BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

Suit No: 2251 of 2007

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO THE ADMINISTRATIVE JUSTICE ACT, CHAPTER 109B AND THE JUDICIAL REVIEW (APPLICATION) RULES 1983

Between

PEARSON LEACOCK	**APPLICANT**

AND

THE ATTORNEY-GENERAL	**1st RESPONDENT**
THE POLICE SERVICE COMMISSION	**2nd RESPONDENT**
THE COMMISSIONER OF POLICE	**3rd RESPONDENT**

Before The Honourable Madam Justice Jacqueline A. R. Cornelius, Judge of the High Court
2008: 19 June, 23 June
2010: March 15, 18, 23 and 24; April 7 and 12;
2011: July 19
2014: October 6;

Mr. Steve A. H. Gollop in association with Mr. Emerson Graham for the Applicant;
Mr. Leslie Haynes, QC, Attorney-at-Law for the First and Third Respondents; and
Mr. Roger S. Barker and Ms. Sharon Deane for the Second Respondent.

DECISION

INTRODUCTION

[1] This is an application by Pearson Leacock ("Mr. Leacock") an attorney-at-law and policeman, for judicial review of the decision of the respondents not to grant him study leave to pursue his professional law qualification. He also seeks restoration of his salary which has not been paid to him since May, 2007.

[2] This is the second time Mr. Leacock has sought judicial review with regard to his study leave. In ***Pearson Leacock v the Attorney General of Barbados (Unreported)*** **High Court Suit No. 1712 of 2005, Decision of October 27, 2005, per Simmons CJ,** it was established that he had a legitimate expectation that leave would be granted for him to pursue a course of study at the Hugh Wooding Law School.

[3] The First Respondent named in the current Application occupying the attention of the Court is once again the Attorney-General, although the Applicant has now also instituted a claim against Mr. Darwin Dottin, the Commissioner of Police, who appears as the Third Respondent and the Second Respondent, the Police Service Commission ("PSC") which is the public body responsible for dealing with disciplinary matters pertaining to members of the Royal Barbados Police Force.

THE APPLICATION

[4] By Originating Motion filed on November 29, 2007, the Applicant instituted a claim in judicial review against the Respondents, seeking the following relief from the Court:

(i) A declaration that in the event which has happened the decision and/or administrative act and/or advice and/or recommendation of the Third Respondent to cease paying a salary to the Applicant and, secondly, the failure of the Third Respondent to sign the Applicant's application for study leave was unreasonable, void and contrary to law;
(ii) An order of certiorari to quash the above administrative acts;
(iii) Mandamus directing the Second Respondent to pay the full salary of the Applicant from the time of his resumption of work on May 31, 2007 to present and to determine the quantum of payment due to him for the period January 1, 2006 to May 30, 2007 and having made that determination to make those payments to him;
(iv) In the alternative, an order of Restitution requiring the Second Respondent to restore the salary of the Applicant as of January 1, 2006 until present.
(v) All such further orders or direction as the Court may deep appropriate;
(vi) Damages; and
(vii) Costs

[5] There were two grounds for the Application. The first ground was that the decision and/or administrative act and/or advice and/or omission of the Second Respondent when he failed to sign the application of the Application or to forward this application to the Third Respondent for study leave was (a) wholly unreasonable, irregular, irrational or an improper exercise of

discretion; (b) an abuse of discretion; and (c) a failure to observe the principles of fairness.

[6] The second ground was that the decision and/or administrative act and/or advice and/or omission of the Respondents to stop the pay of the Applicant without affording him a hearing was wholly unreasonable.

[7] In the particulars of the second ground it was explained that the Applicant had challenged the decision of the Second Respondent not to recommend him for study leave and had received a decision in his favor but that the Second Respondent still refused to sign the Applicant's application for study leave and to forward it to the Third Respondent and, further, had with or without the authority of the Third Respondent stopped the pay of the Applicant and refused to give him duties to perform.

[8] The Application was supported by the Affidavit of Mr. Pearson Leacock dated November 28, 2007 and filed on November 29, 2007. Mr. Leacock filed four further affidavits on March 12, 2009 in response to affidavits filed by or behalf of the three Respondents in this matter. It was on all of these affidavits that he was cross-examined by Counsel for the Respondents.

FACTUAL BACKGROUND

[9] It is undisputed that Mr. Leacock was employed as a police officer attached to the Royal Barbados Police Force as a constable. He enrolled as a student

of the Faculty of Law of the Cave Hill Campus of the University of the West Indies during the course of his employment as a police officer. He successfully completed his law degree and graduated in 2005 with a Bachelor of Laws ("LLB") Upper Second Class Honors. At the time of his graduation, he was still employed as a constable.

[10] He applied to and was accepted by the Hugh Wooding Law School in Trinidad and Tobago to pursue the two year course of studies required to obtain his Legal Education (LEC), which is a postgraduate qualification enabling the holders of law degrees to practice law in Barbados and the Commonwealth Caribbean and without which practice is not permitted.

[11] As the Hugh Wooding Law School was located in Trinidad, the Applicant could not pursue his LEC while also working as a police officer as he had done for his LLB. Therefore, in order to commence his studies at the Hugh Wooding Law School in the academic year beginning in September 2005, the Applicant applied in May 2005 for study leave from the Royal Barbados Police Force for the period September 2005 to June 2007.

