[2016] JMSC CIV 198

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01886

IN THE MATTER OF AN APPLICATION BY EVERTON TABANNAH AND WORRELL LATCHMAN

V

THE INDEPENDENT COMMISSION OF INVESTIGATIONS

BETWEEN	**EVERTON TABANNAH**	**FIRST APPLICANT**
AND	**WORRELL LATCHMAN**	**SECOND APPLICANT**
AND	**THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**RESPONDENT**

IN CHAMBERS

Althea Grant and Wesley Watson for the applicants

Richard Small and Courtney Foster for the respondent

May 27, 30, 31, June 20, 2016

JUDICIAL REVIEW – APPLICATION FOR JUDICIAL REVIEW – INTERIM RELIEF

SYKES J

An injunction and an application for leave to apply for judicial review

[1] The Independent Commission of Investigations ('Indecom' or 'the Commission') has recommended that these two police officers, Deputy Superintendent Everton Tabannah and Constable Worrell Latchman, be charged with giving a false statement to mislead the Commission contrary to section 33 of the Independent Commission of Investigation Act and murder respectively.

[2] Both men have applied for an injunction restraining Indecom from charging them until the application for leave to apply for judicial review has been heard and decided.

[3] The applicants wish to secure leave to seek a number of declarations, an order of mandamus and injunctions restraining Indecom from charging them with the offences mentioned in the first paragraph.

[4] Many of the declarations sought appear repetitive and do not add much to the main declarations sought which are:

> *(a) A declaration order that the failure of [Indecom] to disclose relevant documents that [were] requested via the letter dated 23rd day of April 2016 was a procedural error and a breach of the principles of natural justice.*
>
> *(b) A declaration that the failure of [Indecom] to grant the request via the letter dated 23rd day of April 2016 for the disclosure of the documents will hamper the applicants' opportunity to proceed effectively with their application for leave to apply for judicial review.*
>
> *…*
>
> *(i) An order of mandamus to compel [Indecom] to disclose the documents as requested in the letter dated the 23rd day of April 2016, namely the statements and the scientific evidence which touch and concern the fatal shooting of Donald Chin.*

[5] This matter initially came before this court as an application for interim relief. Specifically it was an injunction. The applicants had initially filed an application for leave to apply for judicial and the date given by the registry was September 2016. This is contrary to the express provision of the Civil Procedure Rules. Those rules expressly state that an application for leave must be placed before a judge 'forthwith.' It was after this date was received that the applicants applied for an injunction. The date was set for the hearing of the injunction. At the hearing for the injunction, the parties agreed that the application for leave should be heard at the same time as the injunction application. These reasons for judgment are for both applications.

The evidence

[6] The court will summarise all the evidence in the case. The applicants and the Commission have filed affidavits. In respect of the affidavits filed by both applicants there is not much difference between and what is about to be stated applies to both affidavits. The court will identify, where necessary, any difference between the two.

[7] The applicants are members of the Jamaica Constabulary Force ('JCF'). Both are attached to the Mobile Reserve Branch which is a major operational arm of the JCF that is not attached to any specific geographical location and are deployed throughout the island where necessary in support of police officers in police divisions.

[8] On October 31, 2012, there was joint police/military operation in the parish of St James. The operation took both men to Rose Heights in the parish of St James. At the end of the operation a male was shot and killed. A formal notice of investigation was served on both men by Indecom. The notice required them to provide a witness statement in respect of the incident. After that notice, both men were required to submit to what they call a question and answer session which was alleged to be connected with the fatal shooting.

[9] The applicants say that a third notice was served requiring them to submit to another question and answer session. They say that at the second question and answer session they were treated as witnesses and not suspects.

[10] In April of 2016 they each received correspondence from the Commission informing them that the Commission had recommended that Constable Latchman be charged with murder and Deputy Superintendent Tabannah be charged with giving a false statement to mislead.

[11] The letter they each received told them that if they are not satisfied with the recommendation made they have the right to seek judicial review of the decision. Among the documents they received was a report which summarised the material in the possession of the Commission. By letter dated April 23, 2016 their attorney at law requested copies of

(i) a copy of the compact disc which recorded the question and answer of both men;

(ii) copies of the witness statements of the witnesses referred to and relied on in the report;

(iii) a copy of the post mortem report, ballistic certificate in respect of the swabbing and firearms, the crime scene report of Mr Peter Parkinson.

[12] The letter explicitly states that 'it is their intention to apply for judicial review in respect of the recommendations which was (sic) in the said report.'

[13] The Commission responded by letter dated April 29, 2016:

> *Reference is made to the matter at caption and to your letter of the 23rd instant advising of your retainer by Deputy Superintendent Everton Tabannah and Constable Worrell Latchman for the captioned purposes.*
>
> *As regards your request that you be furnished with certain documents from our Investigations File (sic); please be advised that having regard to* ***Section 28*** *of the Independent Commission of Investigations Act, we do not disclose statements received pursuant to our investigations unless to further an investigative purpose, or by way of disclosure after charges have been laid, as:*

[a] the concerned officers have not yet been charged; and

[b] we are concerned for the security of the witnesses on which the prosecution intends to rely.

We will only disclose after charges have been laid and the appropriate orders have been made.

[14] Thus it is this decision embodied in this letter that has sparked the application for leave to apply for judicial review.

[15] The Commission has responded through Mr Terrence Williams. He is the Commissioner of Indecom. He begins by outlining his responsibilities, the structure of the Indecom and the like. The Commissioner speaks to a protocol developed between Indecom and JCF regarding the arrest of members of the JCF.

[16] The Commission states that in some reports the whereabouts of witnesses are undisclosed where there are good reasons for doing so. Generally, this will be done to protect witnesses who are fearful or who 'might be at risk of intimidation or tampering.' The Commissioner states that in his experience as prosecuting counsel and as Commissioner he has become aware of 'many witnesses who often express anxiety in giving statements against police officers.' The cause of this anxiety is said to be 'the perception that police officers may discover their whereabouts and interfere with them.' Indecom therefore 'conducts its operations in an endeavour to calm this anxiety, foster public confidence, and diminish the opportunity for witness tampering.'

[17] The Commission explains that section 28 prevents him from disclosing evidence before charges are laid before against the police officer. Further he said that he did not permit disclosure of evidence collected in his investigations unless it is intended to further their function. The policy the Commission said 'is grounded in our respectful view that such disclosure would be unlawful and for the concerns raised in the previous paragraph.' The previous paragraphs spoke about the fear of witnesses. He continued that if he were to disclose the material the Commission's institutional reputation would be harmed and worsen the difficulties in getting witnesses to give statements.

[18] The affidavit continued by stating that the Commission recognised that once the matter was before the court there is a duty to disclose. The Commission noted the delay in getting ballistic certificates in this particular fatal shooting. The Commission stated that the Commissioner personally reviewed the case file. Next comes the sequence of events in this particular case.

[19] In this particular case it is said that the Commission received the applicants' letter. The Commission said that it made arrangements for the applicants to be placed before the Parish Court and caused copies of the evidence to be made for the purpose of disclosure. The Commission's investigator was given instructions on what order to request from the court.

[20] The Commissioner said that he received the applications and supporting affidavits. He repeated in the affidavit what the practice of Indecom was.

