more equal than others. Schools such as Campion College (the school of Kristi's choice where she was eventually placed) are thought of as among the-more-equal-than-others schools. Thus even though the MoE does not publish a league table of schools, parents have developed their own. Therefore, the competition to enter these sought after schools is perhaps just as fierce and intense as under the Common Entrance Examination selection system.

6. The GSAT is held over two days. The candidates are examined in five subject areas: mathematics, language arts, social studies, science and communication task.

7. In this case, no issue has arisen regarding whether the MoE has the power to investigate any alleged examination fraud and to take appropriate action in light of the facts uncovered during any investigation that may take place. It is common ground that the Minister of Education acting under the 1980 Education Regulations made under the Education Act has the power to develop and administer the GSAT examination. What Kristi is saying is that the MoE did not have enough evidence to warrant the conclusion that she was the beneficiary of prior exposure to the examination papers. She is also saying that the MoE acted in breach of natural justice by not informing her that it had decided that she benefited from prior exposure and had decided not to consider her eligible for any scholarships awarded by the Government. She also contends that the decision to prevent her from being considered by private scholarship donors such as the Foundation amounted to the imposition of a penalty without a hearing.

8. It is agreed that the MoE may enter into arrangements with private individuals (real or corporate) for the award of scholarships to suitable candidates. The Foundation is one such private entity. It awards two scholarships each year: one each to the top performing male and female candidate in the GSAT. Whereas the MoE has other criteria for awarding the scholarships administered by the Government of Jamaica, the Foundation has a pure objective system – top marks.

9. Over time, the Foundation's scholarships have grown in prestige. This application proves the importance that some parents attach to them. The Foundation also benefits; it receives favourable publicity and its image is enhanced. The scholarship winners are immortalized in photograph and prose by the leading daily newspapers. The proud teachers are photographed beside the beaming students. Ecstatic parents are interviewed and of course the more of these scholarships any particular school can secure the greater its visibility in the education kingdom. All round then, it is good for all: the Foundation, the scholarship winner, the parent, the teacher and the school which produced the recipient.

The candidate and her mother

10. Kristi prepared for these examinations with a rigour and intensity not commonly seen. Since grade four she began attending extra lesson

classes. In grade five she enrolled at the GSAT Centre operated by Mrs. Stephanie Corcho. This was for mathematics. One Miss Percy tutored Kristi in communication task. A Mr. Speed tutored her in science and social science. Apparently no extra lessons were needed for language arts.

11. When Kristi entered grade six, her mother was of the view that the preparation should be stepped up. For the Christmas term in grade six, Kristi attended the GSAT Centre, Mondays, Tuesdays and Sundays. Then she went to Mr. Speed on Wednesdays, Thursdays and Fridays. Miss Percy had Kristi on Saturdays. During the Christmas break Kristi attended the GSAT Centre every day except public holidays.

12. In addition to this, Mrs. Charles took time off from work in the month preceding the GSAT examinations which were held on March 29 and 30, 2007 to reinforce what was taught to Kristi by her numerous teachers.

13. Kristi was an honour roll student for the academic year 2005/06 at Saints Peter and Paul. To be an honour student, Kristi had to have a minimum of 95% average in all subject areas.

14. In the internal GSAT mocks set by Saints Peter and Paul it is undisputed that Kristi scored the following: mathematics 99%; language arts 98%; social studies 99%, science 100% and communication task 94%. These grades were certified to be true by Mr. Anthony Ashley who was Kristi's class teacher and not challenged by the defendants.

15. With all this preparation one should not be surprised to read in Mrs. Charles' affidavit of December 19, 2007, at paragraph 11: *"Based on our regimen, I was confident that Kristi would not only excel in the GSAT examinations but be the recipient of a Scholarship (sic)."*

16. Mrs. Charles' confidence in her daughter's abilities was well placed. In the GSAT, Kristi scored the following: mathematics 100%; language arts 98%; social studies 99%; science 98% and communication task 12/12.

17. In summarizing Kristi's academic profile, it is clear that before the examination she was a high performer. Her performance on the GSAT

was very very consistent with her profile leading up to the examination. Even in the post examination season she did not falter. Her end of year examinations produced these results: mathematics 97%; language arts 96%; social studies 94.5%; science 94%. There was no examination for communication task. Her summer term average in grade six for the various subjects were as follows: English language 91%; reading comprehension 90%; spelling 99%; communication task 86%; mathematics 93%, social studies 94% and science 94%. Her term average was 92.428% and her examination average was 95.37%.

18. Kristi's attendance record is equally impressive. In a school year of 364 sessions she was never late or absent. Her extra curricular activities are just as impressive. She excelled in dancing, physical education, drama and computer studies. She was involved in brownies (the junior version of Girl Guides); swimming and netball. If this were not enough, she held the position of prefect. The comment from the school on her final report reads: *"Kristi is a hardworking, quiet and diligent pupil who has the ability to achieve excellence."* It is this child that the MoE is saying did not perform on her own merit but was the beneficiary of examination fraud. Clearly, to make a case of examination fraud against Kristi it was going to require cogent evidence.

19. I now go to Mrs. Charles, Kristi's mother. As we have seen, Mrs. Charles' approach to these examinations was nothing short of exceptional thoroughness. She is a parent of extraordinary diligence. It is this diligence that precipitated this legal challenge. It was she who discovered that her child though achieving grades superior to the child who was eventually awarded the Foundation scholarship was not awarded any scholarship at all. This revelation came to her when she read in the Daily Gleaner of June 19, 2007, that the Foundation's prestigious award went to another female candidate who while performing exceptionally well was .8% behind Kristi. The recipient of the scholarship had a GSAT average of 98.2% while Kristi achieved a 99% average.

20. Not unexpectedly, Mrs. Charles contacted the MoE for an explanation. It was then, for the first time, that she was told that there was some irregularity with her daughter's marks. She said that she was told by the MoE "that an investigation had been undertaken and the said Ministry

had concluded that the students who attended the Centre had been exposed to the 2007 GSAT Examination papers" (para. 7 of affidavit of Cleopatra Charles dated October 4, 2007). She was further advised that the Ministry exercised its statutory powers under the Education Act 1965 and the Education Regulations 1980 and "having determined that the students were unknowing participants, decided to promote the students and awarded them their grades" (para. 8 of affidavit of Cleopatra Charles dated October 4, 2007). In other words, the MoE made a most damning finding against Kristi and Mrs. Stephanie Corcho's examination centre and did not inform either of them of its conclusion and decision. None of this is challenged by the defendants. Indeed, as will be noted later, Mrs. Foster Pusey was forced to concede that Kristi ought to have been informed of the decision.

