NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 03617

IN THE MATTER of the death of Janice Allen on the 14th day of April, 2000

AND

IN THE MATTER of the Director of Public Prosecutions

BETWEEN	**MILLICENT FORBES**	**APPLICANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Mr. Richard Small and Mrs. Shawn Wilkinson instructed by David Wong Ken and Co. for the Applicant.

Mrs. Diahann Gordon-Harrison, Mr. Jeremy Taylor and Mrs. Tracy-Ann Johnson for the Respondent.

Application for leave to appeal decision to strike out grant of leave to apply for Judicial Review; decision of the Director of Public Prosecutions; bases for granting leave to appeal;

Heard June 9, and July 7, 2010

CORAM: ANDERSON J.

This is a another application by Miss Millicent Forbes, as she assiduously pursues some redress for her late daughter, Janice Allen who had succumbed to gunshot wounds, apparently inflicted by agents of the State, some ten (10) years ago. In this application, Miss Forbes (hereinafter "the Applicant") seeks leave from this Court to appeal a decision of Brooks J, handed down on April 9, 2010. In his ruling the learned judge, after hearing arguments from both sides, acceded to an application by Director of Public Prosecutions (the DPP) that the Applicant's claim for judicial review of a decision of the DPP be struck out, notwithstanding that another judge, Campbell J had already granted

leave to apply for judicial review on July 23, 2009. In the application before Brooks J. the DPP had also sought to set aside the grant of leave to the applicant.

For the purposes of this application, I adopt without qualification the summary of the background to these proceedings articulated at pages 2-3 of the judge's ruling.

> "The Background
> Constable Allen (no relation to Janice) had previously been charged with murder in respect of Janice's death but was acquitted by a jury. This was after the prosecution at his trial offered no evidence against him. Miss Forbes sought to have the acquittal quashed but that application was refused by the Supreme Court, the Court of Appeal and the Privy Council.
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> Their Lordship's decision in **Forbes v The Attorney General of Jamaica** PCA 81 of 2007 (delivered 19/3/2009) seems to be the inspiration behind both Miss Forbes' present claim as well as the instant application. At paragraph 13 of the judgment, the Privy Council said it was for the Director to decide whether to re-indict Constable Allen. Their Lordship further said in that paragraph, that the Director's decision:
>
> "...will require [the Director] to form a view, first, as to whether the facts will support the allegation that the acquittal was procured by a fraud on the court and, secondly, whether, as a matter of law, that would deprive the accused of his plea [of autrefois acquit]. The Director's decision will in principle be subject to judicial review, but their Lordships do not need to emphasise the reluctance of the courts to question the Director's discretion in these matters." (Emphasis supplied)
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> The Director delivered her decision on the matter on April 30, 2009. She decided not to re-indict Constable Allen. It was then that Miss Forbes sought and received leave to apply for judicial review of the Director's decision. Miss Forbes resultant claim sought the following reliefs:
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> 1) An Order of Certiorari to quash the Defendant's Ruling issued on April 30, 2009 not to re-indict the accused for murder;
> 2) An Order of Mandamus directing the Defendant to conduct a thorough investigation into whether the facts will support the allegation that the acquittal was procured by fraud on the court and whether, as a matter of law, that would deprive the accused of his plea (autrefois acquit); and directing the Respondent

> to reconsider her decision in light of the questions posed by the Privy Council and Applicant in correspondence dated 12th May 2009.
>
> The claim came on for its first hearing on September 9, 2009 and orders were made, with which both sides have complied. On February 22, 2010, the Director filed the present application, for hearing at the scheduled continuation of the first hearing"

His Lordship then proceeded to consider the two issues of (a) whether the grant of leave to apply for judicial review could be set aside and (b) whether the claimant's claim for judicial review should be struck out.