[21] The applicants did not appear in order to be charged at Freeport Police Station in St James. There was telephone contact between the applicants' counsel and the Commissioner. Out of the telephone conversations came clarity and both sides with the result that this application was filed. The Commission raised a number of objections to leave and imputed questionable motivations to the applicants. The court will now examine the objections and then determine whether the applicants have made their case to be granted leave.

Whether the applicants have engaged in conduct designed to frustrate the due process of law

[22] In the written and oral submissions, Mr Small insisted that the applicants' position is designed to frustrate the due process of law. The thought that the police officers may have an honest belief in the soundness of their position appears not to have been contemplated. The strong submission was that their purpose and objective was to delay the process. He submitted that the Commissioner is concerned about the delay already caused in this matter and that the two applicants have breached the protocol established between the Commissioner and the JCF. Mr Small strongly urged the

applicants to abide by the protocol and be charged, placed before the court and then they will receive disclosure. A court must always be cautious before attributing improper motives to litigants. Courts exist to resolve legal and factual disputes that the parties are unable to resolve themselves. It is their constitutional right to approach the court regardless of what their opponents may think. Police officers like all other citizens have the right to ask a court to determine a matter that is of concern to them.

[23] It does seem a bit odd that the Commissioner can inform the applicants that they have the right to apply for judicial review in respect of any decision made by the Commissioner and when the applicants do exactly that they are being castigated for delaying the process. The affidavit of the Commissioner had not provided one jot or tittle of evidence of these specific applicants deliberately doing anything to delay deliberately the process.

[24] Mr Small submitted that the applicants were 'quite happy' with the setting of a September 2016 date to hear the application for leave to apply for judicial review and yet were able to secure an early date for the hearing of the injunction after the Commissioner pointed out that an application for leave to apply for judicial review did not in and of itself operate as a stay of the power to arrest the applicants. That submission is a significant overstatement.

[25] It is an unfortunate fact that the Supreme Court did not initially handle the application for leave to apply for judicial review with the required degree of alacrity. The rule say that such an application must be placed before a judge forthwith. It is not easy to see what other form of words could be used in the CPR to communicate the speed with which these applications are to be dealt with. There is no evidence that the applicants requested a September 2016 date. There is absolutely no evidence that the applicants had any hand in the selection of the date whether for the hearing of the application for leave or the injunction. The usual course is that the applicant file the documents and it is the registry that assigns the date. There is no evidence to suggest that that process was not followed. Thus if the assignment of the date was solely and purely the decision of the registry then there is no evidential basis for suggesting that

the applicants were in any way responsible for that date. It is no accurate to say that they were happy with the date. They got a date presumably on the basis that that was the earliest possible date.

[26] True enough that it was the Commissioner's indication that it was not barred from arrested that prompted the application for an injunction to prevent the arrest but that is not a reason to say the applicants are guilty of deliberate delay.

[27] It is appropriate to set out the sequence of events from the date of the incident to now. The objective evidence is this:

(a) on October 11, 2012, a joint police/military operation took place in Rose Heights, Montego Bay, St James;

(b) Mr Donald Chin was killed during the operation;

(c) the Commission began an investigation;

(d) the investigation was completed in either 2015 or 2016;

(e) the Commission wrote by letter dated April 14, 2016 to Ms Alice Allen, Rose Heights, indicating its recommendations that Constable Latchman and another police officer be charged with the offence of murder and Deputy Superintendent Everton Tabannah be charged with giving a misleading statement;

(f) the applicants wrote to the Commissioner by letter dated April 23, 2016 requesting disclosure of certain documents;

(g) the Commissioner replied by letter dated April 29, 2016 indicating that he would not;

(h) the applicants drafted their applications for leave to apply for judicial review with supporting affidavits and filed them on May 9, 2016 which was set by the registry of the Supreme Court for September 2016;

(i) the date stamp shows that the notice of the application for leave was served on Indecom on May 9, 2016;

(j) communication between the applicants' lawyer and the Commissioner followed;

(k) notice of application for injunction filed and served on May 13, 2016.

[28] Between April 14, 2016 and May 13, 2016, the objective record shows that the applicants filed and served two applications with supporting affidavits. This is significant speed on their part. There is simply no factual basis for criticising the applicants for delay. The applicants reacted with significant haste to the events as they unfolded.

[29] Ironically, the explanation provided by the Commission itself for the over three year delay in delivering its recommendation is important. It attributed the delay to the failure of the forensic laboratory to provide the two certificates until January 2014 and March 2015 respectively. In addition the Commission said that the investigation was complex. In fact the Commission states explicitly that '[a]waiting these certificates and the complexity of the investigation contributed to the delay in the completion of the investigation' (see para 11 of affidavit of the Commissioner). The Commission has not even attempted to suggest that the applicants were complicit in or hindered the course of the investigation. There is no evidence that the applicants had any role in that delay.

[30] The time line shows that after the Commission received the second certificate in March 2015 it took a further thirteen months to communicate its recommendations. The applicants, through their counsel, wrote to the Commission by letter dated April 23, 2016, asking for disclosure. No delay there. The Commission responded by letter dated April 29, 2016. No delay there. The applicants file and serve their application for leave on May 9, 2016. No delay there. After the error on their understanding was pointed out by the Commissioner, they filed the injunction application on May 13, 2016. No delay there.

[31] Mr Small referred to the protocol (JCF/Indecom) and invited the court to examine it. The court has examined the protocol exhibited. It refers to another document that was

not exhibited. The parties are to be commended on arriving at a position for investigations carried out by Indecom. Respectfully, the protocol does not address what is to happen if a member of the JCF wishes to exercise is undoubted legal right to seek judicial review of any decision made by the Commissioner. In the absence of any reference to judicial review it means that the JCF and Indecom, assuming they addressed their minds to it, made the deliberate decision that no reference to judicial review would be included in the protocol. Since the protocol parties did not address the undoubted right of police officers to seek judicial review it cannot be right to criticize a citizen (yes, police officers are still citizens of Jamaica with full constitutional rights) for exercising his or her constitutional right to have a court decide on his civil rights and obligations.

[32] It is this court's conclusion that having regard to all the evidence presented there is no rational basis for suggesting that the applicants are guilty of taking steps to frustrate the due process of law unless the unstated premise is that the police officers should simply comply with the protocol regardless of their concerns about the legality of the process. The other point is this, since the Commissioner is under a duty to remind 'concerned officers and concerned officials, as the case may be, who is not satisfied with a decision of the Commissioner in relation to an investigation' of their 'right to seek judicial review of that decision' it does seem odd that the protocol is silent on this. The protocol is not an Act of Parliament and neither is it subsidiary legislation. It has no legal status. It is at best an understanding arrived at between the JCF and Indecom but it cannot and does not abrogate or restrict any legal right the applicants may have.

[33] The court ends this section of the reasons on a note of irony. The Commission took over three years to make its recommendation. It explains the delay by saying that the investigations were complex and that there were delays in getting the relevant certificates but somehow applicants who file applications in the court at the twenty fifth day and twenty ninth day (that is two applications filed and served on the Monday and Friday of the same week of May 8) after receiving notification of an adverse decision are being accused of deliberate delay. This is all the more remarkable when rule 56.6 (1) of the Civil Procedure Rules ('CPR') demands that applications for leave to apply for

judicial review be filed promptly and in any event within three months of the events giving rise to right to seek leave. The applicants have acted within the law which is superior to and takes precedence over the protocol. They have acted promptly by any definition within the meaning of the rule and there is no evidence to suggest that they are not doing what any aggrieved person would do: seek legal advice and act upon it if they wish.