[12] The application for study leave was made by completing and submitting the requisite forms. Only Part A of these forms had to be completed by the Applicant. The forms were then submitted to the Human Resources Department for Part B to be filled out by his Head of Department i.e. the

Police Commissioner. These forms were to be and were indeed subsequently forwarded by the Police Commissioner to the Training Administration Division (TAD) of the Public Service although they were submitted not only after the deadline by which they should have been sent but in an incomplete state with some of the information required in Part B not filled. The forms were also accompanied by a Memorandum dated March 11, 2005 from the Commissioner which was directed to the Principal Training Officer of TAD and by which the Commissioner indicated that Mr. Leacock's Application for Study Leave and a training loan was not recommended for approval.

High Court Suit No. 1712 of 2005

[13] The Applicant challenged the Police Commissioner's refusal to recommend him for study leave through High Court Suit No. 1712 of 2005. He instituted this action in judicial review and brought it against the Attorney-General of Barbados only, seeking in that suit simply a *declaration* to the effect that the "*decision and/or administrative act and/or advice and/or recommendation*" of the Commissioner made on or about March 11, 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) was not only unreasonable but an irregular or an improper exercise of discretion. Mr.

Leacock also sought in that action an order of *certiorari* to quash the decision and/or administrative act and/or advice and/or recommendation.

[14] The action was heard before the then Chief Justice of Barbados, **Sir David Simmons**, who delivered judgment on October 27, 2005 in what has now become an important administrative law decision in the region. In his decision, the Chief Justice held that the Applicant had a legitimate expectation to study leave that arose as a result of 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*". The Chief Justice was very careful to stress, however, that while the Court had found that the Applicant had a legitimate expectation to being permitted a leave of study to pursue the LEC, the Court could not substitute its decision for that of the competent authority but could only determine whether the process by which that decision had been reached was fair and should be allowed to stand. Thus, the Court granted the following orders:

> "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."

[15] When the Chief Justice delivered his decision in High Court Suit No. 1712 of 2005, the Applicant was not in Barbados working as a police constable but had instead taken either overseas vacation leave or sick leave and was in Trinidad and Tobago where he had registered himself as a student of the Hugh Wooding Law School and commenced his studies for the new academic year. He returned to Barbados briefly so as to be present in Court when the Chief Justice's decision was orally delivered but returned the next day to Trinidad. Like the rest of the facts listed above, this is not disputed. There is, however, some dispute between the parties on what occurred with respect to the Mr. Leacock's application for study leave after the delivery of the decision.

<u>Applicant's Resubmission of the Application for Study Leave</u>

[16] The Applicant gave evidence that as the decision was in his favor, he thought that it was the duty of the Third Respondent to fill out the application for study leave in the proper manner and resubmit it to the Training Administrative Division for approval.

[17] He gave evidence that this was why he did not therefore immediately reapply for study leave but testified instead that he believed his initial application to have remained live and therefore believed that like other fellow police officers he had proceeded to study in Trinidad while the approval of his application for study leave was still pending.

[18] While the Applicant asserted that he believed the application to have remained active, he at the same time agreed that the forms submitted in the initial application were returned to him after the written decision in High Court Suit No. 1712 of 2005 had been delivered and kept not by him but by his attorneys. It was these same forms that were ultimately submitted by the Applicant, unaltered, a second time allegedly on learning of the failure of the Third Respondent to submit the application as the Applicant alleges he should have been done.

[19] Although in his evidence before the Court the Applicant appears to have been clear, in his mind at least, as to the steps to be taken when he had received a decision in his favor, it is also clear, from his own affidavit evidence that his attorneys were not as certain on to how to proceed.

[20] It was for this reason that Mr. Hal Gollop on October 17, 2005 wrote to the Principal Training Officer of the Training Administration Division

explaining the circumstances of the case and the decision of the Chief Justice and requesting the following:

> "I would there appreciate if you would use your good offices to reconsider this matter and advise as to my client's best course of action at this point.
>
> I would also appreciate if you would give this matter your urgent attention.
>
> Please feel free to contact my chambers in order that this matter may be discussed with a view to an expeditious resolution."

[21] By letter dated November 1, 2005, Mr. Gollop was duly advised by the Acting Principal Training Officer on the procedure for applying for study leave and informed that as the application submitted by Mr. Leacock on March 18, 2005 had not been submitted through the relevant Ministry it had been returned to him for resubmission but was never re-submitted.

[22] Despite the urgency expressed by Mr. Gollop, no effort appeared to have been made either by Mr. Leacock or by Mr. Gollop to ensure that the application for study leave was resubmitted as soon as possible. Mr. Leacock testified that he submitted the application on January 5, 2006 to Station Sergeant Hollingsworth and that on that date Sergeant Hollingsworth returned the forms to him and informed him that the Commissioner refused to sign them. Sergeant Hollingsworth has stoutly denied receiving the forms in January or having made the comment that the Applicant has attributed to

him and on this point, the Court prefers the evidence of Sergeant Hollingsworth.

[23] The Applicant claimed to have reapplied using the same forms that were returned to him but according to the evidence of it was in fact not until February 24, 2006 that the application was actually received. The Court therefore finds that it was on that latter date that the Applicant actually resubmitted his application for study leave.

[24] It is noteworthy that by that time the Applicant's overseas leave had expired but no steps were taken by him to apply for further leave, vacation or otherwise, nor did he report for duty at any time, even when he returned to the island during the course of the academic year.