Dealing first with the setting aside, the learned judge expressed the view that Rule 11.16 of the Civil Procedure Rules 2002 (as they have been amended) provided authority for the proposition that where orders are made on without notice applications, a judge of the Supreme Court has an inherent jurisdiction to set such an order aside. An application in that regard must be made not more than fourteen (14) days after notice of the order had been served on the respondent. This had not been done in the instant case and so, in the absence of any new material before him, a requirement for the setting aside, Brooks J also felt that there was no basis to invoke his inherent jurisdiction. He seemed further to have accepted that in the case of **Sharma v Brown-Antoine** [2007], W.L.R. 780 the Privy Council had made it clear that where leave had been granted to move for judicial review, the court's discretion to set that leave aside would "be exercised very sparingly". In light of the fact that the condition in CPR 11.16 had not been met and the need to heed the injunction in **Sharma**, his lordship determined that he could not set the leave aside.

Having refused to set aside the grant of leave, Brooks J then proceeded to consider whether the claim, first filed subsequent to the grant of leave should be stuck out. In this regard, he expressed the view that the DPP was on stronger ground in the efforts to strike out. He noted that the application to strike out referred to the claim form which would have been filed subsequent to and consequent upon the grant of leave. In that regard he considered that the provisions of CPR 25-27 which deal with the court's powers of case management which are specifically applicable to first hearings of judicial review matters

by virtue of Part 56.13. and in particular those dealing with first hearings of a claim for judicial review, clearly allowed for the striking out of the Statement of Case "if it discloses no reasonable ground for bringing or defending a claim." Part 56.13 states:

> (1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.

Further he explored the conceptual context of the applicability of judicial review to the actions of the Director of Public Prosecutions, notwithstanding the unique position of that office within the constitutional architecture which mandated that in the exercise of her powers, the DPP "shall not be subject to the direction or control of any other person or authority."

The learned judge also recognized that the authorities while generally approaching the issue of the review of a DPP's decision with great caution, showed more of a willingness to allow review where there was a decision "not to prosecute." The rationale for this seemed to be that in such cases judicial review provides the only opportunity to challenge the DPP's ruling. In those circumstances, the standard to satisfy the grant of leave for review should not be set too high, or the only effective remedy against the DPP's decision would be lost.

The judge then considered the principles applicable to striking out of a statement of case and adopted the principles enunciated by Harris J.A. in the Jamaican Court of Appeal in **S & T Distributors Ltd. & Anor V CIBC Jamaica Ltd. & Anor (SCCA 112/04 delivered 31/7/2007)**. There Her Ladyship said.

> **"The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and oblivious cases...**

In light of the foregoing, it is clear that a claim will only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real prospect of success contemplates the existence of a claim which carries with it realistic prospect (sic) of successfully prosecuting the claim as opposed to a "fanciful" prospect."

The Issue in this Application

The narrow issue which has to be decided by this court on the application before it is whether leave should be granted to the Applicant to appeal the decision of Brooks J to strike out the statement of case. As will become apparent, that narrow issue must necessarily be canvassed within the context of other principles which may impact upon the constitutional role of the DPP.

SUBMISSIONS FOR THE APPLICANT

In written submissions, counsel for the Applicant submitted that leave should be granted as the Applicant had a "real prospect of successfully prosecuting the appeal", based on the grounds on which reliance is placed to demonstrate that the judge had erred in his decision to strike out the claim. It was submitted that the general rule is that permission would only be given if the Court of Appeal or the Court below is persuaded to the view that an appeal has a "real chance of success". (**Court of Appeal Rules** 1.8(9).)

It was submitted that it is now accepted that "real prospect of success" is to be interpreted as suggested by Lord Woolf M.R. in **Swain v Hillman** [2001] All E.R 91 to mean "*realistic* as opposed to a *fanciful* prospect of success". That test has been adopted in this jurisdiction in cases such as **Paulette Bailey and Edward Bailey v Incorporated Lay Body of Jamaica and Grand Cayman** (Motion 5 of 2005) and **S&T Distributors Limited & Anor v CIBC Jamaica Ltd. & Anor** SCCA 112/04 delivered July 31, 2007.

