BARBADOS

No.1712 of 2005

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

IN THE MATTER OF THE ADMINISTRATIVE JUSTICE ACT, CHAPTER 109B

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY PEARSON LEACOCK

BETWEEN:

PEARSON LEACOCK ***Applicant***

AND

THE ATTORNEY GENERAL ***Respondent***

Before: The Hon. Sir David Simmons K.A., B.C.H., Chief Justice

2005: 11, 13 and 27 October

Mr. Steve Gollop for the Applicant

Mr. Roger Barker and Ms. Sharon Deane for the Respondent

REASONS FOR DECISION

Introduction

SIMMONS CJ: This is an application for judicial review made by Police Constable 1024 Pearson Leacock (Mr. Leacock) under the Administrative Justice Act, Cap.109B against the Attorney-General in her representative capacity under the Crown Proceedings Act, Cap.197. The official against whom complaint is made is the Commissioner of

Police, Mr. Darwin Dottin (the Commissioner). Mr. Leacock sought a *declaration* to the effect that "a decision and/or administrative act and/or advice and/or recommendation" of the Commissioner made on or about 11 March 2005 that Mr. Leacock not be granted study leave for the period September 2005 to June 2007 to pursue the course of study leading to the Legal Education Certificate (LEC) at the Hugh Wooding Law School (HWLS) is unreasonable, irregular, or an improper exercise of discretion. In addition, he sought an order of *certiorari* to quash the decision and/or administrative act and/or advice and/or recommendation. At the conclusion of the hearing of the application on 13 October 2005, I granted the orders sought with costs to the applicant. I promised then to give my written reasons at a later date and I now do so.

[2] The evidence in this case consisted of various affidavits and exhibits. Mr. Leacock's affidavit in support of his motion was filed on 30 August 2005 and exhibited a photocopy of the prescribed form of application for study leave (the application form). Major Charles Brathwaite, Principal Training Officer in the Training Administration Division (the TAD) of the Public Service filed an affidavit on behalf of the Commissioner on 26 September 2005. The Commissioner and Senior Superintendent Morgan Greaves filed affidavits on 29 September 2005 and Mr. Leacock filed affidavits in response to those of the Commissioner, Senior Superintendent Greaves and Major Brathwaite on 30 September 2005.

Procedure for Applications for Study Leave

[3] No police officer – indeed no public officer – is entitled to study leave *as of right*. Study leave is a *privilege*. Major Brathwaite's affidavit of 26 September 2005 explains the procedure for applying for study leave in paras 3, 4 and 5 as follows:

> "3. All applications for study leave for courses commencing in the month of September are required to be submitted to the Training Administration Division no later than February 28 of the same year.
>
> 4. The application forms must be fully completed, *inclusive of the comments and recommendations of the Head of Department and the Permanent Secretary* of the relevant Ministry or his representative. *(emphasis supplied).*
>
> 5. The applications are then considered by the Public Service Training Committee and the Minister responsible for Training who make recommendations to the appropriate Services Commission regarding whether leave should be granted and under what conditions it should be granted."

Undisputed Evidence

[4] Mr. Leacock is a member of the Royal Barbados Police Force (RBPF). In 2002 he was accepted by the Faculty of Law, at the Cave Hill campus of the University of the West Indies (UWI) to read for the Bachelor of Laws degree (LL.B). He was awarded the LL.B degree in 2005 with Second Class Honours and has been accepted by the Hugh Wooding Law School in Trinidad and Tobago to read for the LEC awarded by the Council of Legal Education, starting in September 2005 and ending in 2007. In order to facilitate his attendance at HWLS, Mr. Leacock applied to the TAD on the application form headed 'Application for study leave'. This form is in three

parts viz. Part A, Part B, and Part C. Part A subtitled 'Details of Candidate' must be filled up by an applicant and was filled up by Mr. Leacock in his own handwriting.

[5] On 31 January 2005 he submitted eight copies of the application form to the office of the Commissioner as his Head of Department. Part B must be filled up by the Head of Department. This Part was filled up by someone (presumably in the Human Resources Department of the RBPF). The information on Part B was not in handwriting but was typewritten and gave the appropriate comments in the relevant spaces on the form. Significantly, Part B is not signed or dated by the Head of Department nor is it signed or dated by the Permanent Secretary. The date of submission to the Ministry is blank and so is the date on which it was submitted to the TAD.

Part B of the Application Form

[6] I reproduce below the comments appearing on Part B of the form because they are crucial to the decision in this case. Part C which is to be completed by the TAD is also blank.

Part B: (*To be completed by Head of Department/Ministry*)

PRIORITY:

Please describe the priority of the training within the context of the Ministry, the Public Service and/or National Development needs:

There is a burning desire to have policemen trained in the area of Law due to a growing need for police officers to be knowledgeable in the legal and administrative aspects of their work.

PRIORITY RATING:

RATIONALE:

(a) Specify the career stream/promotion requirements and staff level needs in relation to the course.

(b) Indicate the availability of posts to accommodate the proposed qualifications/upgraded skills.

This officer will be better equipped to deal with most legal matters that should arise in the performance of his duty.

