



[2024] JMSC Civ. 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2024CV02761

**IN THE MATTER OF the Port Authority
of Jamaica Ex-Parte Carrol Pickersgill**

AND

**IN THE MATTER OF Part 56 of the Civil
Procedure Rules**

BETWEEN	BRUCE RATTRAY	APPLICANT
AND	THE PORT AUTHORITY OF JAMAICA	RESPONDENT

IN CHAMBERS – VIA ZOOM

**Mr. Nelton Forsythe and Mrs. Claudia Forsythe instructed by Forsythe & Forsythe
for the Applicant.**

**Mr. Matthew Gabbadon instructed by the Director of State Proceedings for the
Respondent.**

Heard: September 17, 2024 and November 8, 2024

**Application for leave to apply for Judicial Review – Application for extension of
time to apply for leave for Judicial Review – Failure to pursue alternative remedy –
Legitimate Expectation – Section 18 of the Pilotage Act – Expediency**

PETTIGREW-COLLINS J.

INTRODUCTION

- [1] The application before the court is for an extension of time to apply for leave to seek judicial review and for leave to seek judicial review. The circumstances giving rise to these applications are outlined below.
- [2] The applicant, Mr Bruce Rattray, was a marine pilot employed by the Port Authority of Jamaica. He joined the Port Authority as a trainee pilot in April 1980, became an apprentice pilot on July 17, 1980 and ascended to the position of a marine pilot on April 28, 1986. He resigned on July 19, 1994 and later re-joined the Port Authority on January 20, 1995. There seems to be some contention regarding Mr Rattray's date of retirement. According to Mr Rattray, he was in the employ of the Port Authority until his retirement on January 16, 2024, while the Authority gave December 31, 2023 as Mr. Rattray's date of retirement.
- [3] On February 11, 2023, Mr. Rattray attained the age of sixty-five (65) years old. In or around November 21, 2023, he applied for an extension of his marine pilot license. By letter dated December 28, 2023, from the Port Authority, it was communicated to Mr Rattray that at a meeting held on December 19, 2023, the decision was taken by the Board of the Port Authority not to renew his marine pilot license.
- [4] In or about mid-January 2024, Mr Rattray contacted an attorney-at-law to assist him with convincing the Port Authority to extend his marine pilot license. His attorney-at-law contacted the Port Authority by letter dated January 30, 2024, and presented a ten-point plan to the Authority for its consideration, with a view to the Authority reconsidering its decision to refuse the extension of Mr. Rattray's licence. Negotiations between the attorney, Mr Rattray, and the Port Authority took place, according to Mr Rattray, for a period of over three months.
- [5] However, by letter dated April 9, 2024, from the Port Authority to Mr Rattray's attorney-at-law, the Port Authority reaffirmed its rejection of Mr Rattray's application for an extension of his marine pilot license.

THE APPLICATION

[6] On June 28, 2024, Mr Rattray filed a notice of application for court orders for extension of time to apply for leave to seek judicial review and for leave to apply for judicial review. Two affidavits, both sworn to on June 27, 2024 and filed June 28, 2024, supported this notice of application. An affidavit in response to Mr Rattray's affidavit in support was filed by Mrs Hortense Ross-Innerarity sworn to and filed on August 23, 2024. Mr Rattray swore to, and filed an affidavit in response to that of Mrs Ross-Innerarity on September 13, 2024.

[7] Among the orders sought in the notice of application are:

- i) *An order seeking extension of time in which to apply for Judicial Review.*
- and
- ii) *An order seeking leave to apply for Judicial Review*

[8] The applicant also listed the following as orders being sought:

- iii) *An order of certiorari to quash the unlawful and unfair decision of the 1st Respondent in refusing to extend the Applicant's Licence as a Marine Pilot.*
- iv) *An order of mandamus compelling the 1st Respondent to organize for the Applicant to do a medical examination, and if successful to compel the 1st Respondent to extend the Marine Pilot Licence of the Applicant.*

...

- (i) *A Declaration that the decision of the 1st Respondent not to extend the Licence of the Applicant as a Marine Pilot is manifestly unreasonable in light of all the facts of that decision.*
- (ii) *A Declaration that the decision made by the 1st Respondent on 19th December, 2023 not to be extend [sic] the Licence of the Applicant was irregular null and void, because the Board is not empowered to appoint discipline, promote or extend the service of a Marine Pilot.*
- (iii) *A declaration that it is the Superintendent of Pilotage who has the power to discipline promote or extend the service of a Marine Pilot.*

Clearly the preceding are the orders that the applicant intends to seek if granted leave to apply for judicial review.

