[2012] JMSC Civ 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012HCV00994

BETWEEN	**DANVILLE WALKER**	**APPLICANT**
A N D	**THE CONTRACTOR-GENERAL OF JAMAICA**	**RESPONDENT**

Dr. Lloyd Barnett and Keith Bishop instructed by Bishop & Partners for the Claimant

Mrs. Jacqueline Samuels-Brown, Q.C. instructed by Firmlaw for The Contractor-General

February 20, March 9 and 26, 2012

Judicial Review – Reluctance of court to review decision to prosecute even greater when challenge to decision indirect – Alternative remedy as a bar to grant of leave – Discretionary nature of judicial review – Desirability to avoid multiplicity of proceedings – Court will not act in vain

FRASER J

BACKGROUND

[1] In response to concerns that the scrap metal trade in Jamaica was encouraging the theft of property, the Minister of Industry, Investment and Commerce acting under section 8 of the Trade Act made "The Trade (Scrap Metal) (Prohibition of Dealing) Order" dated July 27, 2011. This Order which came into effect on the 29th day of July 2011, prohibited the purchase, sale, distribution, import or export of, or other dealing in scrap metal, subject to two exceptions. Firstly, the Order did not apply to scrap

metal that for the purposes of the Customs Act had been entered for export on or before the 29th July 2011. Secondly, scrap metal that was generated by a body in its normal course of business could be exported directly by that body. However no one acting in any capacity on behalf of such a body could conduct export of scrap metal.

[2] The time allowed for the first exception was subsequently found to be inadequate. This led to the Minister promulgating a new Order on 31st August 2011 that superseded the first Order. This replacement Order had the same title as the first except for the addition "(No. 2)". It was also in the same terms as the first Order, save that the time limited for the first exception to apply was expanded from 29th July 2011 to 16th September 2011.

[3] The Ministerial Orders were superimposed on an existing regulatory structure, whereby permits issued under regulation 12 (3) a of The Trade (Scrap Metal) Regulations 2007 are required to export scrap metal. These 2007 regulations were made by the Minister under powers conferred by sections 8 and 18 of the Trade Act. Therefore, after the Ministerial Order of 31st August 2011 came into force, scrap metal could only lawfully be exported if it fell within either exception of that Order and the exporter had a permit for such export under the 2007 regulations.

THE FORMAL REQUISITION FROM THE OFFICE OF THE CONTRACTOR-GENERAL (OCG)

[4] By letter dated November 18, 2011 the OCG wrote to the applicant. The caption to the letter reads as follows:

> Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act – Conduct of Investigation – Concerning Alleged Breaches of Prescribed Licences for the Scrap Metal

Industry – Exportation of Scrap Metal in Violation of the Ministerial Prohibition Order

[5] The first paragraph advised the applicant that the OCG had commenced a Special Statutory Investigation *inter alia* "into the circumstances surrounding the alleged breaches which are associated with the award and use of certain prescribed licences for the Scrap Metal Industry, and the controversy surrounding the exportation of Scrap Metal in alleged contravention of a Ministerial/Cabinet Prohibition Order".

[6] The OCG then set out a series of allegations and representations that informed its decision to commence the investigation. The salient content of these are set out below in summary, though not in exactly the same order as they appeared in the requisition. The allegations and representations included:

1. The initial ban by the Administration on the Scrap Metal Trade effective April 28, 2011 following reports of theft to facilitate the trade and the assertion that *"the current way in which the industry was operating, is not in the best interest of the country"*;

2. The July 2011 Cabinet decision to 'shutdown' the Scrap Metal Industry due to theft of valuable infrastructure;

3. A letter dated October 10, 2011 from the Applicant Danville Walker, then Commissioner of Customs, to the General Manager of the Shipping Association of Jamaica that provided a list of fifteen (15) entities authorized to export scrap metal.

4. The allegations by the opposition spokesman on industry that despite the ban, scrap metal exports continued, and the subsequent disclosures by the Permanent Secretary in the Ministry of Industry Investment and Commerce, that only two (2) entities had received permission to trade in scrap metal under certain

specified conditions. The allegations and disclosures were contained in a RJR News Article dated October 28, 2011;

5. Media articles that quoted the Minister of Industry, Investment and Commerce conceding a breach of the Cabinet Order/Decision which purportedly stipulated that entities eligible to export scrap metal first needed to procure a permit from the Trade Board. An example was given of the November 2, 2011 Jamaica Gleaner report that, *"The Government yesterday blamed the Jamaica Customs Department for allowing at least eight companies to export scrap metal without the required permits from the Trade Board in the weeks after the industry was banned"*;

