IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT
CLAIM NO. 2012 HCV 00994

COR: THE HONOURABLE MR JUSTICE CAMPBELL
THE HONOURABLE MR JUSTICE SYKES
THE HONOURABLE MISS JUSTICE STRAW

BETWEEN	**DANVILLE WALKER**	**APPLICANT**
AND	**THE CONTRACTOR-GENERAL**	**RESPONDENT**

Dr Lloyd Barnett and Mr Keith Bishop instructed by Bishop and Partners for the applicant

Mrs Jacqueline Samuels-Brown, QC for the respondent

January 11, 12, 13 and April 10, 2013

JUDICIAL REVIEW - RENEWAL OF APPLICATION – TEST FOR LEAVE TO APPLY FOR JUDICIAL REVIEW – DELAY IN APPLYING FOR JUDICIAL REVIEW – WHETHER REMEDY WOULD BE GRANTED EVEN IF APPLICATION FOR LEAVE TO APPLY JUDICIAL REVIEW GRANTED – WHETHER CRIMINAL PROCESS PROVIDES ADEQUATE MEANS OF REDRESS – WHETHER APPLICANT SHOULD BE GRANTED IF CRIMINAL PROCESS PROVIDES ADEQUATE REMEDY - CONTRACTOR GENERAL ACT – SECTIONS 4, 15, 18, 29 OF ACT – PARTS 26, 56 AND 73 OF CIVIL PROCEDURE RULES – WHETHER APPLICATION IN TIME – WHETHER COURT HAS POWER TO EXTEND TIME TO RENEW APPLICATION

CAMPBELL J

Background

[1] The Office of the Contractor-General is constituted a Commission of Parliament to monitor the award and the implementation of government contracts as well as monitoring the grant, issue, suspension of any prescribed licence, among other functions. The applicant, the Honourable Danville Walker OJ, is a former Commissioner of Customs having been appointed in 2008. He has been conferred with national honours for public service and resigned office on the 6th November 2011.

[2] The scrap-metal trade was the subject of a ban which took effect from the 28th April 2011. This was after the reported theft of property and infrastructure to facilitate the trade. Despite the ban, the thefts continued unabated. The Government took the further decision to cease the general trade in the scrap-metal industry. As a result, the Trade (Scrap-metal) (Prohibition of Dealing) Order, dated 27th July 2011, was effected by the Minister of Industry, Investment and Commerce. The Order exempted two categories of scrap traders. Firstly, scrap-metal that 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 by that body. The Order prohibited the purchase, sale, distribution, import or export of, or the other dealings in scrap-metal.

[3] The time allowed of the 29th July 2011, was found to be inadequate. A new Order was promulgated on the 31st August 2011. This extended the time limited for the first exemption to be from the 29th July 2011 to the 16th September 2011. Scrap-metal could only be legally exported if it fell into one of the two exempted categories. Despite the imposition of the general ban, there were allegations of shipments through customs without the necessary permits. The relevant Ministry conceded that there was a breach of the Order requiring prior permission for the export of scrap-metal. The Jamaica Customs was blamed for the breach and

accepted responsibility 'for allowing select persons to export scrap-metal without the requisite licence from the Trade Board for each specific shipment.'

[4] On the 18th November 2011, the Contractor-General wrote the applicant advising him that he had commenced a Special Statutory Investigation into the circumstances surrounding the alleged breaches in the export of scrap-metal. The letter of Requisition for Information (the Requisition) detailed the legislative source on which the Contractor-General relied in the exercise of his powers. The Requisition listed some thirty two (32) questions, many of which had subdivisions totalling about ninety (90) subdivisions and requests for executive summaries. It required the applicant to provide the information and documentation by the 3rd of December 2011.

[5] On the 29th November 2011, the applicant's counsel responded to the Requisition. This response started a chain of correspondence described as 'robust' by Fraser J, and vitriolic by counsel for the respondent. The letter of the 29th November 2011, by Bishop and Partners, noted that the Contractor-General's power to make requisitions and ask questions is statutory and stated, 'In light of this, we must be satisfied that you are lawfully exercising the power you claim or what you intend to do by this investigation is within the scope of your authority under the Contractor-General Act. Accordingly, we will need time to effectively complete the process mentioned above.'

[6] On the 30th November 2011, the Contractor-General replied by extending the time for compliance with the Requisition 'by no longer than seven days, that is to the 9th December 2011 at 12:00 noon', and ended with the comment, 'that the Office of the Contractor-General has never been intimidated, deterred or obstructed by claims which are, on the face of things, patently vexatious, frivolous, misconceived or misguided.'

[7] On that same date, the applicant, through his counsel, invited the respondent 'to do what is decent and remove yourself, in the public interest, from the investigation so that other persons who will take a more professional and dispassionate approach can conduct the investigation. ... We will not be frightened by your deadline of December 9th 2011. If it is convenient for us, we will comply and if not, we will use our options in law to protect our client from any further abuse from your office.'

[8] On the 2nd December 2011 the Contractor-General responded by restating that the deadline of the 9th December 2011 remains. Nonetheless, on the 12th December, the Contractor-General further extended the deadline for compliance with the Requisition, to the 15th December 2011 and warned the applicant to comply or to show cause why he should not be referred to the Director of Public Prosecutions (DPP), for prosecution under section 29 (b) of the Contractor-General Act. The letter cautioned the applicant in these terms, 'Please note that should you fail to meet the revised deadline or to show lawful cause, in writing, why you should not be referred to the Office of the Director of Public Prosecution [you will be so referred] without any further notice given to you or to your Attorney-at-Law.'

[9] On the 20th December 2011, counsel for the applicant wrote the DPP, stating that, in their opinion it was doubtful that the Contractor-General has any jurisdiction or power to issue the requisition since the applicant had no authority to grant, issue or cancel licences or regulate their use and the applicant had not purported to do so, however, their client had indicated a willingness to answer the questions. An undertaking was given to complete the answers subject to the limitations that had been mentioned by the 31st December 2011. On the 23rd December, the answers to the questions posed in the Requisition were given to the Office of the Contractor-General.

[10] On the 1st February 2012, two summonses were issued to the applicant requiring him to appear at the Resident Magistrate Court at Half Way Tree to answer charges that he, on the 2nd and 15th December 2011 respectively, without lawful justification or excuse obstructed hindered or resisted a lawful requirement of the Contractor-General, in breach of section 29 (9) (b) (1) of the Contractor-General Act.

Notice of Application for Court Orders for Administrative Orders for Judicial Review

[11] On the 17th February 2011, the applicant filed Notice of Application for Court Orders, supported by an affidavit of Mr Danville Walker, both documents dated 17th February 2011. The Notice sought:

(a) An Order for leave for judicial review of the Notice of Formal Requisition for information and Documentation issued by the Contractor-General on 18th November 2011 and of the decision of the Contractor-General to refer the matter to the Director of Public Prosecution for the institution of a prosecution of the Applicant;

(b) A declaration that the Notice of formal Requisition for information and documentation issued by the Contractor-General and dated 18th November 2011 is in excess of jurisdiction, ultra vires and void;

(c) 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;

(d) Costs to be costs in the cause.

Application for leave before Fraser J

[12] The application for leave for judicial review was heard on 20th February 2012 by Mr Justice Fraser, who invited counsel to amend Order (a), of the Notice to include the remedy sought to read, "An Order for leave for judicial review by way of Certiorari to set aside the Notice of Formal Requisition for information." Fraser J felt that the words "setting aside" would be read as "quash" to cause the language to conform with the usual usage in judicial review. Mrs. Samuels-Brown objected to the amendment and submitted that the Notice as filed constituted a nullity.

Applicant's Submission

[13] Before Fraser J, Dr Barnett submitted that the requisition was ultra vires, irrational, and included conditions that were unfair. He maintained that in the Requisition, the basis for assumption of jurisdiction was section 4 (1) (b) of the Contractor-General Act. That section, according to Dr Barnett, only spoke to the monitoring of the grant, issue, suspension or revocation of any prescribed licence. It was further submitted that section 4 was not applicable. It was also said that it was a Ministerial Order which was required as Cabinet had no power to make such an order. Counsel submitted that if someone who was licensed and exempted failed to provide notification of his source of scrap-metal, 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 that would be a criminal offence and a matter for the police and would not be a matter that the Contractor-General should be investigating. The submission continued that there is therefore a strong case for concluding that the basis on which the investigation was commenced was flawed and that the Contractor-General was acting in an ultra vires manner.

The Respondent's Submission

[14] Before Fraser J, Mrs Samuels-Brown submitted that there were three procedural bars the applicant could not overcome. The applicant had been

summoned to be before the Half Way Tree Criminal Court, with an adjourned date of 24th April 2013. The applicant was before the Court based on the exercise of the DPP's independent constitutional function. There was no challenge to the DPP. Secondly, there were adequate means of redress in the court before which the applicant has been summoned. The third procedural bar was that the applicant had not specified the relief sought by way of judicial review.

[15] Mrs Samuels-Brown pointed out that the Requisition included a reference to the alleged breaches of prescribed licences. That Section 15 (1) (e) does not limit inquiries to the grant, issue, suspension or revocation of such licences but include inquires into the use of such licences which have been issued. Use can only be made of the licence by going through the customs for the purposes of the export of scrap-metal. The answers given to the Requisition demonstrates that the applicant, as Commissioner of Customs, was a relevant source for enquires.

[16] On the 26th March 2012, the judgment of Fraser J, held that the application dealt with a decision to prosecute and that the courts are 'slow and loathe to interfere' when there is a direct challenge to the exercise of a discretion by a prosecuting authority. He opined that there was the need for greater caution when the challenge is indirect, as in the present case. The court also found that there was adequate alternative redress. The Resident Magistrate Court is well placed to determine the question, whether the Contractor-General acted unlawfully, and if it gets to that, whether all the evidence supports a finding of guilt or innocence of the applicant. The court found that the well-accepted principle that the court will not act in vain was relevant.

Appeal from the judgment of Fraser J

[17] On the 30th March 2012, the applicant appealed the decision of Fraser J, challenging the findings of the court, inter alia:

(a) that the inescapable consequence of a review of the Requisition and the referral of the matter to the Director, would be a review of the ruling of the Director of Public Prosecution;

(b) that the court is slow and loathe to interfere when there is a direct challenge to the discretion of the decision–making of the prosecutorial authority;

(c) adequate means of redress is available. The application is too late, it has progressed beyond the actions of the Contractor-General;

(d) that an amended application would not be adequate since the Director is not a party;

(e) The RM Court is well placed to determine the questions.

[18] The Applicant sought the following orders from the Court of Appeal:

(a) that the judgment given of the 26th March 2012 be set aside;

(b) that the application for amendment of the application for leave should be granted and an order made in terms of the amended Application for Court Orders;

(c) such other Order as the court may seem fit;

(d) costs;

(e) that the court grants a stay of criminal proceedings instituted by the DPP against the Appellant at the

Corporate Area Resident Magistrates Court, Criminal Division.

[19] On the 20th day of April 2012, the Court of Appeal directed the following question to the parties, 'In view of CPR 56.5, is this a matter that is properly before the Court of Appeal at this stage?' On the 9th May 2012 Panton P dismissed the procedural appeal and held, 'I am of the view that the appellant should follow the procedure dictated by Part 56 of the Civil Procedure Rules – which part is specifically dedicated to process of judicial review.'

[20] On the 24th May 2012 the applicant filed a Notice of Application. This notice contained the amendment granted by Fraser J, to add the remedy of Certiorari to quash the Notice of Formal Requisition. It also contained at paragraph (b): an order extending the time for making the application to renew the application for leave for judicial review to the date of filing of notice. The grounds explained the applicant's delay in meeting the time requirements, while he pursued the appeal in the Court of Appeal. The grounds also challenged the adequacy of the alternative remedies of a Constitutional challenge, or preliminary objections or motions in the Resident Magistrate Court. The Notice was supported by an affidavit of the applicant dated 6th June 2012 and filed on the 7th June 2012.

The Renewed Application before the Full Court

[21] Dr Barnett submitted that the Contractor-General has the power to make requisition under the provision of the Contractor-General Act, which is only exercisable in terms of the statute. The relevant provision is section 15 (1) (e). The choice of remedy was dealt with by Dr Barnett, by suggesting that, 'The question is whether the applicant's challenge is appropriate to be resolved in the context of a criminal trial.' The answer, according to Dr Barnett, is that the scope of the enquiry which is required would exceed what is appropriate for the Resident Magistrate Court. He pointed out that there is a vast difference between being placed before a criminal court and seeking judicial review or a

constitutional remedy in the Supreme Court. In making the assessment as to the more appropriate forum, those factors should always be examined by the courts together with the nature and merits of the grounds of challenge to the administrative decision.

[22] Dr Barnett's submission continued, that Fraser J made no such examination of the merit of the grounds of challenge but was determined, on the basis that the matter was before the criminal court and it was inappropriate to make the challenge by way of judicial review. This approach, Dr Barnett submitted, was erroneous. The nature of the challenge must be taken into account. Further, on the proper interpretation of section 15 (1) (e), the question is whether or not the Contractor-General's failure to comply with the statute is essentially a question for judicial review. Even if the matter can be raised at a criminal trial, it can only be determined on judicial review. None of the questions in the Requisition relate to the use, grant or revocation of a licence. Dr Barnett continued that a statutory power has been imposed and the Cabinet has no power to impose such a ban. The decision of the respondent is unreasonable and irrational as to the time allowed for response. The inflexibility in the time period would itself be irrational. The request to the 31st December 2012 was reasonable. That the grounds of challenge are arguable and cannot be concluded at this stage.

[23] Dr Barnett submitted that no procedural bar exists. There is settled authority that a decision of a statutory authority prior to the institution of criminal proceedings is subject to judicial review despite the pending proceedings and therefore the cases of **Sharma v Browne-Antoine** [2007] 1 W.L.R 780 **and R v Director of Public Prosecutions, Ex Parte Kebiline** [2000] 2 AC 326 are inapplicable. In any event, learned counsel submitted, those cases did not say that judicial review is automatically excluded.