[9] The applicant identified the following grounds on which the orders are being sought:

- i. The Applicant had given forty-three (43) years of meritorious service to the 1st Respondent by the time he attained the age of sixty-five (65) years on February 11, 2023.*
- ii. Regulation 15 of the Pilotage Regulations it [sic] provides that : “the Authority shall not renew the licence of a pilot who has attained the age of sixty-five years unless he satisfies the Authority as to his physical fitness to hold a licence and the Authority considers it expedient to renew his licence so however, that the Authority shall not renew the licence of any pilot who has attained the age of seventy years and the validity of a pilot’s licence shall expire at the end of the year in which he attains that age”.*
- iii. Notwithstanding Regulation 15 of the Pilotage Regulations stated at number (ii) above it has, become the standard practice of the 1st Respondent to extend the Marine Pilot Licence up to the age of seventy years old, once such Pilots have passed their medical and there are no outstanding disciplinary issues pending with the Board of the 1st Respondent.*
- iv. The Applicant upon attaining the age of sixty-five applied for an extension of his Marine Pilot Licence, however the 1st Respondent refused to do any medical examination for the Applicant knowing that a medical clearance is necessary for the Applicant to get an extension of his licence.*
- v. The 1st Respondent by letter dated April 9, 2024 to the Applicant’s then Attorneys-at-Law Earle & Wilson of No. 3 Ardenne Road, Kingston 10, gave very vague reasons why his licence was not extended.*
- vi. The reasons stated by the 1st Respondent in (v) above contradict sharply with the letter of commendation dated November 22, 2023, that the Applicant received from the President of the 1st Respondent, Mr. Gordon Shirley.*

ISSUES

[10] The main issues which arise for consideration are: whether the applicant should be granted an extension of time to apply for leave to seek judicial review and whether the applicant has an arguable case for judicial review with a realistic prospect of success and so should be granted leave. Embedded within the first issue, are the following sub issues: whether there is a good reason for the delay in making the application, and whether the applicant had an alternative remedy.

[11] In addressing whether he has an arguable case, it is necessary to address the question of whether Mr Rattray has a valid argument that the conduct of the Port Authority gave rise to a legitimate expectation that his marine pilot licence would be renewed, whether it could properly be argued that the decision was not taken by the competent authority, whether he has an arguable ground on the basis that the Port Authority refused to allow him to do a medical examination. In discussing this latter issue, it is necessary to examine whether the Port Authority can properly argue that it was not expedient to extend the applicant's marine pilot licence. Before examining the issue, it is necessary to very briefly address the applicant's locus standi to bring this application.

Locus standi

[12] Rule 56.2 of the **Civil Procedure Rules** (CPR) provides that:

(1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.

(2) This includes:

(a) Any person who has been adversely affected by the decision which is the subject of the application;

...

[13] There is no question that the applicant is an individual who is aggrieved by the decision of the Port Authority not to renew his marine pilot licence, and so possesses the locus standi to pursue this application. The Port Authority is a body corporate and is said to be the decision maker and is prima facie the proper respondent.

Time within which application is to be made

[14] Rule 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave.

[15] Rule 56.6(1) directs that "*an application for leave to apply for judicial review must be made promptly and in any event, must be made within three months from the date when the grounds for the application first arose*". This court is empowered to

extend time to apply for leave for judicial review if good reason is shown for doing so, based on rule 56.6(2).

[16] Sub rules (3), (4) and (5) of rule 56.6 provide as follows:

(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings

(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.

(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration.

The delay in making the application

[17] The applicant's affidavit evidence is that on November 21, 2023, he applied for an extension of his marine pilot licence. He said that on December 28, 2023, he received a letter dated December 28, 2023, from the Authority, stating that at the meeting of the Board held on December 19, 2023, the decision was taken to refuse the renewal of his licence and so his request for an extension was declined.

[18] The relevant date from which time started to run is December 19, 2023, the date that the decision was made. Mr Rattray stated that upon receiving the said letter dated December 28, 2023, he received advice and thereafter contacted an attorney-at-law. He said he did so in mid-January. It is the Authority's position that since a decision unfavourable to Mr Rattray was made; he should have applied for judicial review at that point.

- [19] Mr Rattray stated that his attorney-at-law contacted the Authority sometime about January 30, 2024 and presented a ten-point plan for the extension of his marine pilot licence. He further said that his attorney-at-law was in negotiations with the Authority from then, and numerous meetings were held between his attorney-at-law, himself and the Authority in order to convince the Authority to extend his marine pilot licence. He said he was quite hopeful that his licence would eventually have been extended, based on how the negotiations were proceeding.
- [20] He stated that sometime in mid-April 2024, his attorney-at-law contacted him and informed him that the Authority had rejected his application for the extension of his licence, and by letter dated April 9, 2024, gave its reasons for rejecting the application.
- [21] The court accepted in **Pedro Burton v The Commissioner of Police** [2014] JMSC Civ 187, that the pursuit of an alternative remedy was a good reason to advance for the delay in making the application for leave to apply for judicial review, and one that should be given favourable consideration. In this instance, the applicant was not pursuing an alternative remedy. However, his attempt to resolve the issue internally by making overtures to the Authority should in my view be regarded in the same light as seeking an alternative remedy. I am of the view that the applicant had a good reason for not making the application up to the time of being made aware that his entreaties to the authority would bear no fruit.
- [22] The only explanation offered by the applicant is that after he was advised of the Authority's decision in April, he discontinued his relationship with his then attorney-at-law. According to him, he discontinued the services of his attorney-at-law due to "unforeseen reasons". He retained a new attorney at law and filed his application on June 28.
- [23] The good administration of justice requires that a litigant should comply with timelines set by Rules of Court and where there is non-compliance, at least a reasonable explanation should be offered. The applicant has offered no good reason whatsoever for this period of the delay from the time when the Authority

communicated the affirmation of its decision until the notice of application was filed. He cannot therefore overcome the hurdle that he has no good reason for the delay.