6. A November 3, 2011 Gleaner/Power 106 News Article which indicated that *"The industry, investment and commerce ministry reported that 97 containers were shipped by customs without the requisite permits from the Trade Board";*

7. A Jamaica Observer article of November 3, 2011 which reported that, *"The Jamaica Customs Department says it accepts responsibility for allowing select persons to export scrap metal without the requisite licence from the Trade Board for each specific shipment"*. The article also quoted a Release purportedly issued by the Jamaica Customs Department which stated, *"…it is apparent that certain interpretations were made of the order by the department which were not in alliance with what the Ministry of Industry, Investment and Commerce required. The department accepts full responsibility for the misinterpretation that resulted in those scrap metal exports."*

[7] The formal requisition from the OCG also brought to the attention of the Applicant certain provisions of the Contractor-General Act ("the Act"); in

particular all or parts of sections 4, 5, 15, 17, 18, 22 and 29. In the context of this application it is useful to highlight the following provisions:

1. Section 4 (1) (b) which mandates the Contractor-General, "…on behalf of Parliament to monitor the **grant, issue, suspension or revocation of any prescribed licence**, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof." *(Emphasis by the OCG in its requisition)*.

2. Section 4 (2) (d) which prescribes the power of a Contractor-General "to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession or any public officer or any person".

3. Section 4 (2) (e) which prescribes the power of a Contractor-General to "require any Public Body to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the award of any contract and such other information in relation thereto as the Contractor-General may consider desirable".

4. Section 4 (4) which provides that, "For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power to require any public officer or any other person to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable".

5. Section 15 (1) which provides:

> "…a Contractor-General may if he considers it necessary or desirable conduct an investigation into any or all of the following matters—
>
> (a)….
>
> (e) the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence;…"

6. Section 29 which provides as follows:

> "Every person who –
>
> (a) …..
>
> (b) Without lawful justification or excuse –
>
> (i) obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or
>
> (ii) fails to comply with any lawful requirement of a Contractor-General or any other person under this Act, …shall be guilty of an offence…"

[8] Though not referred to in the Formal Requisition it is also important to outline the definition of "prescribed licence" contained in section 2 of the Act.

> "prescribed licence" means any licence, certificate, quota, permit or warrant issued or granted pursuant to any enactment by a public body or an officer thereof;

[9] The case of ***Lawrence v Ministry of Construction (Works) and the Attorney General*** (1991) 28 J.L.R. 265 was also highlighted by the OCG as authority for the proposition that the powers of the Contractor-General to monitor or investigate the award of a contract or issuing of a licence/permit arise prior to such contract or licence/permit being granted or issued.

[10] The OCG's Formal Requisition then set out a total of 32 Requisitions/Questions to which the Applicant was required to respond no later than 3:00 p.m. on Friday December 2, 2011. Many of the requisitions/questions had several sub-parts which in effect made the total number of responses required approximately 90. Several of the responses required executive summaries within which a number of issues were to be addressed.

THE SUBSEQUENT CORRESPONDENCE BETWEEN THE OCG AND LEGAL COUNSEL FOR THE APPLICANT

[11] The correspondence between Mr. Bishop, counsel for the applicant and the OCG was in a word "robust". The significant dates and content of the correspondence however can be stated in a quite simple and concise manner without recourse to the "forceful assertions" that flowed from each side. Those assertions though possibly relevant in other proceedings, are not determinative of the outcome of this application.

1. By letter dated 29th November 2011 counsel for the applicant indicated more time was required than given as they needed to be satisfied that the OCG was lawfully exercising the power claimed and that what the OCG intended to do by the investigation was within the scope of its authority under the Contractor-General Act.

2. The OCG by letter dated 30th November 2011 granted an extension of time by seven (7) days to December 9, 2011 at 12 noon. The

OCG however strongly advised that counsel be guided in particular by section 29 (b) (i) and (ii) of the Contractor-General Act — the section under which the applicant now stands charged.

3. Counsel for the applicant replied by letter also dated November 30, 2011 indicating *inter alia* the importance of his client's right to legal representation and the fact that it might not be convenient to comply by December 9, 2011. He however sought to make it clear that the applicant would, if necessary, in the interest of justice cooperate with an investigation by the OCG and would take no steps to prevent or frustrate such an investigation.

4. The OCG responded by letter dated December 2, 2011, the same day the OCG indicated the letter dated 30th November 2011 from counsel for the applicant came to hand, reiterating the deadline of December 9, 2011.

5. On December 12, 2011 the OCG wrote to the applicant indicating that he had failed to comply with the deadline of December 9, 2011 and reminding him of the criminal offence created by section 29 (b) of the Contractor-General Act. The OCG also extended the deadline, requiring the applicant to comply by Thursday, December 15, 2011 at 11:00 a.m., or to show lawful cause in writing why he should not be referred to the Director of Public Prosecutions for prosecution under section 29(b) of the Contractor-General Act.