Respondent's Submission

[24] Counsel for the respondent submitted that Rule 56.3 (4) stipulates that the application must be accompanied by evidence on affidavit. When filed, the application was not so supported. The Notice filed is a fresh notice which they are not entitled to do. Rule 56.5 (4) allows the applicant for leave who is refused to renew the application by lodging in the Registry, a Notice within ten days of the judge's refusal. The provision is mandatory. The applicant is out of time and the court cannot rescue it. There was a failure on the part of the applicant to ask for a specific remedy. Before Fraser J, the application was amended to seek certiorari. The original application did not make reference to the availability of alternative means of redress. The law does not allow the filing of a new application.

[25] Mrs Samuels-Brown submitted that even if the court has a discretion to extend time, Rule 56.6 (2) requires that a good reason be shown before such an extension is granted. The court's decision was handed down on the 9th May; the application was filed on the 24th May. Once the Court of Appeal's decision was known, the applicant was obliged to act promptly, that is within ten days. The reason for the delay is the applicant acting in defiance of the CPR, and is therefore unable to give a good reason for the delay (see **Allan Rutherford & L.P Solicitors v Legal Services Commission** 2010 EWHC 3068 (Admin); **Malicka Reid v Indecom** Claim No. 2011 HCV 00981 (unreported) (delivered 18th March 2011), application filed within 14 days of the Order, failed to file the affidavit in support of the application, relied on previous affidavit. The court said he could not do that.

[26] The submission continued that the Requisition was ultra vires because it did not touch and concern the use of a licence. The law allows the Contractor-General to seek answers from 'any person'. There is no requirement that the person has to be the user (see **John Lawrence v Ministry of Construction (Works) and the Attorney General** 28 JLR 265). According to Mrs Samuels-Brown, the court has to look at all the material before it and cannot ignore

material which does not support the application. The law is represented by the decision in **Boddington v British Transport Police** [1999] 2AC 143 where doubt was cast on **Bugg v Director of Public Prosecutions** [1993] 2 ALL ER 815. The court held that the principle is that in a criminal trial, it should be open to raise the relevant point before the magistrate. Whether the applicant acted without lawful excuse, is a matter which also has to be established at a criminal trial. The law makes it clear that this is a defence that the applicant may raise at his trial in the Resident Magistrate Court. In **Boddington,** it was stated that the restricted approach in **Bugg** was overruled. There are circumstances where points should be taken in the other forum. The complexity of the matter being one of the issues.

[27] Mrs Samuels-Brown pointed out that the applicant ignored several deadlines and extensions until the matter had passed from the hand of the Contractor-General to the DPP. She also submitted that the RM is competent to dispose of the issues raised. The applicant has an adequate alternative remedy. The orders sought amount to a challenge to the DPP's independent constitutional jurisdiction. This application represents a challenge to the prosecution through the back door. By the orders sought, the courts are being asked to act in vain. Judicial review and the consequent appeal will further unduly delay the criminal proceedings.

[28] Dr Barnett, in reply, submitted that he had no quarrel with cases submitted on behalf of the respondent and said that his contention never was that the applicant's objections cannot be heard in the Resident Magistrate's Court. The submission was that, 'the court should take into account, whether or not his normal right to apply to the Supreme Court was precluded by the fact that he could apply or make submissions on these points to the Resident Magistrate.' Dr Barnett submitted that **Boddington** and that line of cases were concerned with a contention that only a challenge in the inferior court on certain types of grounds was admissible in these courts. Those cases decided that the accused person in

those courts could challenge the validity of subordinate legislation which forms the basis of his prosecution. **Boddington**, according to Dr Barnett, does not decide that it is inappropriate to mount such a challenge in the High Court. The fact that the claimant in **Boddington** was entitled to raise the question of the validity of the subordinate legislation which forms the basis of his criminal prosecution does not imply that he could not do it by way of judicial review. His submission was that a person who says the criminal prosecution is founded on an unlawful act by an inferior tribunal is entitled to judicial review.

[29] The House of Lords overruled **Bugg**. The case demonstrates that there are a number of situations, that a challenge by way of judicial review is maintainable. Whether judicial review is appropriate is determined by the circumstances of the case. In relation to the court's discretion to grant or not to grant the remedy. **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and another** [1991] 4 All ER 65, limited to three specific circumstances. **Digicel v OUR** Claim No. 2012 HCV 03318, (unreported) (delivered 12th July 2012), question of stay was obiter. In respect of delay, Dr Barnett submitted that despite the three-month limit, the period can still be extended.

Discussion

[30] Certiorari is one of three prerogative writs which form the trilogy of certiorari, prohibition and mandamus. It is of significant importance in administrative law. Its foundation lies in the governance of the sovereign's realm. It is an instrument to ensure the efficient administration of government. It was meant to bring up the records of inferior courts for an examination for any errors on their face. The sovereign, wishing to be certified of some matters, would order that the necessary information be provided for him. Certiorari would move to quash decisions and orders on the grounds of illegality, procedural impropriety and irrationality. The supervising court could not impose its own version of the impugned order. The remedy being discretionary, the court would refuse the

remedies at its disposal on the basis of delay, or that the applicant did not make full and frank disclosure, or that there was an adequate alternative remedy available or that to make the remedy would be pointless.

[31] In his written skeleton submissions before the Court of Appeal, the applicant contended that, 'The Appellant's complaints relate to the actions of the Contractor-General and not the DPP.' Counsel for the respondent submitted that the applicant was before the court based on the exercise by the DPP of her independent constitutional functions and there was no express challenge in the application for leave to the ruling of the DPP. Fraser J at **[55]** of his judgment noted that the case was dealing with a decision to prosecute. He commented on the reluctance of the court to conduct a review of the decision-making power of the prosecutorial authority. At **[61]** Fraser J says, 'It is well-established principle that the court will not act in vain.' He opined that even if leave was granted to quash the Requisition and referral of the Contractor-General the DPP's ruling would still stand.

[32] Before this court, Dr Barnett submitted that the issue was not a question as to whether the Contractor-General has the power to make requisitions under the provisions of the Contractor-General Act. The issue is whether it is inappropriate to resolve the issues in his application in the context of a criminal trial. That the scope of such an enquiry would go beyond what is appropriate for the Resident Magistrate Court. There is no challenge that the established principles on an application for judicial review is relevant to these proceedings. Dr Barnett submitted that the ordinary rule is that the court will refuse leave to claim judicial review unless:

(a) satisfied that there is an arguable ground for judicial review having a realistic prospect of success;

(b) it is not subject to a discretionary bar such as delay or an alternative remedy.

[33] The argument before this court was concentrated on the first of these limbs. Dr Barnett's treatment of the second limb was restricted to a consideration of alternative remedy. In **[14]** of the applicant's written submission, it is stated:

> With respect to the second limb of the threshold test the Privy Council in Sharma indicated that it was necessary to evaluate the extent to which the Appellant's challenge could be resolved within the criminal process and in so doing to look at the evidence overall and the identity of the grounds on which the Appellant's challenge is arguable. . . .The second limb of the threshold test is not simply a question of whether the Appellant's contentions could be raised in a criminal trial but whether having regard to the nature of the contentions, in particular where they relate to the pre-prosecutorial decisions, it should best be dealt with in the civil or criminal proceedings.

[34] The discretionary bar to which Lord Bingham refers to in his judgment is of much wider application than the two features of the discretionary bar of delay or alternative remedy. In Fordham, **Judicial Review Handbook** (1st Edition, 1993), the learned authors at paragraph 49.1.9 page 382, under the heading, Relief Discretionary, quoted from Lord Mustill's judgment in **Neil v North Antrim Magistrate Court** [1992] 1 WLR1220 as follows:

> *It is however one thing to hold that . . . a decision . . . must in principle be reviewable, and quite another to say that the grant of relief should follow as a matter of course. Neil v North Antrim Magistrate Court [1992] 1 WLR 1220 per Lord Mustill at p1231F, & see 1229g-h 'The indisputable but often overlooked (distinction) between the question whether judicial review is available in the particular field at all, and the*

question whether the practical consequences of granting judicial review in that field are such that in general the power to grant it should rarely if ever be exercised'.

[35] The learned authors of **Judicial Review Handbook**, at paragraph 23.4.7 quoting Lord Roskill state that:

The grant or refusal of the remedy sought by way of judicial review is in the ultimate analysis, discretionary. . . . The form of judicial review sought or granted (if at all) is to be entirely flexible according to the needs of the particular case R v inland Revenue Commissioners, ex.p National Federation of Self Employed and Small Businesses Ltd. [1982] AC617 per Lord Roskill at 656D & 657E-F and at 23.5.

The courts have a distinct dislike of hard and fast rules. They much prefer to formulate principles in a way which demonstrates a capacity to accommodate the particular circumstances of any Review context. (emphasis added)

[36] I mean no disrespect to the able arguments and authorities cited by both counsel in relation to the substantive issue, as to the appropriateness of resolving the validity of the Requisition at the criminal trial or in judicial review. In the particular circumstances of this application, the issues of whether the relief sought would be pointless and whether the applicant had an alternative remedy, loomed so large throughout the hearing that I am of the view that their resolution would determine whether the court should refuse or grant the application sought. The courts have frequently used undue delay in making an application, as a ground for refusing relief. Relief has also been refused for non-disclosure at the leave stage. The court has been reluctant to grant pointless relief. This principle was accepted by Fraser J in the first application. The court has also declined to

issue a remedy even where a decision cannot be attacked without resort to extraneous evidence.

[37] Even if Dr Barnett's submissions are accepted and it was determined that judicial review was the appropriate forum for the resolution of the issues, the remedy offered in judicial review would be pointless at this time. The Contractor-General's Requisition of 18th November 2011 and the decision to refer the matter to the DPP are matters that, even if quashed, will not change anything. In respect of the Requisition, the questions have been answered. An order quashing the Requisition would not have the effect of recalling those answers already given. Dr Barnett has said of the requisition, that the questions are not relevant. The referral of the matter to the DPP underscores the futility of quashing the Requisition. The application to quash that referral would also amount to the court 'writing in water' as the matter has already been referred to the DPP, who has already acted on it. The horse has already gone through the proverbial gate. Quashing the referral has come too late, actions have already been taken on the referral, which its quashing could not roll back. The criminal process is already underway. In Mr Danville Walker's affidavit in support of his application dated 17th February 2011, at paragraph 24, the applicant said that on the 2nd February 2012, he learnt that he would be charged and was duly summoned to the Half Way Tree court on 21st February 2012. The applicant has since entered a plea of not guilty and a trial date had been postponed to 24th April 2013, pending the outcome of this application. What would be the point of granting relief even if the applicant was entitled on the substantive issues, when, to my mind he is not so entitled? In **Aston University Senate, Ex p Roffey** [1969] 2 QB 538 at p 551b, per Donaldson J, *'prerogative writs are a discretionary remedy designed to remedy real and substantial injustice rather than to give satisfaction, however legitimate.'*

[38] In **East Sussex County Council v Steve Steadman, Penelope Steadman & ors.** [2009] EWHC 935 (Fam) a fifteen year old girl, Chantelle, had given birth to a baby girl, Maisie. It was felt that the father was a thirteen year-old

boy, Alfie. He was excluded by DNA evidence. A fifteen year old boy then claimed to be the father. On the application of Essex County Council Maisie, Chantelle and Alfie were made wards of the court. An application was also made for reporting restrictions to prevent further publicity. The judgment said of the publicity, 'Even the time honoured phrase 'media circus' does not adequately describe what went on in the first week or so after Maisie's birth.' Alfie's dad appeared to be stoking the fires of publicity. Chantelle appeared to be seriously affected by the publicity. In refusing the application for restriction of reporting, Mrs. Justice King said at **[88]** of her judgment, quoted with approval from **[34]**, **[36]** of the judgment of Eady J, in **Mosley v News Group Newspapers** [2008] All ER (D) 135 (Apr); [2008] EWHC 687 (QB):

> ***[34]***. . . . *if someone wishes to search on the Internet for the content of the edited footage, there are various ways to access it notwithstanding any order the Court may choose to make imposing limits on the content of the News of the World website. The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised, in the traditional terminology, as a brutum fulmen. It is inappropriate for the Court to make vain gestures.*
>
> ***[36]***. . . . *I have come to the conclusion that the material is so widely accessible that an order in the terms sought would make very little practical difference . . . . The dam has effectively burst. I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate*

public interest in its further publication; the granting of an order against this Respondent at the present juncture would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the News of the World from showing what is already available.

[39] Justice King said, inter alia, at **[91]**:

I have to deal with the reality of the situation regardless of whether or not the Daily Mirror article was published lawfully. There are not just hundreds of public domain photographs of Chantelle, Maisie and Alfie in existence, there are tens of thousands all over the world and largely on the internet

[40] Justice King at **[97]** quoted with approval, Eady J in **Mosley** at **[34]**:

The Court should guard against slipping into playing the role of King Canute'. In my judgment the dam, as Eady J described it, has indeed burst and in practical terms there is no longer anything which the law can protect; the granting of the injunction at the present juncture would merely be a futile gesture.

[41] I find that to quash the Requisition, even if such a course was warranted, would be a pointless relief. It would amount to a futile gesture. A *brutum fulmen.* It would achieve or change nothing. On that basis, I would refuse the application.

Alternative Remedy

[42] The availability of an adequate alternative remedy, save in exceptional circumstances, has always been a bar to the grant of judicial review. As Sir John

Donaldson said in **R v Epping and Harlow General Commissioners, ex p. Goldstraw** [1983] 3 ALL ER 257:

> *But it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.*

[43] The CPR in Rule 56.3 (3) (d) mandates that the application for leave must state, inter alia, 'whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.' The applicant's first application for leave was grounded, inter alia, on the applicant's entitlement to apply for Constitutional redress, but said it would not invoked that remedy, 'since judicial review is capable of providing adequate remedies.'