Disclosure

[34] Mr Small submitted that there is no issue as to disclosure the Commission agreed to make full disclosure but only after both applicants are placed before the court. It is not quite so clear cut. The issue is not whether there should be disclosure when but when there should be disclosure.

[35] Mr Small cited the decisions of **R v Director of Public Prosecutions, Ex parte Lee** [1999] 2 All ER 737. The applicant has been arrested and charged with the offence of murder. He has been in custody for some time and although some disclosure had taken place he was dissatisfied with the level of disclosure. The Crown Prosecuting Service ('CPS') took the view that he was not entitled to more disclosure until after the committal proceedings had taken place. The CPS also took the view that he was not entitled to the disclosure that had taken place so far because no committal had taken place. Counsel for the applicant contended that once the defendant is taken into custody and charged the obligation to disclose arises and is continuous thereafter. Mr Lee sought to review the CPS's policy of refusing disclosure prior to committal proceedings. The relief sought was a stay of the committal proceedings, an order of certiorari to quash the decision and orders of mandamus requiring the prosecution service to consider making disclosure to the applicant and to make disclosure to the applicant. At the time this case arose, disclosure was governed by the Criminal Procedure and Investigations Act, 1996.

[36] It seemed to have been common ground that in relation to an indictable offence Part 1 of the 1996 Act did not apply until after the committal. Kennedy LJ reviewed the law of disclosure before the statute and under the statute. His Lordship noted that under

the statutory regime disclosure was less extensive in the early stage of the process and that more disclosure came at later stages. The learned Lord Justice noted that the statute did not address the period between arrest and committal. His Lordship stated a number of conclusions arising from his review. Paragraphs 5 and 6 are the more relevant ones. His Lordship said at page 749:

> *(5) The 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage. Examples canvassed before us were:*
>
> *"(a) Previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail;*
>
> *(b) Material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process:*
>
> *(c) Material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all:*
>
> *(d) Material which will enable the defendant and his legal advisors to make preparations for trial which may be significantly less effective if disclosure is delayed (eg names of eye witnesses who the prosecution do not intend to use)."*
>
> *(6) Clearly any disclosure by the prosecution prior to committal cannot normally exceed the primary disclosure which after committal would be required by s.3 of the 1996 Act (i.e. disclosure of material which in the prosecutor's opinion might undermine the case for the prosecution). However, to the extent that a defendant or his solicitor chooses to reveal what he would normally only disclose in his defence statement the prosecutor may in advance*

> *give the secondary disclosure which such a revelation would trigger, so whereas no difficulty would arise in relation to disclosing material of the type referred to in sub-para 5(a)(b) and (c) above, and I accept that such material should be disclosed, the disclosure of material of the type referred to in sub-para 5(d) would depend very much on what the defendant chose to reveal about his case.*

[37] Despite the statutory regime, Kennedy LJ accepted that in some instances it may be prudent to make disclosure before the defendant would be entitled to full disclosure. It is to be noted as well that no one in that case argued the obvious point that more disclosure would come after committal and therefore Mr Lee should wait. Neither was another technical point taken which might have been taken by the CPS namely that the application was late.

[38] In this case Mr Small submitted that the Commission was prohibited by section 28 from making disclosure before the applicants are arrested and charged. The court does not think that this submission is on sure ground. Firstly, the statute does not address completely address disclosure in the context of a person being arrested and charged. The language of the statute does not lead to the inevitable conclusion that disclosure of the type sought here in prohibited.

[39] Second, there is a problem with the logic of the submission. Mr Small submitted that after the applicants are placed before the court then they are entitled to full disclosure. In order to properly analyse Mr Small's submissions a number of provisions must be out or references.

[40] The court will set out section 17, ss 7 – 10:

> *(7) On the completion of the investigation, the investigator shall submit a final investigation report and proposed recommendations thereon to the Director of Complaints who shall submit it to the Commissions.*
>
> *(8) After receiving and considering a final investigation report submitted under subsection (7), the Commission shall make its own assessment of the investigation and form its own opinion as to the matter under investigation.*

(9) The Commission shall then prepare a report on the investigation including its recommendations arising therefrom (whether or not confirming any of the proposed recommendations) as are to be acted upon (hereinafter referred to as "recommendations for action").

(10) The Commission shall furnish a copy of the report of the Commission to

(a) the complainant;

(b) the concerned officer or the concerned official;

(c) …

...

(h) …

[41] The statute names the concerned officer as one of, at least, eight person who must be served with the report. The report must contain the Commission's own recommendations regardless of whether or not it is confirming any recommendation made by the investigator into the complaint.

[42] Section 23 states that where the Commission's report contains recommendations for action the relevant body or force shall comply and give effect to the recommendations in the manner and within the time specified. The head of the relevant force or body is to provide a progress report regarding effecting the recommendations. Failure to comply with the recommendations has serious reputational consequences for the force or body. The Commission is required to make a report of the non-compliance and that report is to be laid on the table of each of the House of Parliament. It is a name and shame consequence.

[43] Section 24 reads:

The Commission shall take such steps as are necessary to ensure that a complainant, concerned officer or concerned official, as the case may be, who is not satisfied with a decision of the

Commission in relation to an investigation is advised of the right to seek judicial review of that decision

[44] The word 'decision' is not defined in the statute. The word means 'a conclusion or resolution reached after consideration' (http://www.oxforddictionaries.com/definition/english/decision) (accessed June 6, 2016 at 1655hrs). The word decisions is wider that recommendations which is defined in the same dictionary as 'a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body' (http://www.oxforddictionaries.com/definition/english/recommendation (accessed June 6, 2016 at 1703hrs). Under section 23 the body or force required to carry out the recommendations do not seem to have a choice in the matter unless perhaps it applies to a court for some kind of relief and is successful.

[45] Section 28 reads:

> *(1) The Commissioner and every person concerned with the administration of this Act shall regard as secret and confidential all documents, information and things disclosed to them in the execution of any of the provisions of this Act, except that no disclosure*
>
> *(a) made by the Commissioner or any such person in proceedings for an offence under section 33 of this Act or under the Perjury Act by virtue of section 21 (3) of this Act; or*
>
> *(b) which the Commissioner or any such person thinks necessary to make in the discharge of their functions, and which would not prejudice the security, defence or international relations of Jamaica, shall be deemed inconsistent with any duty imposed by this section*
>
> *(2) Neither the Commissioner nor any of the person aforesaid shall be called upon to give evidence in respect of, or produce any such document, information or thing in any proceedings, other than proceedings mentioned in subsection (1) or section 25.*

[46] According to Mr Small the statute prohibits disclosure unless the exceptions apply. The exceptions are:

(a) proceeding for an offence under section 33 of the Act;

(b) proceeding for an offence under the Perjury Act because of section 21 (3) of the Act;

(c) where the Commissioner or any person administering the Act thinks it necessary to discharge their functions and such disclosure does not prejudice security, defence or international relations of Jamaica;

[47] The context then of section 28 is that after the investigation is completed, the investigator is to submit his final report with recommendations to the Director of Investigations. The Director forwards the report to the Commission. The Commission makes its own recommendations whether or not they are the same as the investigator. The Commission is under a statutory duty to provide a copy of the report to the affected person. Section 24 mandates that the Commission takes steps to notify the '*complainant, concerned officer or concerned official*' of their right to seek judicial review of any decision made by the Commission. As noted earlier, the word 'decision' is wide enough to cover 'recommendation.'