6. By letter dated the 20th December 2011, Mr. Bishop wrote to the Director of Public Prosecutions indicating that though it was doubtful the Contractor-General had any jurisdiction to issue the requisition to the applicant, the applicant had indicated he was willing to answer the questions. However it was pointed out that given the number of questions, including subdivisions, the level of detail required and the fact that the files of the Customs

Department were no longer available to the applicant, the applicant would, subject to the limitations identified, endeavour to complete the answers by December 31, 2011.

7. By letter dated 23rd December 2011, Mr. Bishop wrote to the OCG, copied to the Director of Public Prosecutions, enclosing answers to the questions posed and the required declarations.

THE RULING BY THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE SUBSEQUENT CHARGING OF THE APPLICANT FOR BREACHES OF THE CONTRACTOR-GENERAL ACT

[12] In his affidavit filed in this application the applicant avers that on or about February 2, 2012 he learnt by way of the news media that the Director of Public Prosecutions ruled that he should be charged. He indicated that accompanied by his counsel, Mr. Bishop he subsequently collected summonses from Detective Sergeant Norman Smith of CIB Headquarters which summoned him to the Half-Way Tree Criminal Courts (Resident Magistrate's court) on 21st February 2012.

[13] Copies of the summonses served on the applicant were exhibited to his affidavit. The first alleged that the applicant in the parish of Saint Andrew on the 2nd day of December 2011 without lawful justification or excuse obstructed hindered or resisted a lawful requirement of the Contractor-General contrary to section 29 (b) (1) of the Contractor-General Act. The second alleged that the applicant in the parish of Saint Andrew on the 15th day of December 2011 without lawful justification or excuse failed to comply with a lawful requirement of the Contractor-General contrary to section 29 (b) (ii) of the Contractor General Act.

THE APPLICATION FOR JUDICIAL REVIEW

[14] By Notice of Application for Court Orders dated and filed February 17, 2012 the applicant sought the following orders:

1. An Order for leave for Judicial Review of the Notice of Formal Requisition for Information and Documentation issued by the Contractor-General on November 18, 2011 and of the decision of the Contractor General to refer the matter to the Director of Public Prosecutions for the institution of a prosecution of the Applicant;

2. A declaration that the Notice of Formal Requisition for Information and Documentation issued by the Contractor-General and dated November 18, 2011 is in excess of jurisdiction, *ultra* vires and void;

3. An Order that the granting of leave operate as a stay for all consequential ruling and proceedings arising from the decision of the Contractor General; and

4. Costs to be cost in the cause.

[15] During the hearing following a query from the court as to the nature of the remedy sought on review, Dr. Barnett, counsel for the applicant, sought an amendment of the first order to read, *"An order for leave for judicial review by way of certiorari to set aside the Notice of Formal Requisition for Information and Documentation issued by the Contractor-General on November 18, 2011 and the decision of the Contractor General to refer the matter to the Director of Public Prosecutions for the institution of a prosecution of the Applicant."* Given the language usually associated with the remedy of certiorari, "to set aside" would need to be read as "to quash".

[16] Counsel for the respondent Mrs. Jacqueline Samuels-Brown, Q.C. objected to the amendment submitting that the Order sought initially was a nullity and in any event there was no proper application before the court to amend.

[17] The application to amend and objection will be addressed by the court subsequently in the section of the judgment dealing with "analysis".

[18] The seven grounds on which the Applicant sought the orders were as follows:

1. The Contractor-General acted in excess of jurisdiction in issuing a formal requisition to the Applicant for information and documentation concerning alleged breaches of prescribed licences for the scrap metal industry and exportation of scrap metal or alleged violation of a Ministerial Prohibition Order, as the Contractor-General is only authorised by the Contractor-General Act to monitor or investigate the grant, issue, suspension or revocation of prescribed licences, and

    (1) the Contractor-General's requisition notice is with respect to alleged breaches of a Cabinet Order/Decision/Ministerial Order;

    (2) the requisition notice to the Applicant is not in respect of the grant, issue, suspension or revocation of any licence;

    (3) Neither the Customs Department nor the Applicant, while he was Commissioner of Customs had legal power or duty to grant, issue, suspend, or revoke any licence in respect of scrap metal exportation; and

    (4) There was no rational basis for the Contractor-General to consider or suspect that the Applicant was involved in the grant, issue, suspension or revocation of any licence in respect of scrap metal exportation and he did not purport so to do.