It was accordingly the submission on behalf of the Applicant that the grounds upon which a challenge to the decision of Brooks J was being mounted, disclosed that there was a "real prospect" of successfully prosecuting the appeal". Thus, for example, it was proffered that the learned judge had failed to consider whether Rule 26.3(1)(c) of the

CPR was properly applicable to a judicial review claim, in circumstances where leave to apply for judicial review had already been granted by a judge of this Court. I understand the submission to be a suggestion that the learned judge, had he carefully considered the basis for the grant of leave, would not have come to the view that the power to strike out in Part 26.3 (10 (c) was applicable to such proceedings. This was because, as stated again below, the grant of leave to apply for review was equivalent to a finding that the very low threshold for sending the matter forward for review had been met and this was at least the establishment of "an arguable case". (per Lord Diplock in **Regina v Inland Revenue Commissioners, Ex Parte, National Federation of Self Employed and Small Businesses** [1982] A.C 617).

CPR 26.3(1) (c) is in the following terms:

> In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.

The Applicant's counsel also questioned whether it was open to a judge at a first hearing in judicial review proceedings, leave to apply for Judicial Review having been given, to strike out the statement of case under the court's case management powers.

It was also submitted that there was an inconsistency in the judge's ruling that the previously granted leave could not be set aside, while coming to a decision to strike out the claim. This was especially conflicting since he stated in his judgment that the DPP had not established, nor indeed could it have been argued on her behalf, that the "leave should never have been given". Moreover, he also found as a fact that Ms. Forbes had "not acted unreasonably" in bringing the claim and, in light of that conclusion, he refused to order costs against her.

Counsel for the Applicant in written submissions also found support for the "real prospect" approach to the resolution of the issue in the case of **Hurd v Peasegood** reported in The Times, October 20, 2000. There, Aldous L.J. stated:

> "Request for permission to appeal does not require an analysis of the grounds of the proposed appeal to ascertain whether the appeal will succeed; the court has only to decide whether there is a real prospect of success. If so, permission will be granted, if not, it will be refused."

It was submitted that this approach is provided for in the United Kingston by way of a Practice Direction issued by Lord Woolf, MR, in the Civil Division of the U.K. Court of Appeal, which reinforces the position that:

> "The general rule applied by the Court of Appeal and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be granted unless an appeal would have no real prospect of success. A fanciful prospect is insufficient".

The Practice Direction further provided:

> "Permission may also be given in given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority binding on the Court of Appeal may call for reconsideration. The approach will differ depending on the category and subject matter of the decision and the reason for seeking permission to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance, that will be a factor in favour of granting permission."

In that regard, it was submitted that given the procedural safeguards which were available in judicial review proceedings and which were not available in ordinary actions, it may be that the only appropriate basis on which to strike out such leave was that the applicant had failed to comply *with the terms upon which the leave had been granted*. I should note, *en passant*, that while this may be an interesting suggestion, with respect, it seems to me that it is impossible to accept that as a proposition of general application. For example, fraud or material non-disclosure would seem always be a proper basis upon which to vitiate the grant of leave.

In further support of the application, it was submitted that the purpose of obtaining leave was to "weed out" unmeritorious claims. Counsel cited the judgment of Lord Diplock in the House of Lords in **Reg. v Inland Revenue Commissioners, Ex Parte National Federation of Self-Employed and Small Business** [1982] A.C 617, where his lordship said:

> "So this is a 'threshold' question in the sense that the court must direct its mind to it and form a prima facie view about it upon the material that is available at the first stage....."

He continued:

> "The need for leave to start proceedings for remedies in public law is not new. It applied previously for applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending, even though misconceived".

Based upon that citation, it was suggested that the consideration of an application for leave to appeal may be assimilated to the consideration of an application to strike out, and so, in considering the grant of leave to apply for judicial review, a judge necessarily considers whether there "might be" a basis for going forward to the full application. If that is correct, so the argument runs, the grant of leave is analogous to a determination that the basis for striking out the claim does not exist. The threshold is a very low one. There is therefore an apparent inconsistency in Brooks J's refusing to set aside the leave previously given, while at the same time exercising his discretion to strike out the claim.