[44] The applicant's second application dated 24th May 2012, at paragraph 9 of the grounds on which the applicant sought orders:

> *Possible alternative remedies of an action for constitutional redress or preliminary objections or motions in the Resident Magistrates Court are not appropriate or in keeping with the efficient and just disposal of the issues raised in that –*
>
> *(1) action for constitutional redress are in principle themselves only resorted to if there is no alternative suitable remedy;*
>
> *(2) preliminary objections to the criminal proceedings or motions in the Resident Magistrates Court would subject the applicant to a criminal trial* ***in an inferior court where issues raised as to jurisdiction may***

> ***better be determined by a superior court*** *and in any event, the ruling of the Resident Magistrate on such issue would itself be subject to judicial review and or appeal.(emphasis added)*

[45] These admissions by the applicant of the availability of alternative remedies of constitutional redress and of motions in the criminal trial, which the applicant has not used, preclude the exercise of the judicial review jurisdiction, unless there is a demonstration that judicial review is more appropriate or exceptional circumstances exist. It is settled that certiorari is a remedy of last resort. The case of **Plds Company Limited v Pendle Borough Council** [2012] EWHC 904 (Admin) aptly demonstrates this principle. The claimant's application for building approval was twice refused by the defendant council. As was the claimant's right, an appeal had been lodged against the latter decision. That appeal had not been determined. After the first refusal, the claimant had filed a notice pursuant to relevant legislation requiring the defendant to purchase the land. There was some dispute whether the claimant was the registered owner as required for service of the notice. An application for judicial review was refused and on a renewal of the application, the court was unable to act on the evidence produced. Mr. Justice Gore, QC, in refusing an application for judicial review of the council's decision said at **[17]** and **[18]**

> *17. But there is an additional and, in my judgment, even more compelling reason why this application should be refused. Judicial review is a discretionary remedy. It is a remedy of last resort and ought not to issue when an alternative is available. In this case an alternative is available.*

18. Accordingly, in my judgment, the time limit within which to serve a fresh purchase notice in proper form with the proper evidence, properly demonstrating that the statutory definition of ownership is satisfied in this case, has not yet expired, and the remedy is open to the claimant therefore simply to issue a fresh purchase notice properly supported by proper evidence demonstrating its entitlement. ***That being an alternative to judicial review, as a matter of discretion, I ought not to grant permission and I do not grant permission.*** *(emphasis added)*

[46] The able arguments presented by both sides recognised that there is an available alternative remedy to judicial review that the applicant seeks. The applicant clearly identifies the alternative remedies opened to him in [13] of his skeleton submission. The second limb of the threshold test is not simply a question of whether the applicant's contentions could be raised in a criminal trial but whether, having regard to the nature of the contentions, in particular, where they relate to the pre-prosecutorial decisions, it should best be dealt with in civil or criminal proceedings.

[47] In **Sharma v Brown-Antoine and Others (PC) [2007] 1 WLR 780**, it is noted at **[14 (3)]** of the judgment, that section 9 Judicial Review Act 2000 of the Republic of Trinidad and Tobago provides that the court may not, save in exceptional circumstances, grant leave for judicial review of a decision where any other written law provides an alternative procedure to question review or appeal the decision. The judgment of Lord Bingham and Lord Walker, states at **[14 (5)]**:

(5) It is well established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or

pressure) is a recognised ground of review; Matalulu, above, at pp 735, 736, and Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20 at paras [17] and [20]. It is also well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' (R v Inland Revenue Commissioners, ex parte Mead [1993] 1 All ER 772 at 782), 'sparingly exercised' (R v Director of Public Prosecutions, ex parte C [1995] 1 Cr App Rep 136 at 140), 'very hesitant' (Kostuch v Attorney-General of Alberta (1995) 128 DLR (4th) 440 at 449), 'very rare indeed' (R (on the application of Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin), [2004] Imm AR 549 at para [49]), and 'very rarely' (R (on the application of Bermingham) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin), [2006] 3 All ER 239 at para [63]. In R v Director of Public Prosecutions, ex parte Kebilene [2000] 2 AC 326 at 371, 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.'

With that ruling, other members of the House expressly or generally agreed; see pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. 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. In Wayte v United States 470 US 598 (1985) at 607, Powell J described the decision to prosecute as 'particularly ill-suited to judicial review'.

[48] The only successful applications in English cases for judicial review in respect of a challenge to the decision-making power of a prosecutorial authority, is where judicial review is the only possible remedy, and the applicant has no recourse to a criminal trial or on appeal. In short, an alternative remedy makes redundant the need for judicial review.

[49] In **Sharma** (supra) Baroness Hale, was of the view that the appropriate way to address the issues was in criminal proceedings, she states at **[34]**:

Viewing the matter generally, the present is clearly a case where all issues should, if possible, be resolved in one set of proceedings. There are potential disadvantages for all concerned, including the public, in a scenario in which one outcome might be long and quite probably public judicial review proceedings followed by criminal proceedings. We add that in our view ***it will be in a single set of criminal proceedings, be easier to identify and address in the appropriate way the different issues likely to arise.*** (emphasis added)

[50] Baroness Hale examined the scenario in which judicial review was allowed and the disadvantages that would flow to all concerned. Despite the issue of political interference and the disadvantages to the Chief Justice, it was felt that those issues could be managed in a criminal trial.

[51] The 'exceptional circumstances' standard that is required by section 9 of the Trinidad Judicial Review Act 2000 to grant leave for judicial review when there was an alternative procedure was not met by the complaints of the Chief Justice of improper politically – motivated interference by the Prime Minister and Attorney General, dishonesty of the Chief Magistrate, politically inspired decision making and conduct by the Deputy Director of Public Prosecutions, the Assistant Commissioner of Police and the Commissioner of Police. All these factors alleged by the Chief Justice were insufficient to amount to 'exceptional circumstance' to allow leave to be granted for judicial review, in the face of the alternative remedy of a criminal trial. The Civil Procedure Rule, 56.3 (3) (d) retains the standard of 'exceptional circumstances' required by the common law, and expressed in the Trinidad Act, before judicial review can be granted where an alternative remedy exists. The cardinal principal of which Sir John Donaldson referred in **R v Epping and Harlow General Commissioners, ex p. Goldstraw** is relevant to Rule 56.3 (d).

[52] Mr. Danville Walker's application for judicial review was grounded at paragraph 9 in accordance with Rule 56.3 (3) (d) as follows;

> Possible alternative remedies of an action for constitutional redress or preliminary objections or motions in the Resident Magistrate Court are not appropriate or in keeping with the efficient and just disposal of the issues raised in that –
>
> (1) Action for constitutional redress are in principle themselves only resorted to if there is no alternative suitable remedy;

(2) Preliminary objections to the criminal proceedings or motions in the Resident Magistrates Court would subject the applicant to a criminal trial in an inferior court where issues raised as to jurisdiction may be better determined by a superior court and in any event, the ruling of the Resident Magistrate on such issue would itself be subject to judicial review and/or appeal.

[53] This submission is inconsistent with the judgment in **Sharma [14 (5)]**, and quoted at **[47]** above which is to the effect that where, as here, there are alternative remedies of a criminal trial, constitutional motions and appeals, judicial review will not be granted. Dr Barnett submitted that the Resident Magistrate Court is an inferior court where issues raised as to jurisdiction may better be determined by a superior court. He further submitted, 'The scope of the inquiry would go beyond what is appropriate for the Resident Magistrate Court.' In my judgment, the Resident Magistrate, like the Judge of the Supreme Court, is a creature of statute. There is no distinction between the academic qualifications required for judicial officers of both courts. Both Courts have trained, experienced attorneys-at-law, with the required minimum of ten years of practice for the Judge of the Supreme Court. (See section 5 of the Judicature (Supreme Court) Act 1880). In case of the Resident Magistrates Court, the period is five years of practise in a judicial or legal capacity or one half of the period he has served as a Clerk of Courts before his qualification with such other period to amount to five years (section 12 of Judicature (Resident Magistrate) Act). The Resident Magistrates Court is statutorily empowered to hear and determine a wide range of matters under its criminal jurisdiction.

[54] Dr Barnett's submission that a criminal trial before the Magistrate will only lengthen the process by allowing judicial review of the decision of the Magistrate, ignores the fact that the decision of the Magistrate would have the alternative remedy of a right to appeal. The result of that is, judicial review would only be

granted if, as required by Part 56.3 (3) (d), it is more appropriate than the alternative of an appeal or the situations are exceptional or rare. The learned authors of a Stuart Sime, **Practical Approach to Civil Procedure** (9th) makes that point at page 503, 'It is only in rare situations that judicial review will lie against a decision of a county court, because the proper remedy is to seek to appeal rather than to seek a judicial review (**R (Sivassubramaniam) v Wandsworth County Court** [2003] 1 WLR 275)**.'**

[55] In Boddington v The British Transport Police [1999] 2 AC 143. The House had a sirnilar objection as that formulated in Dr Barnett's submission as to whether the Resident Magistrate Court is capable of dealing with the complexities raised in this matter. The House soundly rejected the submission as follows at page 162, Lord Irving;

> *Nor do I think it right to belittle magistrates' courts: they sometimes have to decide very difficult legal questions and generally have the assistance of a legally qualified clerk to give them guidance on the law. For example when the Human Rights Bill now before Parliament passes into law the magistrates' courts will have to determine difficult questions of law arising from the European Convention on Human Rights. In my judgment only the clear language of a statute could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a byelaw or administrative decision where his prosecution is premised on its validity.*

[56] Lord Steyn accepted certain policy considerations, which in my judgment are relevant to the good administration of justice in this country. I respectfully adopt his Lordship's comments and approval of the defendant's arguments in **Ex. P Hutchinson** [1988] QB 384, 392. His Lordship, after commenting on the 'unduly pessimistic conclusion' taken by Auld LJ, in the Divisional Court, in

relation to challenges to public law issues in the magistrates court and that learned judge of appeal's failure to take into account the counter argument, said at page 174:

> *I am impressed with the following policy considerations put forward by a Greenham Common defendant in* ***Ex parte Hutchinson*** *[1988] Q.B. 384, 392:*
>
> > *Coming to London to the High Court is inconvenient and expensive. Byelaws are generally local laws which have been made for local people to do with local concerns. Magistrates' courts are local courts and there is one in every town of any size in England. The cost of proceedings in a magistrates' court are far less than in the High Court. I believe this egalitarian aspect of seeking recourse to the law in a magistrates' court to be an important sign of the availability of justice for all.*

His Lordship's judgment continued:

> *Moreover, allowing a collateral or defensive challenge 'avoids a cumbrous duplicity of proceedings which could only add to the already overburdened list of applications for judicial review awaiting determination in the Divisional Court' as Lord Bridge of Harwich put it in* ***Chief Adjudication Officer v. Foster*** *[1993] A.C. 754, 766-767. In any event, expediency is not a sufficient and proper basis for taking away by judicial decision part of the jurisdiction of magistrate's courts to rule on issues pertinent to the guilt or innocence of defendants. Moreover, the ruling of the*

Divisional Court is contrary to principle and precedent which permits in civil and criminal cases a collateral or defensive challenge to subordinate legislation and administrative decisions. The result of the decision of the Divisional Court is that magistrate's courts will sometimes be obliged to convict defendants and to punish them despite the fact that the invalidity of the byelaw or order on which the prosecution is based affords the defendant an answer to the charge. Subject to the qualification enunciated in ***Reg v Wicks*** *[1998] AC 92õsuch a view of the law involves an injustice which cannot be tolerated in our criminal justice system.*

[57] I find that the applicant has alternative form of redress. That he has failed to demonstrate that judicial review is more appropriate than a trial in the Resident Magistrate Court; that the applicant has failed to demonstrate that the circumstances of this application are exceptional, and for those grounds, I would dismiss the application.

Application for declaration

[58] The application also sought declaration that the Requisition issued by the Contractor-General and dated 18th November 2011 is in excess of jurisdiction, ultra vires and void. Declarations are granted where the courts think it just and convenient to do so. The decision of the Contractor-General is valid until it is quashed. It is therefore useless to apply for a declaration while the Requisition remains valid. The Privy Council in **Sharma** was unaware of any English case in which leave to challenge a decision of the prosecutorial authority to prosecute has ever been granted. The applicant has failed to show why the criminal trial in the Resident Magistrates Court is not appropriate, when any decision by the magistrates will be appealable to the Court of Appeal, the matter, having moved beyond the Contractor-General's decision, with the referral to the DPP. The

court must be satisfied that the award of a declaration would serve a useful purpose (see **Attorney General v Colchester Corporation** [1955] 2 QB 207 at 217). I would refuse the application for a declaration.

An arguable case with a reasonable prospect of success

[59] What is the scope of the enquiry to be undertaken? The applicant contends that the Requisition of the Contractor-General is invalid; that the authorities of **Sharma** and **Kebiline** are distinguishable and that the principle in **Kebiline** that criminal proceedings should not be subject to collateral challenges, is not applicable to this case. Dr Barnett submitted that 'whether relief should be granted is in the discretion of the judicial review court after an examination of all the facts and factors and not a matter for the decision of the judge at the leave stage.' He relied on **Wicks** and submitted that doubt was cast on the distinction between 'substantive' and 'procedural,' invalidity as a basis for limiting the scope of the 'ultra vires defence.' Mrs. Samuels-Brown submitted that the line of authorities on which the applicant relied had been overtaken by the case of **Boddington**.

[60] The applicant is charged that, 'without lawful justification or excuse obstructed, hindered or resisted, a lawful requirement of the Contractor-General.' The essential ingredient of the charge is whether the Requisition of the Contractor-General is lawful. The determination of this issue coincides with the issues that are raised on the renewal of the application for judicial review. There cannot be a proper determination of the criminal trial without this question being answered. Of equal importance to the adjudication of the criminal trial, is the consideration of the lawfulness or justification of the excuse, if it is found that the Contractor-General acted within the ambit of the power ascribed to him by the Legislature. Both these issues are indispensable and are at the core of criminal trial. If the prosecutor fails to prove these vital ingredients, that's the end of the matter. Is this enquiry beyond the scope of the Resident Magistrate's Court? These courts are presided over by trained lawyers, with a minimum of five years

experience. The Resident Magistrate's Court is the court with which most Jamaicans are familiar.