2. The Contractor-General acted unfairly and/ or irrationally in demanding a response within an unreasonably short time to a voluminous questionnaire at a time when it was public knowledge that the applicant was a candidate in national elections and no

longer had access to the files, facilities or records of the Customs Department and in doing so acted in derogation of the Applicant's constitutional rights to be given a reasonable time to consult with his legal advisors and to be treated fairly;

3. The Contractor-General acted in excess of his jurisdiction in requesting the Applicant to comment and express opinions on various matters, such as Cabinet discussions or decisions, media statements and economic issues which had no relevance to grant, issue, suspension or revocation of licences as well as to compose executive summaries on these and diverse matters.

4. The Applicant is also entitled to apply for constitutional redress but in accordance with generally accepted principle, constitutional redress is not being invoked since judicial review is capable of providing adequate remedies.

5. The Respondent responded to the request for additional time by extending the time for the Applicant's response from the 9th December 2011 to the 15th December 2011 but this extension was inadequate in the circumstances.

6. No time limit for making this application has been exceeded.

7. The Applicant is personally and directly affected by the Respondent's decisions as the requisition was directed at him and the consequential charges laid against him.

THE HEADS OF REVIEW AND THE THRESHOLD TEST

[19] In the landmark case of ***Council of Civil Service Unions (CCSU) v Minister of State for the Civil Service*** [1985] AC 374, HL, Lord Diplock outlined three heads under which review may be sought — illegality,

irrationality and procedural impropriety. At page 410 the learned judge said:

> By 'illegality' I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it….By 'irrationality' I mean…*'Wednesbury'* unreasonableness…I have described the third head as 'procedural impropriety' rather than a failure to observe the basis rules of natural justice.

[20] These heads are not mutually exclusive and it was recognized by Lord Greene MR in ***Wednesbury (Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 K.B. 223) itself, at page 229, that the different grounds tend to *"run into one another".* The applicant in seeking leave sought to fit his application under all three overlapping heads.

[21] To succeed, the application must satisfy the test outlined in ***Sharma v Brown-Antoine*** [2007] 1 W.L.R. 780 at 787(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;…

THE SUBMISSIONS OF COUNSEL FOR THE APPLICANT

[22] Dr Barnett submitting on behalf of the applicant indicated that judicial review was sought on three grounds, that the requisition was *ultra vires,* irrational and included conditions that were unfair.

[23] Dr Barnett first took issue with the nature of the requisition. He pointed out that the heading of the requisition spoke to "Violation of the Ministerial Prohibition Order". He submitted that subject was not within the jurisdiction of the Contractor-General. He maintained that in the requisition letter the basis for assumption of jurisdiction was section 4 (1) (b) of the Act which

spoke to the monitoring of the grant, issue, suspension or revocation of any prescribed licence.

[24] Counsel submitted that licences were not granted by the Commissioner of Customs and that he had no power to issue, suspend or revoke any such licence. The persons in respect of whom the dispute concerning the export of scrap metal arose were persons already in the trade and who qualified under the exemption in the Ministerial Order as persons who generated scrap metal in the course of their normal business. Until that Order made in August 2011 was revoked, irrespective of any decision made by the Cabinet, the legal position remained that that exemption applied to all these persons and the Contractor-General was therefore not in a position to question the exportation by those persons concerning compliance with the statutory instrument.

[25] In any event the submission continued, section 4 of the Contractor-General Act which permits an investigation in respect of prescribed licences was not applicable, as from the requisition the Contractor-General was investigating the reports and allegations that the cabinet policy pronouncement had not been complied with. It was however a Ministerial Order which was required as Cabinet had no power to make such an order.

[26] Counsel pointed out that previous to those two Orders there were scrap metal regulations from 2007. These regulations authorised the responsible Minister to grant permits and licences to persons for the export of scrap metal. It would have been under this general power to grant permits and licences that the exempted persons would have been operating over the years as they generate scrap metal from time to time. Those general permits would have still been in effect since the Ministerial Order of August 31, 2011 exempted those who in the normal course of business produced scrap metal.

[27] Counsel maintained that if someone who was so licenced and exempted were to do anything illegal for example include in a shipment stolen scrap metal or to fail to provide the notifications as to the source of the scrap metal or any other requirements that might be imposed on them, that would not be a matter for customs. That should be investigated by the police and would have nothing to do with the issue, cancellation or use of a licence. He submitted that would be a criminal offence and a matter for the police and would not be what the Contractor-General should be investigating.

[28] Counsel therefore submitted that there was a strong arguable case that the basis on which the investigations was commenced was legally flawed and that the Contractor-General was acting in an *ultra vires* manner.