It was further submitted that, in any event, the authorities support the view that the step of striking out a case is a very harsh one, and ought only to be contemplated in the most extreme of circumstances, and to be exercised with extreme caution. Thus, the discretion to strike out should only be exercised in "plain and obvious cases". (See **S & T Distributors Ltd.** referred to above) This was not such a case. Mere "improbability of success" is not enough. In any event, the court at an interlocutory stage does not have to

carry out a mini trial to arrive at its determination (See per Neuberger J as he then was in **Chan U Seek v Alvis Vehicles Ltd** [2003] EWHC 1238(Ch)

The Applicant concedes that given the constitutional position of the DPP, courts only sparingly exercise the powers they have to review decisions by the DPP. But while this concession is made, it was submitted that the authorities make it clear that the DPP's decisions are indeed reviewable. *(See* **Mohit v The Director of Public Prosecutions of Mauritius,** P.C. No. 31 of 2005) It was also submitted that the threshold for leave to review those decisions is lower when the decision of the DPP is not to prosecute (**See Reg. v Director of Public Prosecutions, Ex Parte Manning** [2001] Q.B. 330 and **Marshall v Director of Public Prosecutions** P.C. NO. 2 OF 2006.

Given the foregoing, the allegations of fact made by the Applicant about the failure of the DPP to carry out the enquires suggested by the Privy Council in its ruling (See **Millicent Forbes v The Attorney General of Jamaica**, P.C. Appeal N0: 81 of 2007) as well as the in-depth examination of the Applicant's grounds and the DPP's responses to the case, undertaken by Brooks J in his judgment, it was the submission that the case for leave to appeal his lordship's ruling had been clearly made out.

Submissions for the Respondent.

For the Respondent, Mrs. Gordon Harrison strongly resisted the application for grant of leave to appeal the ruling of Brooks J. In doing so, she submitted that Brooks J. had properly applied the law and the principles to be deduced from the authorities. She did not dispute the submission that the test for the granting of leave to appeal was "a real prospect of successfully prosecuting the appeal". While she agreed that this did not require a "mini trial", she submitted however, the court was required to look at the factual context before it, in order to arrive at a determination as to whether there is a "real prospect" of successfully prosecuting the appeal. This the learned judge had done.

In this regard, she submitted that the old test to satisfy the grant of leave to apply for judicial review articulated by Lord Diplock in the case of **Regina v IRC Ex Parte**

National Federation of Self-Employed and Small Businesses had undergone some revision and had now been supplanted by a newer more stringent test. The test she argued, was now one of "arguability". Even "potential arguability" was not sufficient. She cited the judgment of Sykes J in **Regina v Industrial Disputes Tribunal Ex Parte J. Wray and Nephew** (HCV 4798 of 2009). The learned judge referred to a study which showed that there had been a sharp decline in the percentage of the grant of applications for leave to proceed to judicial review. In particular, in paragraphs 51and 52, citing the contents of the study, he delivered himself to the following effect.

> .....the test for granting leave to seek judicial review has undergone modification. To support their point, the authors refer to a number of cases which are also referred to below. The old test was stated by Lord Diplock in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.** [1982] A.C. 617, 643 – 644:
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> > The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relied claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this state is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.
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> This kind of language has undergone a remarkable shift so that by the time of **Sharma v Bell-Antoine** [2007] 1 W.L.R. 780, the Judicial Committee of the Privy Council, on an appeal from the Republic of Trinidad and Tobago, could speak in these terms at paragraph 14 (per Lord Bingham and Lord Walker):
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> > The ordinary rule now is that the court will refuse to leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see **R v Legal Aid Board, Ex P. Hughes** (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review

> Handbook 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.

And later in the same paragraph:

> It is not enough that a case is potentially arguable: an applicant cannot plead "potential arguability" to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": **Matalulu v Director of Public Prosecutions** [2003] 4 LRC 712, 733.

This clearly pointed to the need to consider the underlying issue as part of the exercise in deciding whether to grant leave to apply.

Counsel took issue with the Applicant's counsel's submissions on CPR 26.1 (3) (c) that the learned judge, Brooks J. ought not to have countenanced any application of that provision given that these were judicial review proceedings. In that regard she pointed out that Part 56.13 of the CPR specifically incorporates the provisions of Parts 25-27, the Case Management powers of the Court. The judge was therefore clearly within his rights to have had recourse to these provisions of the CPR as they applied, in particular, to a first hearing of a judicial review application in the same way that they were to any other civil proceedings.