Failure to pursue alternative remedy

[24] The respondent advanced that the applicant has failed to comply with the provision dictating that he should state whether there is an alternative remedy available to him and that he has also failed to pursue his alternative remedy. Further, having regard to the applicant's poor performance on the job, and the lack of vacancy in the pilotage service, it would be detrimental to the good administration of justice if the application for extension of time to apply for leave were to be granted.

[25] It is the contention of the respondent that Mr Rattray had an alternative remedy available to him. The respondent relies on the provisions of section 18 of the **Pilotage Act**.

[26] Rule 56.3 (3) (d) require an applicant for judicial review to state whether an alternative form of redress exists, and if so, why is it that judicial review is considered more appropriate, or why the alternate has not been pursued.

[27] Section 18(1) of the **Pilotage Act** states that:

Any pilot or apprentice who is aggrieved by any action taken by the Authority pursuant to a recommendation under paragraph (c) of subsection (2) of section 15, or by the refusal or failure of the Authority to renew his licence, or by the refusal or failure of the Authority having obtained possession of his licence, to return it to him, may appeal to the Court of Appeal within such time and in such manner as may be prescribed by rules of court.

[28] The applicant's response through his attorney is that the relevant section of the **Pilotage Act** states that the applicant "may" apply to the Court of Appeal for redress. The implication from this statement is that it was simply a choice that the applicant could have made to pursue the matter through the Court of Appeal.

[29] Section 15(2) of the **Act** is concerned with a scenario where disciplinary proceedings have been taken against a pilot or apprentice resulting in suspension

of the pilot or apprentice from duty, or the imposition of a fine and in particular paragraph (c) of section 15(2) where there is a recommendation that the licence of the pilot be revoked or suspended.

- [30] The second portion of section 18 does not confine the remedy of an appeal to the Court of Appeal to circumstances involving instances where disciplinary proceedings are invoked but clearly allows that remedy to be pursued where there is a refusal of the Authority to renew a pilot's licence. The section does not speak specifically to the annual renewal and so there is nothing in the section which expressly or by implication, restricts a pilot who has attained the age of 65 from availing himself of the benefit of this provision.
- [31] The use of the terminology 'may' in section 18 in my view indicates that it is permissible for an aggrieved person to pursue the avenue of an appeal. I do not understand the section to mean that an aggrieved person may choose the appeal as one of a number of avenues for seeking redress, but rather, to mean that if an aggrieved person wishes to seek redress, then that is the avenue. This means therefore that the applicant has failed to pursue the avenue for redress made available to him by law. He has not sought to show why the avenue of an appeal to the Court of Appeal would not be suitable in the circumstances.
- [32] The case of **Durity v the Attorney General of Trinidad and Tobago** [2002] UKPC 20 is authority for the proposition that even if a claimant would be out of time in making an application under the court's ordinary non-constitutional jurisdiction, the failure to utilize such channel is not a basis for allowing a claimant to pursue a constitutional claim unless a cogent explanation for the failure is offered. Although the context in that case was a constitutional claim, the principle is no less applicable in circumstances where an applicant failed to pursue an alternative remedy to judicial review and is now out of time to pursue that remedy. That is not a basis for allowing the applicant to pursue judicial review, especially in light of the fact that an unsatisfactory reason has been given for the failure or the unsuitability of the alternative remedy.

[33] Even though I am of the view that the applicant has not offered a good reason for the delay in applying for leave, and did not say whether an alternative remedy was available or seek to explain why the alternative remedy would not be suitable or was not pursued and why judicial review would be more appropriate, I shall nevertheless examine his application on the merits.

The law on the grant of leave

[34] The oft cited case of **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379, a decision of the Judicial Committee of the Privy Council, outlines the test for granting leave to appeal for judicial review. In a joint judgment, Lords Bingham and Walker said the following at page 387 J of the judgment:

*“The ordinary rule now is that the court will refuse 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... 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. As the English Court of Appeal recently said with reference to the civil standard of proof in **R (on the application of N) v Mental Health Review Tribunal (Northern Region)** [2005] EWCA Civ. 1605, [2006] QB 468, at para 62 in a passage applicable mutatis mutandis to arguability:*

...the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a Court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.

*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 The Director of Public Prosecutions** [2003] 4 LRC 712 at 733. (original emphasis of the court)*

[35] The court's role at this stage of the proceedings is to ensure that leave is not granted where an action has no arguable ground and is without a realistic prospect of success.