[61] In **Boddington**, Anthony Scrivener, QC, for the prosecutor, had submitted that it was open to a defendant to challenge subordinate legislation, under which he has been charged as being invalid. He grounded his argument on the authority of **Kruse v Johnson**, a challenge to a bye-law could be mounted on the ground of it being unreasonable. Lord Irvine at page 152 said:

> *The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed. Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions.*

[62] His Lordship, at page 160, considered **Wicks** as an example of

> *A particular context in which an administrative act triggering consequences for the purposes of the criminal law was held not to be capable of challenge in criminal proceedings, but only by other proceedings.*

The elaborate enforcement code had provided for appeals against notices. All that was required to be proved was that the notice was formally valid. His Lordship found, at page 158, that the reasoning in **Buggs**' case, suggesting two classes of legal invalidity of subordinate legislation is inconsistent with respected authority and said:

> *An ultra vires act or subordinate legislation is unlawful simpliciter and if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever.*

Mr Danville Walker has raised no constitutional challenge to the Contractor-General Act which, in any event, is not subordinate legislation, neither has he raised "anything in the statutory basis of jurisdiction" in Judicature (Resident Magistrates) Act, which precluded the Resident Magistrate from considering a challenge to the validity of a Requisition under the Contractor-General Act (See p.157 **Boddington**, approving Lloyd L.J. in **Reg v Reading Crown Court, ex.p Hutchinson** [1988] QB 384 at 391-393). In other words, Mr Walker is not saying that the Resident Magistrate is about to embark on an action that is outside of her statutory powers. The challenge is to what the applicant regards as an ultra vires act on the part of the Contractor-General. Lord Irvine at page 161 of the judgment of **Boddington**, noted that in **Wicks** and **Quietlynn**, where there were challenges to administrative acts, the impugned acts were directed specifically at the defendants and there were provisions in the subordinate legislation for the defendants to challenge the legality of any such acts, before being charged with an offence. Lord Irving's judgment noted, at page 160, that:

> *...in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon*

arguments of invalidity of subordinate legislation or an administrative act under it.

[63] The judgment then drew a contrast between administrative acts specifically directed at the defendants as in **Wicks** and **Quietlynn**, which provided the defendants with clear and ample opportunity provided by the legislation to challenge the legality of the acts, with cases where defendants were charged under bye-laws, which are of 'general character in the sense that it is directed to the world at large.' Unlike in the cases of **Wicks** and **Quietlynn**, the defendants may be only aware of the legislation when he is charged. Lord Irving was of the view that the 'strong presumption' must be that Parliament did not intend to hinder the defendant in his exercise of his clear right to defend himself at his criminal trial by asserting the unlawfulness of the administrative act, the breach of which he is charged. The Contractor-General Act contained no elaborate enforcement code. There were no statutory appeals that were yet to be exhausted. The administrative act complained of could be said was of general application. The only ground forwarded by the applicant is that the matter is better determined in a superior court; an argument which had no real prospect of success. The authorities on which it relied were overtaken by the learning in the matter of **Boddington**.

[64] The applicant was unable to satisfy the first limb of the threshold, and was unable to demonstrate that they had an arguable case with a reasonable prospect of success. For this and the other reasons outlined, I would dismiss the application.

[65] I agree with the judgment of my learned colleagues, Sykes and Straw JJ.

SYKES J

[66] Let me say that I have read the judgment of Campbell J and I agree with his reasoning and conclusion that granting the remedy sought at this stage would be pointless (see **[36]** – **[41]**). I also agree with the judgment of Straw J except where her Ladyship says that Mr Walker requested an extension of time for answering the requisition, I would say that he did not make such a request. Nonetheless I have set out my own reasoning on this important case.

[67] This is a renewal of an application for leave to apply for judicial review by Mr Danville Walker, former Commissioner of Customs, who is seeking (a) to quash the Contractor General's (CG) decision to ask him to answer a number of questions (the requisition) or alternatively, a declaration that the decision to issue the requisition is ultra vires and void; and (b) to quash the decision to refer his failure to answer the questions to the Director of Public Prosecutions (DPP) for prosecution. The initial application was refused by Fraser J on March 26, 2012, after a contested hearing. Mr Walker is pursuing this application under rule 56.5 of the Civil Procedures Rules (CPR) which permits an applicant who has been refused leave to apply to judicial review to renew that application before the Full Court of the Supreme Court. This is not an appeal but a second opportunity to make the case for leave to apply for judicial review. As it was before Fraser J, this renewal is also contested.

[68] The test for leave to apply for judicial review is that stated by the Judicial Committee of the Privy Council in **Sharma v Brown-Antione** (2006) 69 WIR 379, an appeal from the Republic of Trinidad and Tobago. Their Lordships held that test is whether there is an arguable ground for judicial review with a realistic prospect of success which is not subject to a discretionary bar (**[14] (4)** Lord Bingham and Lord Walker). Baroness Hale, Lord Carswell and Lord Mance who delivered the majority judgment did not dissent from this proposition.

[69] Lord Bingham and Lord Walker went on to hold that 'arguability cannot be judged without reference to the nature and gravity of the issue to be argued' (**[14] (4)**). It does not appear that this view was shared by the majority since they resolved the case without any analysis of the nature and gravity of the matter. The majority took the view that there were adequate means of redress in the criminal process to address the complaints of the applicant. The test proposed by the minority was described as flexible in the sense that allegations vary from case to case and in cases where the allegations made on the application are very serious or the consequences of the allegations are serious, then the stronger the evidence needs be to establish the allegations (**[14] (4)**).

Why the challenge arose?

[70] Scrap-metal - because of its connotation in Jamaica - is loved and loathed in equal measure. On the one hand it produces a source of income for those engaged lawfully in the trade (and even the unlawful operators seem to enjoy significant economic benefits). On the other, it is loathed by those whose properties have been invaded, ransacked and stripped of all metal which is then used to fuel the seemingly insatiable appetite of the scrap-metal export industry. No property is too sacred or too profane. From churches, to schools, to private homes, business places, public infrastructure such as bridges and even equipment owned by telecommunications providers – all these places have suffered the predations of the marauders. They come by night and by day; rain or shine – no day is too hot or night too cold. No night is too dark. No day is too bright. No metal is too firmly fixed. No metal is too base. No metal is too precious. Once it is metal, moveable or removable, it is taken. Householders who go to bed leaving beautiful wrought iron gates awaken the following morning to find an open space where the gates once stood. The predators take, quite literally, from a pin to an anchor. So serious had the situation become that the Minister with responsibility for industry had to impose a ban restricting the export of scrap-metal from Jamaica.

[71] During the ban it was alleged that ninety seven shipments of scrap-metal left through the ports of Jamaica for foreign lands. There was a great furore in the land. Politicians, whether of government or opposition, were outraged. Members of the public were flabbergasted. Newspaper editors and readers were flummoxed. The day-time talk shows were inundated by calls from incredulous members of the public. There were even statements attributed to the customs department of which Mr Walker was the head at the material time in which it was said that it accepted responsibility for the 'error.'

[72] In the midst of all this disquiet came the Contractor General (CG). He is created by the Contractor General Act (CGA). He is a Commission of Parliament. He is not accountable to the political executive branch. He scrutinises the contractual processes of the executive. He makes his report to the legislature. In other words, he is the eyes, ears and feet of the legislature which acts as a check on the executive. Once the report is tendered, Members of Parliament, can, if they wish, question the relevant minister whose department has run afoul of the procurement or other procedures. The goal of the CG is to ensure probity in the spending of public funds and integrity in the contractual processes of government when it is procuring goods and services. He is, to use the hackneyed phrase, a watch dog, which, as yet, has no prosecutorial-or-imposition-of-sanction bite, but has a very loud bark. It is for those who hear the bark to look to see what is happening and take appropriate action.

[73] The CG sought to separate fact from rumour, suspicion from evidence. He set about gathering evidence in order to prepare a report to submit to Parliament. The CGA enables this function by conferring on the CG very wide statutory powers of investigation (sections 4 and 15). He can seek information from just about anyone he believes can provide him with information relative to the subject matter of his enquiry (section 18). The person from whom information is sought need not be suspected of any wrong doing. He sought to conduct an investigation into the circumstance in which the shipments were exported from

Jamaica. Unsurprisingly, the CG sent a requisition to Mr Walker who was the Commissioner of Customs at the material time.

[74] By way of letter to Mr Danville Walker, dated November 18, 2011, the CG sent the requisition to Mr Walker and asked him to submit his answers by December 2, 2011. The CG indicated that his investigation was triggered by reports, in the press and elsewhere, that scrap-metal had been exported from Jamaica in circumstances which may amount to a breach of prescribed licences issued by the relevant government agency to persons who wished to export the precious cargo. The CG obligingly explained in exceptional and extraordinary detail the sources of his information (which he was not required to do), what some of the sources said and why he felt an investigation was necessary.

[75] He set out the legal foundation for his actions. He explained his statutory powers and the basis of his legal authority to make the request. To this must be added the further context that the relevant Minister had imposed a ban on scrap-metal exports by way of two Trade (Scrap-metal) (Prohibition of Dealing) Orders, 2011. If anything, the letter from the CG had too much information.

[76] Mr Walker, through his attorney, responded by letter dated November 29, 2011. Learned counsel indicated that he would be advising himself and then his client. He also added that 'we must be satisfied that you are lawfully exercising the power you claim or what you intend to do by this investigation is within the scope of your authority under the Contractor General Act. Accordingly, we will need time to effectively complete the process mentioned above.'

[77] The CG responded by letter dated November 30, 2011. The CG advised counsel that he (the CG) had no doubt about his powers and 'as trained attorneys we would also hope that the 'satisfaction' which you seek, concerning the doubts which you say you harbour, will come to you in short order.' The CG extended the deadline to 12:00 noon on December 9, 2011.

[78] Counsel for Mr Walker wasted no time in responding to the CG also by letter dated November 30, 2011. Counsel accused the CG of behaving in a manner which suggested that '[he] [had] made a conclusion about our client already and you are now seeking information to support that view.' Counsel recommended that the specific officer who wrote the previous letters from the CG's office remove herself so that 'other persons who will take a more professional and dispassionate approach can conduct the investigation.' The right to consult counsel was reiterated and a resolute stance was adopted: 'we will not be frightened by your deadline of December 9, 2011 . . . if it is convenient for us, we will comply and if not we will use our options in law to protect our client from any further abuse from our office.' He added that his client was willing to cooperate with an investigation and will not take steps to frustrate the investigation. As can be seen, the opening round of communication between the CG and Mr Walker's attorney-at-law was not encouraging.

[79] By letter dated December 2, 2011, the CG responded. The first page and one half were spent upbraiding counsel regarding his letter of November 30. The letter ended with a repetition of December 9, 2011 deadline. The battle lines were drawn.

[80] Mr Walker did not respond to this latest letter from the CG and neither did he answer the requisition by the December 9, 2011 deadline. Despite this non-compliance, the CG wrote on December 12, 2011 (three days after the deadline) to Mr Walker and extended the deadline for response to December 15, 2011 at 11:00 am. The CG also told Mr Walker that should he fail to comply he would be committing a criminal offence under section 29 (b) of the CGA. Mr Walker was also told that the matter would be referred to the DPP. The CG also indicated that it was open to Mr Walker to submit in writing reasons why the matter should not be referred to the DPP. There was no response from Mr Walker to the CG which means that Mr Walker did not respond to the letter extending the deadline

and neither did he respond to the letter indicating that he may be prosecuted. He did not take up the invitation to indicate why the matter should not be sent to the DPP.

[81] The next letter in this saga is dated December 20, 2011 from Mr Walker's legal adviser to the DPP. In that letter, Mr Walker's counsel questioned whether the CG had jurisdiction to issue the requisition in the circumstances of the case. It was also explained that Mr Walker is willing to answer the questions but fairness required that he be given a reasonable time to do so. The letter spoke to the unavailability of files, documents and records which would enable him to respond with the degree of precision required by the CG. The letter concludes by suggesting that December 31, 2011 would be a reasonable deadline. It is not entirely clear why this letter was written to the DPP when she neither issued any requisition to Mr Walker nor had any part or lot with this matter until it was in fact referred to her for her assessment of whether criminal charges should be preferred against Mr Walker. There is no evidence that the DPP contacted Mr Walker about the requisition before he wrote to her.

[82] True to his word, the CG sent the file to the DPP who ruled that Mr Walker should be charged with breaches of section 29 (1) (b) of the CGA, namely, failing to comply with a lawful requirement of the CG. There is no evidence showing when the matter was sent to or received by the DPP or when she made her ruling to prosecute.

[83] By letter of December 23, 2011, Mr Walker's counsel sent to the CG the answers to the requisition.

[84] The DPP issued her ruling that Mr Walker should be charged with offences under section 29 (b) of the CGA. Summonses, dated February 1, 2012, were issued and Mr Walker is now before the Resident Magistrate's Court for the Corporate Area in respect of those offences.

[85] After he was summoned, Mr Walker, on February 12, 2012, filed an application for leave to apply for judicial review alleging among other things that the CG exceeded his authority under the CGA when he asked Mr Walker to respond to the requisition and even if he had acted within the Act, his action was irrational and unreasonable in that he was asking Mr Walker to complete a voluminous questionnaire at a time when Mr Walker was a candidate in national elections and no longer had access to the files, documents and records of the Customs Department. This application is directed at pulling the rug from under the DPP's proposed prosecution of Mr Walker.

[86] He also wants the decision to refer the matter to the DPP reviewed.

[87] All that has been stated so far are undisputed. There is no affidavit from the CG and he would not be obliged to file any, this being the leave stage of the procedure. Counsel for the CG has not sought to take issue with the sequence of events outlined by Mr Walker.

The grounds for application

[88] Again it is repeated that this is not an appeal from Fraser J. It is a renewal of the application for leave. Dr Barnett submitted that this renewed application for leave is seeking to challenge two decisions of the CG, namely the decision to issue a requisition to Mr Walker and the decision to refer the matter to the DPP. Dr Barnett accepted that the CG has the power, generally, to issue requisitions but in this particular case, if the CGA is properly interpreted and the requisition examined against the background of what the CG said he was investigating, then the requisition was not properly issued because the statute did not cover the subject matter of the investigation. Therefore, the requisition was ultra vires and thus unlawful.