RELEVANCE:

Specify the relevance of the training course in terms of the programmes, projects and activities of the Ministry/Department

Generally, the Police Force and the Public Service will benefit as a result of having trained persons among them.

SELECTION OF THE COURSE:

(a) Describe the Ministry's special utilization of this type of training "on-the-job".

(b) Suitability of applicant for this type of training.

Constable Leacock is a competent Policeman whose career is unquestionable.

SELECTION OF CANDIDATE:

(a) State the candidate's job activities in relation to the course.

(b) Give background information on candidate's age, years of service, seniority, current academic performance and suitability for the course.

Mr. Leacock has benefited from training in the Police Force as well as his endeavours in advancing himself.

Mr. Leacock was born on 1968-10-18 and enlisted in the force on 1988-07-09.

SUBSTITUTE/ACTING ARRANGEMENTS:

Indicate whether or not substitute/acting arrangements will be necessary:

No

....

Signature of Head of Department *Date submitted to Ministry*

....

Signature of Perm. Sec. (Ministry) *Date submitted to Training Administration*

Memorandum of Recommendation, 11 March 2005

[7] Notwithstanding the omissions of signatures and dates on Part B of the form, it is undoubted that it was sent by the Commissioner's office to the TAD. Produced in evidence was a Memorandum from the Commissioner addressed to the TAD "through the Permanent Secretary, Office of the Attorney-General". It was dated 11 March

2005. It was signed on behalf of the Commissioner by Superintendent Don Nicholls and is as follows:

To: Principal Training Officer

Training Administration Division

Thro' Permanent Secretary

Office of the Attorney General

Our Ref: Pers.1024/05/74

Date: 2005-03-11

Subject: **Application for Study Leave**

Pearson Jerry Leacock Police Constable #1024

Pearson Jerry Leacock Police Constable #1024 is a member of the Royal Barbados Police Force and is currently attached to Central Police Station. He is applying for study leave for the period September 2005 to June 2007 to pursue the Legal Education Certificate (L.E.C.) at the High Wooding Law School, Trinidad.

2. Constable Leacock is also applying for a Training loan of five thousand dollars ($5000.00)

3. The application is not recommended for approval. The eight (8) completed application forms are hereby *forwarded*." (*emphasis supplied*).

[8] It is clear that on 11 March 2005 – 11 days after the last date on which the form ought to have been submitted to the TAD – and 39 days after it was handed in to the Department by Mr. Leacock, the Commissioner's delegate "forwarded" Mr. Leacock's application through the Permanent Secretary to the TAD in an incomplete state and with a recommendation not to approve the application for study leave. I am not sure how the Commissioner or his delegate could have expected the TAD or the Training Committee to consider the merits of an application on a form submitted from his Office in that state of incompleteness. Nevertheless, it was forwarded and forwarded late.

Mr. Leacock's First Affidavit

[9] One of Mr. Leacock's arguments to which I shall advert later is that he had a legitimate expectation that he would have been granted study leave because a practice had grown up in the RBPF over many years that officers who had successfully completed the LL.B. at the UWI were granted study leave to pursue the LEC at HWLS. In his affidavit in support of the motion, Mr. Leacock gives the basis of his expectation in paragraphs 10 to 14. In summary, those paragraphs depose that, to the best of his information, knowledge and belief, 'several members of the RBPF have in the recent past' applied for and been granted leave to pursue the LEC. While he was

studying for the LL.B degree he had permission or leave to attend classes at the UWI. He says that the Commissioner was fully aware of his intention to read for the LEC immediately after completing the LL.B, which he completed successfully. In those circumstances he legitimately expected that he would have been granted study leave and not to have recommended him for study leave was an unreasonable, irregular or improper exercise of discretion by the Commissioner.

Evaluation of the affidavit evidence on behalf of the parties

[10] During the argument I expressed my unease about the evidence in the affidavits filed on behalf of the Commissioner when weighed against those of Mr. Leacock. For example:

(i) Major Brathwaite says that the application forms were brought to the TAD on 18 March 2005 by Mr. Leacock personally. This is denied by Mr. Leacock in para 5 of his affidavit of 30 September 2005. Indeed he says that he was aware that the proper procedure was to submit the forms to the relevant Head of Department for his comments and recommendations 'and then the said Department would forward the application to the Training and Administration Division'. – para 6. I find it hard to accept Major Brathwaite's evidence on this point because it is apparently contradicted by the written evidence consisting of the Memorandum from the Commissioner to Major Brathwaite of 11 March 2005 in which it was stated that the application was "forwarded". Moreover, the form had to be sent *through the Permanent Secretary, Office of the Attorney General* as is clearly indicated on Supt Nicholl's Memorandum at the top left hand corner of the Memorandum. Far from the forms being hand delivered by an applicant, I should have thought that the proper procedure should have been that they would have been sent under cover of the Memorandum to the Permanent Secretary who would sign them and record the date on which they were submitted to the Ministry in the appropriate space at the end of Part B. I do not accept that the application forms could have been hand-delivered by Mr. Leacock to the TAD in contravention of the clear indication in the Memorandum that they were to be sent to the TAD through the Permanent Secretary, Office of the Attorney-General. They required her signature before they finally reached the TAD.