Evidence of the Third Respondent

[25] It was the evidence of the Third Respondent that following the decision of the Chief Justice in the earlier action in this matter, the Third Respondent received a memorandum dated February 28, 2006 from the Office of the Attorney General under whose cover he received Mr. Leacock's application for study leave submitted on February 24, 2006. The application was forwarded to him for endorsement in his capacity as the Applicant's Head of Department.

[26] The Police Commissioner responded to this memorandum by a memorandum of his own dated February 28, 2006 in which he observed that "*Part B of the application form which is to be completed by the Head of Department has in fact already been completed*". He further indicated that as he was seeing the application for the first time, the comments in that part were not completed by him and he therefore recommended that in the circumstances Mr. Leacock should "*submit the application to be processed in the usual and approved manner*".

[27] The Commissioner maintained that he could never endorse the comments that he had found in Part B of the submitted form as they were not in accord with the report written by Senior Superintendent Greaves on the conduct and performance of the Applicant.

[28] It is not disputed that the comments to which the Commissioner referred were filled out on the instructions of Inspector Tony Hollingsworth who had been attached to the Human Response Department of the Royal Barbados Police Force at the material time. Inspector Hollingsworth testified that the comments were the comments normally made in relation to all persons applying to pursue their Legal Education Certificate. He maintained that the normal procedure was usually to insert the comments in question at the initial stage and without consultation with the Commissioner. He insisted

that he was satisfied that these comments were true and correct in relation to the Applicant.

[29] Inspector Hollingsworth accepted that the Commissioner did sometimes disagree with the comments he inserted and if he did, the comments would be adjusted accordingly. The Commissioner had not requested that the comments made in relation to the Applicant be adjusted.

Payment of the Applicant's Salary

[30] As a result of the Applicant's absence from duty without lawful excuse, the Third Respondent ordered that payment of the Applicant's salary be stopped as of January 1, 2006 some months after the Applicant had left to complete his studies in Trinidad. The Third Respondent claimed that he made this order because the effect of section 29 of the ***Police Act*** was that the Applicant had ceased to be a police officer upon his failure to appear for roll-call as he was required to do. Payment of the salary was stopped without first giving the Applicant notice of any intention to do so whether verbally or by letter.

[31] The Applicant also alleged that his status as a member of the police force was confirmed by the Third Respondent himself after January 2006. He pointed out that he was summoned to the office of the Senior Superintendent on September 21, 2007, his name was included in the list of police officers

celebrating their birthday which list was published, as customary, in the Force Orders dated October 5, 2007 and he received a condolence card signed by the Commissioner when his mother passed away on November 20, 2007.

[32] It is clear that upon learning that payment of his salary had ceased, the Applicant's attorney-at-law, Kareen Cole, wrote to the Commissioner of Police by letter dated June 13, 2006 outlining the Applicant's concerns in relation to his salary and seeking information relating to the same. To this letter, no response was received.

[33] It is curious to note, however, that although no response was formally given to the letter of Ms. Cole, the Applicant himself subsequently received communication from the Commissioner of Police. In a letter dated June 29, 2006 and captioned "Absent from Duty", the Applicant was informed that the records of the police force showed that he had been absent from duty since October 13, 2006 with "*nothing to show that you have been granted leave of any kind*". The letter then concluded by stating:

> "In this connection, I am also to bring your attention to section 29(10 of the Police Act, Cap. 167, which states that every subordinate police officer or Constable who absents himself from roll call and from duty for the space of forty-eight hours without lawful excuse, shall be deemed to have illegally resigned from or left the Force"

[34] The Applicant responded to this letter by requesting an audience with the Commissioner as a matter of urgency. He subsequently received a letter July 17, 2006 from Mr. Oral Williams, the Assistant Commissioner of Police writing on behalf of the Commissioner of Police. This letter was described as being "*in connection with [his] absence from duty as a member of the Royal Barbados Police Force*". He was informed that his "*continued absence from duty*" breached section 29 of the ***Police Act*** and he was therefore required to report to the Office of the Senior Superintendent in charge of the Bridgetown Division "*no later than 07:00 hrs on December 23rd, 2006*".

[35] The Applicant never actually reported for duty on the date specified in the letter dated July 17, 2006. Indeed, he has stated that this letter caused him severe anxiety and embarrassment. He states in his affidavit that while he believed that pursuant to the judgment in Suit No. 1712 of 2005 he was entitled to be granted study leave:

> "I felt that if I had returned to work it would exacerbate my emotional distress having completed thirteen of the required eighteen months at Law School at that point."

To avoid returning to work, the Applicant therefore submitted a Medical Certificate dated December 21, 2006 to return to work on January 8, 2007. He did not actually return to work on January 8, 2007 and did not actually

seek to do so until May 31, 2007 when his studies at Hugh Wooding had been completed.

[36] Without providing the force with any notice of his intention to return to duty, the Applicant simply reported for duty at the Central Police Station in Barbados on May 31, 2007. Unsurprisingly, on his arrival he was given no duties to perform. Rather, it is his evidence that he was instructed by Senior Superintendent Don Nicholls to cease working. The Applicant, however, testified at trial that he continued to report for duty on a daily basis despite not being given any instructions or duties and not receiving a salary and maintained that he remained a member of the police force and had not at any time resigned.