[89] On the second challenge, the submission was that CG acted unreasonably having regard to (a) the volume of information requested, (b) the fact that Mr Walker did not have access to files, documents and records at the Customs Department and (c) further that the time given to Mr Walker to respond was simply too short (two weeks initially from November 18, 2011). The time set by the CG did not take account of the right of Mr Walker to seek competent legal advice and that he was a candidate in national elections. Dr Barnett submitted that the conduct of the CG could be described as irrational and unreasonable. He reminded the court that at this stage all he needs to do is to meet the test of arguability with a real prospect of success and that there is no discretionary bar.

Whether the CG had lawful power to embark on the enquiry in question

[90] Dr Barnett's main point was that the statutory basis for issuing the requisition did not apply to this case and so there was no basis in fact or law to refer the matter to the DPP. It was submitted that section 15 (1) (e) and (f) of the CGA, on a proper interpretation, does not permit the CG to issue the requisitions he did in this particular case. Next, it was said that some or all of the requisitions or questions are not within the scope of enquiries which the CG said he was conducting.

[91] It is common ground that the Minister, prior to the ban, had issued Trade (Scrap-metal) Regulations 2007 which imposed the requirement of a licence before any scrap-metal could be exported. Therefore when the ban came into effect the only persons who could export scrap-metal would be those who had licences and fell within the two exempted categories.

[92] It is my view that this submission does not take sufficient account of section 4 (1) (b) of the CGA. Under that section, the CG has power 'to monitor the grant, issue, suspension or revocation of any prescribed licence' and 'where appropriate [power to] examine whether such licence [was] used in accordance with the terms and conditions thereof.'

[93] The submission does not take sufficient notice of the very terms of the November 18 letter to Mr Walker. The CG said that he was initiating an inquiry '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**' (emphasis added). What this means is that he was seeking to find out the circumstances in which prescribed licences that were awarded to exporters were used to circumvent the ban on exporting scrap-metal from Jamaica during the period of the ban since it is common ground that scrap-metal was in fact exported during that period.

[94] Section 4 (b) of the CGA permits the CG to examine whether a prescribed licence was used in accordance with terms and conditions on which it was issued and the letter said he was investigating use of certain licences to circumvent the ban on scrap-metal exports during the period the ban was in place.

[95] In light of this regulatory structure, it is difficult to contend that the CG's requisition does not fall within the ambit of sections 4 (1) (b) and 15 (e) and (f). The prospect of arguing otherwise is not real and therefore the **Sharma** test has not been met.

Whether the CG's conduct was reasonable

[96] I will now refer to Mrs Samuels-Brown's response to the second basis for the challenge. In response to Dr Barnett, Mrs Samuels-Brown examined, in very fine detail, the time line which began on November 18, 2011 and eventually ended on Decernber 15, 2011, against the background of the content of the letters which has been summarised above. Her submission was that the conduct of the CG had to be judged in light of how the issue developed between the parties. Learned Queen's Counsel submitted that the CG does not live in a world

of the abstract or the ideal. He has a statutory mandate which is obliged to give effect. It was further submitted that when one examines the correspondence carefully, it is clear that the CG respected at all times the right of Mr Walker to seek legal advice. There is nothing in his letters to either Mr Walker or to his legal adviser which suggests otherwise.

[97] The undeniable fact, Mrs Samuels-Brown continued, is that despite the acrimonious response of Mr Walker's legal adviser to the November 18 letter from the CG, the CG extended the time to a specific date. Neither Mr Walker nor his legal adviser suggested to the CG how much time was needed and nor did they suggest any date by which Mr Walker would answer the requisition. The CG's letter of November 29 moved the deadline from December 2, 2011 to December 9, 2011. The November 29, 2011 letter from Mr Walker's legal adviser stated that he would consult with his client and advise him accordingly. The legal adviser did not specifically request an extension of time to complete the requisition. However, once it was brought to the attention of the CG that Mr Walker was seeking legal advice, the CG in fact extended the time. This, it was submitted, shows quite clearly that the CG accepted that an extension of time was desirable and also a clear recognition of not only the right to legal advice but also that time should be granted to consult counsel. There was no response to the CG indicating that more time than December 9, 2011 was needed.

[98] Mrs Samuels Brown pressed home the point by noting that the December 9, 2011 deadline came and passed without any request for an extension of time by Mr Walker. In fact, the last letter to the CG from Mr Walker's counsel (November 30, 2011), stated that Mr Walker would not be frightened by the deadline of December 9, 2011. There was no mention, in that letter, that Mr Walker had any difficulty completing the requisition because he was a candidate in national elections or that he had difficulty gaining access to files, documents and records of the customs department or that he needed more time. Despite this response and despite missing the December 9, 2011, the CG extended the

deadline a second time. The CG actually wrote to Mr Walker, by letter of December 12, 2011, reminding him that he had missed the December 9, 2011 deadline and also told Mr Walker that he now had until December 15, 2011 to respond. In other words, even though Mr Walker missed the deadline, he refrained from asking for an extension and did not explain his difficulty, the CG extended the deadline a further six days. Thus, Mr Walker had in fact received a thirteen-day extension of time from the original deadline of December 2, 2011, without any specific request for this coming from him and without any clear indication that he had any difficulty completing the requisition.

[99] The CG, insisted Mrs Samuels Brown, respectfully reminded Mr Walker, in the December 12 letter that he may be in breach of section 29 (b) of the CGA. The CG even took the uncommon step of suggesting to Mr Walker that he could make submissions in writing to the CG indicating why the matter should not be referred to the DPP for prosecution. Mr Walker was even told that should he miss the December 15, 2011, the file would be referred to the DPP without further notice.

[100] The first time that any explanation of difficulty with access to files, documents and records is by way of letter dated December 20 to the DPP and not the CG. This letter was not copied to the CG.

[101] I must confess that when Mrs Samuels Brown laid out the matter in this comprehensive and clinical way, it is really impossible for me to see what was unreasonable about the conduct of the CG. His letters, at times, may have been strident and unnecessarily combative and belligerent. The CG is not known to indulge in pleasantries or to be circumspect in language. He is blunt and direct. His language may even be described as excoriating. However, that should not disguise the substance of his conduct. He asked for the requisition to be answered. He extended time twice without any request from Mr Walker. He provided Mr Walker with a final opportunity to indicate why the matter should not

go forward to prosecution. It is difficult to see how Mr Walker could successfully argue in judicial review proceedings that in the context of this case the CG's conduct was unreasonable or irrational as those terms are understood in administrative law. I do not think that the test has been satisfied on this ground. In light of what has been said it would be very difficult to argue successfully that the CG's conduct was irrational and unreasonable in either the narrow or broad sense of Wednesbury.

Was Mr Walker entitled to seek judicial review in this case with a criminal case pending?

[102] I will now address the issue of whether Mr Walker was correct to seek judicial review rather than resolve his challenges in the criminal court.

[103] Dr Barnett advanced the proposition that a person charged with a criminal offence is not precluded from going to the judicial review court where the criminal proceedings are based on antecedent actions by a statutory functionary. The application to this case is this: the criminal charges against Mr Walker depend on the antecedent conduct of the CG, namely, administering the requisition, setting a time frame for response and submitting the file to the DPP. The criminal charges are that Mr Walker failed to respond to the requisition in the time stated by the CG. The main goal of this proposition was to say that even if other remedies are available judicial review is the most appropriate in this case.

[104] Dr Barnett cited a number of cases from the year 1900 to 2007 in support of his point. Learned counsel went further to submit that since judicial review is open to the person charged, then he should not be barred from exercising this option and that this court should not bar his way to the judicial review court.

[105] I agree with Dr Barnett that the cases do decide that judicial review is open to a person charged before the criminal court where the charges depend on

antecedent action by a statutory functionary. What I would also say, which shall be demonstrated, is that the law has been in continuous motion and the law is now at the point where it can be said that, despite the fact that the person can seek to challenge the antecedent decisions and actions that are the foundation of the criminal charges some very good reason has to be shown that a challenge by way of judicial review should be allowed if the criminal process has begun and can in fact accommodate the complaints and provide an adequate remedy.

[106] Some if not all the decisions cited by Dr Barnett will now have to reassessed in the light of the analysis and reasoning of the House of Lords in **R v Wick** [1998] AC 92 and **Boddington v British Transport Police** [1999] 2 AC 143 as well as the Judicial Committee of the Privy Council's advice in **Sharma**.

[107] The summary of the law in the cases cited by Dr Barnett is now stated. There was a time when it was generally accepted in English and Anglo-Jamaican law that a defendant charged under a byelaw or because of an antecedent administrative decision could challenge in the criminal trial, the validity of the byelaw or administrative action. However, that had changed in light of the increased sophistication of judicial review. The dictum of Webster J in **Quietlynn Ltd v Plymouth City Council** [1988] QB 114, 131 summed up the thinking:

> *It has, of course, long been the practice for justices to decide for the purposes of a case immediately before them upon the validity of byelaws and, before the Town and Country Planning Act 1971, of enforcement notices. But those practices were established long before applications for judicial review were given statutory recognition in section 31 of the Supreme Court Act 1981. The law relating to judicial review has become increasingly more sophisticated in the past few decades, and in our view justices are not to be expected to have to assume the functions of the Divisional*

Court and consider the validity of decisions made by a local authority under this Act in the light of what is now a complex body of law. ***If a bona fide challenge to the validity of the decision in question is raised before them, then the proceedings should be adjourned to enable an application for judicial review to be made and determined.*** *In our view, therefore, except in the case of a decision which is invalid on its face, every decision of the licensing authority under the Act is to be presumed to have been validly made and to continue in force unless and until it has been struck down by the High Court; and neither the justices nor a Crown Court have power to investigate or decide upon its validity. This conclusion constitutes our answer to the question common to these three appeals and is sufficient to determine each of them.* (emphasis added)

[108] The rationale was that the magistrates were inferior courts presided over by non-lawyers and the current state of complexity of judicial review was such that except in obvious cases of invalidity, those courts were not the appropriate forum for these kinds of issues. It was also said that there was the risk that the High Court may hold byelaws or the conduct of the statutory functionary to be valid but the magistrates in a criminal trial may find the contrary. This opened the possibility of acquittal of a guilty person (**Quietlynn** at page 128). This was thought to be undesirable.

[109] The high point of this view epitomised by Webster J's reasoning was reached in the case of **Bugg v Director of Public Prosecutions** [1993] QB 473. Woolf LJ set out to systematise the law. His Lordship developed the distinction between substantive ultra vires and procedural ultra vires for the purpose of deciding which type of ultra vires could be accommodated by magistrates and which by the High or Divisional Court. His Lordship laid out an elaborate defence

of the distinction and why it was valuable (pp 491 – 498). For Lord Justice Woolf, substantive ultra vires meant circumstances where (a) as a matter of law the byelaw or action made was not within statutory authority or (b) it was complained that the action was 'patently unreasonable' (page 494). His Lordship suggested that for substantive ultra vires no evidence was necessary. It was simply a matter of looking at the statute and the byelaw as well as the action taken and deciding whether the enacted byelaw was permitted by the statute or whether the impugned act was permitted by the statute or byelaw. From this premise, his Lordship concluded that it would be much easier for magistrates to deal with this type of ultra vires than procedural ultra vires and consequently they could deal with substantive ultra vires.

[110] In respect of procedural ultra vires, Woolf LJ took the view that it had so many manifestations and required more than ordinary care to recognise and adjudicate upon. Consequently, it was not suitable for magistrates to embark on deciding this type of ultra vires. Woolf LJ while agreeing with Webster J in **Quietlynn** that there had 'long been the practice for justices to decide for the purposes of a case immediately before them upon the validity of byelaws,' the true position was that this practice did not exist in relation to procedural invalidity. Therefore, Woolf LJ agreed on the long practice spoken of by Webster J but made the point that only substantive invalidity was involved in those cases.

[111] Even with this monumental effort, Woolf LJ conceded that the distinction he made did not remove the grey area in some cases such as those where it was said that there was mala fides in the decision making process.

[112] The first sign of a crack in this carefully constructed edifice appeared in the House of Lords case of **Regina v Wicks** [1998] AC 92. In that case the appellant was served with an enforcement notice under a statute. He failed to comply with the notice and was prosecuted. His proposed defence was that the local council acted in bad faith and took into account irrelevant considerations. It was also his

contention that the byelaw was not passed in accordance with the parent statute. The trial court took the view that those were public law defences raising procedural invalidity and could not be raised in the criminal courts. Mr Wicks took his case to the House of Lords. The House held that whether it was open to challenge action taken under a statute on the ground of invalidity depended on the proper interpretation of the statute. On the specific facts of the case, it was held that the particular statute under examination did not permit challenges to the validity of byelaws and therefore the defendant could not mount his public law defences.

[113] What is important in this case is that Lord Nicholls and Lord Hoffman expressed very strong reservations about the soundness of the distinction made by Woolf LJ in **Bugg** but felt that the facts and circumstances were not appropriate for overruling that decision.

[114] The post-Wicks precarious existence of **Bugg** came to an end in **Boddington v British Transport Police** [1999] 2 AC 143. In that case a ban was implemented on smoking on railway carriages. The defendant lit up and was convicted. The trial court rejected challenges to the validity of the byelaw and administrative decision to implement the ban. On appeal to the Divisional Court it was held that the challenges to the procedural and substantive validity of the byelaw could not be addressed in the criminal court. On further appeal to the House or Lords, the entire matter was revisited. The decision of the Divisional Court was reversed and **Bugg** was overruled. More important the intellectual foundations of **Bugg** were removed and discarded.

[115] Lord Irvine held that the distinction between substantive invalidity and procedural invalidity was not sustainable in any practical way. Lord Irvine concluded his analysis by saying that unless the language of the statute so indicated then it must be presumed that the legislature intended the citizen to be

able to raise any defence to a criminal charge that was available. Therefore, a citizen could raise substantive and procedural invalidity in a criminal trial.