[11] *(ii)* The affidavits of the Commissioner and Senior Superintendent Greaves purport to cast Mr. Leacock in the mould of a persistent malingerer who abused sick leave to his own advantage and to the disadvantage of the Royal Barbados Police Force. In para 5 of his affidavit, the Commissioner says:

> "5. The records show that Constable Leacock was on sick leave for 127 days in 1997, 43 days in 1998, 29 days in 1999, 6 in 2000, 167 in 2001 and 109 in 2002."

In para 12, the Commissioner continues:

> "12. In spite of the extremely liberal arrangements offered, Constable Leacock's work ethic was poor. He resisted his supervisor's efforts to oversee his work and often reported sick. The records *revealed that for the year 2005 he has accumulated 199 days' sick leave* from a possible 265 working days." *(emphasis supplied)*

[12] This evidence was countered by Mr. Leacock in his affidavit of 30 September 2005. He explained that he was indeed on sick leave as alleged by the Commissioner but points out that, for the period 1999-2000, his sick leave was occasioned by a back injury which he received while on duty as a policeman. Further, for the

period 2001-2002, he suffered other injuries in a motor vehicular accident. All of his sick leave was duly certified by a medical practitioner. There was no attempt by the Commissioner to challenge Mr. Leacock's explanations. On this issue, I prefer the evidence of Mr. Leacock. I conclude that the Commissioner's evidence in respect of sick leave is an *ex post facto* rationalisation of his decision not to recommend study leave. How else can the reference to 199 sick days in 2005 be explained?

[13] The date on which I must assess the exercise of the Commissioner's discretion to recommend or not to recommend study leave is 11 March 2005, the date on which the recommendation was made in the Memorandum. It needs no Solomon to know that the year 2005 was only 70 days old on 11 March 2005. So, to say by way of an explanation for the recommendation six months earlier that the records 'revealed' that he has accumulated 199 days sick leave in 2005 puts an unusual strain upon commonsense and clearly could not have been the fact at 11 March 2005. It was simply impossible to accumulate 199 days sick leave at that date.

[14] *(iii)* Then it was alleged by the Commissioner that he sought and obtained 'a verbal report from the Divisional Officer of the Bridgetown Division, Senior Superintendent Morgan Greaves on the work performance of Constable Leacock. "A written report was submitted subsequently" – para 6 of the Commissioner's affidavit. This report is said to have shown that Constable Leacock was transferred to the Bridgetown Division on 30 July 2004 – para 9. Senior Superintendent Greaves met with Constable Leacock on 30 July 2004 and certain matters were discussed – para 10. The substance of the discussion is not given. The Commissioner says at para 13 that "the report showed that Constable Leacock was extremely uncooperative, created difficulties for his supervisors and is not an asset to the Police Force." These observations were denied by Mr. Leacock in para 6 of his affidavit of 30 September 2005.

[15] I find it amazing that an adverse written report should have been received in 2004 about Mr. Leacock and at no time was he shown it and asked to comment on it. No disciplinary proceedings were begun against him. No attempt was made to have this man who is 'not an asset to the Police Force' dismissed from the Force. Equally amazing is the omission to exhibit the report and produce it in evidence. Since Mr. Leacock specifically denied the tenor of the Commissioner's comments and, in the absence of the actual report, I am not satisfied that, at 11 March 2005, these considerations were operating on the Commissioner's mind when he decided not to recommend Mr. Leacock for study leave. And over and above this, the Commissioner's comments do not sit comfortably with the comments on Part B of the application form – see para [6] (*supra*). In my judgment, the evidence of an alleged written report which was not produced is of little probative value. I discount it from my considerations.

[16] *(iv)* As regards the affidavit of Senior Superintendent Morgan Greaves, it is deposed that on 30 July 2004, he met with Mr. Leacock who indicated to him that he had previously produced a doctor's certificate indicating that he could not work at night, could not stand for long periods, should be given light duties and was attending UWI. Superintendent Greaves said that he agreed to allow him to work day duties at Central Police Station. Mr. Leacock was instructed to patrol Bridgetown for 2 to 3 hours and to report to an Inspector every time he fell in for duty or returned from duty. Mr. Greaves says that on 3 October 2004 he met Mr. Leacock with Assistant Superintendent Robinson and Inspector Cadogan and told him that he was not satisfied that he was working 6 hours a day. Senior Superintendent Greaves said that Mr. Leacock told him that he suffered from blackouts and stress. According to Mr. Greaves, Mr. Leacock was "more often sick than at work".

[17] Again Mr. Leacock denied Superintendent Greaves' evidence. Specifically, he said that he has no difficulty seeing; he does not suffer from blackouts or stress. Whenever he reported sick it was certified by a doctor. As regards his work ethic, it is not denied by the respondent's witnesses that, in the summer of 2004, he was instructed to attend a course for senior constables and successfully completed the course. He even received a commendation for outstanding work both in theory and in practice.