[29] Counsel further submitted that the Contractor-General was acting in an irrational and unfair manner in issuing the Requisition and addressing questions to the applicant when he was:

1. not personally involved in the day to day checking of entries, or inspection of containers; and

2. at the time of the requisition no longer a member of the Customs Dept having resigned and having even when in office no power to grant, suspend or revoke any licence.

[30] Counsel also complained that the questionnaire was very extensive and asked for facts, opinions and executive summaries — 90 in all. This he maintained was irrational as the applicant no longer held public office, was known to be engaged as a candidate in the then upcoming general elections and the time given time for response was unrealistic. He pointed out this was the subject matter of correspondence between the Contractor-General and the legal advisers of the applicant, which correspondence has already been outlined earlier in the judgment.

[31] Counsel pointed out that the issue of the answering of the questionnaire had to be viewed in the context of the fact that the Commissioner of Customs does not handle the grant of licences and that the Commissioner of Customs himself would not be involved in the passing of goods or inspection of containers, but would be required merely as a matter of policy to deploy officers as are required for administrative purposes.

[32] Counsel submitted that in all the circumstances to take the view that the responses which were made were obstructionist or unreasonable is in itself an irrational position also bearing in mind that in the Supreme Court a judge would give far more time to respond in such a circumstance, especially where the person no longer had the administrative support to investigate the matters raised by the questionnaire.

[33] On the grounds advanced counsel concluded his submission by asking that that leave be granted for the judicial review application and a stay of consequential rulings and proceedings. He noted a declaration would also be sought but that was a matter for which no leave was required.

THE SUBMISSIONS OF COUNSEL FOR THE RESPONDENT

A PROCEDURAL BARS TO THE GRANT OF LEAVE

[34] Counsel for the respondent commenced her response to the application by submitting that the application must fail as there were three procedural hurdles the applicant could not overcome.

[35] Counsel first pointed out that the claimant was at the time of the application summoned to be before the Half Way Tree Criminal Courts on the 21st February 2012. At the time of writing this judgment the applicant's case has been postponed to April 4, 2012, pending the outcome of this application.

[36] Counsel submitted that there were two overlapping jurisdictions, one flowing from the other but each separate. Counsel spoke of the jurisdictions of the Contractor-General and the Director of Public Prosecutions (the Director); both being independent, the Contractor-General under Statute and the Director under the Constitution. Counsel submitted that the applicant was before the court based on the exercise by the Director of her independent constitutional functions. However as the Director was not joined in the application, even if the court were minded to favourably consider the application, the grant of leave could not extend to matters which flow from the acts of the Director who was not joined in the application.

[37] Counsel pointed out that the application and affidavit in support centre entirely on the Contractor-General and were the Director to be added it would require a new Notice. Counsel further submitted that even if the court were, as the court indicated it had contemplated, to require that the courtesies of service of the application be extended to the Director, the fact would remain that there has been no challenge in the application to the ruling of the Director and her decision that the applicant should be placed before the court.

[38] Counsel further submitted that if the Director had acted based on a false statutory premise it should be the actions of the Director which were to be challenged and not those of the Contractor-General who could not force the Director to act.

[39] The second procedural bar raised by counsel for the respondent was that the applicant had appropriate alternative means of redress in the court before which he was charged and should therefore be denied leave to proceed by way of judicial review in keeping with the Civil Procedure Rules r.56.3(3) (d).

[40] Counsel submitted that if the matter had not reached the courts and there was a long impasse between the applicant and the Contractor-General then perhaps the applicant would be correct to seek redress by way of judicial review. It was, however, inappropriate counsel maintained for the applicant to wait to see if he would be charged to take action.

[41] Counsel submitted that it was patently clear that an appropriate alternative remedy now existed before the Resident Magistrate's Court at Half-Way Tree. The Contractor-General and the Director having independently exercised their respective powers and the matter now being before the criminal court, the applicant could not credibly maintain he had no alternative means of redress as those means have now become available. The applicant could raise before the Resident Magistrate at trial the points that are sought to be raised by way of judicial review either *in limine*, at a submission of no case to answer, or at any stage of the trial. The Resident Magistrate is clothed with the power to interpret the Act and can dismiss the charge if it is concluded that the Contractor-General acted in an *ultra vires* manner or for any other reason there was no breach of the Act. Counsel continued that whatever the Supreme Court was being asked to rule on, were matters on which the Resident Magistrate could adjudicate.

[42] Counsel submitted that the fact that the resolution of some of the issues raised would require statutory interpretation did not make judicial review the appropriate procedure to be adopted, as every matter, criminal or civil that comes before any court, involves some interpretation of law. The matter already being before a properly constituted court the matter could be addressed there. Counsel further submitted that, if after submissions before the Resident Magistrate the ruling goes against the applicant he could then approach the Supreme Court for judicial review or await the outcome of the trial and if convicted appeal.