[36] Sykes J (as he then was) in **R v IDT ex parte J. Wray & Nephew Limited**, Claim No. 2009 HCV 04798, judgment delivered October 23, 2009, stated;

“There must be in the words of Lord Bingham and Lord Walker, ‘arguable ground for judicial review having a realistic prospect of success’... The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges regardless of the litigants are required to make an assessment of whether leave should be granted in light of the now stated approach. An applicant cannot cast about expressions such as ultra vires, null and void, erroneous in law, wrong in law, unreasonable without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions.”

[37] The case of **Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service** [1985] AC 374 is often relied on in examining the bases on which judicial review may be sought. Lord Diplock enumerated the rationale. These are illegality, irrationality and procedural impropriety. At page 410, he said:

By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury’ unreasonableness (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...

I have described the third head as ‘procedural impropriety’ rather than a failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules which are expressly laid down in the legislative instrument by which its

jurisdiction is conferred even where such failure does not involve any denial of natural justice...

[38] Proportionality has also in more recent years been cited as a ground for judicial review. Proportionality does not arise in this case and will not be discussed.

The basis of the application for leave

[39] The applicant must establish a basis on at least one of the recognized grounds before he will be granted leave to apply for judicial review. Mr Forsythe on behalf of the applicant expressly placed reliance on procedural impropriety in the process of making the decision not to extend the applicant's tenure beyond the normal retirement age. He has also set out some factual bases in the grounds. Among them is the assertion that it has become the standard practice of the Port Authority to extend marine pilots' licences up to the age of seventy years old, once such pilots pass their medical examination and there are no outstanding disciplinary issues pending with the Board. This ground possibly raises the question of whether Mr Rattay could have a legitimate expectation that his marine pilot licence would be renewed up to his attaining the age of seventy years.

[40] The ground that the reasons given in the letter of April 9, 2024, contradicts the contents of the letter of commendation from the Chairman of the Board of the Port Authority, as well as that which says that vague reasons were given in the letter of April 9 for the refusal to extend his licence, raise the ground of irrationality. Although not specifically raised as a ground, Mr Rattray deponed that the decision not to renew the licence was not made by an authority competent to do so. This evidence raises issues of unlawfulness and or procedural impropriety. I shall address this latter point first.

Whether the decision was taken by the body empowered to do so

[41] The applicant stated in his affidavit that the decision not to extend his marine pilot licence was not taken by the authority empowered to do so, since the Pilotage Act

makes no reference to the Board having any power to grant an extension of a marine pilot's licence. Public law dictates that a public body cannot exercise jurisdiction that it does not have. The decision will be held to be unlawful if the incorrect body or individual within the body purports to make a decision that it is not authorized to make. If Mr Rattray's assertion is correct, it would also mean that the correct procedure was not followed in making the decision to not renew the licence.

[42] By virtue of the **Port Authority Act**, the Port Authority was established as a body corporate and possesses, among other powers, that of entering into contracts. (Section 4(1)). Section 4(2) provides that the schedule shall have effect as to the constitution and procedure of the Authority. The schedule to section 4 states that the Authority must consist of not more than 10 individuals appointed by the Minister, who also appoints one of those individuals as the chairman. It is that group of individuals, presumably referred to as the Board, which acts for the Authority.

[43] Section 2 (2) of the **Pilotage Act** provides that:

In relation to the functions of the Authority under this Act, the provisions of this Act shall be read and construed as one with the Port Authority Act and all amendments thereto, and references in that Act to the provisions of that Act and the regulations thereunder shall be construed to include references to this Act and regulations made hereunder.

[44] The disciplinary powers of the Authority are exercised by the Superintendent of Pilotage. It is unclear from the applicant's affidavit or his submissions who he says is the proper authority with responsibility for determining whether or not his licence should be renewed. If it is that he is saying that it is the Superintendent of Pilotage, then he is incorrect, as her functions are limited to those assigned to her by the Pilotage Act or those delegated by the Port Authority. The interpretation section of the Act states that "*Superintendent of Pilotage*" means *the person appointed by the Authority to exercise and perform the functions assigned to him by or under this Act or delegated to him by the Authority.*

[45] Since Mr Rattray is an employee of the Port Authority, prima facie, it is the Authority that makes decisions in relation to his employment, except where the functions are delegated. There is no indication that there was a delegation of that aspect of the authority's function. The onus is on Mr Rattray to say who he understands to be the proper decision maker, since he is saying that it is not the Port Authority. He has not so stated. On the face of it, it is the Port Authority that is empowered to make the decision as to whether Mr Rattray's licence should be extended. The applicant has not demonstrated that he has a viable argument that the decision was not taken by the competent authority.

Legitimate Expectation

[46] The applicant did not distinctly raise the question of his legitimate expectation as a ground but it has been obliquely raised, based on his affidavit evidence, that it has become the standard practice of the Port Authority to extend a marine pilot's licence up to the age of seventy years old, once such pilots pass their medical examination. He stated that in his forty-three years with the Port Authority, he was not aware of any pilot who attained the age of sixty-five and who desired to have an extension of his/her licence and was refused permission by the first respondent to do his/her medical examination or who was not given an extension of his licence.

[47] No arguments were made on the point so I shall not embark upon any detail analysis of the matter.