The MoE's suspicion and investigation

21. Mrs. Stephanie Corcho, an enterprising woman with multiple degrees and who is now a doctoral candidate in education, operates the GSAT Centre which as the name suggests prepares candidates for the examination. Kristi was one of the many students who attended this centre. On Monday, March 26, 2007, she held classes for her students. She told them that she would not have any classes on Tuesday, March 27, 2007 and Wednesday, March 28, 2007. She also told her students that there would be classes on Thursday, March 29, 2007, and possibly on March 28, 2007, depending on the completion of her engagement on that date. None of this is challenged by the defendants.

22. On March 28, 2007, Mrs. Corcho held revision classes between 4:00pm and 6:00pm. She reviewed mathematics and social studies which were the subjects to be done on Thursday, March 29, 2007. She also held classes on Thursday, March 29 after the mathematics and social studies examinations. During this session on March 29 she asked the students to write on one of three topics. These were (a) a letter to a friend telling him or her about Jamaica; (b) My School and (c) a letter to the Vice Chancellor of the University of the West Indies, Mona, inviting him to speak on the "The Importance of University Education".

23. A careful review of the events of March 29, 2007, is now required since the events of this day were significant in they eyes of the MoE.

Sister Shirley Chung, the principal of Saints Peter and Paul, in a written statement exhibited in this case, stated that on Thursday, March 29, 2007, at approximately 3:30pm she received a report from a parent 'X' (unnamed and unidentified) who reported that it appeared that there was leaking of GSAT papers because students attending Mrs. Corcho's centre were briefed on the questions the previous afternoon meaning March 28.

24. I now relate Sister Chung's report to the MoE. The account about to be given demonstrates the severe difficulties that any reasonable decision maker would have in establishing the facts in the circumstances of this case. While it is agreed that the MoE had the power to investigate examination fraud and take appropriate action, it cannot be denied that there must be a proper factual foundation before any action against Kristi could be taken.

25. Sister Chung said that X told her that Y (unnamed and unidentified) asked X why X's son was not at the revision of March 28. Y told X that it was unfortunate that X's son did not attend the session. X asked why this was unfortunate because neither he nor his son was informed that a class was scheduled. Y asked X if he (X) did not receive a phone call. There is no evidence indicating X's response. There is no further report from Sister Chung on this conversation.

26. Sister Chung continues by saying that on Friday, March 30, 2007, she spoke with a student (unnamed and unidentified). This conversation was said by Sister Chung to confirm that special sessions were held on Wednesday, March 28 and Thursday, March 29 and that revision was done orally. I pause here to note that at least in respect of the communication task Sister's informants were inaccurate. There is clear and unequivocal evidence that Mrs. Corcho, on March 29, asked the students **to write** (not speak) on one of three topics. I make this point to highlight how important it is to conduct proper investigations before taking action. Subsequent to this Sister said that she received information from teachers (unnamed and unidentified) that students (unnamed and unidentified) told them (the teachers) that questions appearing on the GSAT papers were revised with them at Mrs. Corcho's centre.

27. I note here that Sister Chung and the MoE called these classes special sessions. It is not clear how the MoE or Sister Chung arrived at this nomenclature. According to Mrs. Corcho her examination preparation methods include working right up to the day before the examinations and if the examinations are held over a number of days, she requires her charges to work on these days. None of this was challenged by the defendants.

28. A number of observations about this report from Sister Chung needs to be made. There is no evidence that any of the parents, X or Y, was interviewed by the MoE. There is no evidence that any of the teachers about whom Sister Chung spoke was identified by and interviewed by the MoE. There is no evidence that the child spoken to by Sister Chung or the children spoken to by the teachers were interviewed by the MoE. In other words, there is no evidence that the MoE sought to confirm (i) what Sister Chung said that parent 'X' said parent 'Y' said and (ii) what Sister Chung said the teachers said the students said about alleged prior exposure. This is part of the "evidence" the MoE relied on to conclude that Kristi benefited from dishonesty.

29. The other part of the "evidence" came about in this way. When the MoE received this information from Sister Chung, it sent Dr. Myers Thomas, a ministry official, to investigate. On March 29 Dr. Myers Thomas went to Mrs. Corcho's centre and pretended to be a prospective client. During this covert operation, Dr. Myers Thomas alleged that she heard Mrs. Corcho, while stroking the hair of a female student, ask her what she was going to write about tomorrow (i.e. March 30) and the student is alleged to have said "My School".

30. The MoE says that after the visit of Dr. Myers Thomas to the GSAT centre it launched an investigation "to determine whether the students at the private homework centre had unauthorized exposure to the 2007 GSAT prior to its administration by the Ministry" (see para. 28 of affidavit of Mrs. Maria Jones dated November 20, 2007). Thus when the investigation was launched, the MoE had (a) the report of Sister Chung and (b) the visit by Dr. Myers Thomas to the GSAT centre. It should be bourne in mind that Sister Chung at no time purported to have actual knowledge. She was reporting what she was told by a parent and teachers

who on the evidence before the court did not themselves see first hand any evidence of examination fraud. The parent and teachers were themselves relying reports made to them. It was said that some of the students claimed that when they sat the examinations on March 29, they had seen some questions that they had seen before. This while sounding serious has a possible explanation which is now indicated.

31. Dr. Myers Thomas provides an affidavit outlining her visit to the GSAT centre. She observed written papers which had "My School". According to her, Mrs. Corcho told her that she (Corcho) used past GSAT papers which she obtained from teachers, and newspapers along with other material. This latter statement was confirmed by Mrs. Corcho.