She also did not accept the submission of the Applicant that Brooks J's refusal to order the setting aside of the leave was "inconsistent" with his decision to strike out the claim. With respect to this submission, she pointed out that CPR Part 11.16 which is in the terms set out below, specifically provides that the time within which an application to set aside an order made on a without notice or *ex parte* application, would have been fourteen days after the Order was served upon the Respondent. That time had expired and therefore it was not open for the DPP to secure an order setting aside the order for leave granted previously by Campbell J.

Mrs. Gordon Harrison asked: "What is the law on the review of the DPP's decision"? She submitted that Brooks J. had carefully considered what the law was on this question.

It was clear that it would be rare for a court to interfere with the constitutional right of the DPP and that in this case, there was no basis for such interference. If that proposition was correct, then there was clearly no real prospect of successfully prosecuting any appeal and leave should therefore be refused. She cited **Matalulu v Director of Public Prosecutions** [2003] 4 LRC 712 which provided a "check list" of factors which the court would consider in determining whether to interfere with a DPP's exercise of her discretion. (These are set out in the Court's reasoning below). She derived from the principles set out in the list in **Matalulu** that, to be reviewable, the action of the DPP would have fall within one of the categories adumbrated by **Matalulu**, or be otherwise "unreasonable" within the meaning of that phrase as used in the **Wednesbury Corporation** case. In this regard, she again referred to the judgment of Sykes J. in the J. Wray and Nephew case, at paragraph 74 thereof which, in her view, re-inforced the proposition that the term "unreasonable" meant, "verging on absurdity".

She also cited the authority of **Michelle Andrews v The DPP, The Attorney General and The Chief Magistrate of St. Vincent and the Grenadines**. (HCVAP 2008/003). In that case, the applicant for leave to appeal a refusal of leave to apply for judicial review had made certain allegations of sexual misconduct including rape, on the part of the Prime Minister of St. Vincent and the Grenadines and had instituted two private criminal complaints against him. The St. Vincent and the Grenadines DPP had taken over the prosecution and had then purported to take over the prosecutions and had then entered a *Nolle Prosequi.* When the applicant sought to proceed on her private criminal complaints, the Chief Magistrate ruled that there was no viable prosecution. The applicant sought judicial review of both the decision of the DPP and the Magistrate. Leave to apply was refused. The Court of Appeal for the Eastern Caribbean States was faced with the same questions which this Court has to decide:

(a) whether, if leave was granted, the substantive appeal would have real prospect of success; and

(b) whether there is some other compelling reason why the appeal should be heard.

The Court, after reviewing the constitutional position and the authorities, refused leave to appeal the denial of the grant of leave to apply for judicial review.

Mrs. Gordon-Harrison posited that in determining the issue of the grant of leave in this case, the Court had to be informed by an understanding of the law which related to the powers to review decisions of the Director of Public Prosecutions. The starting point of that examination is that section 94 (3) (c) of the Constitution of Jamaica provided as follows:

> The Director of Public Prosecutions shall have the power in any case in which he considers it desirable so to do, to discontinue at any stage before judgment is delivered, any such criminal proceedings instituted or undertaken by himself or any other person in authority.

It is clear that the constitution contemplates that the position of the DPP is to be the beneficiary of special discretionary powers in the exercise of her functions so as to enhance the independence which must attend her office. She submitted that based on that provision and the strength of the authorities which have sought to interpret it, and other compelling reasons, at the end of the day one has to consider the nature of the evidence and to weigh it with the other considerations such as public interest. It was also her submission that the DPP, as indicated in her reasons given for deciding not to re-indict the accused Rohan Allen, had completely discharged her constitutional duty. Further, she had addressed her mind to and had taken on board the advice of the Privy Council as set out in paragraph 13 of the Board's ruling in this case when the application had gone to the Privy Council on appeal. The Privy Council had suggested the following:

> It is therefore for the Director of Public Prosecutions to decide whether to re-indict the accused and submit and submit that he is not entitled to plead autrefois acquit. That will require her to form a view, first, as to whether the facts will support the allegations that the acquittal was secured by fraud on the court, and, secondly, whether, as matter of law, that would deprive the accused of his plea. The Director's decision will in principle be subject to judicial review, but their lordships do not need to emphasize the reluctance of the courts to question the Director's discretion in these matters.