[43] The third procedural bar raised by counsel for the respondent was that the applicant had not specified the nature of the relief sought by way of judicial review. Counsel maintained that even if the applicant was asking for certiorari, it would be certiorari of what? The decision of the Contractor-General to refer the matter to the Director? Counsel pointed out that there has, however, been no challenge to the ruling of the Director which is the decision by virtue of which the applicant is charged before the Resident Magistrate's court. Counsel submitted that if the decision of the Contractor-General was flawed that was a matter the Resident Magistrate could deal with.

B SUBSTANTIVE REASONS WHY LEAVE SHOULD NOT BE GRANTED

[44] Counsel for the respondent submitted that the action of the Contractor-General was in no way *ultra vires*. Mrs Samuels-Brown, as did counsel for the applicant Dr. Barnett, also placed reliance on the heading in the Notice of Formal Requisition, but for a different reason. Counsel pointed out that in addition to a reference to violation of a Ministerial order the heading also included a reference to alleged breaches of prescribed licences. Further, counsel referred to the definition of prescribed licence in the Act and submitted that in any event there could be no question that the Ministerial orders were in the form of a prescribed licence. Counsel also submitted that even if the Contractor-General acted on media reports that would not affect the legitimacy of the investigations.

[45] Counsel placed great reliance on section 15 (1) (e) of the Act and pointed out that in relation to prescribed licences the Contractor-General's powers are not limited to inquiries about the grant, issue, suspension or revocation of such licences include inquiries into the **use** of such licences which have been issued.

[46] Counsel submitted that on the applicant's own admission, and as a matter of commonsense, a person who has been granted a prescribed licence

can only use that licence by going through the Customs Department for the purposes of the export of scrap metal. It was incorrect therefore to say that those matters were not within the Contractor-General's remit. If a licencee incorporated stolen scrap metal into his shipment that would have something to do with the misuse of the licence. That being a matter for the police would not exclude it also being a matter for the Contractor-General.

[47] In relation to the second ground that the actions of the Contractor-General in addressing the Notice of Formal Requisition to the applicant was unfair or irrational, counsel for the respondent submitted that under section 18 of the Act the Contractor-General may call upon for assistance or summon any person in relation to any matter which falls under his purview concerning investigations undertaken under the Act. In the circumstances of this case it could not be said that the Contractor-General was acting unfairly or irrationally in seeking the assistance of the applicant as Head of Customs given the nature of the allegations being investigated. Even though the applicant sought refuge in the fact that he was not engaged in the day to day operations concerning the export of scrap metal and did not have the power to grant licences, counsel maintained that by his own act of purporting to answer the questions the applicant demonstrated he was able to assist and was a relevant person for the Contractor-General to engage to inform the OCG's investigations.

[48] In relation to the challenge to the reasonableness of the time allowed for response, counsel submitted the applicant had almost three weeks from the date of the Notice of Formal Requisition and just over two weeks from the time the applicant indicated it came to his attention to the final deadline date of December 15, 2011. Counsel noted that there were extensions of time granted and that by letter dated 23rd December 2011 the applicant purported to comply with the requisition and answer the questions asked. Counsel submitted it would be for the Resident Magistrate to determine whether the applicant had sufficient time to

respond and whether the letter of the 23rd December 2011 constituted compliance.

[49] On the question of the application for a stay counsel submitted that as the proceedings emanated from the ruling of the Director who was not joined in the action, no stay should be granted in the absence of the Director.

THE ANALYSIS

[50] I will first deal with the question of the procedural bars raised by counsel for the respondent.

[51] It cannot be disputed that it is the Director who put the applicant before the court and not the Contractor-General. It is true that, but for the action of the Contractor-General the applicant would not be charged before the court. However the referral by the Contractor-General was only a necessary but not a sufficient action for the applicant to be placed before the court. The matter having been referred to the Director, the Director independently exercising her constitutional function ruled that charges be preferred. The Director could have ruled otherwise. Therefore the inescapable consequence of a review of the Notice of Formal Requisition and the referral by the Contractor-General of the matter to the Director, would be a *de facto* review of the ruling of the Director. This would raise the possibility of the Judicial Review Court casting doubt on the legitimacy of the ruling of the Director without the Director having the opportunity to defend the ruling or to prosecute the charge seeking a conviction. This in a context where:

1. the Judicial Review Court would not know precisely what material was before the Director at the time of ruling, (which may or may not have been limited to the material referred by the Contractor-General); and

2. by virtue of the letter dated 20th December 2011 written to the Director by Mr. Bishop, counsel for the applicant, the Director would have been made specifically aware of the applicant's contention that the OCG was acting without authority, in spite of which the Director decided to prefer charges; and

3. it is known that courts have historically and for good reason been slow to interfere in the exercise of the discretion of prosecuting authorities whether or not to prefer charges.