[116] Lord Steyn summed up the matter succinctly at page 173:

> *There is, above all, another matter which strikes at the root of the decision in Bugg's case. That decision contemplates that, despite the invalidity of a byelaw and the fact that consistently with Reg. v. Wicks such invalidity may in a given case afford a defence to a charge, a magistrate court may not rule on the defence. Instead the magistrates may convict a defendant under the byelaw and punish him. That is an unacceptable consequence in a democracy based on the rule of law. It is true that Bugg's case allows the defendant to challenge the byelaw in judicial review proceedings. The defendant may, however, be out of time before he becomes aware of the existence of the byelaw. He may lack the resources to defend his interests in two courts. He may not be able to obtain legal aid for an application for leave to apply for judicial review. Leave to apply for judicial review may be refused. At a substantive hearing his scope for demanding examination of witnesses in the Divisional Court may be restricted. He may be denied a remedy on a discretionary basis. The possibility of judicial review will, therefore, in no way compensate him for the loss of the right to defend himself by a defensive challenge to the byelaw in cases where the invalidity of the byelaw might afford him with a defence to the charge. My Lords, with the utmost deference to eminent judges sitting in the Divisional Court I have to say the consequences of Bugg's case are too austere and indeed too authoritarian to be compatible with*

the traditions of the common law. In Eshugbayi Eleko v. Government of Nigeria [1931] A.C. 662, a habeas corpus case, Lord Atkin observed, at p. 670, that 'no member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a court of justice.' There is no reason why a defendant in a criminal trial should be in a worse position and that seems to me to reflect the true spirit of the common law.

[117] This case marked the formal end of the thinking developed by Webster J and Woolf LJ. The law is now at the point where a person charged with a criminal offence can raise defences to that charge even if those defences involve what would normally be public law issues. It is also true to say that he has the option of going to a judicial review court to challenge the byelaw or the action of the functionary. However, as will now be shown the latter option is now subject to considerations raised by the majority in the **Sharma** case. As Campbell J pointed out, Mr Walker is now before the criminal court. This application is not coming in the hiatus between the decisions of the CG (that is the decision to issue the requisition and the referral to the DPP) and the initiation of criminal process. In this present factual circumstance, Mr Walker's options have been narrowed by the fact that he was summoned and is awaiting trial.

[118] In **Sharma** the issue was whether the Chief Justice should have been granted leave to bring judicial review proceedings of the DPP's decision to prosecute him where it is alleged that the prosecution was brought because of political influences. The judge at first instance granted leave. The Court of Appeal reversed her decision and the Privy Council upheld the Court of Appeal. It was unanimously held by the Privy Council that although such proceedings could be brought the case was not an appropriate one because the Chief Justice had not established that the criminal court could not grant an appropriate remedy for his

allegations. This is where unanimity ended. The majority took the view that there were adequate means of redress in the criminal process while the minority took the view that the evidence adduced by the Chief Justice fell woefully short of what was required to mount the challenge.

[119] The minority (Lord Bingham and Lord Walker) demonstrated how a court faced with the question of whether to permit judicial review after criminal charges are laid may approach the matter (that is, if the approach of the minority is accepted). The methodology is this: (a) identify clearly and accurately what the complaint is; (b) identify clearly and accurately the remedy sought and (c) decide whether the complaints can be adequately addressed by the criminal courts. If the answer to (c) is that adequate means of redress exist in the criminal process then judicial review should be declined.

[120] Dr Barnett suggested that **Sharma's** case was unique in the sense that the issue there was whether there ought to be judicial review of a decision to prosecute. It is well known that judicial review of a decision to prosecute absent an allegation of mala fides is certainly bound to fail. While this is true it is my respectful view that the discussion in the case revealed more than what has been attributed to it by Dr Barnett. No special law was created or applied. I am quite aware, as Campbell J has pointed out, that in **Sharma**, section 9 of the Judicial Review Act 2000 of the Republic of Trinidad and Tobago, stated that exceptional circumstances need to exist before a remedy under judicial review proceedings could be granted if there were other means of redress available. It is my respectful view that the relevant statutory provision in the 2000 Act is consistent with the well established view that remedies are not granted in judicial review proceedings if adequate means of redress exist which have not been exhausted unless there is some good reason not to pursue those remedies. The reference to exceptional circumstances in section 9 of the 2000 Act did not create a new principle but enhanced it. It may be said that the bar was raised by the adjective 'exceptional' but that should not obscure the fact that courts have always held

that where other means of redress exist then the applicant should exhaust those means. This is reinforced by the requirement on an application for leave to apply for judicial review that the applicant needs to state why he is seeking a remedy by means of judicial review and in so doing he is required to say whether alternate means of redress exist and if they do, why he is not using them. Ultimately, the point being made is that even without section 9 of the 2000 Act the outcome would, quite likely, have been the same.

[121] The test was applied and the Chief Justice's case was found wanting. It is true that the minority (Lord Bingham and Lord Walker) stated that the Chief Justice had a high mountain to climb in order to make out his allegation and that the material presented up to that time fell far short of what was required. However, the majority did not approach the matter in that way and decided the case on procedural lines, namely, that there were adequate means within the criminal process to address the Chief Justice's complaints. The availability of remedies within the criminal process was the decisive factor for the majority and not the strength or weakness of the Chief Justice's case. **Sharma**, in my respectful view, shows that the fact that a defendant wishes to go to the judicial review court is not decisive in and of itself. If anything, **Sharma** confirms the reluctance to grant leave for judicial review if the criminal process can provide redress for the concerns of the defendant. While the applicant has a choice of forum, the choice is not unfettered.

[122] Applying the approach of the majority then it cannot be said that Mr Walker's complaints cannot be addressed by the criminal process. It is my humble view that it is purely a matter of statutory interpretation, which a Resident Magistrate is more than competent to decide. Surely, it cannot be suggested that a Resident Magistrate (a trained lawyer) is incapable of interpreting a statute and deciding whether the CG had a lawful basis to issue his requisition. Mr Walker's lack of response within the time set by the CG can be dealt with by the criminal process. Under section 29 (b), the court will have to look at the totality of the

evidence and decide whether Mr Walker had any lawful justification or excuse for not responding within the time. In making this assessment, the criminal court will have to decide whether, in all the circumstances of the case, the time set was reasonable.

[123] The same conclusion can be arrived at using the methodology of the minority. The difference here is this: I will not be commenting on the strength or weakness of Mr Walker's case. I will show that there is no issue raised by Mr Walker that a Resident Magistrate cannot deal with. Mr Walker is seeking certiorari to quash the decisions to issue the requisition to him and to refer the matter to the DPP. The bases on which Mr Walker wishes to make the challenge have already been stated (**[88]** and **[89]**). The first basis is a matter of statutory interpretation and the examination of a document. The second basis can be determined by an examination of all the evidence called on the issue. I see no reason why a Resident Magistrate cannot make these assessments.

[124] Finally, it was suggested that Mr Walker was involved in national elections and therefore his time was consumed and this presumably amounts to lawful justification or excuse for the purposes of section 29. This too a Resident Magistrate is thoroughly equipped to decide.

[125] Dr Barnett resisted these conclusions by submitting that in this case, the scope of the enquiries necessary to make the challenges in the criminal trial before the Resident Magistrate would make that court an inappropriate forum. It is not immediately obvious, especially in light of **Sharma**, what enquiries could be undertaken which would not be within the competence of a Resident Magistrate. Also, if according to **Boddington** magistrates in England who are not trained as lawyers are considered equipped to deal with both substantive and procedural ultra vires then it is very difficult to see why a Resident Magistrate in Jamaica (who, by the time of permanent appointment, would have had ten years legal exposure, that is five years of study followed by five years of practice) cannot

address the issues raised by Mr Walker. In **Sharma**, the majority envisioned that the criminal trial was an appropriate forum to canvass the issue of the basis of the prosecution in trying to find out whether political considerations led to the Chief Justice being charged with very serious offences. By contrast, the issues here are substantive invalidity (requisition not within terms of statute) and procedural invalidity (conduct of CG unreasonable) – much simpler, I would think, to determine than whether the prosecution of a sitting Chief Justice was procured at the behest of a sitting Prime Minister and his Attorney General. One only needs to contemplate what would be involved in such a trial with these types of allegations and the atmosphere of such an enquiry compared to what is being alleged in the instant case and it is not hard to see that the circumstances of Mr Walker's case pales in comparison to that of **Sharma**. The image of a sitting Chief Justice in the dock of a criminal court while his counsel is cross-examining a number of persons including the DPP, possibly the Prime Minister and Attorney General to make the case of politically motivated prosecution can in no way be compared to this case. If the criminal courts were thought sufficient to handle the Chief Justice's complaints then even more so a criminal court can handle Mr Walker's complaints where there is no suggestion of mala fides or dishonesty in the CG's decision making process.

[126] Dr Barnett also made reference to a possible infringement of section 13 of the Charter of Fundamental Rights and Freedoms in order to suggest that the CG infringed Mr Walker's right to consult counsel of his choice. In my view, this too can be dealt with by the Resident Magistrate. If there was such a breach then the Resident Magistrate would have to consider whether this breach has had such an adverse effect on the criminal process that Mr Walker could not secure a fair trial. Again, **Sharma** and **R v Horseferry Road Magistrates' Court, ex parte Bennett** [1994] 1 AC 42 have clearly indicated that inferior criminal courts do have the power to prevent abuse of their process, albeit that that power should be exercised sparingly. Surely, if Mr Walker can establish on a balance of probabilities that his right to counsel was abused to the extent that he cannot

receive a fair trial then the Resident Magistrate can give effect to such a complaint by dismissing the charges laid against Mr Walker. I am not saying that Mr Walker has established any such thing. What I am saying is that he can make such a case before the Resident Magistrate and should he fail and he is convicted then the appellate route is open to him.

[127] From the review of the law, it is now safe to say that so far as the intersection of criminal proceedings and judicial review is concerned, the stage has now been reached where it can be said that collateral litigation by way of judicial review, where criminal proceedings (not investigations) have begun, is discouraged, unless there is really no other remedy or there is something exceptional about the case that makes judicial review the proper response. Thus, it is no longer simply whether the remedy of judicial review is available but whether permitting such a challenge should be allowed when there are adequate measures in the criminal process to deal with the complaint of a defendant. Thus, Dr Barnett's broad submission has to be pared down to meet the reality of the present state of the law.

[128] In relation to the point made in the immediately preceding paragraph, the Australian judiciary have labelled this system of challenging various aspects of steps prior to the initiation of criminal proceeding or steps taken after a criminal prosecution has begun as 'fragmentation of a criminal process.' The underlying idea is that the court should be reluctant to grant remedies when criminal proceedings are underway unless there are exceptional circumstances. This is the position of the Australian judiciary even in cases where the courts have been given express statutory power to intervene on matters relating to an evidentiary ruling during the course of a criminal trial (see, for example, **Atlas v DPP** [2001] VSC 209, Bongiorno J). I see no reason why similar judicial restraint should not be applied in this case.

[129] The thought behind this kind of judicial restraint was expressed by the High Court of Australia in **Sankey v Whitlam** 142 CLR 1, pp 26 – 27, Gibbs ACJ:

> *In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief. The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process. I am not intending to criticize those concerned with the conduct of Bourke v. Hamilton, or to show any disrespect for the careful judgments delivered in that matter—indeed I have derived much assistance from them—when I say that that case provides an example of the way in which criminal proceedings may be needlessly protracted if they are interrupted by an application for a declaration—in the end the declaration sought was refused but the proceedings had been delayed for the space of almost a year. The present case itself is another regrettable example of the delay that can be caused by departures from the normal course of*

> *procedure.* ***For these reasons I would respectfully endorse the observations of Jacobs P. (as he then was) in Shapowloff v. Dunn, that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order.*** *Although these remarks may be no more than mere 'administrative cautions' ... I nevertheless consider that if a judge failed to give proper weight to these matters it could not be said that he had properly exercised his discretion.*(emphasis added)

[130] So, yes, the Australian judiciary were dealing with a statutory power to grant relief on matters of evidence and procedure after a criminal trial had commenced but the caution expressed should be even stronger in the instant case because it has not been shown that the Resident Magistrate's Court is either inherently incapable of providing adequate redress or that there is something special and unique about this case which would make it a good case to go forward for judicial review. The core reasoning of the Australian judiciary, with appropriate, modification is applicable here.

[131] The final point to make here is that the factual foundation for judicial review in the CG's decision to issue the requisition would have arisen by November 18 the date of the letter to Mr Walker. The reason is that in judicial review time for making the application begins when the decision is made and not when it is communicated or known by the applicant. However, while Mr Walker was consulting his legal adviser the process of decision making did not stand still.

[132] It appears that it was the summons to the criminal court that sparked further action from Mr Walker. The point is that in his initial response to the CG by way of the November 29 letter, Mr Walker's attorney did say that he was wondering whether the CG had lawful basis for exercising his power to issue the requisition. This was the first opportunity to seek judicial review before being charged. This must mean that counsel appreciated that judicial review was the remedy since that was the only legal remedy possible at that stage of this saga if he wanted to challenge the decision. The December 20 letter to the DPP, again questioned whether the CG was acting lawfully. Mr Walker, despite his questioning of the CG's powers, clearly elected not to challenge them by way of judicial review until after the criminal charges were laid. Here again was a second window of opportunity to challenge the CG by way of judicial review.

[133] Mr Walker in fact submitted a response to the CG by letter dated December 23, 2011. Mr Walker has now complied with the requisition and thus as Campbell J has pointed out, there is nothing to quash. One interpretation of the delay in seeking judicial review and submitting the answers to the CG is that Mr Walker considered and decided against judicial review despite his misgivings about the CG's powers.

[134] Obviously, Mr Walker has had a change of heart. Nothing is wrong with that but while this was going on the CG and the DPP were on the road to prosecution and a prosecution has now been instituted. At this point in the matter, the issue of alternative remedies must loom large and must be taken into account.

[135] The decision I have made is not to be seen as 'punishing' Mr Walker for not applying for judicial review before the criminal charges were preferred but rather to emphasise that not acting in time may lead to developments on the ground which alter the outcome had action been taken earlier. Lest we forget, the

basis of the criminal charges is the failure to respond within the time set and not the adequacy of the responses.