[48] In the case of **Tanisha Perry v The Commissioner of Police and The Attorney General of Jamaica** [2022] JMSC Civ 161, Wint Blair J cited the case of **Francis Paponette v Others v The Attorney General of Trinidad and Tobago** [2010] UKPC 32, where the concept of legitimate expectation was succinctly explained as follows:

"28. In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453, at para 60:

“It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is ‘clear, unambiguous and devoid of relevant qualification’: see Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called ‘the macro-political field’: see R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131.”

- [49] The Authority, through Mrs Ross-Innerarity, has disputed the assertion, which in any event was a somewhat bald statement without any further information or material to substantiate the assertion. The implication from the statement is that the Authority has carried on a course of conduct which led Mr Rattray to believe that as of course, he would have been allowed to undergo a medical upon retirement and if the result of the examination was satisfactory, his licence would as of course be extended. The matter of the medical examination will be discussed at the appropriate juncture, but I note at this point, that the applicant failed to undergo a medical examination when he was requested to do so. In any event, Mr Rattray has provided no evidence that he was given a clear and unambiguous representation or promise or that there was a course of conduct by the Authority on which he relied which led him to have a legitimate expectation that his marine pilot licence would be renewed. He cannot therefore present a viable argument based of a legitimate expectation
- [50] Further, the Port Authority was bound to have regard not just to the outcome of the medical examination in respect of any pilot who had attained retirement, and the extension of whose licence was under consideration, but also to the question of whether it was expedient to extend their licences.
- [51] If I were to assume that there is truth in the assertion that such a practice exists, the assumption then, would be that both limbs of the requirement under Regulation 15 of the **Pilotage Regulations** would not necessarily have been satisfied in those instances where the licences of those persons were extended. If that were so, then the applicant would be relying on a practice that is in essence unlawful, and he

would therefore be asking the court to give effect to an unlawful 'legitimate' expectation, which would not be legitimate in law.

The refusal to allow the applicant to undergo a medical examination

- [52] The arguments advanced raise issues of impropriety, since Mr Forsythe's contention is that the correct procedure was not followed in making the decision not to allow Mr Rattray to undergo a medical examination. The applicant said that around November 21, 2023, he applied for an extension of his marine pilot licence and the Authority refused to allow him to do any medical examination on the ground that he would not be granted an extension based on Regulation 15 of the **Pilotage Regulations**. He also stated that a medical clearance is a prerequisite for such an extension to be granted.
- [53] The argument is that there is a two-pronged test to determine whether the applicant's tenure should be extended. The first step it was argued, was to allow the applicant to undergo the medical examination, but the Authority did not permit him to undergo a medical examination by a medical doctor provided by or chosen by the Authority, and so it was not open to the Authority to move to the second stage.
- [54] The respondent says that the onus was on the applicant to satisfy the respondent of his physical fitness, and that to date he has not provided the respondent with a medical report in proof of his fitness to continue in the position.
- [55] Each party places reliance on the provisions of regulations 15 and 16 of the **Pilotage Regulations, 1975**.
- [56] Regulation 15 of the **Pilotage Regulations, 1975** provides that:

The Authority shall not renew the licence of a pilot who has attained the age of sixty-five years unless he satisfies the Authority as to his physical fitness to hold a licence and the Authority considers it expedient to renew his licence, so, however, that the Authority shall not renew the licence of any pilot who has attained the age of seventy years, and the validity of a

pilot's licence shall expire at the end of the year in which he attains that age.

[57] Regulation 16 of the **Pilotage Regulations**, 1975 provides that:

The Authority may, before renewing the licence of a pilot or at any time as it sees fit, request any pilot to submit to a medical examination by a registered medical practitioner chosen by the Authority.

[58] From a reading of Regulation 15, there are two criteria to be satisfied in order for the licence of a pilot who has attained the age of 65 to be renewed. There is nothing in the regulation to say that the consideration as to whether a pilot's licence will be renewed must necessarily begin with the pilot satisfying the Authority as to his fitness; the position is that both criteria must be met. The pilot must satisfy the Authority as to his physical fitness and the Authority must consider that it is expedient to renew the licence.

[59] Mr Rattray said that about a year prior to him attaining the age of sixty-five years, (in or around February 2022) he underwent a medical examination by Dr Richard Gomes, a senior medical practitioner, and he was cleared medically as being fit and able to continue his service as a marine pilot.

[60] The respondent's position is that Mr Rattray was requested to do a medical examination in or around February 2023 but refused to do so. Mr Rattray does not deny this but says that that request for a medical examination was not made pursuant to any application by him for an extension of his licence. Mr Rattray's evidence is that on February 11, 2023, he attained the age of sixty-five years old and that his application for the renewal was not made until November 21, 2023.

[61] It is to be noted that Regulation 16 requires the Authority to provide or chose a medical practitioner to conduct the examination of a pilot whose licence is being considered for extension. It would also appear that the Authority could request that a pilot undergoes a medical examination outside of the time frame when his extension is under consideration. Mr Rattray opted not to undergo an examination

at a point when a request was made of him. It would not be open to him without more to say that a medical examination conducted in close proximity to his attaining the age of 65 could not be taken into consideration in determining whether his licence should be extended.