32. The implication of Mrs. Corcho's statement is that GSAT past papers are available. The sense I got from Mrs. Corcho is that past GSAT papers are not particularly difficult to come by despite the clear instructions to the examination centres that the papers are not to leave the examination room. If this is correct then it would explain why some students may have seen some questions on the 2007 GSAT before they went into the examinations. If this is so then one should not be surprised that students may well see questions on the examination that they have seen before because the MoE repeats fifteen percent of the question over a period of time (several years). This means that on the question papers which have 80 questions, there would be 12 repeats and the papers with 60 questions would have 9 repeats. Thus once Mrs. Corcho admitted that she had past GSAT papers it should have occurred to the MoE that the students would in fact see questions on the examinations that they had seen before. It meant that this fact of seeing previous questions did not advance the MoE's case of prior exposure if indeed the past papers are widely available. Indeed the assertion that the papers are available was not denied by the MoE. There are many texts in the market that claim to be past GSAT papers. The MoE neither confirmed nor denied this assertion. Thus if the assertions made about these texts are true then clearly the students will see previous questions. In any event Mrs. Jones' affidavit of November 20, 2007, downplayed the effect of the availability of prior examinations because for any year's examination paper after taking account of the repeat questions the rest of the paper has original questions (see para. 9).

33. As part of its investigation the MoE summoned Mrs. Corcho to a meeting on April 17, 2007. She was not told the purpose of the meeting. At this meeting, Mrs. Corcho was asked to provide the names of the other students who attended her GSAT centre. The MoE told her that the names were wanted in order that the students from her centre should resit the examination. She refused to hand over the names.

34. This aspect of the case is important because it is necessary to determine whether the MoE had already made up its mind that Kristi was exposed to the examination before she sat them. According to Mrs. Corcho at the April 17 meeting Mrs. Maria Jones outlined the reports she had received from Sister Chung and Dr. Myers Thomas. Mrs. Jones requested the "list of all the names of the students who attended my classes, ***so that they could re-sit the examination that was already set***" (my emphasis) (see para. 23 of affidavit of Stephanie Corcho dated December 19, 2007). If this is correct, then the only conclusion to be drawn is that the MoE had already concluded that the exposure had occurred. Mrs. Jones swore an affidavit in response to this affidavit. In this affidavit Mrs. Jones said that Mrs. Corcho denied the irregularity. Importantly Mrs. Jones adds, that the MoE had no reason to doubt the credibility of Dr. Myers Thomas and "felt that it had sufficient cause to make arrangements for those students present at Mrs. Corcho's revision classes during the period March 28 to March 29 2007 to resit their examinations" (para. 13 of Mrs. Maria Jones' affidavit dated February 18, 2008). This is a remarkable conclusion in light of the "evidence" in possession of the MoE which amounted to (a) third hand hearsay from Sister Chung and (b) a report from Dr. Myers Thomas. In other words, the MoE had already concluded that there was exposure to the papers and the remedy was to have a re-sit. Dr. Myers Thomas puts the matter beyond doubt when she stated that once it has been determined that there was a breach the remedy was a resit (see para. 33 of affidavit of Dr. Myers Thomas dated February 18, 2008).

35. There is an exchange of letters between the MoE and Mrs. Corcho which needs to be examined. On April 20, 2007, Mrs. Corcho wrote to the MoE asking for written correspondence regarding the allegations made by the MoE. The MoE responded by letter dated May 3, 2007, over the

signature of Mrs. Jones which has this sentence: *"As explained at the meeting, when confronted with reasonable cause to believe that the examination security might have been breached our responsibility is to seek to investigate the matter and if our findings so warrant, administer a new examination for the affected students."*

36. The letter concludes with: *"We regret that you do not see the immediate value in assisting the Ministry in its investigation by either enabling access to the students, or by formally countering the report received by this Ministry."*

37. It is to be noted that the letter from Mrs. Jones says that the MoE investigates to see if there is reasonable cause to believe that there might have been a breach of examination security and if the findings warrant such a conclusion then the MoE administers the resit examination. In other words, if the investigations lead to the conclusion that there was a breach then a re-sit is done. Following this train of reasoning, since the MoE asked for the names not for the purpose of conducting further investigation to find out if there was a breach but to organize a re-sit then this can only mean that the MoE, before meeting Mrs. Corcho, had already decided that there was in fact a breach. This was as early as April 17, 2007, and nothing was said to Kristi. The clue that points to this conclusion by the MoE is paragraph 13 of Mrs. Jones' affidavit dated February 18, 2008. She swore in that affidavit that: *"[i]n response to paragraphs 22 to 24 of the said affidavit, [affidavit of Mrs. Corcho dated December 19, 2007] at the meeting held on April 17, 2007, Mrs. Corcho denied the existence of any examination irregularity occurring at the home work centre operated by her. The Ministry however had no reason to doubt the credibility of the observations of Dr. Myers Thomas and felt that it had sufficient cause to make arrangements for those present at Mrs. Corcho's revision classes during the period March 28 to March 29 2007 to re-sit their examination. The Ministry made a request for the names of the students attending the said revision classes, which Mrs. Corcho has not complied with to date."*

38. Mrs. Jones is very plain. The meeting with Mrs. Corcho was to make arrangements for the re-sits, not to gather further information. It seems quite clear that the MoE decided that Dr. Myers Thomas was to be

believed. Thus the meeting of April 17 was not an investigation to determine whether there was a breach of examination security but rather a meeting to make arrangements for a re-sit because in the MoE's view the breach had indeed been established. In other words, Kristi was condemned without a hearing.

39. Mrs. Jones' affidavit of February 18, 2008, sought to convey the impression that Mrs. Corcho had flatly refused to cooperate with the MoE but this is a very misleading and an extremely inaccurate picture because Mrs. Corcho responded to Mrs. Jones' letter of May 3 by letter dated May 25, 2007 in which she (Corcho) wrote: "*I further stated that I would forward the list of students who attended classes on March 28 and 29 2007, if and only if the papers done by these students would be analysed to determine impropriety, but not for re-sit without analysis* (underline appears in original)."