[52] In ***Sharma v Browne-Antoine*** (2006) 69 WIR 379, the Judicial Committee of the Privy Council at page 388 stated that *"It is…well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy."* Dicta of Lord Steyn in ***R v Director of Public Prosecutions, ex parte Kebilene*** [2000] 2 AC 326 at 371 was also quoted to demonstrate just how exceptional a remedy it is. Lord Steyn said, *"My lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review."*

[53] At page 389 of ***Sharma*** it was noted that:

> Decisions have been successfully challenged where the decision is not to prosecute (see *Mohit*, at para [18]); in such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy; *R (on the application of Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800 at para [67], and *Matalulu*, above, at p 736.

[54] Concerning the approach of the courts on an application to review a decision not to prosecute, this was further explained by Lord Carswell delivering the judgment of the court in the case of ***Marshall v Director of Public Prosecutions*** [2007] UKPC 4. At paragraph 18 the court stated

that, *"In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower."* The reason being that, *"… the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."*

[55] In this case however we are dealing with a decision to prosecute. The reluctance of the courts to interfere in the exercise of the discretion of the prosecuting authority, especially when the decision is to prosecute, perhaps explains the studious avoidance by the applicant of any direct challenge to the ruling of the Director. Instead the challenge is to the OCG's Notice of Formal Requisition and decision to refer the matter to the Director with a request for a consequential order that the granting of leave operate as a stay of the ruling and proceedings arising from the decision of the Contractor-General. However the fact, that for the reasons stated above, the courts are slow and loathe to interfere when there is a direct challenge to the exercise of discretion by a prosecuting authority, means that *a fortiori* the courts should be even more cautious when moved to conduct a review that would involve by implication an indirect challenge to the decision making of the prosecutorial authority. Even more so when the prosecutorial authority has not been joined in the action nor served with the application.

[56] The second procedural bar relied on by counsel for the respondent is connected to the fact that there has in fact been a decision to prosecute. The avenue and arena of the pending criminal trial is now available for the applicant to advance the arguments he seeks to mount by way of judicial review. There is therefore adequate alternative redress. In one sense therefore the application is too late, in that events have progressed beyond the actions of the Contractor-General that the applicant has

sought to challenge. The matter is already before a court which is competent and best placed to treat with all the issues that may arise.

[57] In ***Sharma***, on an application for leave to review the decision to prosecute based on an allegation that it was inspired by political pressure, the Judicial Committee of the Privy Council held that the issue relating to the decision to prosecute should properly be raised in the course of criminal proceedings either as an application to stay the proceedings on the ground of abuse of process or at the substantive trial. Applying that ruling to the instant application the issue in relation to the facts that led to the decision to prosecute would here be whether the action of the Contractor-General in issuing the Notice of Formal Requisition to the applicant was *ultra vires.* Therefore the decision to prosecute, and the investigation and referral that led to it, could be challenged at the applicant's criminal trial in the same manner as suggested in ***Sharma***.

[58] The case of ***Boddington v British Transport Police*** [1999] 2 AC 143 HL. is quite helpful on the issue of relying on the *ultra vires* principle as a defence in a criminal trial. In that matter the defendant was convicted of a charge of smoking in a railway carriage where smoking was prohibited, contrary to a railway byelaw. He had sought to defend himself on the basis that the relevant byelaw was *ultra vires* and void, but was not permitted to do so. The House of Lords held that a defendant to a criminal charge was entitled as a matter of right to raise such a defence, absent a clear parliamentary intention to the contrary. It would follow as a matter of inexorable logic that the applicant would be entitled to advance at the criminal trial the contention that the Contractor-General acted *ultra vires* the Act and hence that there is no sustainable foundation to the criminal charges.

[59] The situation is therefore this. The applicant in the criminal trial would be entitled to argue both that the authority being relied on to ground the

offences with which he has been charged does not exist or that if the authority exists his actions or omissions being complained of do not amount to the commission of offences. The applicant is in effect saying "I committed no offence as I cannot be guilty of obstructing the Contractor-General in, or of failing to respond to an inquiry the Contractor-General had no statutory authority to undertake". Proof of that statutory authority, its appropriate use in terms of the nature of the questions posed to the applicant and the reasonableness of the time frame within which the applicant was required to respond would therefore be *sine quibus non* of the sustainability of the criminal charges. Such proof is necessary though not sufficient for a conviction. Apart from the existence of those factors, there would also have to be evidence of the actions or omissions which make out the charges.