Conditions for Study Leave

[18] Mr. Barker, for the respondent, explained to the Court that, when a police officer is given study leave to pursue a course at UWI, he must make arrangements with an officer in senior command as to how he will replace the hours off to study by the assumption of other duties. This, said Mr. Barker, is a requirement or condition of study leave as expressed in a circular issued by the Permanent Secretary in the Ministry of the Civil Service to all Heads of Department on 19 July 2002 under the rubric "Policy on Leave from Work for the purpose of studying". The circular was exhibited to the Commissioner's affidavit and produced in evidence. It sets out in very clear terms the policy to enable public officers to pursue higher education while working in their substantive employment.

[19] It appears from para 9 of the affidavit of Senior Superintendent Greaves that on or about 3 October 2004, with a view to giving effect to the policy, he met with Mr. Leacock in the presence of Assistant Superintendent Robinson and Inspector Cadogan to examine his timetable and to 'give me the hours he could work so that there would be no difficulty in his attending the University of the West Indies'. It is not disputed that a schedule of work was developed between Senior Superintendent Greaves and Mr. Leacock to allow him to work 30 hours a week and still attend classes at UWI. But, according to Mr. Greaves, Mr. Leacock did not keep to the schedule.

[20] What Senior Superintendent Greaves wishes the Court to believe is that, on 3 October 2004, he sat with a policeman whose performance was not satisfactory but, nevertheless, he worked out a schedule for him to study and have time off from work. Then 6 months later, the same policeman is said to be "not an asset to the Force". Again, I have to say that Mr. Greaves' evidence does not reach such a standard of cogency as to persuade me that I can safely rely upon it. At best, the affidavit evidence on behalf of the Commissioner is not of such a nature and quality as to convince me, on a balance of probabilities, that it was a reliable basis for the exercise of the Commissioner's discretion not to recommend Mr. Leacock for study leave. And I so find. I turn next to the legal issues raised in this application.

The Grounds for Judicial Review

1. Unreasonable or Improper Exercise of Discretion

[21] Unreasonable decisions by government officials are unlawful. One of the grounds upon which the High Court may grant relief by way of the remedies of declaration or certiorari, *inter alia*, is set out in s.4(e) of the

Administrative Justice Act, Cap.109B as:

> "(e) unreasonable or irregular or improper exercise of discretion".

This ground requires discussion of the way in which the courts have interpreted it. In ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 2 All ER 680, Lord Greene MR*** famously examined the concept of unreasonableness. At p.682 he said:

> "When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case…The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.
>
> What then are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion…
>
> Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty….unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word 'unreasonable'. It is true that the discretion must be exercised reasonably."

[22] His Lordship went on to explain that the word 'unreasonable' is often used in a comprehensive sense to embrace "things that must not be done".

> "For instance a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority…"

[23] ***Lord Greene's*** construction of the word 'unreasonableness' in its many facets gave rise to the phrase '***Wednesbury*** unreasonableness'. In 1984, in ***Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935,*** (the ***GCHQ*** case) ***Lord Diplock*** re-considered ***Wednesbury*** and held that administrative action is subject to control by judicial review under three heads: *(i)* illegality, where the decision-maker has been guilty of an error of law; *(ii)* irrationality, where the decision-maker has acted so unreasonably that no reasonable decision-maker would have made the decision; *(iii)* procedural impropriety, where the decision-maker has failed in his duty to act fairly. At p.950 Lord Diplock explained 'irrationality':

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…Irrationality by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review."

[24] ***Lord Diplock's*** use of the word 'irrationality' is, of course, not meant to impugn the mental capacity of the decision-maker but his explanation is useful to the extent that it recognises that courts can and often will resort to logic in their evaluation of the facts leading to the decision. Despite the interchangeability of vocabulary, "unreasonableness" and "irrationality" imply an improper exercise of power including factors taken into account in reaching a decision *or the way in which the decision is sought to be justified or reasoned.*

[25] The categories of unreasonableness are not closed and an unfair action can seldom be a reasonable one. Nor is there a universal rule as to the principles on which the exercise of a discretion may be reviewed. And while claiming no authority to dictate the decision that ought to have been made in the exercise of the discretion in this case, a court is yet duty bound to declare invalid a purported exercise of such a discretion where the proper limits have not been observed. A discretion must be exercised according to reason, justice and the law. It must never be exercised whimsically or capriciously but within those limits which a reasonable person performing a public duty ought to confine himself. And the supervisory jurisdiction of the High Court exists to ensure that the process by which the decision was reached was fair and proper. It is not for the courts to say *how* the discretion ought to have been exercised. To do so would effectively transfer the decision-making power from officials to the courts.

[26] In ***Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 at 155, Lord Brightman*** said:

> "Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

In other words, judicial review is about the decision-making process. It is concerned not with the merits of a decision but with the way in which the decision was reached. The purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority who made the decision. The duty of the court, *inter alia*, is to confine itself to whether the decision-making authority exceeded his power, erred in law, breached principles of natural justice or reached a decision which no reasonable tribunal or authority could have reached.