40. In other words Mrs. Corcho was asking the MoE to conduct a proper investigation and if the names were required for that purpose, she would release the names. I am unable to see why this stance by Mrs. Corcho was labeled as uncooperative. Anyone could see the clear imputation on the reputation of Mrs. Corcho. She was asking the MoE to do not only what it ought to have done but what it said it would have done, which as should by now be apparent, it failed to do. Indeed it will be recalled that the MoE has stated at paragraph 28 of the affidavit of Mrs. Jones dated November 20, 2007, that following the report of Dr. Myers Thomas the MoE launched "*a full investigation ... to determine whether the students at the private homework centre had unauthorized exposure to the GSAT 2007 Exam prior to its administration by the Ministry*". There is no evidence that the MoE did anything, between March 29 and April 17 other than to believe the report of Dr. Myers Thomas and then concluded that there was a breach. There was no evidence that the MoE conducted any investigation after the report it received from Sister Chung and Dr. Myers Thomas. In fact, there is no evidence that the MoE even conducted an internal examination of its own processes to determine where the leak occurred since it was so sure that a leak had taken place. In short, no investigation was done. This shows the danger of not having clear demarcation of roles in a single organization that administers examinations, investigates alleged breaches of examination security and

adjudicates to determine whether there was indeed examination fraud. There is no evidence that the internal processes of the MoE have any demarcation of function. It may be that had there been a separate body that examined the evidence the MoE may have detected that more evidence was required before coming to the conclusion that it did. The body need not be external to the MoE but simply another group of person not involved in the investigation to review the evidence gathered. The fact that the allegation is one of examination fraud and the need for the MoE to protect the integrity of its examinations make the case for more careful procedures because the consequences of such a conclusion are long lasting and devastating for the persons involved.

41. When an examination body is investigating a case of examination fraud and it has concluded its investigations and those investigations suggest that a particular candidate either committed the fraud or was a beneficiary of the fraud and the body intends to act in a manner adverse to the suspect then there is great need for adherence to principles of natural justice (see ***Benedict Nkhoma and others v Council of the University of Malawi*** (Misc Civil Cause No. 54 of 1992) (delivered January 18, 1993). Indeed one would think that the more serious the allegation the greater care in observing natural justice. This position is supported by the case of ***Flanagan v University College of Dublin*** [1988] I. E. H. C. (delivered September 29, 1988) where Baron J. said at paragraph 19:

> *Once a lay tribunal is required to act judicially, the procedures to be adopted by it must be reasonable having regard to this requirement and to the consequences for the person concerned in the event of an adverse decision. Accordingly, procedures which might afford a sufficient protection to the person in one case, and so be acceptable, might not be acceptable in a more serious case.*

42. In the field of education, there could hardly be a more serious charge leveled against a person. To accuse a person or an entity of (to say nothing of concluding that the person or entity was involved in) examination fraud is quite a damaging allegation to make. To conclude that an examination candidate received the performance enhancing elixir

of prior exposure to the very examination the candidate is to sit is a grave and serious conclusion and should not be lightly made. It really amounts to an imputation of dishonesty on the part of someone. In other areas of law, allegations of dishonesty are not lightly made and it usually requires compelling evidence to sustain the charge. I am not importing private law concepts into this area. I accept that decision makers are not operating a court of law but nonetheless it would be well if they bore in mind that to conclude that a person was dishonest or benefited from dishonesty even if he or she were not personally dishonest really needs good evidence.

Further difficulties

43. It turns out that an essay on "My School" appeared at the communication task paper on March 30, 2007. The MoE said that the ability of Mrs. Corcho to "predict" that a letter on My School would appear was too specific to be a genuine prediction. This position does not bear scrutiny. The communication task always has two questions. Question one is usually asking the candidate to fill in or complete a document of one sort or another. Question two is always a written long answer that can only take one of three forms: (a) a letter; (b) an essay or (c) a short story. It was accepted by both sides that in the GSAT world a written component of the communication task may well have included a question on "My School". Additionally, the examination has to have topics that are sufficiently generic so as to provide all children with an equal opportunity of doing well. There could not be a question on, for example, a visit to Europe since many children would not have that experience.

44. From the many exhibits from the various books purporting to have GSAT questions, the topic "My School", is a very popular one. It was accepted by the defendants that any reasonable GSAT teacher would prepare the child to write an essay or letter on that topic. The MoE tried to say that Mrs. Corcho could not have predicted this topic because it had not come in previous examination despite its popularity. It would seem to me that this fact would itself be a good one to prepare for it. If it had not appeared before then the likelihood of it appearing in 2007 was not a far fetched possibility as was indeed accepted by the defendants during the course of the hearing. In any event, the Achilles heel in the MoE's position was that the 2007 question was very specific.

It asked the candidates to write to a friend who was coming to his or her school telling him (a) the rules; (b) the description and (c) any special activities held during the year. There is no evidence that Mrs. Corcho had this degree of specific information or communicated such precise instructions to her students. Even more tellingly, there is no evidence that any child at Mrs. Corcho's examination centre had this specific information. There is no evidence that any papers written by the students on March 29 on "My School" had any information sufficiently specific to raise a reasonable suspicion that prior exposure was the most likely explanation for Mrs. Corcho choosing that topic as one of the three for her revision classes.

45. The MoE sought to clinch its case against Kristi by saying that she performed above average taking into account her school average. This is what the MoE told Kristi's parents on June 29, 2007 at a meeting between the parties after Mrs. Charles discovered on June 19 that her another child had received the Foundation scholarship. This chain of reasoning was undone by the plain unvarnished facts which were as follows: (a) the MoE made the decision as early as April 17, 2007 that Kristi was exposed to the examination; (b) the MoE wrote to the Foundation on June 14, 2007, indicating that another child was the top female student; (c) the information on Kristi's average was sent to the MoE by letter dated June 27, 2007. In short, the MoE could not have used Kristi's average to make its decision because it did not have the averages in its possession before June 27 when it is now agreed that the decision to forward another child's name to the Foundation was already made. The June 27 letter has assumed great importance. It was provided two days before the meeting with Kristi's parents which was held on June 29, 2007. At the meeting with Kristi's parents as reflected in the minutes, the MoE told the parents that one of the factors taken into account against Kristi and indeed the other identified children who attended Mrs. Corcho's centre was that the GSAT average was considerably above the school average. This led Mr. Earle to accuse the MoE of ex post facto rationalization. He even accused the MoE of deliberately embarking on a course of action designed to mislead the court. According to Mr. Earle this attempt at a cover up is illustrated by the two affidavits of Mrs. Maria Jones dated November 20, 2007, and February 18, 2008. In these affidavits Mrs. Jones stated that the MoE

used the average to assist in making the decision. For Mr. Earle, if the November 20 affidavit was an error, the February 18, 2008 affidavit was something worse. I will delay a finding on this issue until the hearing of the evidence regarding damages but it is indeed regrettable that such an error could be made twice in a context where the MoE was labeling Kristi as a tainted scholar who benefited from examination fraud.

46. Even assuming that the MoE had Kristi's average at the time it made its various decisions can it seriously be contended that a difference of 4 or 5 marks is sufficiently significant to reinforce a conclusion that there was prior exposure to the examination when the evidence strongly suggests that Kristi is a 94% to 100% student?

