JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THIS MATTER OF SECTION 5A OF THE PAROLE

CLAIM NO. 2007 HCV 042356

BETWEEN	**NEVILLE WHYTE**	**APPLICANT**
AND	**THE ATTORNEY GENERAL**	**RESPONDENT**

Lord Anthony Gilford QC and Mrs. Helene Coley-Nicholson for the Applicant
Mr. Curtis Cochrane instructed by the Director of State Proceedings for the Respondent.

Heard on 12th February 2008

Application for leave to apply for Judicial Review

MORRISON, J (Ag.)

By way of Notice of Application for Court orders dated 25th October 2007 this applicant seeks an order of certiorari to quash a decision dated 17th December 2003 and recorded in an order dated 12th September 2007. The order complained of is that of the Honourable Mr. Justice Cooke J.A. who decided that Neville Whyte should not be eligible for parole until twenty years have elapsed. The commencement date of his revised sentence was 2nd May 1990.

Further, the applicant sought a declaration to say that he is entitled to have his application for parole heard and determined by the Parole Board. The applicant has set out a number of bases in support of his application. In gradatim, that he was not informed of the hearing at which his case was to be considered; that he was not given an opportunity to be represented at this hearing or to make representations

of any kind to the learned judge; that the delay in informing him of the decision was inexcusable; that because of the aforementioned transgressions his rights under section 20 (2) of the Constitution of Jamaica to a fair hearing within a reasonable time was contravened; if the said order is quashed he will be entitled to have his application for parole heard and determined.

Secondly, he asserts that, he has no alternative form of redress.

Thirdly, he complains that no consideration has been given to the matter by the Respondent in response to his complaint. He submits that the time for applying for judicial review has not been exceeded since this order could only take effect from the date on which it was drawn up, that is, 12th September 2007.

Finally, he laments that he is directly affected since he has an application for parole pending before the Parole Board, which application would not be heard and determined unless the order made is quashed.

I shall not labour or lengthen upon his application for an extension of time within which to make application for leave to apply for judicial review as the Respondent, pro confesso, stated that it is not concerned about the late application for reasons I infer as being eminently unassailable: The signal administrative failure of the state to notify the applicant on time of date of his review. Instead, I shall deal substantively with the application for leave to apply for judicial review.

It is the applicant's contention that the decision of Cooke, JA was purportedly given pursuant to Section 5A of the Parole Act. That section, they observe, provides for a Judge of the Court of Appeal to determine a minimum period in the case of a person whose death sentence was commuted to life imprisonment. In this regard, they submit, that Cooke, J.A. was performing a statutory function in contradistinction to sitting as the Court of Appeal. Further, that he was not sitting as a Court in Jamaica at all. The applicant supports both postulations by reference to

the cases of **R v. Simpson (1996) 48 WIR** and **R v. Williams and Banks (1997) 51 WIR**.

The applicant submits the view that the decision of Cooke, J.A. is a decision of a public authority empowered by statute and thus is amenable to Judicial review. This is all the more so as there is no remedy available to the applicant particularly as there is no right of appeal from this decision. Procedurally, the applicant says, that on the basis of **Huntley v. Attorney General of Jamaica (1994) 46 W.I.R** an inmate had the right to make representations to the Judge before a minimum period of incarceration was ordered in his case. Further, they contend, that there is no distinction in principle between the procedures under the amendment to the Offences against the Person Act Section 4, as considered in **Huntley** supra, and the procedure under Section 5A of the Parole Act. In both points of reference the applicant posits that judges had been given and are now given, the mandate to extend the minimum period of elapsed time before which an applicant becomes eligible for parole.

In response, the Respondent, for the most part, was content to say that the route taken by the applicant is inappropriate. The route suggested is by way of an "appeal" to the full court. The use of the word "appeal" is to be understood in a qualified generic sense.

It is their contention that Section 5A of the Parole Act gives a Judge of appeal a strict judicial function. Further, they invited the court to look at Section 2 thereof for its definition of "Judges" and "Appellant." The Respondent tenders the view that there is a review process under Act 14 of 1992 to the Offences against the Person Act and that the review process thereunder should be applied, as if unchanged, to Section 5A of the Parole Act. In fact, says the Respondent Section 7 of the Parole Act permits the aggrieved applicant to seek review by the full court.