ISSUES

[37] The issues that arise for determination in this action can be quite broadly stated as follows:

1) Whether the Attorney-General is a proper party to this action;
2) Whether the Court should exercise the discretion granted to it by ***section 8*** of the ***Administrative Justice Act,*** **Cap 109B of the Laws of Barbados** and refuse to grant any relief as there had been undue delay in making the application;
3) Whether the failure of the First Respondent to act constituted a breach of natural justice;
4) Whether the Second Respondent acted in breach of the rules of natural justice and the principles of fairness; and
5) Whether the Third Respondent acted in breach or failed to perform his duty in accordance with the law.

[38] The first issue as to whether the Attorney-General has been properly added as a party in this action will be dealt with first and separately from the other issues.

LAW AND DISCUSSION

<u>Is the Attorney-General a proper party to this action?</u>

[39] Turning first to the question of whether the Attorney-General was properly added as a party.

[40] **LEGAL SUBMISSIONS OF COUNSEL:** Mr. Graham, who appeared on behalf of the Plaintiff, accepted that the issue of whether the Attorney-General was a proper party to the proceedings had not been decided in the earlier matter arising from the same facts, although he submitted that the earlier proceeding had decided the issue of whether the other Respondents had been properly joined. He pointed out that the Attorney General, who was the First Respondent, was responsible for the portfolio of the Royal Barbados Police Force and that the Third Respondent was answerable to him and urged the Court to take judicial notice of this fact.

[41] Mr. Graham also submitted that **section 14(2)** of the ***Crown Proceedings Act,*** **Cap 197 of the Laws of Barbados** provided that civil proceedings against the Crown shall be instituted against the Attorney-General. He directed the Court to its earlier decision in ***Lloyd v Attorney-General***

(Unreported) Civil Suit No. 979 of 1996 and the Trinidadian case of ***Hochoy v Nuge*** **(1964) 7 WIR 174**. Using these cases, he submitted that it was not necessary for any specific allegation of an act or omission by the Attorney-General himself and the Attorney-General, the First Respondent, was therefore properly joined as a party in the matter.

[42] Mr. Leslie Haynes, Q.C., learned counsel for the First and Third Defendants in Suit No. 1712 of 2005, ***Pearson Leacock v. Attorney-General*** has submitted that the Attorney-General was not a proper party to the matter and should not therefore have been added. In making this submission, he relied primarily upon the ***Crown Proceedings Act,*** **Cap 197 of the Laws of Barbados** and the judgment of the Eastern Caribbean Supreme Court in ***Fredericks et al v Comptroller of Customs and the Attorney-General*** **(unreported) Civil Appeal No. 037 of 2008 decided July 9, 2009 per George-Creque JA.**

[43] Relying on the decision of ***Fredericks*** Mr. Haynes, QC argued that judicial review proceedings were public law proceedings that could not be categorized as civil proceedings as defined under the ***Crown Proceedings Act***. He submitted that the cases of ***Hochoy and Nuge (supra)*** and ***Lloyd v Attorney-General (supra)***, which had been cited by counsel for the Applicant were not relevant to the proceedings before the Court as the acts

in question in those proceedings had been acts of the Governor-General while *Pearson Leacock* was not challenging any acts or omissions of the Governor-General.

The *Crown Proceedings Act* Cap 197 of the Laws of Barbados

[44] In considering the issue at hand, a good starting point is an examination of the ***Crown Proceedings Act***. The ***Crown Proceedings Act*** is modeled after the ***Crown Proceedings Act, 1947 of the United Kingdom***. The English Act, which has now been repealed, is described as having altered significantly both the procedural and substantive law concerning the liability of the Crown: ***Atkin's Court Proceedings*** **(Volume 13) para 504**. Subject to certain exceptions, it permitted an individual to bring civil claims against the State much in the same way as he could against an individual: ***Ibid para 501***.

[45] The ***Crown Proceedings Act, Cap 197 of the Laws of Barbados*** describes itself as an Act to amend the law relating to the civil liabilities and the rights of the Crown and to civil proceedings by and against the Crown.

[46] ***Section 3*** of the Act sets out the right to sue the Crown and provides that

> 3**.** Where any person has a claim against the Crown and, where, before the 23rd February, 1955 the claim might have been enforced, subject to the grant of the Governor's fiat, by petition of right or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to this Act, the claim may be enforced as of right and without the fiat of the Governor-General, by

> proceedings taken against the Crown for that purpose in accordance with this Act.

[47] The Act provides in ***section 14(2)*** that civil proceedings against the Crown shall be instituted against the Attorney-General. The Act defines "*civil proceedings*" as including proceedings in the Supreme Court or a Magistrate's court sitting in the exercise of his civil jurisdiction for the recovery of fines or penalties but provides that it shall not include proceedings that correspond to proceedings on the Crown side of the Queen's Bench Division in the United Kingdom. Proceedings on the Crown side of the Queen's Bench Division refer to proceedings in the Administrative Court: ***Atkin's Court Proceedings*** **(Volume 13) para 514**.

[48] The Act further provides in **section 2(3)** that

> (3) Any reference in Parts IV or V to civil proceedings by or against the Crown or to civil proceedings to which the Crown is a party shall be construed as including a reference to civil proceedings to which the Attorney-General or any Government department, or any officer of the Crown as such, is a party: but the Crown shall not for the purposes of Parts IV or V be deemed to be a party to any proceedings by reason only that they are brought by the Attorney-General upon the relation of some other person.

