

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 00981

BETWEEN	MALICA REID	APPLICANT
AND	THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS	1ST RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND RESPONDENT
AND	DIRECTOR OF PUBLIC PROSECUTION	3RD RESPONDENT
AND	ISAIAH SIMMS	4TH RESPONDENT
AND	ERIC DALEY	5TH RESPONDENT

Ms. Carolyn Cameron and Mr. C. Cameron instructed by CRC & Company for Applicant

Mr. R. Small and Mrs. Shawn Wilkinson for 1st, 4th and 5th Respondents

Mrs. Michelle Shand-Forbes and Ms. Marlene Chisholm for 2nd Respondent

Mr. Donald Gittens on behalf of interested parties

Michael James, Police Federation and its Chairman, Raymond Wilson and Special Constable Force Association D/C Delroy Davis – President of United District Constable Association

Heard: March 14, 15 and 17, 18, 2011

*Indecom Act - Application for Leave to
Apply for Judicial Review - Powers of Arrest*

Straw J

1. The applicant, a corporal of police with the Jamaica Constabulary Force has applied for leave for Judicial Review in relation to, *inter alia*, the following issues:
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 - a. The lawfulness of the purported exercise of powers of arrest and charge by the Commissioner of the Independent Commission of Investigations who derives his powers from the Independent Commission of Investigations Act (Indecom Act).
 - b. The review the lawfulness of the purported exercise of powers of arrest and charge by private citizens who derive their powers from the Justice of the Peace Jurisdiction Act.
 - c. To review the lawfulness of the Act of prosecuting a police officer without first obtaining the ruling of the Director of Public Prosecution (DPP).
3. Although the hearing of this matter concerned the issue of leave, all the relevant parties were served and arguments heard from all save and except the third respondent who declined to be heard at this stage.
4. Rule 56 3 (1) (d) of the Civil Procedure Rules (CPR) 2002 states that the application for leave must state whether an alternative form of redress exists and, if so, why judicial review is more appropriate and why the alternative has not been pursued.

The Relevant Issues Giving Rise to the Application

5. In November 2010, the applicant was a member of a police team involved in a gun battle with alleged gunmen. Mr. Roderick Hill was shot and killed during this incident.

The Commissioner of Indecom commenced investigations into the matter and on February 25, 2011, the fourth and fifth respondents who were officers of Indecom, arrested and charged the applicant for the murder of Mr. Hill, and (on the instructions of the first respondent through its Commissioner) detained and placed the applicant before the Resident Magistrate's Court in Savanna-la-mar.

6. He was remanded in custody by the Resident Magistrate, Her Honour Ms. Lyle Armstrong on the application of the first respondent and detained at the Savanna-la-mar Police Station jail.

7. At about 4:15 p.m., he was returned to court before the Magistrate who told him, he would be released as there were some issues with the manner in which he was placed before the court and he was asked to return on March 1, 2011.

8. On that date, the Resident Magistrate heard legal arguments from the first respondent and the applicant's attorney-at-law. He was then asked to return to court on March 16, 2011 for a ruling on the issue whether the first respondent has *locus standi* to conduct a case in court against him and whether he has a right to charge him for murder without a ruling from the third respondent.

9. As of the date of delivery of this judgment, the above-mentioned date has now passed. However, arguments and submissions commenced in the matter from March 14, 2011.

However, on March 17, 2011, there were new developments as the court was informed that the DPP had entered a *nolle prosequi* in the Resident Magistrate's Court in the prosecution 'purportedly' commenced by the Commissioner of Indecom. Further, on the date of delivery of this judgment, a voluntary bill of indictment had been entered in the Home Circuit Court against the applicant on the charge of murder.

10. Counsel for the applicant therefore withdrew the application for prohibition in relation to the Resident Magistrate.

11. Mr. Small submitted that the issue of judicial review was now entirely academic, save and except for the allegation that the arrest was unlawful. He submitted that the alternative remedy, a civil trial, is available to the applicant.

12. Mr. Cameron, on behalf of the applicant asked the court to consider the effect of the refusal on the applicant if he had to institute proceedings in a civil court for the tort of false imprisonment as he would have the burden of proving both malice and lack of reasonable and probable cause.

Reasons for Judgment

13. This is a seminal case and, although the terms of reference have shifted since the submissions commenced, the issues are still relevant. At this time, the application for *certiorari* is unnecessary. However, the court still has to assess the relevant facts within the framework of the purpose for judicial review as the applicant is seeking to obtain several declarations.

14. Albert Fiadjoe, **Commonwealth Caribbean Public Law**, (3rd edition), in examining the issue of judicial review, states as follows (pg. 15):

"The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality --- Its jurisdiction is always involved at the instance of a person who is prejudiced or aggravated by an act or omission of a public authority ---.