[48] One of the recommendations is that Deputy Superintendent Tabannah be charged with an offence under section 33 of the statute. Section 33 criminalises wilfully making false statements to mislead or attempting to mislead the Commission or an investigator or any person carrying out any function under the Act. Other conduct is criminalised as well which need not concern us. Thus it appears that Mr Small accepted that at least in respect of Deputy Superintendent Tabannah disclosure is permitted. The premise of this submission is that section 28 refers to proceeding under section 33 and until the applicant is placed before the court there is no proceeding and therefore under the law no disclosure is permitted.

[49] The recommendation is that Constable Latchman be charged with murder. This is not a section 33 offence and neither is it an offence under the Perjury Act. This leaves the third exception namely, where the Commissioner or any person administering the Act thinks it necessary to discharge their functions and the disclosure does not

prejudice security, defence or international relations in Jamaica. It is not immediately obvious that this exception applies to murder or indeed any other offence. A good argument could be made that the phraseology '*not prejudice the security, defence or international relations of Jamaica*' does not easily accommodate safety of witnesses.

[50] If section 28 does not obviously apply to disclosure in cases other than those mentioned then Mr Small's proposition that full disclosure applies after arrest and charge rests on the common law.

[51] The common law now has more to say about disclosure in judicial review proceedings. If the Commission is subject to judicial review, which it undoubtedly is, and the common law has improved access to documents in judicial review proceedings, why should the improved position not apply to the Commission particularly where the common law has developed safeguards regarding sensitive information? What is this improved position?

[52] The House of Lords in **Tweed v Parades Commission for Northern Ireland** [2007] 1 AC 650. This was a case involving the exercise of powers given to the Parades Commission by statute. Anyone familiar with the history of Northern Ireland cannot help but be aware that spring to autumn each in Northern Ireland can be called the marching season. Various groups plan parades and marches to either celebrate or commemorate some event that is important to them. Public disorder is not uncommon. To regulate the parades a statute was enacted that established a Parades Commission which had the responsibility of considering applications to hold these events. They had the power to grant or deny permission. If it granted permission it could impose conditions.

[53] The appellant on behalf of a lodge sought to hold a public procession. The Commission received reports from various persons including the police. Permission was granted but subject to conditions. This decision was challenged by way of judicial review. The challenge raised the issue of a disproportionate infringement of convention rights. The appellant sought disclosure of certain documents which were summarised. The trial judge granted the order. The Court of Appeal reversed the decision. The House of Lords reversed the Court of Appeal. Lord Bingham stated that while

disclosure in civil proceedings was a valuable means of eliciting the truth it could be costly, time-consuming, oppressive and unnecessary. Judicial review proceedings, for Lord Bingham, usually raised questions of law while the facts were usually common ground. In the normal case, disclosure would be unnecessary. However, there were some cases where disclosure was appropriate. On the question of providing summarized documents his Lordship stated at paragraph 4:

> *4 Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.*

[54] Lord Carswell summarised the old view at paragraph 29:

> *29 The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits: see R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 , 654, per Lord Scarman, and cf Lewis, Judicial Remedies in Public Law , 3rd ed (2004), para 9.086 and a valuable article by Oliver Sanders, "Disclosure of Documents in Claims for Judicial Review" [2006] JR 194 . In building upon this foundation the courts developed a restrictive rule, whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which would be to act*

> *as a challenge to the accuracy of the affidavit evidence: see the line of authority represented in England by R v Secretary of State for the Environment, Ex p Islington London Borough [1997] JR 121 and in Northern Ireland by In re McGuigan's Application [1994] NI 143 and In re Rooney's Application [1995] NI 398 .*

[55] Lord Carswell summarised the intellectual foundation for these antiquated views at paragraph 31:

> *29 The courts in both jurisdictions developed over a series of decisions an approach to disclosure in judicial review which is more narrowly confined than in actions commenced by writ. The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits: see R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 , 654, per Lord Scarman, and cf Lewis, Judicial Remedies in Public Law , 3rd ed (2004), para 9.086 and a valuable article by Oliver Sanders, "Disclosure of Documents in Claims for Judicial Review" [2006] JR 194 . In building upon this foundation the courts developed a restrictive rule, whereby they held that unless there is some prima facie case for suggesting that the evidence relied upon by the deciding authority is in some respects incorrect or inadequate it is improper to allow disclosure of documents, the only purpose of which would be to act as a challenge to the accuracy of the affidavit evidence: see the line of authority represented in England by R v Secretary of State for the Environment, Ex p Islington London Borough [1997] JR 121 and in Northern Ireland by In re McGuigan's Application [1994] NI 143 and In re Rooney's Application [1995] NI 398 .*

[56] At paragraph 32 Lord Carswell indicated the new view:

> *I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving*

issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.

[57] Lord Brown's contribution is found at paragraphs 56 and 57:

. In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time consuming, to flood the court with needless paper. I share, however, Lord Carswell's (and, indeed, the Law Commission's) view that the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it, "a more flexible and less prescriptive principle" should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case.

57 On this approach the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker (a fortiori the main documents underlying decisions challenged on the ground that they violate an unqualified Convention right, for example under article 3). That said, such occasions are likely to remain infrequent: respondent authorities under existing practices routinely exhibit such documents to their affidavits (and, indeed, should be readier to do so whenever proportionality is in issue). Take this very case. But for the important matter of confidentiality arising in respect of these particular documents, it seems to me almost inevitable that they would have been exhibited, not least because that would have been simpler than summarising them. Without his having seen them, however, one can readily understand the appellant's concern that their effect may have been unwittingly distorted.

[58] The change then is that court should now be more readily disposed to order disclosure than before. This does not mean that it should be ordered as a matter of course because in many instances it would not be necessary since the facts are not usually in dispute and the primary issue is usually the legal consequence of the facts. It is said that disclosure can be expensive and time consuming. The issue of time and cost does not arise in this case because Mr Small has indicated that the Commission has already copied the documents and won't hand them over until the applicants are before the court.