[60] The Resident Magistrate's court in assessing the criminal charges would be well placed to determine the questions of whether the Contractor-General acted unlawfully *(the strict legal question)*, and if it gets to that, whether all the evidence supports a finding of guilt or innocence *(the factual question).* The Judicial Review Court could however only determine whether or not the Contractor-General acted unlawfully. Requiring the applicant to raise his objections before the court of trial will therefore prevent potential multiplicity of proceedings. As said in ***Sharma*** at paragraph 34 and which I find applicable to the facts of this case, *"…it will in a single set of criminal proceedings be easier to identify and address in the appropriate way the different issues likely to arise."*

[61] The third procedural bar raised by counsel for the respondent is that the action did not seek any relief and that even if the relief to be sought was certiorari in relation to the actions of the Contractor-General, the actions of the Director have not been challenged. It was earlier outlined that counsel for the respondent objected to the application to amend the first Order sought to insert the relief of certiorari against the actions of the Contractor-

General. This objection was on the ground that the Order initially sought was a nullity and could not be amended. It is manifest however that the court has the power to amend, (see rule 56.5 (6) of the Civil Procedure Rules), and the court will exercise the discretion to allow the amendment sought. The amended order however does not cure the deficiency highlighted by counsel for the respondent. There is still no challenge to the ruling of the Director. It is a well established principle that a court will not act in vain. Further judicial review is a discretionary remedy. If leave were granted and the relief of certiorari ultimately ordered to quash the actions and referral of the Contractor-General, the ruling of the Director would still stand and there would therefore be no proper basis on which the court could grant a stay of the criminal proceedings before the Resident Magistrate's court. The Judicial Review Court would therefore, contrary to established principles, have acted in vain.

[62] In responding to the submissions of counsel for the respondent, Dr. Barnett, counsel for the applicant, submitted that the ruling of the Director should not deprive the citizen of the right to judicial review and that the alternative remedy contemplated by the civil procedure rules was an alternative civil remedy and did not contemplate requiring an applicant to submit to a criminal trial. He cited the case of ***Director of Public Prosecutions v Nasralla*** [1967] 2 ALL E R 161 in support of this latter submission.

[63] In ***Nasralla*** after the jury acquitted on murder and returned no verdict on manslaughter the prosecution applied for the case to be set for re-trial on the offence of manslaughter. The defence objected on the ground that the accused would be entitled to successfully raise the plea of *autrefois acquit*. Small J after hearing arguments overruled the objection and set the matter for trial. Mr. Nasralla then applied to the Constitutional Court alleging a breach of his fundamental rights under section 20(8) of the Constitution, as it the section then was. The Constitutional Court refused

his application but on appeal it was upheld by the Court of Appeal. On appeal to the Judicial Committee of the Privy Council it was held that as the jury had not returned a verdict on the offence of manslaughter the accused was not entitled to benefit from that the plea of *autrefois acquit.*

[64] Importantly for the present purposes the court noted that the appellant would have been able to have advanced the plea of *autrefois acquit* at the new trial if the constitutional challenge had not been mounted. This is significant given the earlier discussion concerning the desirability of the avoidance of multiplicity of proceedings. The factual substratum of this case also cannot be ignored. This is a situation where, as granting leave to seek judicial review would amount to a review of the ruling of the Director "through the back door", the available and appropriate remedy is for the matter to be heard in one set of proceedings before the Resident Magistrate's court where all affected parties can be represented and the several issues addressed.

DISPOSITION

[65] The court has concluded based on the analysis conducted that the application should be refused on the basis that the three procedural bars raised by counsel for the respondent have been established.

[66] The court gave detailed consideration of whether, in the event the conclusion on the procedural bars is wrong, the substantive aspects of the application should be addressed and a determination made of whether or not there is an arguable case with a reasonable prospect of success. That discussion would however require the court to express an opinion on the legal sustainability of the charges in a context where the ruling of the court leaves precisely that issue is to be fully canvassed before the court of trial. In that court both the applicant and the Director, by virtue of whose ruling the applicant stands charged, or her representative, will be present to make full submissions on that critical issue. I therefore decline to address

the substantive aspects of the application, in order that the criminal proceedings may be conducted free from the colour of any opinion expressed by this court.

[67] The application for leave to apply for judicial review is therefore refused. No Order as to costs. On March 9, 2012, when I handed down my draft judgment, Mr. Bishop, counsel for the applicant sought and I granted leave to appeal. If a challenge to the refusal of leave to apply for judicial review is pursued, in determining how to proceed it may be useful for counsel to consider whether, in the circumstances of this case, rule 56.5 (1) (a) or rule 56.5 (3) of the Civil Procedure Rules applies.