The concessions

47. At the commencement of the hearing the defendant's position was that the meeting on June 29, 2007, between the Ministry officials and the Kristi's parents was a rehearing but after further examination Mrs. Foster Pusey accepted that it was a meeting explaining the Ministry's decision and not a rehearing. The effect was that the breach of natural justice that occurred when the Ministry concluded that Kristi had prior exposure to the papers was not remedied.

48. On the fourth day of this hearing Mrs. Foster Pusey quite correctly made important concessions. The concessions, I believe, were inevitable. As the proceeding progressed it became quite clear that sustaining the MoE's decision was not going to be an easy task. The MoE has now accepted that it was wrong not to inform Kristi and her parents of the decision which it had made, namely, that Kristi was the beneficiary of prior exposure to the examination before she sat the papers. The MoE has even accepted that it did not have enough evidence to justify the finding that Kristi was exposed to the papers before the examination.

49. These concessions were in addition to the concession made on the second day of this hearing, namely, that one of the matters that the MoE said it took into account in concluding that Kristi had prior exposure to the papers, specifically, Kristi's average at Saints Peter and Paul was sent to the MoE after the decision not to consider Kristi for any of the Government Scholarships and not to forward her name to the Foundation.

This meant that this was not part of the material considered by the MoE at the time it made its decision.

50. Even though these concessions were made, because of the importance of the matter I felt that it was essential to set out the evidence and the state of the law which, in effect, compelled the defendants to make the concessions that they did.

The law

51. Mrs. Foster Pusey, in her written submissions, made the point that judicial review is just that - a review of how the decision was made and not an appeal. The implication being that the court is not to find or cannot find facts not found by the decision maker. The court is confined to examining the process. One of the cases at the forefront of Mrs. Foster Pusey's submissions was ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1947] 2 All ER 680. It is now clear that the techniques developed by the courts to review executive action have been greatly refined since the decision of Lord Greene M.R. In that case Lord Greene held that a court could only set aside the decision of the decision maker if it could be shown that his decision was so unreasonable that no reasonable decision maker could have come to the conclusion at which the decision maker arrived. From this, the expression Wednesbury unreasonableness was borne.

52. The clear implication of this reasoning was summarised and rejected by Lord Cooke in ***Regina (Daley) v Secretary of State for the Home Department*** [2001] 2 A.C. 532 at para. 32:

> *And I think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any*

administrative field merely by a finding that the decision under review is not capricious or absurd.

53. To put it bluntly, can it be seriously contended today, that a decision maker can be as irrational as he wants but as long as he does not reach the level of irrationality contemplated by Lord Greene he is immune from challenge? If Lord Greene is really to be understood as saying that a challenge can only succeed if there is something so irrational that no reasonable decision maker could have come to that particular conclusion, then what he is really saying is that flawed logic, inaccurate information and any other thing that may have distorted the decision in the particular case is alright as long as when one steps back and looks at the decision itself and one is able to conclude that a reasonable decision maker (a class to which the particular decision maker may not belong) could have come to the same conclusion, then all is well. I must confess that I have great difficulty with this proposition.

54. Fortunately, Lord Greene's prescription which in its purest form can become a source of unfairness has been circumvented. Lord Woolf MR has led the way in two decisions that have not quite received the recognition they deserve in this jurisdiction. The first is ***R v Lord Saville of Newdigate*** [2001] W.L.R. 1855 where his Lordship at paras. 32 and 33:

> ***32*** *[I]t is as well to start by remembering that the reason for the usual Wednesbury standard (see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223) being applied is because the body whose activities are being reviewed has the responsibility of making the decision and not the courts. In addition that body in the majority of situations is going to be better qualified to make decisions than the courts. It is only where the decision is unlawful in the broadest sense that the courts can intervene. The courts have the final responsibility of deciding (whether a decision is unlawful) and not the body being reviewed. The courts therefore can and do intervene when unlawfulness is established. This can be because a body such as a tribunal has misdirected itself in law, has not taken into account a*

consideration it is required to take into account or taken into account a consideration which it is not entitled to take into account when exercising its discretion. A court can also decide a decision was unlawful because it was reached in an unfair or unjust manner.

33 However, there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. *But this description does not do justice to the decision-maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision. If a decision could affect an individual's safety then obviously there needs to be a greater justification for taking that decision than if it does not have such grave consequences.* (my emphasis)

55. One of the notable things about this passage is Lord Woolf's reference to the court being able to examine the material on which the decision was based. His Lordship conceives of the possibility that a decision maker may not be perverse or unreasonable in the Wednesbury sense but may still be subject to challenge by way of judicial review if the material before him does not support the decision he made.

56. The second important decision is ***R v North and East Devon Health Authority Ex parte Coughlan*** [2000] Q.B. 213 in which Lord Woolf was in no doubt that a decision reached by a lawful process may be successfully challenged if it is unfair because it unfairly frustrates the legitimate expectation of the applicant.

57. There has been another development in judicial review that has cut a path around ***Wednesbury***. This is the error of precedent fact principle.

Briefly stated, the principle is that where certain facts must be found to exist before a power can be exercised by the decision maker then the courts can look to see if those facts are present. If they are not, then the decision of the functionary based on non existent facts will be vulnerable to challenge. Lord Wilberforce in ***Secretary of State for Education and Science v Tameside*** [1977] A.C. 1014 at page 1047 said:

> *If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.*

58. The existence of judicial review on this ground was confirmed but not applied by the House of Lords in ***R v Criminal Injuries Compensation Board*** [1999] 2 A.C. 330, 344 - 345. By 2004 Lord Justice Carnwarth of the Court of Appeal of England and Wales in ***E v Secretary of State for the Home Department*** [2004] Q.B. 1044 at para. 66 said:

> *In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result.*

59. Thus there cannot be any doubt that judicial review is available where it can be shown that a decision maker acted when the condition precedent to taking the decision to act did not in fact exist. This is not substituting the courts view for that of the decision maker. No decision maker has the authority to act on facts which have not been established. If the facts exist then it is the decision maker, not the courts, who is to decide on the course of action in light of those facts but facts there must be, not suspicion. Even without reference to any of the cases on the

precedent fact principle the Court of Appeal of Jamaica has accepted this principle as being applicable to Jamaica (see ***The Attorney General of Jamaica v The Jamaica Civil Service Association Ex parte*** SCCA No. 56/02 (delivered December 19, 2003) at pages 11 - 13).