[59] Lord Carswell indicated this safeguard regarding confidential information at paragraph 41:

> *The complete text of the officers' views may be of some importance, for the reasons which I have given, but much of it appears to have been based on information and opinions obtained on the basis of assurances of confidentiality. I think that the judge considering disclosure should first receive and inspect the full text of all of the documents in items 2 to 6, so that he may decide whether that would give sufficient extra assistance to the appellant's case on proportionality, over and above the summary already furnished, to justify its disclosure in the interests of fair disposal of the case. If he does so decide, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If he decides the contrary in the case of any of the documents, that document will not be disclosed to the appellant. Only after this has been settled should the question of public interest immunity receive any necessary consideration.*

[60] Lord Brown on the same point held at paragraph 58:

> *58 I too agree, therefore, that the disclosure application here should not be dismissed. I would treat all five documents in the same way: the judge should receive from the respondent and inspect the full text of the disputed documents (consistently with the practice laid down by the House of Lords in Science Research Council v Nassé [1980] AC 1028); if he concludes that realistically their disclosure could not affect the outcome of the proportionality challenge he will*

> *dismiss the appellant's application for inspection; if, however, he reaches the contrary conclusion he will need to consider (with counsel's assistance) the question of redaction; only then may he still need to determine the respondent's public interest immunity claim.*

[61] All this the court to say that recommendations made by the Commission regardless of whether they lead to criminal charges are susceptible to judicial review. In **OUR v Contractor General** [2016] JMSC Civ 27, Fraser J reviewed cases from England and Wales and demonstrated that recommendations, in certain circumstances, can properly the subject of judicial review (**[57] – [63]**). Those circumstances include an adverse recommendation directed at someone or even if not directed at someone it would have an adverse impact on the person.

[62] The Commission stated that its policy is not disclose such evidence before an officer is charged because it would be unlawful and amount to a breach of confidentiality that would undermine the effectiveness of the Commission's work. The court does not accept this position as legally sound because decisions of the Commission are subject to judicial review and the law now is that in appropriate cases disclosure of material can be ordered and where necessary the issue of redaction can be addressed. The judge would get the document first and decide whether it adds anything to the applicant's case. This solution has its own problems and far from perfect but it is certainly a significant advance on the antiquated position that hitherto existed. The law has therefore adequately addressed the Commission's concerns about undermining its institutional reputation. In other words, the law is moving towards greater openness and accountability and there is no good reason why Jamaica should not move in that direction. The Commission has awesome powers.

[63] By virtue of statute and the common law, the Commission has a complete set of powers in itself. Such concentration of power in one institution was hitherto unknown in Jamaica. The Commission is (a) a receiver of complaints; (b) investigator of crimes; (c) able to decide who is alleged to have committed offences; (d) able to decide which persons to charge and for what offences; (e) able to deprive persons of their liberty since by judicial decision it can arrest persons; (f) able to secure search warrants; (g)

summon witnesses; (h) examine witnesses on oath and those witnesses are subject to prosecution for perjury; (f) conduct its own prosecution and (g) make recommendation which must be carried out by the body to whom the recommendations are directed. All this without any independent review at any stage before the appearance of the person in court unless there is judicial review. The potential for abuse should be obvious. We need not remind ourselves about that rightly famous statement about the potential of power and absolute power. This means that this court takes the view that applications for leave to apply for judicial review should be the most anxious scrutiny and thought before they are dismissed if the decision is taken to refuse leave.

[64] The court does not accept that disclosure before arrest and charge is necessarily a breach of the statute.

[65] It is important to note that in **Ex parte Lee** the court did not take the position that the defendant should wait until the committal process was completed. Leave was in fact granted to make the application and what came before the court was the actual hearing of the application itself. At the end of the hearing the prosecution in fact made the disclosure wanted and therefore it became unnecessary to make any order.

[66] The phraseology of paragraph 5 (b) of Kennedy LJ's conclusions needs to be emphasised. It actually states that advanced disclosure may be made 'to enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process.' The court did not understand Mr Small to be saying that this proposition ought not to be followed or inconsistent with subsequent authority. It is also important to note that Kennedy LJ did not remotely suggest that the application was an abuse of process or a delaying tactic. In that case, Mr Lee was already arrested, charged and placed before the courts. In the instant case, neither police officer has been arrested or charged but recommendations adverse to them have already been made and the Commission's decisions are in fact subject to judicial review.

[67] Mr Small submitted that the applicants and that the Parish Judge rule on the issues raised in this application. Learned counsel cited a number of cases in support of his proposition. The first is **Scantlebury and others v Attorney General of Barbados**

(2009) 76 WIR 86. The case was one in which the appellants were arrested and placed before the court for committal proceedings to take place with a view to their extradition to the United States. The proceedings actually commenced with evidence being led. It was after the evidence commenced and before conclusion that the appellants raised a number of issues. Judicial review proceedings commenced to challenge a number of rulings made by the magistrate. On appeal, it was held that appellants should have waited until the conclusion of the committal proceedings before raising their challenge. The court also held that section 20 of the Extradition Act provided an efficacious remedy. Miss Grant says that the substantive point of distinction between the instant case and **Scantlebury** is that the applicants have not yet been arrested, charged and no hearing as begun before any court other than these applications.

[68] The Commission's next case was **R v Secretary of State for the Home Department ex parte Norgren** [2000] QB 817. This was another extradition case. There, the applicant's arrest and extradition was sought by the United States of America under a provisional warrant. He was arrested and placed on remand. He was then released on bail. His solicitors made representations to the Home Secretary who indicated that the authority to proceed would not be issued and the applicant was discharged. The solicitors sought reassurances from the Home Secretary that should another request be made they would like to make further submissions. The Home Secretary did not respond. A second request was made. The Home Secretary issued his authority to proceed and a warrant was issued for his arrest. At the time this was done the applicant was outside of the country. In the meantime the applicant has been arrested in Switzerland pursuant to a request for extradition from the United States. The applicant challenged the authority to proceed. Judicial review was granted.

[69] The Home Secretary took a preliminary point that applicant's challenge was academic because (a) the appellant was outside the country; (b) no sign that he will return; and (c) the warrant had not been executed and there was no realistic prospect of it being executed. Therefore the application served no useful purpose. The court did not agree because (a) the United States had not withdrawn its request and (b) it was of

importance to the applicant to know whether he could return to the United Kingdom without the risk of arrest.

[70] On the point of procedural unfairness the court held that the statutory scheme did not make provision for representation to the Home Secretary before an order to proceed was issued. Given that it was not normal to inform persons, for obvious reasons, of their pending arrest there was no procedural unfairness for the Home Secretary to issue his authority or order to proceed without informing the appellant.

[71] It was submitted that the Home Secretary's order was unlawful because the crime alleged was not an extradition crime and it was for the Home Secretary and not the magistrate to decide whether the conduct was an extradition crime.

[72] The court examined, in detail, the provisions of the Extradition Act. It examined what the Home Secretary needed to be satisfied about and what the magistrate's duty was. It held that the Home Secretary need not form a correct legal judgment before issuing the order to proceed. The court also pointed out that the magistrate would need to consider the evidence actually adduced and ask himself 'if the applicant had done in England and Wales and not (as alleged) in the United States what he is shown to have done, would that conduct constitute the crime specified in the order to proceed and be punishable here by imprisonment for a year or more and would it constitute an offence for which the magistrate would commit the applicant for trial?' In light of the fact that the matter had not yet been heard by the magistrate the court refrained from taking any view of the matter before the magistrate had ruled and made a decision.

[73] What the case shows is that the precondition for the Home Secretary to issue the order to proceed in fact existed and thus the legal standard was met. That being the case the next stage was a hearing before the magistrate. The hearing before the magistrate was not to determine whether the Home Secretary had properly exercised his statutory power to issue the order to proceed but to determine whether the legal standard was met for extradition. That process had not yet started and that was the reason for the court refraining from deciding whether the standard would in fact be met. This was the reason for the court saying '[t]he statutory scheme envisages that a

challenge of this kind should follow and not precede a decision by the magistrate, and it would in our view distort that scheme if we were now to rule.' It is clear that the **Ex parte Norgren** case raised different factual and legal issues from the instant case.