- [62] I disagree with the applicant that a decision to refuse the extension of his pilot licence without affording him an opportunity to be examined by a medical practitioner of the Authority's choice provides him with a good ground for an arguable case for judicial review with a realistic prospect of success.

Expediency

- [63] The discussion regarding whether it was open to the authority to determine that it was not expedient to extend Mr Rattray's pilot licence, as indicated earlier, raises the issue of irrationality. Mr Rattray's grounds that vague reasons were given in the letter of April 9 for the refusal to extend his licence and that the reasons given in the letter of April 9, 2024, contradicts the contents of the letter of commendation from the Chairman of the Board of the Port Authority will be discussed under this heading.
- [64] The case of **R (on the application of McCormack) v Governing Body of St Edmund Campion Catholic School and Others** [2012] EWHC 3928 (Admin), which was helpfully supplied by counsel for the respondent, provided a definition and explanation of the word "expedient". Beaston J stated at paragraph 90, Beaston J, the following:

"Encouraged by the sort of questions I put during the hearing, the claimant reformulated his submissions on this in terms of a failure to take account of relevant factors. In effect he submitted that given the advice from the Secretary of State's officials, any departure from that advice was Wednesbury unreasonable or irrational. The difficulty with this is that, once the threshold of acting unreasonably or failing to discharge a duty has been met, the Secretary of State is given discretion. The discretion is given to make such directions as appear to him to be expedient. "Expediency" is a term which fits Mr Tindall's characterization of subjective and not hard edged. A quick examination of dictionary definitions gives the following meanings "convenient and practical", "suitable or appropriate". The Oxford English Dictionary states: "conducive to advantage in general or to a

general purpose, suitable to the circumstances of the case." There is also a more deprecative sense of "useful or politic as opposed to just or right" and also "something that helps forward or that conduces to an object". I concluded that it cannot be irrational to conclude that the suspension was not going to have effect for much longer and that the claimant's status as a governor was linked to his employment dispute and the outcome of it. It may be that the claimant is right and that he will be vindicated in the appropriate employment context. However, on the facts, as they stood at the time the Secretary of State made his decision and the prognosis as to when the disciplinary proceedings would be heard, it is not possible to say that he was irrational."

- [65] Another case in which a definition and explanation of the term "expedient" was given, is **Herbert v Phillips and Sealey** (1967) 10 WIR 435, a case arising out of the Court of Appeal of West Indies Associated States, where it was held that the Emergency Powers Regulations was in conflict with the Constitution of St Christopher, Nevis and Anguilla Constitution. PC Lewis JA stated at page 447 paragraph I that:

"The word "expedient" when used in describing a course of conduct by any one conveys the idea of something done which is conducive to special advantage rather than to what is universally right, the subordination of moral principle for the sake of facilitating an end or purpose, an act which is politic rather than just. Therefore, a law which has its basis in expediency would principally be concerned with attaining the immediate objective of the legislator and would not necessarily have any regard to the interests of those whom it is intended to affect; it would not be tested by the opinion of the community as to its justice or reasonableness. On the other hand, where it is predicated of a law that it should be "reasonably justifiable," this connotes the idea that given the particular circumstances with which the law is intended to deal it may when tested by the opinion of the ordinary man be susceptible of acceptance as satisfying the requirement of s 14 of the Constitution of being "reasonably justifiable." The concepts of expediency and reasonable justification cannot be equated; indeed, they are in conflict with each other; and the latter requirement considerably restricts the type of law which the Governor may make. It follows therefore that the content of any law based on these two conflicting concepts must differ materially." (my emphasis)

- [66] The reasons given by Mrs. Ross-Innerarity as to why the applicant was not seen as a fit person for his licence to be renewed, were rooted in the applicant's 'underperformance' and/or 'unsatisfactory performance', and also concerns about

his health and wellbeing, specifically with regard to his weight. These reasons were garnered from her affidavit sworn August 23, 2024 and the various exhibits attached thereto. The reasons are as follows:

1. Mr. Rattray's underperformance and unsatisfactory performance: - Mrs. Ross-Innerarity denied that Mr. Rattray's performance has been exemplary throughout his years of service, and she stated that she wrote to Mr. Rattray on numerous occasions regarding his unsatisfactory performance. She exhibited a number of letters, emails, a memorandum and performance records either directed to Mr. Rattray, or in relation to Mr. Rattray. The documents exhibited are:

letter to Mr Rattray dated July 20, 2018, Memorandum to Mr Rattray dated January 11, 2018,

letter to Mr Rattray dated January 29, 2018,

electronic mail dated January 31, 2023

electronic mail dated May 8, 2023

the Port Authority's pilots' performance records for period of January 1 – December 31, 2019, and

the Port Authority's pilots' performance records for January 1 - December 31, 2023.