The DPP, in her reasons for not re-indicting Rohan Allen, clearly stated her view that the available evidence which she had reviewed, would not be able to support a prima facie case being made out against the accused. Since she had considered the suggestions made

by the Privy Council, and there was no evidence of her having acted unreasonably and certainly not in bad faith, leave should be refused and the general principle that there was a reluctance to question the authority of the DPP should be upheld.

She again firmly rejected the view that there was any inconsistency in the decision of Justice Brooks to decline to set aside the leave to apply for judicial review which had been previously given Mr. Justice Campbell, while acceding to the application to strike out. In fact Justice Brooks' decision clearly sets out that it was on the basis of Part 11.16 of the CPR that the setting aside could not have been contemplated. She was fully in support of the decision arrived at by Mr. Justice Brooks that the claim disclosed "no reasonable ground for bringing or defending an action", the basis for striking out under the relevant provisions of the CPR. This was the proper consideration and the conclusion that it disclosed no reasonable prospect of success was a just and correct one.

Response

Mr., Small in a brief response to authorities, pointed out that the extent of the detailed examination into the issues carried out by Brooks J itself demonstrated that there were arguable issues. He also asked the court to consider the implication of paragraph 2 of Mr. Justice Sykes' judgment cited by Mrs. Gordon Harrison and question whether the correct test was in fact as suggest there one of being arguable.

Finally, he submitted that the five principles enunciated in **Matalulu** were not exhaustive, but there merely illustrative of the areas where the court may interfere in the exercise of the DPP's discretion. This court ought not to find that its discretion was circumscribed by the terms of that case.

Court's Decision

The starting point for this court must be the provision of section 94 of the Constitution referred to above. The independence of the Office of the DPP is sacrosanct. It is, in my view, because of this that the authorities exhibit a clear recognition, as is clearly stated in

Sharma, that the power to subject the exercise by the DPP of her discretion to judicial review, is one that must be "sparingly exercised".

In **Leonie Marshall v The Director of Public Prosecutions** (Privy Council Appeal No. 2 of 2006) their lordships considered an appeal from a decision of the Court of Appeal in Jamaica which upheld a decision of the Full Court dismissing an application to grant judicial review of the Jamaican Director of Public prosecutions decision not to prosecute policemen who had been implicated in the shooting death of one Patrick Genus. There the Board agreed with the view expressed by McCalla J.A. that in such proceedings, when considering the sufficiency of the reasons of the DPP for not prosecuting in a particular case, the court could if the reasons given appeared deficient "weigh up the evidence for itself and ascertain whether the DPP could sensible decide as he did on that evidence. They see force in the opinion expressed by Smith JA that that is the real issue in the appeal".

At paragraph 17, the Board stated:

> The position and functions of the DPP are such that judicial review of his decisions, though available in principle is a "highly exceptional remedy" (**Sharma v Brown-Antoine** (2006) UKPC 57 para 14) Where policy considerations come into the decision it is particularly difficult for a court to review it since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the judgment of the Supreme Court of Fiji in **Matalulu v The Director of Public Prosecutions** [2003] LRC 712 735-6 which was cited with approval by the Board in **Mohit v The DPP of Mauritius** [2006] UKPC 20:
>
> > It is not necessary for present purposes to explore exhaustively the circumstances in which judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is neither within the constitutional function nor the practical competence of the Courts to assess their merits. This approach subsumes concerns about separation of powers.

Indeed, in the **Michelle Andrews** case, in the Eastern Caribbean Court of Appeal, Chong J.A. (Ag) cited the words of Lord Steyn in **Regina v Director of Public Prosecutions *Ex Parte* Kelilene** [2000] 2 AC 326 at 371, where his lordship had said.

> "My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the DPP to consent to the prosecution of the applicants is not amenable to judicial review".