[74] The next case is that of **Government of the United States of America v Bowe** (1989) 37 WIR 9. This was another extradition case where on October 4, 1985 the Mr Bowe was in fact arrested on a warrant issued under an order to proceed issued by the relevant minister. On October 28, 2005, Mr Bowe was refused leave by the Supreme Court seeking orders of certiorari and prohibition to quash the arrest warrant and prohibit the commencement of the extradition proceedings. On November 25, 1985, the magistrate held that the conspiracy charge on which Mr Bowe's extradition was sought was not an extradition crime. The United States Government sought to quash this finding and Mr Bowe moved to quash the warrant that was issued on October 4, 1985. On February 5, 1986, the Supreme Court quashed the proceedings before the magistrate.

[75] Another round of proceedings began under an order purported signed on March 4, 1986. Mr Bowe was arrested on the same day the order was signed. On June 16, 1986, in respect of these second proceedings, the magistrate ruled that he had a case to answer. Mr Bowe applied for certiorari and prohibition. The Supreme Court said that his application was premature since the proceedings before the magistrate was not completed. In February 1987 the Court of Appeal reversed the Supreme Court and remitted the matter for hearing. On March 13, 1987, the Supreme Court quashed the magistrate's court proceedings. When the Court of Appeal reversed the Supreme Court in respect of these second proceedings it ordered costs against the United States Government which was appealed to the Privy Council.

[76] A third round of proceedings began in 1987. In respect of the first two rounds the continuous sticking point was that the order was signed by the Minister and not by Governor General. In these third round proceedings, Mr Bowe was arrested. He sought certiorari and prohibition to quash the warrant and the proceedings before the magistrate.

[77] After resolving the legal issue Lord Lowry said at page 28:

> *The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their Lordships' decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that, generally speaking, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied.*

[78] Lord Lowry is cautioning about interrupting the proceedings that were already within the province of the magistrate. That is not the case here. The applicants have not yet been placed before the court.

[79] The final case cited by Mr Small is that of **Coke v The Minister of Justice** Claim No 2010HCV02529 (unreported) (delivered June 9, 2010). That was another case of extradition in which the applicant sought leave to review the decision of the Minister of Justice to issue her authority proceed. McCalla CJ refused leave on the basis that he had alternative means of redress and he ought to avail himself of those.

[80] It may well be that the key to understanding the outcome in the extradition cases is the special nature of extraction. In **Scantlebury** Simmons CJ stated at paragraph 1:

> *These appeals raise issues specific to the law of extradition and highlight the special character of extradition proceedings. Although such proceedings are grounded in the criminal law, they are very much sui generis.*

[81] The learned Chief Justice stated at paragraph 72 - 74:

> ***[72]*** *Mr Gollop's argument appears to us to be misconceived. Extradition proceedings, as we said in the introductory paragraph of this judgment, are sui generis. It is critically important to appreciate that a distinction must be drawn between the character of a court*

hearing proceedings for extradition and the character and functions of a court conducting a preliminary inquiry into an indictable offence. In the vast majority of extradition cases the court considers the evidence on paper. The attention of the court hearing the committal proceedings is focused on the contents of the committal bundle. In Kindler v Canada (Minister of Justice) [1993] 4 LRC 85 at 124 McLachlin J (as she then was) said:

'While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process in purpose and procedure and most importantly, in the factors which render it fair. Extradition procedure, unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.' (Our emphasis.)

[73] *Extradition law proceeds upon the assumption that the requesting state (in this case the USA) is acting in good faith and the fugitive will receive a fair trial in the courts of the requesting state. Committal under the Extradition Act is not part of the trial process of our courts.*

[74] *The phrase 'as nearly as may be' in s 13(3) of the Act was construed by the English Court of Appeal in R v Govr of Pentonville Prison, ex p Lee [1993] 3 All ER 504. Ognall J, with whom Watkins LJ agreed, said (at 508) in relation to s 9(2) of the English Extradition Act 1989 where the phrase appears:*

'The words must be consistent with the terms and purpose of the extradition legislation. Proper regard must also be had to the limited function of the magistrate in extradition proceedings. That function is defined in s 9(8) (a) of the [1989] Act. That requires the magistrate to be satisfied "that the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court".' (Our emphasis.)

[82] These paragraphs from the Chief Justice arose because counsel the applicant had submitted that the applicant was deprived of his right to cross examination under section 18 of the Barbados Constitution. The Chief Justice was demonstrating why that right did not usually apply to extradition proceedings.

[83] It would appear that the case relied on by Mr Small, all extradition cases, turn on the special nature of those proceedings. This means that some caution is necessary before talking the dicta in those cases an applying in another sphere which has its own peculiarities. Also, at least in Jamaica, after the committal process ends in extradition matters, the fugitive is able to raise in habeas corpus application at the Supreme Court all the matters that he alleges affects the validity of the process. He can have the court examine the entire process from the issuing of the provisional warrant to the authority to proceeds, to the nature and quality of the evidence and whether the offence is properly an extradition offence. In those circumstances, it is not surprising that judicial review proceedings are not encouraged in extradition matters because the applicant can in real way and substantive way challenge the entire process. He can, in the Court of Appeal, raise constitutional matters even though they were not raised in any of the courts below.

[84] The decision of McCalla CJ in **Coke** is perfectly consistent with what has just been said and so her Ladyship's decision was not surprising The extract relied by Mr Small where the learned Chief Justice that the applicant in that case should submit himself to the extradition must be understood against the sure jurisprudence that the matter that applicant wanted addressed, namely, whether the Minister of Justice should have issued the authority to proceed. The applicant also raised questions about whether the treaty provisions were breached. All those matter could be fully addressed in the courts.

[85] The court is at a cross roads. Does the court go in the direction of excluding from consideration that the Commission is a public body with power to make recommendations and focus solely on its police-like functions and go the route of discouraging judicial review in criminal proceedings, or should the court emphasise that it is a public body which has made recommendations and has a policy of non-disclosure before arrest and charge and permit a challenge to the policy and possibly the recommendations? The answer to this will come after referring to the submissions on alternative remedies.

Alternative remedies

[86] The question of alternative remedies has a context. There has been reference to a protocol. The protocol exhibited by the Commission was considered to be the one relevant to this case. The court observes that there is a major heading and then subheadings which are set out:

> ***PROTOCOL FOR COOPERATION WITH THE INDEPENDENT COMMISSION OF INVESTIGATIONS***
>
> *In furtherance of the instructions previously promulgated in Force Orders No 3464 Sub No 1 dated 2013 – 10- 24 in regarding (sic) the ten point protocol to guide investigations by INDECOM specific protocols are hereby published with additional instructions for the guidance of all members. These protocols will guide: -*
>
> - ***the arrest/prosecution of members***
> - ***the testing of firearms and ammunition exhibits and***
> - ***the call out of INDECOM to incident scenes***

[87] The protocol then goes on to detail the procedures under each of these sub-headings.