2. Mr Rattray's health and wellbeing, specifically with regard to his weight: - She said that she expressed to Mr Rattray her concerns for his health and personal safety within the context of his ability to perform some of the functions he is required to undertake, such as embarking and disembarking pilot ladders, that she urged him to take the matter of his health and wellbeing seriously, and she expressed concerns particularly about his weight. Further, that Mr Rattray was contacted by a representative of the Authority's human resources department to have a medical arranged and

that he refused. Electronic mail dated February 1, 2023 and May 8, 2023 in support of this assertion were exhibited to Mrs Ross-Innerarity's affidavit.

- [67] A letter of commendation dated December 22, 2023, was sent to Mr Rattray from Mr Gordon Shirley, President and CEO of the Port Authority of Jamaica. This letter was exhibited to the applicant's first affidavit. In that letter, Mr Shirley congratulated Mr Rattray on receiving the "*Dedication and Commitment to Service Award*", recognized Mr Rattray's long service, and referred to his positive attitude, good work ethics, high level of enthusiasm and team spiritedness. Mr Rattray was also given a gift certificate in recognition of his 43 years of "*sterling contribution*" to the Port Authority of Jamaica.
- [68] Mrs Ross-Innerarity's position is that issuing the letter of commendation to Mr Rattray is not in conflict with the decision of the respondent to refuse extension of the applicant's tenure beyond the retirement age. Further, that the letter of commendation was issued solely on the basis of years of service and does not contemplate factors related to on-the-job performance.
- [69] On the face of it, the contents of the letter of commendation speak not only to Mr Rattray's years of service, but to the quality of that service, and to say that the letter of commendation was issued solely on account of Mr Rattray's years of service is absurd. There is no performance records or information relative to the greater portion of Mr Rattray's years of employment. Even if that is the reason for its issuance, there is no good reason why it should contain information which is clearly inconsistent with documented information regarding performance and conduct, unless it is with reference to a period prior to the years for which the performance information was made available to this court. In any event, that would only be speculation, since there is nothing in the letter to so indicate. The contents of the letter starkly contrast with the information provided in various documents exhibited to the affidavit of Mrs Ross-Innerarity (see documents referred to in paragraph 65 of this judgment).

[70] Some of those documents provide measured performance data, which speak to less than satisfactory performance. Although these exhibits do not cover much of Mr. Rattray's work life with the Authority, they cover a significant number of years over which Mr. Rattray's alleged underperformance and unsatisfactory performance were highlighted. It is of relevance that the information relates to the later years of his employment. the Authority would be entitled to rely on his performance in the latter years in order to make a true assessment as to his eligibility for an extension of his licence.

[71] Mr Rattray's short response to the performance data provided is that the information is fictitious, and his scores have been purposely undervalued. That assertion raises a question of fact and would require a level of enquiry which is outside of the scope of judicial review.

[72] The performance data would, in my opinion, be a more accurate measure of Mr Rattray's on the job performance than the assertions in a one-off letter, which on the face of it, speaks in very general terms, and came from the Chairman of the Board who probably never exercised direct supervision over Mr Rattray. Since it is more probable the case that the performance data reports would have been prepared periodically by persons with knowledge of his work ethic and no doubt exercised direct supervision over him, it cannot be said that there was no proper basis for concluding that his performance was below par. The Authority was entitled to rely on information garnered over a significant period in order to assess whether Mr Rattray's licence should be renewed.

[73] In a letter dated January 30, 2024, from Mr Rattray's attorney to the Port Authority of Jamaica, a 'ten-point plan' stating reasons which he believed made it expedient for the Authority to extend Mr Rattray's contract was set out. By letter dated April 9, 2024, Carrol Pickersgill, Senior Vice President- Legal, Regulatory and Corporate Affairs of the Port Authority of Jamaica, responded to the attorney's ten-point plan. The points and the responses thereto are as follows:

1. Institutional Knowledge and Experience

The attorney highlighted Mr Rattray's forty-three (43) years' experience working for the Port Authority, stating that this expertise is invaluable and can contribute significantly to the ongoing projects and operations at the Authority. In response, the Authority stated that Mr Rattray's experience in the ports is constrained by his limited attendance and availability to provide pilotage service, that this constraint has operated over an estimated period of several years and that Mr Rattray's performance has consistently fallen below the required minimum performance level.

2. Ease of Transition

It was stated that based on Mr Rattray's deep understanding of the Authority's processes and the culture and inner workings of the Marine Pilot Department, a smooth handover to new employees and team members would be ensured by extending Mr Rattray's contract. In response, the Authority said that Mr Rattray's consistent unavailability would not auger well for a smooth transition.

3. Mentorship and Training

The attorney said that Mr Rattray is excellently positioned to provide mentorship, guidance and hands-on training to junior employees, which would ensure the continuity in transfer of skills and ultimately benefit the Port Authority. The Authority stated, in response to this point, that Mr Rattray's failure to participate in scheduled training for practicing pilots would also have had an adverse effect on his knowledge base.

4. Cost-Effectiveness

The attorney highlighted that hiring and training a new employee can be costly and time-consuming and stated that Mr Rattray is already equipped with the requisite training and competencies, hence removing the need for any extensive on boarding process. The Authority response was that given Mr Rattray's record, he could provide little assistance in this regard. Further,

that the cost and on boarding process for pilots is incurred and implemented over the course of their training which is hands on and done at a level for practicing professionals.