[136] I now turn to the procedural objections.

Procedural objections

[137] The relevant facts for this part of the reasons for judgment are these. Fraser J delivered his reasons for refusal on March 26, 2012. Mr Walker filed notice of appeal and grounds of appeal on March 30, 2012 in the Court of Appeal. The Court of Appeal gave its decision on May 9, 2012. Mr Walker filed a notice of application for court order seeking leave for judicial review on May 24, 2012.

[138] Rule 56.5 (5) says that where the applicant intends to renew his application after a refusal, he must file the notice of intention to do that within ten days of service of the judge's refusal. Mrs Samuels-Brown took issue with whether this was a renewal or a completely new application. I agree with Straw J's resolution of this issue (**[172] – [182]**).

[139] Mrs Samuels-Brown took a fundamental point regarding time: Mr Walker is out of time. She submitted that on any analysis this renewal is out of time. There is no power in the court to extend time and, even if the court could extend time, Mr Walker has not presented any good reason for the court to exercise its discretion in his favour.

[140] Mrs Samuels-Brown submitted that we need look no further than rule 56.5. The present hearing is a renewal of an application for leave. Under rule 56.5 (4) and (5) Mr Walker needed to have filed a notice of intention to renew his application at the registry within ten days of the service of the judge's refusal. There is no evidence that this was done and so he was out of time. There is no provision in the CPR for an appeal to the Court of Appeal when the initial

application is refused. The rules set out quite clearly what the applicant must do if he wishes to renew his application.

[141] Mr Walker filed an appeal in the Court of Appeal and eventually appeared before the learned President who pointed out to him rule 56.5. During this trip to the Court of Appeal, the ten days passed. It was further submitted that the excursion to the Court of Appeal did not have the effect of stopping time from running, presumably, because there is no statement to that effect in the rules and an appeal does not have the intrinsic ability to suspend time. The fact that the learned President directed Mr Walker back to the Supreme Court did not stop time from running against Mr Walker.

[142] Queen's Counsel pointed out that even after Mr Walker got the result of his appeal to the Court of Appeal (May 9, 2012) he still did not act within ten days of that date. It was submitted that even if it were the case that an appeal to the Court of Appeal suspended the operation of the ten days such that that the ten days would begin from the time the Court of Appeal delivered its decision he is still out of time. According to counsel, there is no provision for extension of time in Part 56 in these circumstances and since Parts 25 to 27 only arise at the first hearing, after leave has been granted, then Mr Walker, unfortunately, is out of time.

[143] In this regard, notice must be taken of the important Court of Appeal decision of **Golding v Simpson Miller** SCCA No 3/08 (April 11, 2008). In that case, the applicant had been granted leave to apply for judicial review. It was necessary then for her to file the claim form and do the other necessaries within fourteen days of leave being granted. This she failed to do and applied for an extension of time. It appeared that the judge acted under Parts 11 and 25 which permit the court to use its case management powers to extend time. Mr Golding, the appellant, contended that the judge did not have the power to extend time. The three Judges of Appeal made important statements about Part 56 of the

CPR and its relationship to other rules which are very instructive. Panton P held that Part 11 of the CPR is the general rule whereas Part 56 deals specifically with judicial review. His Lordship stated that where it was intended that the special rules in Part 56 were to be affected by other rules then provision is so made within Part 56. As an example, the learned President referred to rule 56.13 (1) which spoke to a first hearing and the application of Parts 25 and 27 to the first hearing. There was no such provision relating to the time limits set by the CPR in the period between grant of leave and filing the claim form. Indeed, his Lordship held that the special Part 56 rule is not to be watered down by general rules unless there is a statement in Part 56 to that effect.

[144] Smith JA expressly addressed the question of whether the power to enlarge time under rule 26.1 (2) (c) applied to the circumstances before the court. His Lordship concluded, after referring to rule 26.1, that the structure and wording of rule 56.13 force the conclusion that rule 26 applies only at or after first hearing and not before. The inference from this, according to the Justice of Appeal, was that the circumstances in which the court may exercise general power are limited to those under rule 56.13. Indeed, his Lordship went as far as saying that unless 'a particular rule [in Part 56] so provides, the court may not exercise its general powers of case management at any stage before the substantive proceedings have commenced' (page 22).

[145] This conclusion of his Lordship was further supported by his reference to rule 56.6 (2) which empowers the court to extend time to make the application for leave. By contrast, his Lordship pointed out that there is no express provision permitting the extension of time for filing the claim pursuant to rule 56.4 (12). His Lordship observed that it was this omission from rule 56.4 (12) that forced counsel to ground the application in rule 26.1. Smith JA pointed out that 'the curtailing of the applicant's ability to renew the application where he has failed to file the claim in the time prescribed by rule 56.4 (12) seems ... to support the

contention that the court may not, in the exercise of its general powers, enlarge the time prescribed by that rule' (page 23).

[146] Harris JA came to the same conclusion as the other members of the court. Her Ladyship was quite clear that if the court were to have the power to extend time within which to file the fixed date claim form after getting leave to apply for judicial review, specific provisions would have been made in Part 56.

[147] From the judgments of the Court of Appeal, the principle then is that judicial review proceedings are unique and Part 56 is a self-contained code applicable to such proceedings and any power to be exercised under that Part is either expressly stated or incorporated by reference to other rules which grant such powers. In effect, the court has held that under Part 56 there is no power to extend time except where Part 56 so states either specifically or by incorporating other Parts which contain such a power.

[148] This is so notwithstanding the fact that rule 2.2 states quite clearly that the CPR applies to all civil proceedings and that civil proceedings is defined to include judicial review. Thus, the Court of Appeal is saying that even though the wording of section 2.2 which would have engaged Parts 11, 25 to 27, the powers contained in those parts are not available in judicial review applications save where Part 56 so states and the only rule in Part 56 which so states is rule 56.12 (1) which says that Parts 25 to 27 apply to first hearings.

[149] In this case, rule 56.5 does not confer any power to extend time within which to file the notice of intention to renew the application. Rule 56.5 (4) says that the notice must be lodged within ten days of service of the judge's refusal.

[150] In light of the Court of Appeal's reasoning, I am unable to disagree with Mrs Samuels-Brown. It does appear that Mr Walker is well and truly out of time in every sense of the word having regard to the rule 56.5 and the non-availability of

the power to extend time in these circumstances. There is no power in this court to extend the time within which to file and pursue the application to renew.

[151] Mrs Samuels-Brown did not stop there. She went on to say that in the unlikely event the court, somehow found it possible to derive a power to extend time, then that power should not be exercised in favour of Mr Walker because he has provided no reason to say nothing of a good reason why he was late. He has not explained why he took the trip to the Court of Appeal. If that were not bad enough, Mr Walker has not explained why he did not act within ten days from the decision in the Court of Appeal so that he could give himself a fighting chance of trying to squeeze into rule 56.5 (4) and (5).

[152] In his affidavit, Mr Walker states that after he received the decision of Fraser J he instructed his attorney to go to the Court of Appeal. He said that he gave those instructions the same day that he received the decision. According to Queen's Counsel that is not a good reason for not compliance with rule 56.5 which sets out the path to be taken. She submitted that Mr Walker chose to ignore the correct path and created his own.

[153] I am reluctant to conclude that a litigant who at all times sought to exercise his right to renew a failed application and who acted incorrectly procedurally does not have a good reason for the exercise of a discretion. I would not agree with Mrs Samuels-Brown on this. In some circumstances, an honest mistake may amount to a good reason.

Conclusion and disposition

[154] I have concluded that Mr Walker has failed in establishing that he has a realistic prospect of success if leave were to be granted. It is my view that the criminal process has sufficient means to address the issues Mr Walker wished to raise on judicial review. Finally, on an examination of the material against the

backdrop of Part 56, Mr Walker is out of time and this court has no power to extend time in the circumstances of this case.

[155] Mr Walker's renewal of an application for leave to apply for judicial review is refused.

STRAW J

[156] Mr Danville Walker, the applicant, was the Commissioner of Customs from June 2008 to 6th November 2011. The respondent, the Contractor-General, is a Commission of Parliament with functions designated under The Contractor-General Act. These functions include those listed at section 4 (1) b of the Act:

> *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.*

[157] Mr. Walker is renewing an application for leave to proceed to judicial review of the actions of the Contractor-General under the Act.

BACKGROUND TO THE APPLICATION

[158] The scrap-metal industry is regulated by licences granted to exporters which are issued by the Trade Board. It is the duty of the Customs Department to ensure that the documents of the exporter are in order and that the containers are free of contraband and stolen scrap-metal.

[159] In 2011, certain national concerns came to a head in relation to the exportation of scrap-metal. As a result of these concerns, 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 which came into effect on the 29th July 2011.' This Order prohibited the purchase, sale, distribution, import or export of, or other dealing in scrap-metal subject to two exceptions:

Firstly, scrap-metal that 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, but not by any intermediary.

[160] The Minister promulgated a new Order on the 31st August 2011 that superseded the first order with the effect that the time limited for the first exception to apply was expanded to the 16th September 2011. After this Ministerial Order came into force, scrap-metal could only lawfully be exported if it fell within either of the two exceptions as described and the exporter had a permit for the export.

THE ACTIONS OF THE CONTRACTOR-GENERAL

[161] By letter dated 18th November 2011, the office of the Contractor-General wrote to Mr. Walker in his capacity as head of the Customs Department during the relevant period. The letter was headed 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.*

[162] The letter then sets out the reasons that prompted the investigation which include allegations by the Opposition Spokesman on industry and various media reports alleging a breach of the applicable law in relation to the exportation of scrap-metal occurring after the Ministerial Order was put into effect. The

Requisition listed 32 questions including summaries to be answered by the applicant.

[163] The letter required submission by Mr. Walker by the 3rd of December 2011. Eventually, the deadline was finally extended to the 15th December. It was made clear that if he failed to submit the answer by that date, the matter would be referred to the Office of the Director of Public Prosecutions (ODPP) for possible prosecution. Mr. Walker did not submit his answers until the 23rd December. He was subsequently charged for a breach of the Contractor-General Act on a ruling by the ODPP and placed before the Resident Magistrate's Criminal Court for the Corporate Area.

THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

[164] Mr. Walker has requested leave to apply for judicial review by way of an order of Certiorari to quash the Notice of formal requisition issued by the Contractor-General and of the decision to refer the matter to the ODPP for the institution of a prosecution against him.

[165] These applications are made, firstly, on the basis that the Contractor-General acted in excess of his authority in issuing the requisition and his actions are *ultra vires* and void. Secondly, that the time limit given by the Contractor-General was wholly disproportionate to the voluminous answers required. The Contractor-General, therefore, acted irrationally and unfairly in not allowing an extension of time and referring the matter to the ODPP.

[166] An Order extending the time for making the application to renew the application for leave for judicial review to the date of the filing of this application has also been requested.

THE ISSUE OF DELAY-THE PROCEDURAL CHALLENGE

[167] It is important to note that this application for leave is a renewed application before the Full Court by virtue of Section 56.5 (1) of the CPR. An application was made previously before Fraser J (by Notice of Application filed on 17th February 2012) who refused leave. The rules provide that an applicant may renew his application by notice lodged in the Registry within 10 days of the service of the Judge's refusal (Section 56.5 (4) and (5)). Fraser J delivered judgment on the 26th March 2012. Mr. Walker, however, declined to renew his application but chose to appeal the judgment of Fraser J.

[168] However, the President of the Court of Appeal, Panton P, considered the application, referred the appellant to the above section of the CPR and dismissed the appeal on the 9th May 2012. Mr. Walker then filed the present application for renewal before the Full Court on the 24th May 2011.

[169] Mrs. Samuels-Brown QC, representing the Contractor-General, has mounted a challenge to this present application on the basis of delay. She has submitted that the law allows for the renewal of the original application and not a fresh one although the court may allow the original application to be amended. She states that it is a new application as it is the second application filed. [24th May, six months after the Contractor-General's requisition] It is materially different from the first as it incorporates an application for extension of time to 'renew the application.'

[170] Secondly, it introduces new grounds in that it acknowledges that the Contractor- General's investigative powers extends to the use of licences and not just to the grant, issue or revocation and proceeds to assert that the requisitions do not relate to such use.

[171] Mrs Samuels-Brown submits also that it is out of time as it does not fall within section 56.6 (1) and (2) of the CPR as it has not been made promptly

neither is there any good reason given for the delay. The relevant sections read as follows:

> *56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when the grounds for the application first arose.*
>
> *(2) However, the court may extend the time if good reason for doing so is shown.*

IS THIS A NEW APPLICATION?

[172] The original application of the 17th February would have been filed within the three (3) months after Mr. Walker received notice of the requisition. The affidavit evidence reveals that he received it on the 25th November 2011. The relevant sections of the CPR which govern a renewal are Sections 56.5 (4) and (5):

> *56.5*
>
> *(4) - - an applicant may renew his application by lodging in the Registry notice of his intention.*
>
> *(5) The notice under paragraph (4) must be lodged within 10 days of service of the judge's refusal or conditional leave on the applicant.*

[173] A perusal of the CPR reveals that there is no specified notification form to be used under this section. The application filed on 24th May, cannot, without more, be said to be a new application as it may be interpreted as the filing of the notice of intention. The inclusion of an application for extension of time is also not new material as Mr. Walker had chosen to appeal the decision of Fraser J, which

was procedurally incorrect, and therefore had a duty to explain the reason for the delay beyond 10 days.

[174] Mr. Walker's second affidavit filed on the 7th June 2012 contains the reason for the delay and is not the affidavit filed in support of the application for leave. This application was previously filed on the 17th February 2012. There may be some debate as to whether the other new material included would take the application outwit the jurisdiction of a renewal but there is a greater challenge to the viability of this application.

[175] Mrs. Samuels-Brown submits that this application is also out of time as it was not lodged within the required 10 days mandated for renewal (Section 56.5(5)). She states that this is obviously based on the use of the word 'must.' Counsel submits further that, where the rules intend to give the court discretion to extend time, it states so specifically as set out in 56.6 (2). There is no such discretion extended in relation to the application for renewal.