[88] It has been said that when applying for judicial review the applicant needs to not only assert but demonstrate that there is no other remedy. This court and quite others have gone along with this conventional understanding but is this really so under the Jamaican rule relating to applications for leave to apply for judicial review?

[89] Rule 56.3 governs the application for leave. Rule 56.3 (1) says that the person seeking judicial review must apply for leave. The application may be made without notice (rule 56.3 (2)). Rule 56.3 (3) (d) states:

> *The application must state –*
>
> *(d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.*

[90] This provision must rest on the assumption that there may be other means of redress available and the applicant needs to justify why judicial review is more appropriate. If this is correct then it is no longer correct to say that judicial review can only be pursued if no alternative form of redress exists.

[91] There is another development that has occurred which was not addressed during the submissions. David Fraser J has decided that applications for declarations do not need leave (**OUR v Contractor General**; **Audrey Bernard Kilbourne v The Board of Management of Maldon Primary School** [2015] JMSC Civ 170). In the present case, the applicants have applied for a number of declarations and an order of mandamus. If his Lordship is correct then this court is really only considering whether leave should be given for mandamus since by virtue of his Lordship's reasoning leave is not required for declarations. The Court of Appeal has not yet had the opportunity to pronounce on this position.

[92] This court has examined Fraser J's reasoning in both cases it is with regret that this court disagrees. What we now call judicial review has a very long history which must be briefly told. Well before what we would call today central government, various bodies were given the authority to carry out all sorts of public functions. In order to find out whether these bodies were doing what they were supposed to do, the sovereign developed three writs – certiorari, mandamus and prohibition – which became known as prerogative writs since they were issued by the sovereign. Certiorari was used to quash decisions that the sovereign concluded were wrongfully made. Mandamus was used to compel the body to carry out their mandate and prohibition was to prevent the body from doing something wrongful before it did the wrong. Over time the sovereign's loyal subjects were able to complain about some public body and if a sufficient case was made out, the sovereign would 'summon' the record for examination to see if the complaint was made out. If it was then the appropriate order would issue. As time went on these prerogative orders were granted almost exclusively at the behest of private citizens. This explains the title of judicial review applications in the England (but not in Jamaica). In England the title is Regina/Rex on the application of [claimant] v [name of

public body] At least this is the title in recent times. Before that it was Regina/Rex v [public body] ex parte [name of applicant].

[93] There have been procedural changes in the way the remedies (formerly called prerogative orders and now called administrative orders) are secured but that did not change the fact that these orders were available only against public bodies. The orders provided remedies in circumstances where the body did not necessarily cause harm sufficient to say that damage (in the private law sense) had been caused. Since in legal theory in old time, the sovereign was the ultimate source of power on earth and the sovereign's authority came from God, it followed that no one could compel the sovereign to grant any of the prerogative orders and on this foundation rested the idea that all these orders were discretionary. After all, if the sovereign decided not to grant the remedy which human being on earth could compel him or her to act otherwise? The idea that orders were discretionary has continued to today even though the entire process takes place in court without any referral to the sovereign.

[94] Declarations began life as private law remedy but eventually came to be used in judicial review adjudications. It was a case of the declaration being adopted and adapted for judicial review rather than the other way round. It is this court's view that the remedies sought against public bodies and it is not being pursued as a claim in private law and it is not framed as a constitutional action must be by way of judicial review.

[95] The difference in wording between the English CPR and the Jamaican CPR is not sufficient to say that in Jamaica where a declaration is sought against a public body and no private law remedy is being pursued then it means that in Jamaica leave is not required in the same way that leave is required for administrative orders. This court is of the view that once a declaration is sought as a public law remedy then the claimant must obtain leave. The leave requirement is to weed out weak cases and to prevent harassment of public bodies. These bodies make hundreds of decisions on a daily basis. Many persons rely on these decisions in daily life. Public bodies must be able to rely on absence of a challenge within the stipulated time as a sign that all is well. This is the reasoning behind requiring applicants to seek leave promptly.

[96] For these reasons the court although initially inclined to the view that leave was not required for a declaration has taken the opposite position. The applicants in this case would therefore need leave even to secure declarations.

[97] Mr Small took the position that due process of law is that persons against whom allegations are made should face those charges in the courts set up by the state. The courts are there to ensure a fair trial. At paragraphs 40 - 58 of the Commission's written submissions it is stated that there is no claim that applicants can raise in judicial review proceedings that cannot be raised before the Parish Judge or whomever tries a matter brought before them. It was also submitted that there is no issue which can be raised in judicial review proceedings that cannot be raised before the Circuit Court if the matter is committed to trial at the Circuit Court. This view presumably rests on the relevant paragraphs in the **Sharma** case where reference was made to the **Regina v Horseferry Road Magistrates' Court Ex parte Bennett** [1994] 1 AC 42 case. In the **Ex parte Bennett** case their Lordships accepted that inferior courts had inherent power to control abuse of process but that power was severely restricted.

[98] It is this court's view that position expressed in **Sharma** must be carefully read in its context. To understand the context more has to be said about the **Ex parte Bennett** case. The issue arose in **Ex parte Bennett** because the allegation was that the defendant had been kidnapped and taken to England. Although there was the possibility of special arrangements for extradition between South African and England no such proceedings were brought. Before the magistrate he wanted to challenge the court's jurisdiction and sought an adjournment. It was refused and he was committed. He sought judicial review which was also refused on the ground that English courts could not enquire into how a person was brought before the court. That position was reversed by the House of Lords. The court also held that in the event that a question arose of deliberate abuse of the extradition process then the magistrate should adjourn the proceedings so that the Divisional Court could hear the matter. The matter was remitted to the Divisional Court for further consideration. In the course of judgment Lord Griffith stated at page 64:

> *I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.*

[99] From this dictum, it is clear that the Parish Judge could only consider whether the Commission's decision made or would make the trial unfair. Such a judge could not consider the any wider application of the abuse of process doctrine. That consideration could only be given by the Supreme Court.

[100] Sharma's case was one in which committal proceedings were to take place before any trial could occur. This means that the trial was to be in the High Court of Trinidad and Tobago and as a superior court of record could consider wider questions of abuse process as indicated in **Ex parte Bennett**. It could be said that in this case, Constable Latchman is to be tried for murder and that can only be before the Supreme Court and as a superior court of record can address the wider issue of abuse of process. Deputy Superintendent Tabannah is to be tried for the Parish Court and thus following on from **Ex parte Bennet** the Parish Judge is restricted to question of the fairness of the trial.

[101] On the other hand it the Commission is a statutory body, exercising statutory powers. For the Commission to make a recommendation that a person be charged

necessarily presupposes that there is evidence to support the recommendation. Judicial review is available in circumstances where the decision maker is alleged to have made a decision without the necessary evidential foundation. In summary it states that where a necessary condition must exist before a power can be exercised then an affected person may seek to challenge the exercise of the power on the basis that precedent condition did not exist and therefore the decision was irrational in the administrative law sense and not in the sense of the decision maker never thought about what he was doing.

[102] That this ground of challenge exists is not in doubt. Lord Wilberforce in ***Secretary of State for Education and Science v Tameside*** [1977] A.C. 1014 at page 1047 said:

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

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

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

[104] How these points be successfully raised before a Parish Judge or a Circuit Court judge is not entirely clear.