It should be noted that despite the Act's definition of "civil proceedings, **Rule 2.2** of the ***Supreme Court (Civil Procedure) Rules,*** **2008** explicitly provides that civil proceedings include applications for judicial review.

[49] The decision in ***Hochoy v Nuge*** did not pertain to the ***Crown Proceedings Act***. However, the decision is important to consider because it is sometimes

used as authority to support bringing an action against, or joining the Attorney-General as a party, in judicial review proceedings.

[50] In ***Hochoy v Nuge***, the act of the Governor-General of Trinidad and Tobago to appoint a Commission of Inquiry to look into certain matters pursuant to statutory powers conferred upon him was challenged as being *ultra vires*. He was named as Defendant in the claims filed to do so. One of the primary issues before the Court was whether the Governor-General was immune from suit for official acts done by him in his official capacity. In holding that the Governor-General could not enjoy the sovereignty of the Crown, which was personal, and that the Court had the power to examine the character of acts done by him as Governor-General and determine whether he had the competence to do it, **Wooding, CJ**, *obiter dicta*, that:

> For the foregoing reasons I would dismiss the appeals. Nevertheless, having discharged my duties as a judge, I would suggest that in future the practice be followed of naming the Attorney-General as defendant whenever the validity of any act of state done by the Governor-General is being called in question. It is not in dispute that the appointment by the appellant of the commission of inquiry which is said to be in excess of the statutory power is one which by s 63 of the Constitution can only have been made in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. Accordingly, although the appointment of the commission was his act by reason that the Ordinance names him as the person to perform it, it is really an act of the Government or, as it may be called, an act of state. In my personal view, the ordinary civilities dictate that the same course should be followed in this country as was followed in New Zealand when Cock and others challenged the validity of an appointment made there by the Governor in Council under its

> Commissions of Inquiry Act, 1908: they sued the Attorney-General- see 28 NZLR 405. I think that the same procedure might commendably be adopted here.

[51] **Hytali JA** echoed this dicta, noting that:

> As a footnote merely, to this judgment, I would add that the constitutional status of the State is now such that it would be more in keeping with its dignity, if matters of this kind were litigated against the Attorney-General. No prejudice is likely to result from adopting this procedure and I join with the learned Chief Justice in commending it for acceptance.

[52] As a result of the dicta of **Wooding, CJ** in ***Hochoy***, in claims challenging the validity of acts said to have been done by the Governor-General or under the exercise of executive power usually name the Attorney-General as party. The Governor-General has, however, been himself named as party in some public law matters without any apparent difficulty: See, for example, ***Thompson v Judicial and Legal Service Commission and Governor-General of the Commonwealth of the Bahamas*** **(unreported) Bahamas Supreme Court, No. PUB 0004 of 2005, Decision of June 6, 2005** and ***Cabey v the Governor et al*** **(unreported) High Court of Montserrat Suit No. MNIHCV 4 of 2003, Decision of October 21, 2004**.

COMMONWEALTH CARIBBEAN JURISPRUDENCE

[53] A number of cases in the Commonwealth Caribbean have undertaken an examination of the relevant ***Crown Proceedings Act*** (or equivalent statutes) as related to applications for judicial review or constitutional motions, with

most appearing to arrive at the conclusion that the Act did not apply to these particular actions.

[54] For example, in the Bahamian case of ***Airport, Airline and Allied Workers' Union v Harding et al*** **(unreported) Suit No. 33 of 2007**, **Decision of January 26, 2009** when the Court was determining whether to award costs, Counsel for the Respondents submitted that the Applicant should be made to pay the costs of the Attorney-General as he had been added unnecessarily as the Applicant had made no allegation against him nor was their relief directed at him and the Court had therefore made no order against him.

[55] The Court surmised that the Attorney-General had been added as a party because the Applicants thought that the Registrar of Trade Unions could not be sued in his own name and because they must have had in mind **section 12(1)** of the ***Crown Proceedings Act*** **of the Bahamas** which (like its Barbadian counterpart) provided that civil proceedings by or against the Crown were to be instituted against the Attorney-General.

[56] Relying on the earlier decision of the Bahamas Supreme Court in ***Turnquest v Parliamentary Registrar*** **[1982] BHS J. No. 31**, the Court held, however, that the Registrar could be sued in his official capacity without adding the Attorney-General as a party and agreed with the submissions of Counsel for the Respondent that it had not been necessary to add him as a party.

However, it declined to award costs against the Applicant because although the Attorney-General had been brought to the Court unnecessarily he had made no application to remove himself as respondent although it was open to him to do so at any time. In these circumstances, it was not equitable for him to receive costs.

[57] In the St. Lucian case of ***Fredericks et al v Comptroller of Customs and the Attorney-General*** **(unreported) Civil Appeal No. 037 of 2008, Decision of July 6, 2009,** the Court of Appeal of the Eastern Caribbean was required to consider the effect of the ***Crown Proceedings Act of St. Lucia***, which is similar to that of Barbados. The Appellants had instituted a constitutional motion alleging breach of his rights to personal liberty and deprivation of property and had brought this claim against both the Comptroller and the Attorney-General. One of the issues on appeal was the applicability of the ***Crown Proceedings Act or CPA*** to the constitutional action and the appropriate party against whom the action should have been brought. The Court therefore had to consider whether the matter could be considered a civil proceeding as defined by the CPA.