[27] Unreasonable or improper exercise of discretion is a ground upon which evidence is particularly relevant and facts, rather than legal principles tend to predominate in the court's evaluation of a case. It is for that reason that I recited in some considerable detail the affidavit evidence and my evaluation of it. And I remind myself that I have to judge the Commissioner's exercise of his discretion whether to recommend study leave or not as the facts and matters surrounding this case stood at 11 March 2005 when the Memorandum was forwarded to the TAD. The problem which faced Mr. Barker was how to override the comments of the Commissioner *per* Superintendent Don Nicholls in Part B of the application form. They have not been explained away satisfactorily or at all. The evidence of the Commissioner and Senior Superintendent Morgan Greaves, coming some 6 months after the submission of the application form did not deal with Part B of the application form or attempt to explain the differences and inconsistencies in the quality of the comments on the form vis-à-vis the allegations in their affidavits. In fairness to the Commissioner, he did depose that, at the time of his decision, he took the considerations mentioned in the next paragraph into account.

[28] At para 14 of his affidavit he deposed as follows:

> "14. In making my decision not to support his application for leave to pursue studies at the HWLS I took into account –

(a) his poor work ethic;

(b) his long absence from work ostensibly on sick leave while at the same time attending University; and

(c) his uncooperative attitude and the difficulty he created for his senior officers."

[29] In my consideration of the affidavit evidence filed on behalf of the Commissioner, I expressed my scepticism about the reliability of this evidence for the reasons more particularly stated at paras [10] to [20]. In the result, I am not satisfied, on a balance of probabilities, that the evidence filed on behalf of the Commissioner is preferable to that of Mr. Leacock. When dealing with a decision said to be unreasonable or irrational, the assessment of a court is directed to the motives underlying or supporting the decision; it is directed to the factors taken into account on the way to reaching the decision or upon the way the decision is justified or reasoned. This case seems to me to be in the category of irrationality in the sense that the decision of the Commissioner was not properly reasoned. There was "an absence of logical connection between the evidence and the ostensible reasons for the decision" to quote the authors of *de Smith, Woolf and Jowell's "Principles of Judicial Review", First Edition, 1999 at p.459*. The facts, taken as a whole, are not, in my view, reasonably capable of supporting the Commissioner's decision.

[30] I find that the Commissioner's discretion was improperly exercised because, upon an evaluation of the evidence on behalf of the Commissioner, there was an absence of a logical connection between the evidence and the ostensible reasons for the decision. Indeed on 11 March 2005, the only evidence in existence was Part B of the application form which showed nothing adverse against Mr. Leacock and the bald statement of Superintendent Nicholls without any supporting reasons that "the application is not recommended for approval." It was arguable that not only was this a recommendation which flew in the face of the contents of Part B but was a decision arrived at without any evidential basis.

2. Legitimate Expectation

[31] ***Lord Denning***, in one of his creative moments as Master of the Rolls, first coined the expression 'legitimate expectation' in ***Schmidt v. Secretary of State for Home Affairs [1969] 1 All ER 904***. The Master of the Rolls was referring to an individual's right to be heard before a decision is made by a public official which could adversely affect the individual's liberty or property. At p.908 His Lordship said:

> "I quite agree, of course that where a public officer has power to deprive a person of his liberty or his property, the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf."

[32] Later, at p.909, he introduced the doctrine in the vocabulary of the common law in this passage:

> "The speeches in ***Ridge v. Baldwin [1963] 2 All ER 66*** show that the administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add *some legitimate expectation* of which it would not be fair to deprive him without hearing what he has to say."

Lord Denning continued to implant the doctrine in the common law in ***Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175*** and in ***R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operator's Association [1972] 2 Q.B. 299***. In this latter case, he referred in argument at p.304 to a "settled expectation" as something conferring rights.

[33] At its birth, the scope of the doctrine was limited to providing a public law remedy for procedural unfairness and emphasised the duty on public officials to act fairly in the exercise of their duties. Since 1969 the doctrine has taken firm roots in public law through a succession of cases all over the Commonwealth and its boundaries have been explained and expanded. It is, however, a doctrine still very much in a state of evolution. But it is now settled that the phrase means no more than a *reasonable* expectation. In the words of ***Persaud JA in Attorney-General of Trinidad and Tobago v. K.C. Confectionery Ltd (1985) 34 WIR 387,*** "the word 'legitimate' is not confined to mean 'legal' but means 'reasonable'." – p.405. I do not propose to survey the mass of Commonwealth jurisprudence on the doctrine in this case because the point on which Mr. Gollop relies is a narrow one and is not concerned with the procedural aspect of the doctrine.

[34] I think it suffices if I mention a selection of Commonwealth authorities and limit the discussion of authorities to two cases from the Commonwealth Caribbean and one from Bermuda. In 1983 ***Lord Fraser*** explained the doctrine in the Privy Council decision in ***Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 All ER 346***. The next year, in the ***GCHQ*** case, the House of Lords gave a comprehensive definition of the doctrine. Both ***Lord Fraser*** and ***Lord Diplock*** were careful to state the content of the doctrine. ***Lord Fraser*** put the doctrine on a general basis in these terms in the ***GCHQ*** case at ***[1984] 3 All ER*** 943-944:

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by ***Lord Diplock*** in ***O'Reilly v. Mackman [1982] 3 All ER 1124*** and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise from an express promise given on behalf of a public authority *or from the existence of a regular practice which the claimant can reasonably expect to continue*." (emphasis supplied).