60. At this stage then, if anything is left of ***Wednesbury*** it is really that part of the decision which makes the important point that a decision maker must take into account only relevant matters and exclude irrelevant matters from his consideration. This, incidentally, is how the court in the ***Jamaica Civil Service Association*** case, treated ***Wednesbury***.

Conclusions

61. In this particular case even if it could be said that the MoE was not unreasonable in the Wednesbury sense it clearly acted unfairly. It did not conduct a proper investigation. When the conduct of the MoE is examined it is apparent that the MoE did not conduct the "full investigation" it said it would. It is not for the courts to tell the MoE how to investigate these matters. The role of the court is to look at what was done and decide whether it was adequate in the circumstances of the case.

62. The MoE did not establish any fact that tended to show that Kristi benefited from prior exposure. It did not give Kristi an opportunity to meet the allegation that her performance was not on merit. Kristi would also legitimately expect that if at the end of a fair and impartial investigation the MoE had good reason to conclude that she received an unfair advantage because of prior exposure to the examination papers she would be presented with an opportunity to deal with such a damning conclusion with all its implications. She would expect to be able to refute the allegation and imputation of her being a tainted scholar. These legitimate expectations were not met. All this amounts to unfairness.

63. The other thing that must be made abundantly clear is that the evidence collected by the MoE could not even begin to make a case of examination fraud against Kristi. The information available to the MoE was insufficient for it to conclude that Kristi was exposed to the 2007 GSAT. There is no evidence to suggest, much less to lead to a conclusion,

that Kristi's performance was anything other than her own honest efforts produced by the regimen already described. To accuse someone of the most serious charge that one can level against a candidate in an examination on the basis of the evidence collected by the MoE in this case is, indeed, to be regretted. Kristi was not given an opportunity to defend herself against these most serious of allegations yet she was deprived of the opportunity of receiving a scholarship. All who knew her and knew her grades must have been puzzled as to the reason for her not being the recipient of a scholarship. To subject Kristi to the shame, embarrassment, ridicule and scorn of her peers and teachers without an opportunity to defend herself was unfortunate. As Fortescue J. said in ***R v University of Cambridge*** 93 E.R. 698, 704: *"Besides the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, even God himself did not pass sentence on Adam, before he was called upon to make his defence. Adam (says God) where are thou? Has thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."* On this ground alone the decision of the MoE is objectionable.

64. The MoE's approach to the issue showed that by April 17, it was predisposed to believing its own official and clearly formed the view that no further investigation was necessary. In the future it may be advisable that there be two separate bodies. One to investigate and another to hear the evidence against the alleged offender. Had this been done it is unlikely that MoE would have found itself in this position. It is evident that Dr. Myers Thomas was an influential person. She investigated, chaired the scholarship committee and was present at the June 29 meeting. It may be that her presence and involvement in virtually at all stages of this matter prevented others from looking at the matter objectively.

The remedies

65. Kristi has asked for mandamus to compel the MoE to advise Scotiabank Jamaica Foundation that she was the top performing female student for the 2007 GSAT examinations.

66. Mrs. Foster Pusey submitted that because a court in judicial review proceedings is concerned with process rather than outcome the court will not compel a public authority to exercise its discretion in any particular way. This, it was said, is in keeping with the principle that the exercise of the power is vested in the decision maker and not the courts. She relies on ***Camacho and Sons Ltd v Collector of Customs*** (1971) 18 W.I.R. 159 and ***Ryan v The Attorney General of the Bahamas*** [19080] A.C. 718. The submission continued by saying that the MoE has already exercised its discretion not to notify the Foundation that Kristi received the highest score for female students. It was even submitted that it was not established that the MoE failed to exercise its discretion according to law. The best that this court could do according to Mrs. Foster Pusey is to order the MoE to exercise its discretion according to law.

67. As already indicated, if the MoE did not have any evidence on which it could have decided that Kristi was the beneficiary of examination fraud then it must necessarily follow that it failed to exercise properly any discretion that it had. I would go further by saying that in this particular case, once it is accepted that Kristi is the top female student there is really no discretion (other than a possible discretion to supply the information or not) to exercise because the sole basis for the award of the Foundation scholarship is best grades for female candidates. In other words, the proposition advanced by Mrs. Foster Pusey is not as unlimited as she suggests. The Foundation asks for the top female performer. The MoE did not supply the correct information. The criteria for identifying the top female performer are purely objective - best marks for female candidates. There is no interview. There is no judgment to make. It would be an extraordinary thing if the MoE had the power or discretion to supply inaccurate or possibly untruthful information. I cannot imagine that the Foundation would be happy with the proposition that the MoE has authority to supply it with inaccurate information. The only discretion here that can properly exist is whether to supply the information or not but the discretion cannot include power to supply incorrect information.

68. Mrs. Foster Pusey also submitted that mandamus should not be given because there is no evidence of a demand and a refusal. Again this proposition is not as wide as it appears. As long ago as 1918, a different

view was expressed by Channel J. in ***The King v. The Revising Barrister for the Borough of Hanley*** [1912] 3 K.B. 518, 531:

> *The requirement that before the Court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it is a very useful one, but it cannot be applicable in all possible cases.*

69. One writer has said that "the public body is likely to be aware of the need to act, from the conduct of the parties, and the circumstances of the case, rather than from a formal demand and refusal" (see, *Lewis, Christopher,* ***Judicial Remedies in Public Law,*** (2004) (Sweet & Maxwell) ch. 06 - 065). The authors of Wade & Forsyth's ***Administrative Law*** (2004) (OUP) p 626, have also suggested that this rule, in some instances, does not apply with full rigour.