To buttress this submission the Respondent pointed this court to the decisions of the Court of Appeal in **Clifford Brown et al vs Resident**

Magistrate, St. Catherine and Anor". The Respondent argued that the Supreme Court does not have supervisory power of control over the Judge of Appeal and in support yields of the authority of **Millicent Forbes v The Attorney General of Jamaica,** Supreme Court Civil Appeal No. 29/2005.

Finally the Respondent offers the case of **McCordie Morrison v. The Chairman of the Parole Board et al,** located at SCCA No. 24/03, for guidance as to the application of Section 5A of the Parole Act.

The issue, pure and simple, is this: Is the decision of Cooke, JA amenable to judicial review? I begin by recognizing that judicial review is concerned not with the decision but with the decision-making process. Broadly speaking, the power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of public authorities in order to ensure that they act within their given powers. It is the power of the Court to keep public authorities within their proper bounds and legality. The Courts jurisdiction derives at the instance of a person who claims to be prejudiced or is aggrieved by an act or omission of a public authority.

Part 56 of the Civil Procedure Rules, 2002 deals with judicial review, among other things, Rule 56.1 (3) (A) refers to judicial review as including the remedy of certiorari. Rule 56.2 is instituted, "who may apply for judicial review and includes in its reference, "any person who has been adversely affected by the decision which is the subject of the application."

However, before obtaining a grant of judicial review such an applicant must first obtain the leave of the court according to Rule 56.3. Rule 56.4 directs, inter alia, that an application for leave to make a claim for judicial review must be considered forthwith by a judge of the court.

Now, who are the authorities amendable to judicial review? The case law shows that all public authorities are subject to judicial review. These include Governors, Governors General, Service Commissions,

Ministers, the Legislative and the judiciary. (Quoted from Professor Albert Fiadjoe in COMMONWEALTH CARIBBEAN PUBLIC LAW, 2ND EDITION). In determining this question one ought not to be swayed by personages however eminent they are, however august their sphere of authority or high office. The paramount consideration is the applicant's human right. In this latter regard one only need refer to the Bloody Sunday case, so called. It is cited at **R v. Lord Saville of Newdigate and Others 1999 4 A.E.R. 860**

I turn now to the relevant pieces of legislation under consideration. Section 5A of the Parole Acts read in full: "Where, pursuant to Section 90 of the Constitution, a sentence of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was so commuted **shall be examined by a Judge of the Court of Appeal who shall** determine whether the person should serve a period of more than seven years before becoming eligible for parole and, if so, shall specify this period so determined."

The powers which may be exercised by a Judge of the Court of Appeal are set out at Section 32 (1) of the Judicature (Appellate Jurisdiction) Act. It reads: "Subject to subsection (2) the powers of the Court to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign Legal Aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to grant bail to an appellant and to give directions regarding computation of sentence may be exercised by any Judge of this Court. It is apposite to observe at this time that the interpretation section of the above Act defines an appellant as a person who has been convicted and desires to appeal under this Act.

The offences against the person (Amendment) Act, 1992 at Section 5 reads: "The Parole Act is amended (a) by inserting ...the following...where, pursuant to Section 90 of the Constitution , a sentence

of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was so commuted shall be determined by a Judge of the Court of Appeal who shall determine whether the person should serve a period of more than seven years before becoming eligible for parole and if so, shall specify the period so determined..."

If one concedes that the decision of the Parole Board in respect of an application for parole is amenable to judicial review then by parity of reasoning the clothing of a Judge of Appeal within similar statutory powers renders any such decision made by a Judge of Appeal reviewable, not withstanding his high eminent office: **See R v Lord Saville of Newdigate and Others,** supra. The question is can a lesser Court review the decision of Cooke, J.A.? Before we answer that question as posed the question which stands in our way of proceeding is in what capacity did Cooke, J.A. purport to render that decision: As a Judge of the Court of Appeal properly understood or was he a public authority acting under the auspices of a statutory power? A review of these cases is appropriate since both sides rely in some instances, on the identical authorities.