[35] ***Lord Diplock*** in ***O'Reilly v Mackman [1982] 3 All ER 1124*** at 1126-1127 and ***Lord Roskill*** in the ***GCHQ*** case ***[1984] 3 All ER*** 935 at 954, stated the underlying rationale of the doctrine as resting upon an all-pervasive duty to act fairly. The essential question in cases where the doctrine is relied on is fairness in public administration. In the ***GCHQ*** case, it was clear from the speeches in the House of Lords that had it not been that issues of national security prevented the Court from undertaking a review, the legitimate expectation of civil servants that they would have been consulted before their terms of employment were altered would have been upheld. In ***Ng Yuen Shiu*** at p.351, ***Lord Fraser*** re-iterated the need for public officials to act with propriety and fairness in the interests of good administration. He said:

> "When a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as implementation

does not interfere with its statutory duty."

In ***Ng Yuen Shiu***, the respondent was an illegal immigrant in Hong Kong. Four years after his illegal entry the government announced that illegal immigrants would be interviewed and although no guarantees could be given that they would not subsequently be deported, each case would be considered on its merits. The respondent reported to the immigration authorities on the day after the announcement of the policy and a removal order was made against him. The Privy Council held that it was unlawful for the immigration authorities to renege on the assurance that illegal immigrants would be given a hearing on the merits of their cases.

[36] In Australia the doctrine was accepted in ***Heatley v. Tasmanian Racing and Gaming Commission (1977) 137 C.L.R. 487***; in ***South Africa*** in ***Administrator, Transvaal v. Traub (1989) 4 SA 731(A)*** and in New Zealand in ***Birss v. Secretary for Justice [1984] 1 N.Z.L.R. 56,*** where the term "reasonable expectation" was preferred. But in ***Bradley v. Attorney-General [1988] 2 N.Z.L.R. 454, Smellie J*** said that the concept of 'legitimate expectation' was now well established.

[37] Mr. Steve Gollop cited two cases where the doctrine was discussed in the Court of Appeal of Guyana. In ***Kent Garment Factory v. Attorney General (1991) 46 WIR 177***, the appellants were clothing manufacturers. They obtained a licence from the competent authority, appointed by the Minister of Trade under s.3 of the Trade Act, to import cloth and other fabric from a named supplier in the USA. The licence expired on 9 February 1988. When it had been granted two copies were returned to the appellant duly stamped. On 3 February 1988, because of a delay in shipping part of the consignment, that part was not expected to arrive before expiry of the licence. The appellants therefore applied for an extension of the licence. They had customarily applied for extensions of licences and routinely these had been granted. They were asked to return the licences and did so. It was found that the words "and others" had been inserted on the licences after reference to the named suppliers. The authorities delayed in granting the extension and the appellants filed a constitutional motion seeking a declaration that the failure to extend the validity of the licence had been arbitrary and unlawful.

[38] The Court of Appeal held that the appellants had a legitimate expectation by reason of their own experience and the practice of the authorities that the period on the licences would have been extended for at least such period as would have covered the arrival of the goods. ***Kenneth George C*** said at p.187:

> "….In my view, and subject to what I shall say later, the appellants can be said to have had a legitimate expectation that the competent authority would have extended their licence, at least for a period which could have covered the arrival of those goods which had been paid for before its expiry date and shipped."

[39] The other Guyanese case is ***Barnwell v. Attorney General (1993) 49 WIR 88***. The appellant was a High Court judge. On two occasions he was invited to appear before the Judicial and Legal Services Commission in relation to allegations which had been made about his conduct. On each occasion after the appellant had explained his conduct to the Commission, the matters were treated as closed and the Commission took no further action. In September 1989 the appellant was summoned to the Chambers of the Chancellor who was also Chairman of the Commission. He was told that a magistrate had made allegations against him in a letter sent to the Chancellor. The Chancellor did not show the letter to the appellant but merely read it to him. The Chancellor thereafter

reported his discussions with the appellant to the Commission and showed the members of the Commission the letter. Some days later, without giving the appellant an opportunity to appear before it or comment in any way, the Commission represented to the President of the Republic that the question of removing the appellant from office be investigated and the appellant was in fact soon suspended from office. He sought judicial review of the decision of the Commission.

[40] ***Aubrey Bishop CJ*** and ***Cecil Kennard JA*** held that the appellant had been deprived of his legitimate expectation (based on his previous experience before the Commission in relation to allegations) that he would have been afforded an opportunity to be heard before the Commission reached a decision.

The Court cited with approval a dictum ***of Kenneth George C*** in ***Kent Garment Factory*** (*supra*) at p.187 on the doctrine of legitimate expectation:

> "It is a concept that is based on the desirability of and indeed the necessity for, propriety and good faith on the part of a public official or authority towards a citizen, not to depart from a course of action which the latter has been led to believe or expect would be pursued or adopted and which departure would adversely affect his property or liberty, without due and adequate notice and, if appropriate, providing for an opportunity to be heard."