He further cited the **Matalulu** decision which provides some guidance on the parameters to be considered in looking at the prospect of judicial review of the decisions of the DPP. In that case it was stated:

> It may be accepted however, that a purported exercise of power (i.e. the DPP's power under section 64) would be reviewable if it were made;
>
> 1. in excess of the DPP's constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law.(See section 96 (4) (a).
> 2. When, contrary to the provisions of the constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act on political instruction the decision could be amenable to review.
> 3. In bad faith, for example dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
> 4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
> 5. Where the DPP has fettered his or her own discretion by a rigid policy – for example one that precludes prosecution of a specific class of offences.

Instructively, the judgment in **Matalulu** continued:

> There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial decision would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of

> situations in which such decisions would be reviewable for want of natural justice.

With respect, I adopt the views of the learned judge for the purpose of the analysis of this case.

One of the main thrusts of the grounds of appeal proposed to be relied on if leave were given, is that the reasons given by the DPP are inadequate. In this regard, there are two points to be made. The first is that while it may be accepted that where reasons are given they are reviewable for sufficiency (See the judgments in the Court of Appeal in **Leonie Marshall)**, it is clear that there is no obligation to give reasons. In **Ex Parte Manning**, the following exchange between Lord Bingham of Cornhill CJ and Mr. Turner Q.C

> Mr. Turner: "My Lord, on the further matter, the question of reasons, I do not for my part, understand your lordship to have said that there is an obligation as a matter of law, but really to have stated that as a matter of good administrative practice....."
>
> His Lordship: "We have stated that there is not an obligation as a matter of law".
>
> Mr. Turner: "I am grateful for the clarification my Lord, but your lordship of course put forth an exhortation that good administration practice should be followed".

Secondly, it is instructive to note that the main reason given by the DPP for her refusal to re-indict, was her conviction that the prosecution would be able to provide evidence which could lead to a successful prosecution. In that regard, it seems clear the notwithstanding the protestations of the Applicant to the contrary, the DPP paid close attention to the advice proffered by the Privy Council in considering whether to re-indict Constable Allen. It was her view that that course could not be successfully pursued.

It should be noted that the affidavit of the Director of Public Prosecution which was sworn on the 30th November, 2009 provides a clear averment that the Director "carefully considered the comments" of their Lordships in the Privy Counsel Judgment in the instant case. It is also stated

> "Consequent upon such a consideration I embarked upon an extensive and thorough investigation in respect of the allegations of the applicant herein that a fraud had been perpetrated upon the court and that it was as a result of this fraud that the accused had been acquitted.
>
> That at all material times when considering whether or not to exercise my discretion to prosecute any individual whatsoever, several facts are taken into account. These factors have as the underlying guiding principle the fundamental consideration of what is best in the public interest."

In **Marshall** the Board said:

> In their Lordships' view the possibility of mounting a successful prosecution of any of the police officers by disproving that defence beyond reasonable doubt was minimal and the DPP was justified in deciding not to bring such a prosecution.

In this regard, it should be noted as well, that the submission of Mrs. Gordon Harrison that the court must look at the substantive underlying issue, here the quality of the available evidence, seems to be supported by the Board in **Marshall**. For there, the Board made the following observation about the judgments of the judges in the Court of Appeal, without adverse comment:

> All three judges were in agreement that the court was entitled to look at the *sufficiency of the evidence for prosecution of the officers*, which Smith JA regarded as *the real issue*". (My emphasis)

Also in **Marshall** the Board reiterated that view that:

> Where the decision is based on an assessment of the evidence and the prospects of securing a conviction, *the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict*: **R v Director of Public Prosecutions Ex Parte Manning** [2001] QB 330, 339 para 41 per Lord Bingham of Cornhill CJ. There are many examples of such statements by courts in the common law world relating to decisions to prosecute, as to which see **Sharma v Brown-Antoine**. In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower. The reasons are set out in para 23 of the judgment of Lord Bingham CJ in **Ex Parte Manning**, supra. (Emphasis Mine)

> Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see for example **R v Director of Public Prosecutions Ex Parte C** 1 Cr App R 136. But

> as the decided cases also make clear the power of review is one to be sparingly exercised. The reasons are clear.....In most cases, the decision will turn not on an analysis of relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before ..... a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the Courts will not easily find that a decision not to prosecute is bad in law, on which basis alone a court s likely to intervene. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute, and if the test were too exacting an effective remedy would be denied.