70. The demand and refusal principle in based on the idea that the "the party alleged to be in fault [needs to know] distinctly what he was required to do, so as to exercise an option whether he would do it or not" (see ***The King v The Company of Proprietors of the Brecknock and Abergavenny Canal Navigation*** 111 E.R. 395, 398 per Coleridge J.). This position has been restated in modern cases (see ***Re Dunlop and Halifax City Charter*** [1944] 3 D.L.R. 257, 260; ***R v Board of Commissioners of Public Utilities, Ex parte Halifax Transit Corporation*** 15 D.L.R. (3d) 720, 732 per Copper J.A.) It is important to note that Cooper J.A. observed that he did not "overlook the fact that in certain circumstances demand and refusal are unnecessary - see *R v ex rel Mickklesen and McGaughey v Highway Traffic Board* [1947] 2 D.L.R. 373 at p. 378" (see page 732). The Canadian courts have held that if the "course of conduct [of the decision maker] shews a settled purpose not to perform this statute-imposed duty ... in such a case a demand and refusal would be useless, and need not be proved" (see ***Re West Nissouri Continuation School*** (1917) 33 D.L.R. 209, 212 per Meredith C.J.C.P.) In ***Re Stratford Local Option By Law*** (1915) 25 D.L.R. 774 Meredith J. ordered mandamus when it became clear that the decision maker had no intention to act in accordance with the law.

71. In the case before me the MoE knew what it was required to do, thus a demand and refusal would be unnecessary in this context. This is bourne out the fact that MoE supplied the name of another female candidate. The true reason for mandamus not to issue in this case is that there is no evidence before me that MoE is under a statutory duty, as distinct from a private law obligation, to inform the Foundation of who is the top performing female student. Mr. Earle has not been able to point to any specific statute or regulation that imposes the duty in respect of which Kristi is seeking mandamus and consequently this remedy is refused.

72. I now turn to the claim for certiorari. In examining the claim, certiorari is asked for only in relation to decision not to award Kristi any scholarship and the decision not to forward her name to the Foundation. No claim is made for certiorari in respect of the decision that Kristi's performance was not her genuine effort but was the result of examination fraud. In considering the claim for certiorari it must be remembered that all the possible scholarships have been awarded to other candidates. There is also evidence that top marks are not the sole criteria for the award of government scholarships. Thus even if the decision is quashed Kristi's position would not be advanced. If this is correct, then not much useful purpose would be served by quashing the decision. Certiorari would not, therefore, be an appropriate remedy. It would seem to me that declarations are more appropriate for the instant case.

73. So let me be quite clear. Whereas top marks are just one element to be considered when awarding a scholarship to the best students, that is not the case with the Foundation scholarship. As stated already, the Foundation looks only at marks. The consequence of this is that Kristi would certainly have been the Foundation female scholar for 2007 but for the missteps of the MoE. So to this extent it can be said that MoE deprived Kristi of the opportunity of being considered for the Foundation scholarship.

74. I make the following declarations:

a. The Minister of Education and the Permanent Secretary failed to conduct any proper investigation into the reports of examination fraud.

b. The Minister of Education and the Permanent Secretary erred in law and fact when they concluded that there was evidence to establish that Kristi Charles was exposed to the Grade Six Achievement Test papers before the examinations were held over the period March 29 and 30, 2007.

c. The Minister of Education and the Permanent Secretary misdirected themselves on the evidence that they had in that they failed to appreciate that such facts as they had could not reasonably lead to a finding that Kristi benefited from prior exposure to the 2007 Grade Six Achievement Test with the result that the conclusion arrived at was irrational and unreasonable.

d. The evidence relied on by the Minister of Education and the Permanent Secretary to establish that Kristi Charles had an unfair advantage by being exposed to the Grade Six Achievement Test papers before the examinations were held over the period March 29 and 30, 2007, was unreliable in the extreme and consisted solely of conjecture and suspicion.

e. The Minister of Education and the Permanent Secretary erred when they concluded that Kristi Charles' results were the consequence of examination fraud.

f. The Minister of Education and the Permanent Secretary acted in breach of natural justice by not informing Kristi Charles of the decision not to consider her eligible for any scholarships offered by the Government of Jamaica in that a penalty was imposed without giving Kristi Charles an opportunity to refute the allegations and conclusion arrived at by the Minister of Education and the Permanent Secretary.

g. The meeting of June 29, 2007 between officials of the Ministry of Education was not a rehearing of the case against Kristi and so was incapable of remedying the prior breach of natural justice.

h. The decision by the Minister of Education, the Permanent Secretary and the Scholarship Committee of the Ministry of Education not to advise the Scotiabank Jamaica Foundation that Kristi Charles was the top performing student in the 2007 Grade Six Achievement Test thereby depriving her of the opportunity of being considered for a scholarship awarded by that foundation amounted to the imposition of a penalty without giving Kristi Charles an opportunity to be heard.

Amendment to claim damages

75. As I stated earlier an application for damages was made. On April 10, 2008, I granted the application to amend the claim to include a claim for damages. My reasons now follow.

76. Rule 56.1 (3) of the Civil Procedure Rules ('CPR') states that judicial review includes the remedies (whether by way or (sic) or writ or order of) -

a. *Certiorari, for quashing unlawful acts;*
b. *Prohibition, for prohibiting unlawful acts; and*
c. *Mandamus, for requiring performance of a public duty including a duty to make a decision or determination or to hear and determine any case.*

Rule 56.1 (4) states:

In addition to or instead of any administrative order the court may without requiring the issue of any further proceedings grant -

a. *an injunction;*
b. *restitution or damages; or*
c. *an order for the return of any property, real or personal.*

77. Miss Stephany Orr opposed the application on the ground that damages are only awarded where there is a cause of action or breach of

statutory duty and if damages were to be awarded in this case there needs to be specific statutory authorization.

78. I believe that this submission does not sufficiently recognise the effect of the Judicature (Supreme Court) Act (the JSCA). That legislation combined in one court all previous courts that existed in Jamaica. There was a fusion of the administration of common law and equity. Traditionally, the common law courts awarded damages while declarations and injunctions were features of the courts of equity. By the time of the passage of the JSCA, judicial review was an established jurisdiction of the Supreme Court of Jamaica. Section 52 of JSCA is drafted on basis that the court already had the power to issue writs of prohibition, mandamus and certiorari.

79. When the administration of the courts became fused it necessarily followed that there was no longer any need to have different procedural codes for each of the separate jurisdictions as was the case before the JSCA. Having said this, it must not be thought that it was not possible to have specific procedures for particular aspects of the new court's jurisdiction. This reasoning explains, for example, special rules relating to judicial review, probate and matrimonial causes. These special rules recognised that some aspect of the court's business could not be adequately dealt with by using the usual procedures applicable to, for example, negligence actions. The upshot was that a procedural code was enacted to complement the JSCA. This was the Civil Procedure Code ('CPC'). What this did was to combine the best procedural element of the prior existing courts and made them available in all actions and suits unless there were specific procedural rules for a particular cause of action or suit. The point being made is that, generally speaking (very generally speaking), once there was only one court then the remedies available in common law courts became available in suits in equity and vice versa.