[41] An assertion of a legitimate expectation does not necessarily mean that a claimant has a right to be protected. In ***Ng Yuen Shiu, Lord Fraser*** was of opinion that the doctrine included expectations which go beyond legal rights, provided they have a reasonable basis. Non-rights, such as privileges or interests, have been accorded the protection of the law – ***Schmidt v. Secretary of State for Home Affairs [1969] 1 All ER 904***. As formulated by ***Lord Diplock*** in the ***GCHQ*** case, a legitimate expectation may arise from an expectation of a benefit or from an expectation of a hearing. ***Lord Scarman*** pointedly asked in ***Re: Findlay [1985] AC 318*** at 338 "But what was their legitimate expectation?" ***Findlay*** concerned the legitimacy of a sudden change of policy by the British Home Secretary which resulted in a number of prisoners who had been sentenced to life imprisonment losing their expectation of an early release on parole. It seems to me that it is pertinent to ask the question posed by ***Lord Scarman*** whenever an applicant for judicial review relies upon the doctrine. The learned authors of the Fifth Edition (1995) of Professor Stanley de Smith's seminal work, '*Judicial Review of Administrative Action*', (now edited by *Lord Woolf* and Professor Jeffrey Jowell), when dealing with the scope of legitimate expectation at para 8-046 p.421, include the sub-heading, 'Expectation of what?' They answer the question thus:

> "The terms of the representation by the decision-maker (whether express or implied from past practice) must entitle the party to whom it is addressed to expect, legitimately, one of two things:
>
> (i) that a hearing or other appropriate procedures will be afforded before the decision is made; or
>
> (ii) that a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied."

Barnwell is a good example of the first aspect of the doctrine of legitimate expectation as propounded by *de*

Smith, Woolf and Jowell whereas the ***Kent Garment Factory*** case fits the second category.

[42] The Bermudan case, ***Marks v. Minister of Home Affairs (1984) 36 WIR 106*** is arguably a decision to which both aspects of the doctrine of legitimate expectation were applied. Dr. Marks was a consultant psychiatrist born in England. He worked in Bermuda from 1971 to 1974 and in South Africa from 1974 to 1976. After marrying a South African, he returned to Bermuda in 1976 and was granted a work permit for one year. This was renewed upon application, every year up to the end of 1982. Between 1976 and 1982 he built up a thriving practice. When he sought renewal of his work permit in 1982, the Chief Immigration Officer consulted the Bermuda Medical Council and the Medical Society since the Bermudan immigration legislation required the Minister responsible for Home Affairs to do so. Representations were made to the Chief Immigration Officer as a result of which he renewed Dr. Mark's work permit for six months. No further renewal was allowed; no reasons for the decision were given and, indeed, none was required to be given. Dr. Marks applied to the High Court for orders of *certiorari* and *mandamus*. These were refused. However, on appeal to the Court of Appeal, the appeal was allowed on the ground that Dr. Marks had a legitimate expectation that his work permit would be renewed because of the previous virtually automatic renewals. In addition, the Court held that he should have been advised of any factors which were likely to influence the decision not to renew the work permit and he should have been given an opportunity to make representations. In the opinion of the Court of Appeal, the element of fairness was absent from the Minister's decision.

[43] ***Sir Alastair Blair-Kerr P*** delivered the leading judgment of the Court and, in my view, without explicitly writing in terms of substantive and procedural legitimate expectation, grounded his decision on both aspects of the doctrine. At p.109 he said:

> "There can be no doubt that, having regard to the history of this case and the virtually automatic regular renewals of permission to engage in gainful occupation, the appellant had a legitimate expectation of a further renewal."

That passage has the flavour of substantive legitimate expectation within the meaning of ***Lord Fraser's*** dictum (see para [34]).

[44] Then at p.110, the President said:

> "The applicant for renewal (in a legitimate expectation case) must be given an opportunity of making representations against an intended or possible refusal to renew. He must have notice of the adverse factors likely to influence the Minister against renewal in order that he can meet the case against him in those representations…..The absence of disclosure and of any opportunity to make appropriate representations has been the key feature in this court's decision in this case."

That is the language of procedural legitimate expectation. But, of course, this case was decided before the law had worked out the full extent of the doctrine.

[45] Professor Albert Fiadjoe in his excellent work '*Commonwealth Caribbean Public Law*', *Second Edition (1999)* provides a useful conspectus of the development of the doctrine in England and the Commonwealth Caribbean. – see pp.258-269. He makes it clear that the present boundaries of the doctrine embrace both substantive benefits or privileges and procedural rights. That part of the doctrine dealing with a benefit of a substantive

nature may be described as 'substantive legitimate expectation' whereas that part dealing with an expectation of a hearing or procedures may be characterised as 'procedural legitimate expectation'. The dynamism of the common law has served to move the doctrine beyond its original procedural boundaries involving a right to be heard. As Professor Fiadjoe observes at p.262:

> "[T]here can be a 'substantive' legitimate expectation, that is, an expectation capable of giving rise to an entitlement to a substantive benefit that the claimant asserts cannot be denied to him, and not merely to be consulted or heard."