5. Project Completion

The attorney said that Mr Rattray's involvement in any unfinished or new projects of the Authority could ensure the successful and timely completion of the said projects. Further that Mr Rattray's involvement therein would most likely prevent disruptions in the execution of the projects. The Authority response was that there are no unfinished projects with respect to the pilotage service.

6. Versatility and Adaptability

It was stated that Mr Rattray is versatile and capable of adapting to any new situation in his area of expertise. The Authority's response was that Mr Rattray's record has not evidenced versatility and/or adaptability.

7. Part-time

The attorney stated that Mr Rattray is prepared to work part-time or on reduced hours/days. The Authority said that there is no room for part-time engagement in the structure and scheduling of the pilotage service.

8. Temporary Skills Gap

It was said that Mr Rattray stands willing to fill any temporary skills gap which may exist in the Marine Pilot Department and is ideally suited to bridge any deficiencies until a suitable long term replacement is found. The Authority responded to this point by stating that there are no temporary gaps or deficiencies in the service. Further, that there are seven (7) apprentices in training for completion over varying periods, with at least two (2) apprentices expected to qualify in 2024.

9. Continuity of Relationships

The attorney stated that Mr Rattray would have cultivated several harmonious relationships with different shipping industry personnel on behalf of the Authority and that the Authority could benefit were these connections to be maintained. The Authority responded that Mr Rattray's consistent unavailability has caused considerable concern amongst stakeholders including members of the shipping and port community as well as members of the pilot body.

10. Project Initiative

The attorney said that Mr Rattray would be ideally placed to spearhead any new projects or initiatives within his area of expertise. In response to this point, the Authority referred to its response to point #5 above, where it said that there are no unfinished projects with respect to the pilotage service.

- [74]** Mr Forsythe has described the Authority's response to the attorney's letter as a point-by-point combative response. I can only say that it was a direct response countering each point raised by the applicant as to why his licence should be extended.
- [75]** The applicant has said that he *strongly believes that the respondent has set out to victimise him*. See paragraph 10 of Mr Rattray's third affidavit sworn September 13, 2024.
- [76]** When one examines the responses to the ten-point-plan enumerating the perceived benefits of an extension of Mr Rattray's tenure to the Authority, they appear to encapsulate conclusions that could reasonably be arrived at based on the contents of the documents speaking to Mr Rattray's performance over a number of years in the later period of his employment as a marine pilot. Mr Rattray could not in my view properly argue that there was no basis for the Authority to conclude that it was not expedient to extend his pilot licence. It cannot be said that

the reasons given by the respondent are so unreasonable as to be 'irrational in a *Wednesbury* sense.

[77] In the face of an application for leave to apply for judicial review, the court is not concerned with the merits of a decision made by a public body, but instead with the question of **whether the decision has been made in accordance with any law setting out how the decision is to be made and in accordance with the rules of natural justice. Further, that the decision should not be unreasonable or irrational.**

[78] The respondent has set out reasons for determining that it was not expedient for the authority to renew the applicant's licence. When one considers the meaning of expedient: "convenient and practical", "suitable or appropriate", "conducive to advantage in general or to a general purpose, suitable to the circumstances of the case" it becomes evident that Mr. Rattray does not stand on good grounds. And this is so without applying the meaning of expedient in the more depreciative sense of "useful or politic as opposed to just or right".

CONCLUSION

[79] The applicant has not provided any good reasons for the delay in applying for leave to apply for judicial review, and therefore should not be granted an extension of time to the pursue the application for leave. He has failed to avail himself of an alternative remedy without providing any reasons for the failure.

[80] He has not demonstrated that he has any arguable grounds with a realistic prospect of success. He cannot properly argue that the decision not to renew his marine pilot licence was not made by the competent authority. He cannot properly argue that the conduct of the Port Authority gave rise to a legitimate expectation on his part that his marine pilot licence would be renewed upon retirement as long as he satisfactorily underwent a medical examination. The substantive basis on which he sought leave, namely, that he was not permitted to undergo a medical examination, cannot avail him. The Port Authority has demonstrated that there was

a basis on which it could have made the decision that it was not expedient to extend Mr Rattray's marine licence beyond the usual retirement years. Based on the foregoing, the application for an extension of time to apply for leave to claim judicial review is refused. Leave to apply for judicial review is refused. There shall be no order as to costs.

ADDENDUM

[81] On the morning of November 8, 2024 when the decision was handed down, counsel Mr. Matthew Gabbadon sought leave to appeal the court's decision to make no order as to costs. Leave was refused. The court places reliance on Rule 56.15(4) and (5) of the Civil Procedure Rules which provides that:

56.15(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.

(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

Mr. Gabbadon has placed no evidence nor made any submissions before the court to demonstrate that the applicant has acted unreasonably in making the application. This court discerned nothing in the conduct of the application that would warrant the making of an order for costs against the applicant.

.....
A. Pettigrew Collins
Puisne Judge