[58] In his judgment, **George-Creque, JA** pointed out that civil proceedings had been restrictively defined under the Act and noted that in ***M v Home Office*** **[1993] 3 All ER 537, Lord Woolf**, in speaking of the UK CPA, had made it

clear that it did not apply to all high court proceedings and, in particular, against those which would have been brought by prerogative orders. **Lord Bingham of Cornhill** in the Privy Council decision in ***Gairy and Another v Attorney-General of Grenada*** **[2001] UKPC 30; [2002] 1 AC 167** had also observed that the expression "civil proceedings" in the CPA "probably excludes what would now be judicial review" while the Privy Council had approved the Jamaican Court of Appeal's holding to this effect in ***Minister of Foreign Affairs, Trade and Industry v Vehicle and Supplies Ltd*** **[1991] 1 WLR 550**.

[59] **George-Creque, JA** therefore concluded that the it was obvious from the legislative framework of the CPA that it was intended to provide for the institution and maintenance of actions by and against the Crown in respect of liabilities arising in contract, tort or like actions committed by its servants and officers. He held that the claim before him did not therefore fall within the definition of civil proceedings under the CPA but was instead "more in the nature of a review of the exercise of the power used by the Comptroller held up against the fundamental protections guaranteed by the Constitution as the benchmark for such a review".

[60] A similar conclusion was reached by the Judicial Committee of the Privy Council in ***Bahamas Hotel Maintenance & Allied Workers Union v***

Bahamas Catering and Allied Workers Union et al* [2011] UKPC 4** where an application for judicial review was brought to challenge certain actions and decisions taken by the Minister under the ***Industrial Relations Act. The action named the Attorney-General as party and one of the issues arising was whether he had been a proper party to the application.

[61] **Lord Walker**, who gave the judgment of the Court, observed that judicial review was "directed to official decision-making and the official who took the relevant decision is the natural respondent to the proceedings". The ***Crown Proceedings Act*** did not authorize the addition of the Attorney-General as a proper party as proceedings in judicial review were not included in the definition of civil proceedings under that Act and the Bahamian Court of Appeal erred when it referred to it. The Court accordingly held that the Minister whose exercise of statutory power was being challenged was the proper respondent to the application and the Attorney-General was correct in submitting that he should not have been added as a party to the proceedings. The Court further observed that the Attorney-General would very rarely be a proper party to judicial review applications as most decisions taken by were not amenable to judicial review.

[62] In fact, **Conteh, CJ** in ***ex parte Telecommunications Limited v R et al*** **(unreported) High Court Suit No. 47 of 2002, Belize Supreme Court Decision of February 12, 2002** has correctly pointed out that in judicial review applications in England, the Attorney-General is only added as a party if the action against which judicial review is sought gives emanates from his office.

[63] **Lord Walker** in ***Bahamas Hotel Maintenance and Allied Workers Union*** (supra) also chastised the Attorney-General for failing to adopt a consistent course in the proceedings, pointing out that it was difficult to determine whether the occasions when it was proper, and when it was not proper, to join the Attorney-General, who should therefore, if incorrectly joined, "*take active steps to rectify the position as quickly and inexpensively as possible*".

[64] Whether the Attorney-General should be a party to judicial review proceedings was also considered by the Eastern Caribbean Supreme Court in ***Virgin Islands Environmental Council v Attorney-General et al*** **(unreported) Claim No. 2007/0185, BVI High Court Decision of September 21, 2009 per Hariprashad-Charles, J.** where the Applicant brought proceedings in judicial review to seek an order of certiorari to quash the decision of the Minster of Planning to grant planning approval for a five-star hotel, marina and golf course in a marine protected area.

[65] Counsel for the Respondent submitted that the Minister of Planning was the proper defendant, rather than the Attorney-General as it was the decision of the former that was being called into account. He further submitted that judicial review proceedings were not civil proceedings within the meaning of the Crown Proceedings Act. Counsel urged to consider and apply the Jamaican case of ***Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd*** **(1992) LRC (Const) 720 (decided June 16, 1989)** where the Court of Appeal of Jamaica had concluded that definition of civil proceedings in the ***Crown Proceedings Act*** excluded proceedings which would be taken in the crown side of the Queen's Bench division, in other words prerogative writs of certiorari, mandamus and prohibition and the Act did not therefore apply to judicial review proceedings. The Privy Council had subsequently approved this finding by the Court of Appeal (**May 13, 1991**).

[66] The Court noted that similar pronouncements had been made by the Trinidadian Court of Appeal in ***Chandresh Sharma v Attorney General*** **(unreported) C.A. No 115 of 2003,** the Eastern Caribbean Court of Appeal in ***Richard Frederick et al v The Comptroller of Customs and the Attorney General*** **(unreported) Decision of July 6, 2009** and **Webster, J (ag)** of the High Court of Saint Vincent and the Grenadines in ***Monica Ross v Minister***

of Agriculture, Lands and Fisheries et al **(unreported) Claim No. 255 of 2001**.

[67] **Hariprashad-Charles, J**. then pointed out that under **section 13** of the ***Crown Proceedings Act*** *of* **the British Virgin Islands**, civil proceedings could be instituted either against the Attorney-General or against an authorized officer in his official name.

[68] She concluded that:

> So, it seems to me that it is perfectly proper to bring a claim for judicial review against the Attorney General alone. In fact, case law in our courts is replete with such examples. In addition, Part 56.11.2 empowers the judge to allow any person or body appearing to have a sufficient interest in the subject matter to be heard whether or nor served with the claim form as well as direct the manner in which such person or body may be heard.