[176] A review of the authorities supports Mrs. Samuels-Brown's contention. In **Golding v Simpson Miller**, SCCA No 3/08 (unreported) (delivered April 11, 2008), the Court of Appeal ruled that an application grounded in section 56 of the CPR could not be granted to extend time in which to file a Fixed Date Claim Form. Leave had been granted to the respondent to proceed to judicial review by Beckford J. She had also ordered that the Fixed Date Claim Form was to be filed within 14 days in accordance with rule 56.4 (12) which states that leave is conditional on this being done.

[177] In **Golding,** Panton P emphasized that Part 56 dealt specifically with Administrative Law and where it is intended that these special rules are to be affected by other rules, it is so stated, for example, at rule 56.13 (1) that provides that Parts 25 to 27 of the CPR applied. The respondents leave which was conditional had therefore lapsed (**[10]**).

[178] Part 26.1 (2) (c) grants a discretion to the court to extend or shorten time for compliance with any rule, practice direction, order or direction of the court. Counsel for the respondent in **Golding** had argued that the above section could be applied by the court to allow the time for the Fixed Date Claim Form to be filed.

[179] Harris JA in **Golding**, **[32]** stated that the critical issue was centred on the true interpretation of Rule 56. 4. Her Ladyship agreed with the submissions of counsel for the appellant that Part 56.6, dealing with delay, is inapplicable to a situation in which there had been a prior ruling and that the rule in 56.13(1) must be construed to mean that the court may only apply the provisions of rules 25 to 27 where a Fixed Date Claim Form has been filed **[36]**. Harris JA also stated that rule 26.1 (2) (e) excludes the discretion to extend time where the rules provide otherwise.

[180] The Court of Appeal has made it clear that Part 56 establishes its own procedural requirements and any timeline indicated must be observed. This court would therefore have no discretion to extend time in an application for renewal which may be possible for an original application under rule 56. 6 (1) and (2) where good reason is shown.

[181] Under section 56.5 (4) and (5) of the CPR, the right of renewal is granted but the time within which the right may be exercised is restricted. In **Norma McNaughty v Clifton Wright et al**, SCCA No 20/2005, Smith JA considered a procedural appeal in relation to the discretion of the court to extend time by virtue of rule 26.1 (2) (c) to an application arising under rule 73.3 (7) of the CPR. Although the sections being considered are unrelated, his words are in parity to the ruling in **Golding**:

> *In my judgment, rule 26. 1 (2) (c), does not empower the court to extend a limitation period set by a rule for*

the exercise of a right. This rule deals with the failure to comply with a rule in relation to proceedings before the court not with a failure to exercise a right to apply to restore proceedings.

[182] It does appear that Mr. Walker would be unable to cross this procedural hurdle. Even if the court had the discretion to disregard the period up to the dismissal of the appeal on the 9th May 2012, he failed to lodge the intention to renew within 10 days as the notice was not filed until the 24th May 2012. I would therefore be unable to grant any order for an extension of time to renew the application. I will, however, consider whether Mr. Walker has established a case of merit for leave to be granted.

THE TEST TO BE APPLIED

[183] In order to succeed in an application for leave to apply for judicial review, Mr. Walker must satisfy the test as set out in **Sharma v Brown Antoine** [2007] 1WLR 780, **[14 (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.

REALISTIC PROSPECT OF SUCCESS

[184] Dr Lloyd Barnett is contending that the Requisition was *ultra vires* as it was not in accordance with the terms of the Contractor-General Act as described in the relevant section 15 (1) (e):

15 (1) Subject to subsection (2), a Contractor-General may, if he considers it necessary or desirable, conduct an investigation into any or all of the following matters-

(a) ...

(b) ...

(c) ...

(d) ...

(e) *The circumstances of the grant, issue, use, suspension or revocation of any prescribed licences.*

(f) ....

[185] Dr Barnett submits that the Requisition had nothing to do with any of those factors and that the voluminous material requested was based on a Cabinet decision which is outwit the jurisdiction of the Contractor-General. The requisition was therefore unlawful and misguided. It is on this basis that the referral to the Director of Public Prosecution is challenged.

[186] Counsel has therefore requested that the Court examine the issues raised in the Requisition in the context of the Contractor-General's powers to see if Mr. Walker has a realistic prospect of success with the arguments as advanced.

THE REQUISITION

[187] It is a voluminous document and I do not intend to list all the specifics and details. My brother, Sykes J has very helpfully summarized the various issues outlined and I would gratefully adopt his recital. The actual questions and requested summaries commence at page 6 and continue to page 20. The introductory section does refer to an alleged contravention of a Ministerial/ Cabinet Prohibition Order [heading] as well as breach of the Cabinet Order/Decisions (**[5]**) but the substance of the document and not merely the

extraction of certain words has to be considered. It is clear that the Contractor-General's enquiry relates to a breach of the ministerial orders.

THE ACT

[188] Mrs. Samuels-Brown has submitted that one should not restrict the word 'use' merely to the conduct of the actual exporter and that the powers of the Contractor-General have to be considered within the context of the entire Act.

[189] It is to be noted that, sections 4 (1) (b) and 15 (1) (e) aside, there are other provisions in the Act that grant some latitude to the investigative arm of that office. Section 4 (4), for example, reads as follows:

> *For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power 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 grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable.*

[190] Section 18 (1) is also of relevance as it empowers the Contractor-General to request information and production of documents from any officer or member of a public body or any other person who he believes can assist him in relation to the investigation of any matter pursuant to the Act.

[191] Mrs Samuels Brown has urged the court to consider the approach of the court in **Mass Energy Ltd V Birmingham City Council**, [1994] Env LR,298 and

make a conclusive ruling on the issue as to whether the claim is 'likely to succeed'

[192] In **Mass Energy Ltd v Birmingham City Council**, the Court of Appeal of England and Wales considered a renewed application for leave to apply for judicial review. Glidewell LJ expressed the view that the court had the benefit of detailed inter partes argument and since it was unlikely that the points would be canvassed in much greater detail if leave were granted, the court should only grant leave if the case 'is not merely arguable but is strong; that is to say, is likely to succeed' (pp 307 – 308).

[193] Scott LJ also agreed with this approach:

> *...it seems to me to be right that this Court should try and form a view, not as to whether a case for judicial review is arguable, but as to where the case is a good one and likely to succeed. If a conclusion cannot be reached that the case is a good one and likely to succeed, leave should not, in my opinion be granted.*

[194] In **Sharma,** the standard expressed is 'a realistic prospect of success', which may be considered to be less onerous than 'likely to succeed.' Two members of the Board, Lord Bingham and Lord Walker did examine the evidence put forward by the appellant and expressed that arguability cannot be judged without reference to the nature and gravity of the issue to be argued **[14(4)]**. There was, however, some restraint in expressing opinions on the prospects of success or failure by the other three members (Per Baroness Hale of Richmond, Lord Carswell and Lord Mance, **[31]** and **[33]**).

[195] There is also a material distinction between **Mass Energy** and the present case as it includes a collateral challenge to the decision of the ODPP to

prosecute Mr. Walker. While I must therefore assess the material to identify factors in justifying any conclusion that the challenge is more than merely arguable, I must exercise caution in expressing any rigorous view on the success or failure of the points raised by Mr. Walker.

[196] In **Sharma**, the Board emphasized that judicial review of a decision to prosecute, although available in principle, is a highly exceptional remedy and that leave will not be granted if the complaint could be properly resolved within the criminal process **[14(5)]**, **[31]**. In assessing the issue of 'a realistic prospect', I do so against the background of an impending criminal prosecution and considering whether it would not be more desirable to have the challenges mounted in that venue.

[197] Bearing in mind the role of the Customs Department in the exporting of scrap-metal, the powers of the Contractor-General, in particular, section 15, section 4 (1) (b) and 4 (2) (e) and section 18 (1) as well as the various reports, [through media and otherwise], that had come to the attention of the Contractor-General as outlined in the introductory section of the Requisition, it is my opinion that Mr. Walker has not met the required standard. There are no factors identified in relation to the exercise of the Contractor-General's powers to justify a finding of 'a realistic prospect of success.'

UNFAIRNESS OF TIME CONSTRAINT

[198] I am of a similar view also in respect to the challenge mounted that the time limit extended to Mr. Walker was unfair and irrational.

[199] Dr Barnett has emphasized the number of questions asked and summaries required, some with unpleasant implications and allegations of corruption. He has further submitted that it would have been reasonable to allow Mr. Walker time to take the document into account and to receive legal advice.

[200] Dr Barnett has provided the court with a chronology which is concise and helpful. This has been referred to by Sykes J and again, I adopt his narration in relation to the chronology.

[201] Suffice it to say that the requisition which is dated the 18th of November 2011 required submission by the 3rd of December.

[202] It came to Mr. Walker's attention on the 25th of November. He then instructed counsel, Mr. Bishop to respond and time was requested to consider the legal issues. This communication is dated 29th of November.

[203] The Contractor-General replied on 30th November demanding the answers by December 9 at 12 noon. Mr. Bishop replied on the same day protesting the tone of the Contractor-General's response. This letter contained the following remarks:

> *We will not be frightened by your deadline of December 9, ... if it is convenient for us, we will comply and if not we will use our options in law to protect our client ....*

[204] It is to be noted that the letters between both parties were acrimonious. However, this first and only request for an extension of time was granted. Mr. Bishop did not communicate with the Contractor-General that Mr. Walker was involved in the General Elections that were pending, nor that he had resigned as Commissioner of Customs since 6th November and documentation would not be readily available to him. These issues were first raised by the applicant in correspondence with the ODPP. The fact of his resignation may have been public knowledge but any difficulties attached to that fact were never emphasized.

[205] There was no further communication from Mr. Walker to the Contractor-General. On December 12, the Contractor-General informed Mr. Walker that he had failed to meet the deadline and extended the time to December 15. The last paragraph of that letter reads as follows:

> *Please note that should you fail to meet the revised deadline or to show lawful cause in writing, you will be referred to the Office of the Director of Public Prosecutions [ODPP] without any further notice given to you or to your Attorneys at Law.*

[206] This communication was met with the sound of silence. The Contractor-General referred the matter to the ODPP on the 15th of December for the prosecution of Mr. Walker.

[207] Mr. Walker's attorney then wrote directly to The ODPP. The difficulties described above were mentioned with the indication that the document would be submitted by the 31st December.

[208] The last date in the saga is on the 23rd December when Mr. Walker's answers were submitted to the Contractor-General. In spite of Mr. Walker's letter, the Director of Public Prosecution made the decision to have Mr. Walker prosecuted by virtue of section 29 (b) (ii) of the Act.

[209] Dr Barnett has submitted that the request for an extension of time to the 31st of December was reasonable. Mrs. Samuels-Brown has submitted that the issues of irrationality and unfairness must be judged in the context of the Contractor-Generals' letters and Mr. Walker's response. On the face of it, Mr. Walker requested an extension on only one occasion. It was granted to him, and a second extension granted without a request.

[210] It is my opinion that it strains credibility to argue that a request for an extension to the 31st was reasonable as Mr. Walker made no such request except to the ODPP (who have not been joined as a party to this application). I am therefore unimpressed with the submission of unfairness.

[211] Baroness Hale of Richmond, Lord Carswell and Lord Mance in **Sharma,** as stated previously, did not place much emphasis on the analysis of the evidence but considered whether the issues raised could properly be resolved within the criminal process (**[31]**) and expressed as follows:

> *The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the ... complaint could not properly be resolved within the criminal* process.

ALTERNATIVE REMEDY

[212] Dr Barnett has submitted that it would be inappropriate to resolve the matter in the Resident Magistrate's Court for the following reasons:

> Firstly, an administrative decision is the foundation of the subsequent criminal proceedings and it is appropriate to challenge by judicial review.

> Secondly, it is more appropriate that the applicant should seek relief and determination by this court as he is challenging the exercise of statutory powers exercised prior to the criminal proceedings rather than be subjected to a criminal trial.

[213] In **Boddington and British Transport Police** [1999] 2 A.C. 143, the House of Lords eradicated any distinction between substantive and procedural error as a basis for challenge in the criminal court. The court held that a defendant was not precluded from raising in a criminal prosecution the contention that a byelaw or an administrative act undertaken pursuant to it was *ultra vires* and unlawful.

[214] Lord Irvine of Lairg L.C. spoke to the possible restrictions to this principle in the following terms (pp152 -153):

> *The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.*

[215] This is seen for example, in tax cases where there is an ample appeal procedure that the statute provides for an aggrieved taxpayer. In ***R v Wicks*** [1997], 2 ALL ER 801, the House of Lords held that a defendant who was charged with failing to comply with an order made under statutory powers could not challenge its validity in criminal proceedings as the relevant act contained an

elaborate statutory code with detailed provisions regarding appeals. It is important to note, however, that the authorities including **Boddington** are not precluding judicial review where criminal proceedings are pending but the trend is towards a refusal of leave unless the alternative remedy is quite unsuitable.

[216] All of the issues raised by Dr Barnett have been met by the authorities discussed above. The ODPP has ruled that Mr. Walker be charged with a breach of the Contractor-General Act. The Act allows him to raise a defence of lawful justification or excuse (section 29 (b)). All the issues raised in relation to time constraints could be raised. A detailed examination of the role of the Customs Department in relation to the licences could be elicited in evidence in order to assist the court with a determination as to whether there was any legal basis for the Requisition.

[217] There is no statutory appeal process that would limit his ability to raise these defences of unfairness and irrationality within the criminal proceedings. If he is aggrieved with the decision of the Resident Magistrate, he has the option of an appeal to a higher court. In this regard, his alternative remedies are eminently suitable and adequate.

FINAL REMARKS

[218] In light of the above, the application for leave to proceed to judicial review is refused. Based on these reasons and the reasons set out by Campbell and Sykes JJ, I would dismiss the application for judicial review.

ORDER OF THE COURT

Campbell J

Application for renewal of leave to apply for judicial review dismissed.