See also ***R. v. Secretary of State for the Home Department ex parte Ruddock [1987] 2 All ER 518 at p.531*** where ***Taylor J*** concluded that the doctrine was not limited to a right to be heard but 'in essence imposes a duty to act fairly'

[46] Thus, it can now be said with confidence that the doctrine of legitimate expectation which originated as a public law innovation to ensure procedural fairness, such as to give a right to be consulted or be heard, has now evolved and expanded to protect benefits, advantages or interests of a substantive nature which an applicant can reasonably expect to be permitted to enjoy. It seems, however, that the Canadian courts have held that the doctrine does not create substantive rights but is to be considered as an aspect of procedural fairness – Re ***Canada Assistance Plan (B.C.) [1991] 2 S.C.R. 525***. For illuminating and analytical expositions of the doctrine; see ***R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 per Sedley J*** at 723-735 and ***R. v. North and East Devon Health Authority, ex parte Coughlan [2000] 3 All ER 850*** expecially at p.871 *et seq*.

[47] Mr. Gollop's short point is that Mr. Leacock deposed that for many years a practice has been established to allow police officers to read for the LL.B degree and, upon successful completion of the degree, to be granted study leave to go to the HWLS to read for the LEC. During the argument Counsel on both sides reminded me of a long list of police officers including the Commissioner and his immediate predecessor in office, Mr. Grantley Watson, who were beneficiaries of this practice. It was common ground between Counsel that this practice has existed for a long time and no case could be recalled where any police officer with an LL.B degree had been denied the privilege of study leave to pursue the LEC. As I indicated at para [9] the evidence of the practice was contained in paras 10 to 14 of Mr. Leacock's affidavit of 30 August 2005. *It was not disputed or in any way challenged by the Commissioner or any of the other deponents.* I can therefore do no more than accept Mr. Leacock's evidence on the point as reliable evidence of the practice for which Mr. Gollop contended. Indeed Mr. Barker also made it plain: 'We are not disputing the fact that policemen have gone to Cave Hill and then to HWLS to pursue the LEC."

[48] Counsel for Mr. Leacock therefore rests his submissions on the last sentence of ***Lord Fraser's*** dictum quoted above at para [34] – i.e. "substantive legitimate expectation". There was in existence a regular practice that police officers who graduated with an LL.B. degree from the UWI were granted study leave to proceed to HWLS to read for the professional qualification of the LEC. Mr. Leacock reasonably expected the practice to continue and to obtain a benefit similar to that accorded to other police officers over the years.

Conclusion

[49] Asking myself what could Mr. Leacock have legitimately expected, I am of opinion that, *based on the uncontroverted evidence of the practice which I have described*, Mr. Leacock had a legitimate expectation that he would have been granted study leave to go to the HWLS to read for his professional qualification as an attorney-at-law during the period September 2005 to June 2007 as had been the case with many others before him. He had *no legally enforceable right to study leave but, by virtue of the practice, he had a reasonable expectation that he would have been granted leave*. In other words, the practice induced a legitimate expectation of a substantive benefit which was disappointed by the Commissioner's adverse recommendation. The expectation derived from a representation implied from the regular and established practice based upon the past actions of the office of the Commissioner in not objecting to the grant of study leave to police officers pursuing the LEC. I can find no overriding consideration on the evidence to justify a departure from what had been the previous practice. To resile from that practice now is a breach of Mr. Leacock's legitimate expectation.

[50] In conclusion, I merely desire to add that it is no part of my function or indeed of any court's in a judicial review application to substitute the court's decision for that of the competent authority. Judicial review is not an appeal. I have only been concerned to determine whether the process by which the Commissioner came to his decision or recommendation accorded with notions of fairness and should be allowed to stand or not. I have found that process to have been flawed and will grant the orders sought accordingly except that I cannot declare as stated in the motion that Mr. Leacock "is entitled to study leave". That would be an intrusion into the merits of the case.

[51] The merits of a case will often involve policy considerations. Such considerations are not for the courts. ***Sedley J*** in ***ex parte Hamble (Offshore) Fisheries Ltd*** (*supra*) captured the separation of the roles of public officials and the courts in these types of case in the following passage at p.731, which is worth repeating:

> "While policy is for the policy maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy)."

Disposal

[52] For the reasons stated in this judgment, I made the following orders on 13 October 2005:

> 1. It is hereby DECLARED that in the events which have happened the decision, administrative act, advice or recommendation of the Commissioner of Police as the agent of the Respondent made or given on or about 11 March 2005 to the effect that the Applicant be not granted study leave to study for the Legal Education Certificate at the Hugh Wooding Law School, St. Augustine, Trinidad, during the period September 2005 to June 2007 is and was an unreasonable and improper exercise of discretion and is hereby declared to be null and void.
>
> 2. An Order of Certiorari is hereby made quashing the said decision, administrative act, advice or recommendation of the Commissioner of Police.
>
> 3. The respondent will pay the applicant's costs, to be agreed or taxed.

Chief Justice