[69] She noted, however, that even if she was incorrect in the conclusion at which she arrived, the Attorney-General was a proper party to the claim given the history of the proceedings. The Applicant had applied to delete the Minister as respondent and although an Order substituting the Attorney-General as sole Respondent had been made in the presence of all persons, Counsel for the Attorney-General should have raised the issue at that time or should have appealed the Order.

[70] In ***Eddy v Jenkins et al*** **(unreported) Suit No. 160 of 1999, Decision of December 2, 2002**, the Applicant brought a judicial review application

seeking an Order of prohibition preventing a Land Tribunal from hearing claims for compensation under the Land Acquisition Act in respect of certain lands, as well as an order of certiorari to remove any decision made by the said Tribunal relating to that land. He brought the application against the members of the said tribunal only. When the matter came on for hearing, the Attorney-General applied not to be removed as a party but to be added as a respondent, submitting that the action should have been brought against him pursuant to the ***Crown Proceedings Act***.

[71] Counsel for the Applicant strongly resisted the Attorney-General's application arguing that civil proceedings under the ***Crown Proceedings Act*** did not include applications for judicial review and the Attorney-General was not a necessary party.

[72] That Court pointed out that, unlike England and other Commonwealth Caribbean jurisdictions, the ***Crown Proceedings Act*** **of St. Christopher and Nevis** did not in its definition of civil proceedings exclude proceedings on the Crown side. Accordingly, the Act provided statutory authority for the Attorney-General to be added as a party and the application of the Attorney-General was therefore granted. The Court also agreed with that the grounds for relief raised the issue of breaches of the constitution and observed that the CPR permitted it to allow any person who had sufficient interest on the

subject matter of a claim to make submissions whether or not served with the claim form and indicated that the Attorney-General had demonstrated sufficient interest to be granted leave under this Rule.

THE POSITION OF THE BARBADIAN COURT

[73] The question of whether the Attorney-General should be joined as a party to all judicial review applications has already been considered by the High Court of Barbados in a number of decisions. In most of these decisions the Court had concluded that the Attorney-General had been properly joined.

[74] The first of the decisions to be considered will be that in ***C.O. Williams Construction Ltd v Blackman***, where the decision or act of the Minister of Transport regarding the award of a public contract to construct and/or rehabilitate a public highway in Barbados to the Claimant's competitor. The decision, which the Court held concerned not the statutory power of the Minister in question but the statutory power of the Cabinet of Barbados, went all the way up to the Privy Council.

[75] One of the issues that had arose in the matter when it appeared before the High Court was whether the Attorney-General should be struck out as a party as he had been unnecessarily or improperly joined. **Sir Denys Williams, CJ** refused the application to strike out the Attorney-General. In his unreported decision dated **February 27, 1989** he considered the ***Crown***

Proceedings Act which required by section 18 that civil proceedings be instituted against the Attorney-General and also defined civil proceedings to exclude proceedings in Barbados corresponding to proceedings on the crown side of the Queen's Bench Division in the United Kingdom. He noted that:

> Proceedings on the Crown side of the Queen's Bench Division are those by means of which the Queen's Bench Division exercises its ancient jurisdiction of supervising inferior courts and public authorities. This jurisdiction used to be exercised principally by the prerogative writs of *habeas corpus*, certiorari, mandamus and prohibition. In Barbados it is now so exercised by the prerogative writ of habeas corpus and by the orders of certiorari, mandamus and prohibition under Order 53 and by the powers of judicial review under the Administrative Justice Act, Cap. 109 B [which powers include the grant of orders of certiorari 'mandamus and prohibition].

[76] He therefore concluded that the ***Crown Proceedings Act*** could not justify the Attorney-General being added as a party but held the Attorney-General had been correctly named, given the approach recommended by **Wooding, CJ** and **Hytali, JA** in ***Hochoy v Nuge (supra)***.

[77] On appeal before the Court of Appeal of Barbados in Civil Appeal No. 6 of 89, **Decision of February 3, 1993**, counsel for the Appellants (the Respondents in the High Court matter) conceded that if the Cabinet decision was properly subject to judicial review it would be entirely proper to name the Attorney-General as Respondent given the decision in ***Hochoy***. The Court of Appeal held:

> Being of the opinion that the Cabinet of Barbados is in the circumstances of the case an authority of Government whose act in making the final decision with respect to the award of the contract in question is subject to review under the Administrative Justice Act, I would accept the sentiments expressed in Hochoy v Nuge and hold that it is entirely proper and the ordinary civilities would so dictate to name the Attorney-General, himself a Minister and member of Cabinet, as a Respondent to litigate the matter.

[78] The issue of whether the Attorney-General was properly joined as a party did not arise when the matter reached the Privy Council.

[79] An application to strike out the Attorney-General as party was also made in ***Lloyd v Attorney-General (unreported), Suit No. 979 of 1996, Decision of April 30, 1998*** with counsel relying on the earlier decision of **Moore J** in ***Scotland District Association Inc***. The Court pointed out that as the act of which judicial review was sought was the decision to interdict a public service employee pending an investigation into irregularities in the department with which she was employed. The Court pointed out that the act in question was an act of the Governor-General made on the advice of the Public Service Commission. As ***Hochoy v Nuge*** had established the Attorney-General was the party to be sued when the Governor-General performed an act of state that was the subject of an action for judicial review, **Moore J**. held that the Attorney-General was the proper respondent "in the peculiar circumstances of this case".