Once an applicant satisfies the requirement of locus standi, an applicant may bring proceedings for judicial review even if there is no decision on which a prerogative order can legally rest. This is because judicial review is wider than the old prerogative orders. Accordingly, one can seek redress in judicial

review by the most suitable remedy and there would be no obstacle to the grant of, say, a declaration merely because certiorari could not be granted or was inappropriate.

Accordingly, the court has power in a judicial review application to declare as unconstitutional, law or governmental action which is inconsistent with the constitution. This involves reviewing governmental action in the form of laws or acts of the executive for consistency with the constitution."

15. It is within the context of the understanding of judicial review that the court now begins an examination of the issues applicable to the granting of leave.

16. Mr. Small has submitted that the application should be refused as judicial review is a remedy of last resort. He has cited several cases including *R (on the application of Lim and another v Secretary of State for the Home Department)* (2007) EWCA Civ 773 and *Yates v Wilson and others* (1989) 168 CLR, 338).

In *R (on the application of Lim and another)* supra, at paragraph 13, Lord Justice Sedley expressed the principle governing application for leave in the following terms:

"It is well established --- that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available, the court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review."

17. In *Yates* (supra), a decision of the High Court of Australia, Sir Anthony Mason in delivering the judgment of the court said at page 339:

"It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us."

18. By analogy, Mr. Small is contending that any grant of leave at this point would only serve to fragment the criminal process which is undesirable.

19. However, in **Regina ex parte Livingston Owayne Small v The Commissioner of Police et al**, SC 2003/HCV2362 my brother, Campbell J, in delivering judgment in relation to an application for leave, stated at para 16:

"The adequacy of the alternative remedy to deal with the question that is raised in the given case is a vital consideration. If the alternative is not suitable or effective, then there will be no bar to the applicant seeking relief by way of judicial review. Regina (on the application of Taylor) Maidstone Borough Council 204 EWHC254 (Admin). See also Dionne Holness v Coroner of Kingston and St. Andrew and the Attorney General of Jamaica, HCV00999/2005 Supreme Court (unreported) delivered 18th September 2006."

20. In relation to this issue of an alternative remedy, Beatson J in **Regina (on an application by JD Wheatherspoon Plc) v Guilford Borough Council** 2006 EWHC 815 (Admin) (at paragraph 90) stated:

"The test of whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the 'adequacy,' 'effectiveness' and suitability of that alternative remedy. See ex parte Cowan R v Devon CC, ex parte Baker (1985) 1 All ER 73 at 92, 91 LGR 479, 11 BMLR 141. In R v Leeds CC ex parte Hendy (1994) 6 Admin LR at 443 it was said that the test can be boiled down to whether 'the real issue to be determined can sensibly be determined' by the alternative procedure and in R v Newham LBC ex parte R 1995 ELR 156 at 163 that it is whether the alternative statutory remedy will resolve the question at issue fully and directly."

21. In order to determine whether the submissions of counsel in relation to the alternative remedy has any merit, certain relevant provisions of the Independent Commission of Investigation Act, 2010 (Indecom Act) must be examined.

22. The first respondent is relying on Section 20 of the said Act to ground his powers of arrest:

“20. For the purpose of giving effect to Sections 4, 13 and 14, the Commissioner and the investigative staff of the Commission shall, in the exercise of their duty under this Act have the like powers, authorities and privileges as are given by law to a constable.”

Section 4 sets out the functions of the Commission. It is quite extensive. It makes no reference to any powers of arrest. The other sections read as follows:

“13. An investigation under this Act may be undertaken by the Commission on its own initiative.

14(1) The Commission shall, for the purpose of deciding the most appropriate method of investigation, make an assessment of –

- a. the seriousness of the case;
- b. the importance of the investigations;
- c. public interest considerations;
- d. the particular circumstances in which the incident occurred.

(2) The Commissioner may manage, supervise, direct and control an investigation carried out by Security Forces or the relevant public body in relation to an incident where in the opinion of the Commission, it is necessary to direct and oversee that investigation.

(3) Where the Commissioner takes action under subsection (2), it shall notify the responsible head or the responsible officer, as the case may be and direct that no action shall be taken until the Commission has completed its investigation.”

23. On an examination of all these sections, it is certainly not clear or unambiguous from a plain reading of the text that the law makers intended to vest powers of arrest in the Commissioner.

Mr. Small has argued that, since he is vested with investigative powers, this must certainly include arrest as a possible end to such a process. However, there are other bodies vested with investigative powers that do not have powers of arrest. I also bear in mind that the above Act came into existence on April 15, 2010. The preamble states that it is an Act to repeal the Police Public Complaints Act; to make provision for the establishment of a Commission of Parliament to be known as the Independent Commission of Investigation to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons.