[105] The point being raised by the applicants is that they wish to have full disclosure of the material the Commission relied on in making its recommendation. Now if the applicants are charged and placed before the court at what possible point could they make before the Parish Judge to reverse what has already happened? The harm would have been done. They would be before the court on the footing that a trial is to commence in short order. The only other possible remedy would be an abuse of process remedy. While such a remedy is said to be possible in inferior courts it is said to be 'vert strictly confined.' In order to succeed on such an application that applicant would need to show that a fair trial was no longer possible or unfair manipulation of the court process (**R v Telford Justices** [1991] 2 QB 78).

[106] The court is concerned that Mr Small's submission if accepted will result in the permanent denial of the possibility of challenging the Commission under this head of challenge since the Commission may always make the argument that the matter can be resolved before the Parish Judge or any tribunal.

[107] One of the Commission's responses to the disclosure request was that it was not its policy to disclose material before the person is placed before the court. Before continuing the court must refer to **British Oxygen Co Ltd v Minister of Technology** [1971] AC 610, Lord Reid speaking for a unanimous House of Lords said at page 625:

> *The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" (to adapt from Bankes L.J. on p. 183). I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing. In the present case the respondent's officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so. The*

> *respondent might at any time change his mind and therefore I think that the appellants are entitled to have a decision whether these cylinders are eligible for grant.*

[108] The principle outlined here is that it is appropriate for the Commission to have a policy but that policy cannot mean that in all cases it is applied without considering the facts and circumstances of the particular case. The submission from Miss Grant is that in this particular case that policy cannot apply with the same rigidity because the main reasons, (a) section 28 and (b) safety of witnesses, do not apply at all or with the same strictness because the content of the material already provided effectively undermines those positions. In the context of this case, that submission is quite correct. This is all the more reason for saying that even if there is a policy each case needs to be assessed on its individual circumstance in order to see whether the particular case justifies a departure from the policy. The affidavit from the Commission does not address the individual merits of this case but simply says that it made the decision not to disclose based on its policy.

[109] Mr Small submitted that the Commission's decision was sound in law based on section 28 but as already noted since the Commission has in fact given some disclosure that would enable identification of the potential witnesses then it must mean that Commission believes that the existing legal framework, in spite of section 28, permits at least the level of disclosure given in this case so far at this point in the proceedings. The challenged raised by the applicants is whether this is the only level of disclosure permitted by the law at this stage in the proceedings. That respectfully must be an ultimate question for the court and not the Commission. If the Commission's view of the law was not open to challenge then the practical effect would be that the Commission would be the entity that decides its own boundaries. This is clearly undesirable.

[110] The reason for the undesirability is this: a statutory functionary may have the power to make a decision but in the course of making the decision the functionary, in perfect good faith misconstrues the provisions under which he is acting. He may have given great weight to some factor that he ought not to. The Commission is not infallible. Neither are the courts but the difference between the Commission and the courts is that

the courts are the institution set up by law to decide final questions of law. Any other conclusion would result in a de facto ouster clause by giving the Commission final say on the boundaries of its own power.

[111] As Lord Millett held in **Runa Begum v Tower Hamlets LCB** [2003] 2 AC 430, 462, 663 **[99]**:

> *A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court.*

[112] At the risk of repetition the Commission's approach to this matter has the potential to forestall this remedy identified by Lord Millett.

Whether the applicants have met the test for judicial review

[113] The test for leave to apply for judicial review is that stated by Privy Council in **Sharma v Brown-Antione** (2006) 69 WIR 379. The test is well known. It is found at paragraph 14 (4) in the joint judgment of Lord Bingham and Lord Walker:

> *(4) 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; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR*

> *623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 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. 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 Director of Public Prosecutions [2003] 4 LRC 712 at 733.*

[114] This is the test. This court has given very careful consideration to the applicants' case, the evidence in support and the affidavit evidence of the Commission. The court has also examined all the authorities cited by the parties and the court has also examined another case not cited by the parties.

[115] The court notes the very restricted relief made by the applicants at this stage and their ultimate purpose. The applicants have not asserted that the Commission did not take relevant matters into account, excluded relevant matters or did not have the evidence for its recommendation to charge the police officers. They have not alleged any flaw in the decision making process. In their affidavits they have quite frankly said unless there is disclosure 'there is no way to confirm or deny if there was a breach of process or procedure on the part of the Independent Commission of Investigations which may render the recommendations contained in the report invalid' (paragraph 53

of affidavit of Superintendent Everton Tabannah and paragraph 47 of the affidavit of Constable Worrell Latchman).

[116] The applicants say that they wish to have the documents 'so that they could be placed in a position to ascertain if an abuse of the power, process, and/or procedure has occurred' (para 10 of written submissions). According to the applicants 'because the documents and reports were referred to and relied upon in The (sic) Commissioner's Report (sic) they formed the opinion that it was **fair and just** that the documents be served on them' (bold and underlining in original) (para 10 of written submissions). This way of putting the argument raises a direct challenge to the Commission's policy that it never makes disclosure until the matter is before the court.

[117] In this case for example, the Commission states that one of the reasons for non-disclosure prior to the persons being charged and placed before the court is fear of witness intimidation and tampering. While that may be true in a general sense, the Commissioner did not assert that that risk was present in this specific case and if it were it begs the question of why did the Commission give sufficient evidence that would enable identification of the witnesses? Even if he had made that assertion that would necessarily be the end of the matter since there are now heads of judicial that would enable a court to determine whether the fear identified in fact existed.

[118] It has been noted earlier that nothing is wrong with having a policy but to use the policy as a basis for the decision not to make disclosure without any indication that the facts and circumstances of the case may well suggest another outcome is undesirable. It may well be a manifestation of a closed ear approach to the exercise of the statutory authority. If this is what the Commission did and what the applicants are alleging that it is this court's view that the applicants have indeed crossed the threshold for judicial review. The fact that the applicants wish to have the documents in order to determine whether they can make any further applications is beside the point. What they are challenging is whether they are entitled to any further disclosure at this stage. A recommendation has been made that has already had an adverse impact on them.

[119] In **Ex parte Lee** the Divisional Court could easily have said to Mr Lee that he is to await the completion of the committal proceedings and he will get further disclosure. Happily, the court saw the implication of the position taken by the CPS and permitted the application to go forward in order that the policy position of the CPS could be reviewed. As noted earlier, no order was made because the CPS re-examined its position and made the disclosure. The issue raised by the applicants is of importance and ought not to be seen as a deliberate attempt to delay the prosecution. Mr Lee was not seen in that light.

[120] We must not lose sight of the fact that the Commission's powers are exercisable only in relation to alleged improperly behaving police officers. The Commission has power to investigate a wide range of public bodies and similar issues may arise. It is important to have the question raised by the applicants answered.

[121] The applicants have satisfied the test. There are no discretionary bars. There was no delay in making the application.

Disposition

[122] The application for leave is granted. The court also orders by way of an injunction that the Commission, its servants, employees, agents or anyone acting or purporting to act on its behalf is restrained from taking any steps or further steps to give effect to or implement the recommendation to have Everton Tabannah and Worrell Latchman charged with any offence whatsoever including but not limited to the offences identified in the recommendation until the judicial review proceedings are heard and determined in the Supreme Court. Costs of this application to the applicants.