In R v. Simpson (1996) 4 WIR p.207 Lord Goff of Cheveley delivered the advise of the Privy Council Board. Devon Simpson appealed to the Judicial Committee of the Privy Council against the sentence of death. Leroy Morgan and Samuel Williams appealed against refusal by the Court of Appeal to grant leave of appeal against their conviction for murder whereas Walford Wallace appealed to the Board against the dismissal by the Court of Appeal of his appeal against convictions for murder.

It was observed by Lord Goff that each appellant raised a question of construction of the Offences against the Person (Amendment) Act 1992. He laid down on behalf of his brethren that the main purpose of the Amendment Act was to introduce with the Principal Act a series of

amendments which had the effect that a person charged with murder would be charged either with capital murder or with non capital murder.

Further on, at p. 280, he goes on to say, "Now it is plain that ...the Court of Appeal was purporting to act in its capacity as the Court of Appeal of Jamaica in determining whether or not to classify the murders as capital or non-capital. Their Lordships are clearly of the opinion that this Court of Appeal acting as such, had no jurisdiction to carry out any such classification or exercise... it is clear that the statutory power of review is vested not in the Court of Appeal as such, but in Judges of the Court of Appeal. It is also plain that there is no other provision in the Amendment Act of elsewhere from which the Court of Appeal as such derives jurisdiction to perform the classification procedure..."

To be sure what this case says, among other things, is that the Court of Appeal in carrying out the review in exercising a statutory power. Indeed in the consolidated cases of **Kervin Williams and Melbourne Banks v R Zephania Hamilton and Junior Leslie** reported at (1997) 51 WIR at p. 212 and particularly at p. 238, Lord Hutton, who delivered the advice of the board says that, in the opinion of their Lordship, the single Judge of this Court of Appeal carrying out a review under Section 9 (2), cannot be regarded as a 'Court of Jamaica' within the meaning of Section 110 (5). Further on, in reference to Lord Woolf's judgment in Huntley's case, that the review by the first judge is closely linked with the second review by the three judges, so that a, "Court" will, in practice, ultimately decide whether there should be fresh death penalty.

In **Clifford Brown et al v the Resident Magistrate, St. Catherine and another (1995) 32 JLR** (1) it was held, inter alia, that a Resident Magistrate or another judicial officer is permitted to fall in error but that does not necessarily make the Judgment amendable in certiorari. Certiorari is a specialized remedy which operated in the area if public law and is essentially a discretionary remedy. Where the conditionalities for

its exercise do not exist it ought not to be invoked. Touching on the latter point, Carey JA at p. 120 cited an observation of Lord Reid in **Anisminic Limited v Foreign Compensation and Another (1969) 1 All. E.R 208**. "...But there are many cases where, although their tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to made. It may have failed in the course of the enquiry to comply with the requirements of natural justice."

This observation is relevant in demonstrating there was a failure, in the instant case, in notifying the Claimant between 2003 and 2007. It was during that time he became eligible to apply for parole. He was entitled to fair hearing within a reasonable time as is stated in Section 20 (2) of the constitution.

Based on the clear authorities referred to above I adopt the submissions of the Claimant that when Cooke, JA made his decision he was performing a statutory function and was not sitting as the Court of Appeal.

The Respondent has failed to rebut the submission and indeed has not demonstrated to me that the Claimant has any other available remedy. It is ineluctable that this Claimant has no rights of appeal from the decision of Cooke, JA. as is delineated and demonstrated by the powers of a judge of appeal under the Judicature (Appellate Jurisdiction) Act, supra.

I conclude by saying that the order imposed by Cooke, JA in 2003 was done without affording the Claimant to be present and to make representations. According to McCordie Morrison, supra, this signal failure to notify the Claimant cannot be visited upon him as it was the state's responsibility so to do. Since the decision of Cooke JA is

amendable to judicial review I am persuaded that the application for leave of appeal ought to be granted and I so order.

On the clear unfortunate circumstances in which the order came about I am of the view that a refusal by me would cause substantial hardship to or substantially prejudice the human rights of the applicant without at the same time doing detriment to the good administration. I hold that the requirement of Rule 56.2 and Rule 56.5 have been met.

In this regard I am compelled to extend the time within which to make application for leave to apply for judicial review.