80. Indeed section 48 (g) empowers the Supreme Court to grant all such remedies as the parties appear to be entitled to so that so far as possible all matters of controversy between them can be settled in one claim. All the remedies listed in rule 56.1 (4) could have been granted by the courts that existed before the JSCA. There is no need to file

several claims seeking equitable or common law relief. The legal foundation for claiming damages in judicial review proceedings is in place. Once this is appreciated then the rules of court can regulate how the remedies can be claimed. Thus if, statutory authorization were needed to empower the courts to award damages in judicial review then section 48 (g) provides that authority. In 2002 the CPC was swept away and replaced by the CPR. This is a new procedural code for the Supreme Court which still retains the jurisdiction it had when the JSCA was enacted. The CPR is simply saying that damages which could have been awarded in common law actions are now to be awarded in judicial review proceedings. The CPR is simply completing the logic of what was started over one hundred years ago. On this basis, damages can be awarded in judicial review proceedings.

81. Part 56 of the CPR is widening the options of the court on judicial review. Judicial review as initially developed was a demonstration of the theory that the sovereign was the ultimate source of temporal justice and so she had the authority to correct any maladministration by inferior courts and tribunals. Since it was the sovereign exercising the prerogative power to correct maladministration of inferior courts and tribunal, the common law baulked at the idea of the citizen recovering damages arising from any misuse of power. It was not that the citizen did not suffer damage but policy weighed against the award of damages.

82. However, time has moved on. Judicial review is now seen as an important procedure for ensuring accountability and restraining an overreaching executive. The theoretical construct that judicial review is an example of the sovereign holding inferior courts and tribunals in check cannot but bring a wry smile to the faces of modern citizenry. The reality has outstripped the theory. The fact is that modern governance and the realities of modern life have made that theory redundant. In constitutional democracies the foundation for judicial review is the constitution (per Downer J.A. in ***DYC Fishing Ltd v Minister of Agriculture*** (2003) 67 W.I.R. 154, 162). I doubt very much whether the sovereign is even aware of the many applications brought by persons seeking judicial review. Indeed the order of the court when made issues directly to the offending party. Whatever may have been the historical origins of judicial review, the logic of a written constitution and an

independent judiciary is that it is the courts which decide whether there has been a breach of authority.

83. Judicial review is linked to the idea of good governance. The ability to challenge decisions of the executive has been enhanced. The locus standi requirements, for example, have been relaxed. Interested parties even if not directly affected by the action of the decision maker can now participate in judicial review proceedings (see rule 56.15) once they have a sufficient interest. Naturally, the restrictive approach to locus standi could hardly be sustained in a modern liberal democratic state. No great leap of imagination is required to see that maladministration may result in damage to the citizen.

84. If one looks at the development of judicial review in England, one sees a similar thing. The reforms of 1977 which took effecting in 1978 received statutory enshrinement in the Supreme Court Act of 1981. The 1977 reforms in judicial review were brought about by changes in procedure not statutory enactment (see Lord Diplock in ***O'Reilly v Mackman*** [1983] 2 A.C. 237 on the far reaching nature of the 1977 reforms). For example under the new Ord 53, for the first time in England, an injunction and declaration were available in judicial review proceedings. It is true that some had misgivings about whether this could be done procedurally without supporting statutory provisions but nonetheless the courts acted on the reforms (see Lord Denning M.R. in ***O'Reilly v Mackman*** [1983] 2 A.C. 237, 256). If my understanding of JSCA is correct it is not easy to appreciate the misgivings that existed in England which, at the time of the 1977 reforms, had the Judicature Act of 1873 which contained section 24, the equivalent of section 48 of JSCA. Having examined the logic of the matter, I do not see why the logic cannot apply to Jamaica in the absence of specific statutory provision. This, therefore, is a second basis on which damages can be awarded in judicial review proceedings. If I may be permitted to cite a passage from Lord Diplock's judgment in ***O'Reilly*** which puts the matter in its proper perspective demonstrates that Miss Orr's proposition has taken root on shallow ground. At page 283 his Lordship said:

> *Another handicap under which an applicant for a prerogative order under Order 53 formerly laboured (though it would not*

have affected the appellants in the instant cases even if they had brought their actions before the 1977 alteration to Order 53) was that a claim for damages for breach of a right in private law of the applicant resulting from an invalid decision of a public authority could not be made in an application under Order 53. Damages could only be claimed in a separate action begun by writ; whereas in an action so begun they could be claimed as additional relief as well as a declaration of nullity of the decision from which the damage claimed had flowed. Rule 7 of the new Order 53 permits the applicant for judicial review to include in the statement in support of his application for leave a claim for damages and empowers the court to award damages on the hearing of the application if satisfied that such damages could have been awarded to him in an action begun by him by writ at the time of the making of the application.

Finally rule 1 of the new Order 53 enables an application for a declaration or an injunction to be included in an application for judicial review. This was not previously the case; only prerogative orders could be obtained in proceedings under Order 53. Declarations or injunctions were obtainable only in actions begun by writ or originating summons. So a person seeking to challenge a decision had to make a choice of the remedy that he sought at the outset of the proceedings, although when the matter was examined more closely in the course of the proceedings it might appear that he was not entitled to that remedy but would have been entitled to some other remedy available only in the other kind of proceeding.

85. It is to be noted as well that in this passage, the restriction on the award of damages which is now embodied in section 31 of the Supreme Court Act was embodied in the procedural rules of 1977 and not the statute. The Jamaican CPR has no such restriction. It may be that the absence of such restriction is indicating to the courts here in Jamaica that we ought not to take such a restrictive approach. On the other hand, it may be that the restriction applies. The ultimate determination of this question will have to await the hearing on damages in this matter.

86. The framers of 56.4 (4) undoubtedly took these matters into account and gave the courts more flexibility in crafting remedies to meet the justice of the case. It does not follow, however, that each instance of maladministration translates eo instanti into a claim for damages.

87. The courts have developed principles relating to the award of damages in other areas where the legislature did not provide any guidance. Personal injury assessments are an example of this. It cannot be seriously argued that this new responsibility is beyond the judges of today. Let us, with confidence, embrace the new power conferred on the court in judicial review and begin the development of principles applicable to this area of law.