With respect to this question which a Director of Public Prosecution must necessarily consider in deciding whether to prosecute, that is as to the possibility of providing evidence which could lead to a conviction, the Director of Public Prosecutions, in her affidavit, asserts.

> "I cannot find that initial evidential link which would render any conduct on the part of Mr. Rohan Allen as being part of a conspiracy or an involvement to perpetrate a fraud on the court. As enunciated, the evidential substratum to ground the elements of the fraud is also inadequate".

Specifically the Director asserts that having considered all the material before her with respect to whether the prospective accused could be deprived of his plea of *autrefois acquit*, she formed the view that there would have to be compelling reasons or evidence of fraud to which the applicant had alluded. She continues:

> "Having found neither, as a matter of law, there was no legal basis on which Mr. Rohan Allen could be deprived of his pleas".

In the circumstances of this evidence it is difficult for this court to find that there is a real prospect of prosecuting the appeal so as to grant leave to do so.

In looking at the decision of Brooks J, I come to the view that his reasoning for striking out the grant of leave is valid and unimpeachable. As such, I do not find that there was a real prospect of successfully prosecuting an appeal should leave be granted. But, as pointed out in the Michelle Andrews case, the court must go on to consider whether there is "other compelling reason" on the basis of which the court ought to grant leave to appeal.

Learned counsel for the Applicant had submitted that this is a matter of "general public interest" so that even if there were "no real prospect of prosecuting the appeal", this would still provide a basis for the grant of leave. In that regard, counsel had cited the **Practice Direction** of the United Kingdom Court of Appeal, quoted above. There is no doubt that there has been considerable public interest in this case, as it has unfolded over these many years, not the least because the accused was a police officer. Indeed, the fact of the involvement of an "agent of the state", has guaranteed continuing interest in the case. I would, however, adopt the reasoning of Chong J.A. in the **Michelle Andrews** case where, in considering "other compelling reason", he mentioned the applicant's "general feeling of injustice". I would infer from the nature of the Applicant's submissions that this sentiment could also be advanced on behalf of the Applicant here, certainly insofar as the State's purported involvement is concerned.

But public interest is not the same as saying that the matter is of general public importance. I would suggest that the term refers to importance in terms of the juridical or jurisprudential importance. The comment of Sir Denys Williams in **Re King's Application** (1980) 40 WIR 15 at page 35, is certainly apposite: His lordship said:

> It cannot be accepted that a police officer should be charged and prosecuted for murder if a prima facie case is not made out. It cannot be in the public interest that a police officer should be treated differently from a civilian in such matters.

I return to the authority of **Matalulu**. While I accept that the examples set out in that case are not necessarily exhaustive, I do believe that their lordships were deliberate to restrict the potential categories of other compelling reasons to where there was "bad faith". Thus their proposition that given the width of the DPP's constitutional powers,

the exercise of discretionary powers for improper motives "not amounting to bad faith" would not give rise to a successful challenge. Despite the grounds of appeal articulated by the Applicant, there is no basis for any suggestion that there was any bad faith on the part of the DPP.

Finally, it should advert to the case of **Paulette Bailey and Edward Bailey v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands,** SCCA 103/2004, cited above. In that case McCalla J.A. (Acting, as she then was) in her opinion in support of the Court of Appeal's unanimous decision to set aside the grant by the trial judge of leave to appeal, having reviewed the submissions and the law, said:

> For the reasons stated herein, it seems to me that the appeal against the order of Campbell J. has *little chance of succeeding* and accordingly I would set aside the permission granted to appeal. (My emphasis)

It is not clear that her ladyship was intending to derogate from the idea of "real prospect of successfully prosecuting" an appeal. But it certainly seems to put a small "gloss" on that term for the purposes of this application. I would hold that not only is there "little chance of succeeding" in this appeal, but that there is "no real prospect" thereof. In those circumstances, I must deny the application for leave to appeal.

With respect to costs, however, like Brooks J in the substantive application to strike out the leave granted, I am firmly of the view that it is appropriate here to make "No Order as to Costs".

ROY K. ANDERSON
PUISNE JUDGE
JULY 8, 2010