24. The applicant is the first police officer to be arrested and brought before the court for prosecution under the auspices of the said Commission. The issue is of national importance and is clearly one of exceptional circumstances.

25. In addition, it is the opinion of this court that the alternative remedy of a civil trial is not the most suitable or effective and will certainly not resolve the issue 'fully and directly.' The issue involves the legality of the actions of a public officer. Mr. Small has submitted that Section 20 vests the Commissioner with powers of arrest and also that the officers of the Commission, in their private capacity are entitled to arrest on a warrant obtained from a Justice of the Peace by virtue of Section 33 of the Justices of the Peace Act.

Bearing in mind that the applicant was arrested on the basis of investigations carried out by the Commission, and not on first hand knowledge of the events by the Commissioner and his officers, these are all relevant issues in need of clarification and adjudication.

26. The applicant is seeking, *inter alia*, the following declarations:

1. "A declaration that the Act, on its true and correct interpretation, does not confer on the Commissioner, the power to arrest and/or charge anyone for any criminal offence.
2. A declaration that the Act, on its true and correct interpretation, does not confer on the Commissioner, the power to arrest and/or charge anyone for the criminal offence or murder.
3. A declaration that the Act, on its true and correct interpretation, does not confer on the Commissioner, the power to arrest and/or charge a member of the Jamaica Constabulary Force for the offence of murder, arising from circumstances that occur in the execution of his duties, unless the third defendant so rules.
4. A declaration that under the Police Services Regulations 1961 now in force under and pursuant to the Constitution of Jamaica, the applicant could not and/or cannot be lawfully charged for the offence of murder, arising from circumstances that occur in the execution of his duties, unless the third respondent so rules."

27. In relation to the declarations sought at numbers 3 and 4, Mr. Small has submitted that, based on the relevant sections of the Police Services Regulations, the Director of Public Prosecution has no monopoly on instituting prosecution and that the common-law safeguards the right to private prosecution.

The court was referred to several cases including **Gouriet v Union of Post Office Workers**, 1977 3 All ER 70. Lord Diplock made the following observation that the right to bring a private prosecution was a right:

“Which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and to bring criminals to justice and the creation in 1879 of the office of Director Public Prosecution (---), the need for prosecutions to be undertaken --- by private individuals has largely disappeared, but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of these authorities to prosecute offenders against the criminal law.”

28. Again, the issue of private prosecution is relevant and requires detailed examination and exploration in order to assist in the clarification of the process to be engaged by the Commissioner in carrying out his duties. The issue, however, does not detract from the compelling arguments advanced by counsel for the applicant of the need for clarity in relation to the powers of arrest of the Commissioner.

29. I used the word ‘compelling’ because the applicant has to satisfy this court 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 (per **Sharma v Bell - Antoine** (2007 1 WLR780, per Lord Bingham and Lord Walker at para 14).

30. In **R v Legal Aid Board ex parte Hughes** (1992) 24 HLR 698, a case from the Court of Appeal of England and Wales, Lord Donaldson MR stated thus at paragraph 16:

“---In such a case leave is or should now only be granted if prima facie there is already an arguable case for granting the relief claimed. This is not necessarily to be determined on a ‘quick perusal of the material,’ although any in-depth examination is

inappropriate. --- it is only when prima facie there is already no arguable case that leave should be refused ex parte ----. This is quite different from a substantive hearing in that the respondent need only summarise its answer sufficiently to enable the judge to decide there is or is not an arguable case."

31. I must express gratitude to counsel, Mr. Small for his in-depth submissions on the points raised. However, for the reasons mentioned earlier, I am persuaded that a *prima facie* arguable case has been made out by the applicant.

It is in the interest of all the stakeholders to be satisfied that the Commissioner proceeds on firm footing and not on shaky ground. There are interested parties waiting to add their voices to the deliberations. If it is not Mr. Reid, then who else would be more appropriate to make the application? If it is not now, then when?

I wish to make a final point in relation to the constitutional issues raised. Although I entertain some doubts about the suitability of these issues as a result of the doctrine of last resort, I will grant leave also in relation to these issues as the circumstances are inextricably linked to the declarations being sought. The Notice of Application filed on March 3, 2011 is granted in terms of paragraphs 3:1 to 3:7 and 3:11 to 3:13.

The first hearing of this matter is to take place on July 15, 2011 at 11:00 a.m.

Leave is conditional on the applicant making a claim for judicial review within 14 days of this Order.

Leave to appeal is granted to the 1st, 2nd, 4th and 5th respondents.