[80] In his judgment in ***Parsons Pest Control v Chief Town Planner et al*** **(unreported) Suit No. 154 of 1999, Decision of March 28, 2001**, **Payne J** noted that he had refused an *in limine* application of counsel for the Respondents to remove the Attorney-General as a party to the proceedings "having regard to the practice recommended in ***Hochoy v Nuge and others***".

[81] In its subsequent decision in a judicial review application instituted against the Chief Town Planner, the Chief Surveyor and the Attorney-General in his representative capacity under the Crown Proceedings Act in order to challenge the governmental acquisition of the Six Men's Plantation in Saint Peter, **Chenery J. (ag)** of the Barbados High Court rejected an *in limine* application by counsel for the Respondents to have the Attorney-General struck out and concluded that the Attorney-General "*as representative of the Crown*" was properly joined as a party to the proceedings.

[82] The decision in question was ***Mount Six Men's Company Limited v Chief Town Planner et al*** **(unreported) High Court Suit No. 274 of 1999, Decision of June 26, 2003**, Counsel for the Respondents had argued that the application had not (i) concerned any administrative act or omission on the part of the Attorney-General; and (ii) that the judicial review proceedings were not civil proceedings within the meaning of the ***Crown Proceedings***

Act. ***Section 18*** of the Act could not therefore be invoked to justify making the Attorney-General a respondent.

[83] In response, Counsel for the Applicant relied upon ***Hochoy v Nuge*** **(1964) 1 WLR 181** and the earlier decision of the Court in ***C.O.Williams Construction v. Blackman*** **(1989) 41 W.I.R. 46** and pointed out that the acquisition of land was done in the name of the Crown and the Applicant was therefore seeking a declaratory judgment against the Crown, which was represented by the Governor General.

[84] **Chenery J**. considered the cases cited by the Applicant, as well as ***Dyson v Attorney-General*** **[1911] 1 K.B. 410,** and concluded that:

> [25] In the present matter as the Court understands it, the applicant is seeking a declaratory judgment against the Crown and (on the basis of ***Dyson v. Attorney General***) it seems proper to the Court that the Attorney General be a party to the proceedings as representative of the Crown.

[85] The question of whether the Attorney-General was properly added as a party to a judicial review application was also considered by **Kentish J.** in her relatively recent decision in ***Shazar Distributions Inc. v the Attorney-General*** **(Unreported) Civil Suit No. 424 of 2006, Decision of June 23, 2006**.

[86] Counsel for the Attorney-General in that matter had submitted that the Attorney-General should be struck out as a party, pointing out that the

Judicial Review (Application) Rules,* 1983 *("the Rules") made under the ***Administrative Justice Act (AJA)* Cap 109B** stipulated that only notice of an application for judicial review should be served on the Attorney General and did not therefore intend the Attorney General to be a party to such applications. In support of his submission, Counsel directed the Court to the decision of **Moore J**. in ***I.D.M. Marketing Corporation v. The Attorney General et al* (Unreported) No. 1188 of 1995**.

[87] **Kentish J.** declined to follow the decision of **Moore J**. preferring instead to be guided by the decision ***C.O. Williams v Blackman*** on which she relied to hold that "*the substantive law settled under the Crown Proceedings Act Cap 197 of the Laws of Barbados that the proper party to be sued in actions concerning or involving departments of government is the Attorney General as representative of the Crown, can be overthrown by procedural rules*".

[88] She noted that in Barbados it was a well-established practice to join the Attorney-General as party to a judicial review application, referring in her judgment to four examples where this had been done (***Judy Lloyd v. The Attorney General et al; Alfred Sparman v. Gilbert Greaves et al; Rupert Hugh Barker v. The Attorney General et al; and C.O. Williams v. Donald G. Blackman et al***). She also pointed out that no prejudice could result to the Attorney-General by adding him as a party as he would have been called

upon in any event to represent the comptroller of customs. **Kentish J.** therefore dismissed the Application of Counsel for the Respondents to strike out the Attorney-General as party to the proceedings.

[89] In ***Harper v Arthur*** **(Unreported) High Court of Barbados, Civil Suit No. 533 of 2004, Decision of June 7, 2007,** the Applicant instituted a claim in judicial review as a result of the decision of the Minister of Finance not to grant him a duty free concession on a vehicle that he was importing into Barbados as returning national. The action was brought not only against the Minister of Finance but the Attorney-General in her representative capacity under the ***Crown Proceedings Act, Cap. 197***. The Court accepted that the Attorney-General who was joined in her representative capacity was properly joined in this matter although they did not discuss the issue in any detail.

[90] Other applications in which the Attorney-General was joined as a party (but where his addition as a party was not contested and the Court did not have cause to consider whether his joining was proper) include ***Bolden v Attorney-General*** **(unreported) Suit No. 905 of 1989, Decision of February 12, 1990;** ***Computer Information Services Ltd et al v the Attorney General and the Registrar of Titles*** **(unreported) Suit No. 365 of 1990, Decision of April 2, 1990;** ***Boyce v Attorney-General et al***

(unreported) Suit No. 2244 of 1993, Decision of July 31, 1997*; Abed v Attorney-General* (unreported) Suit No. 1312 of 1993, Decision of April 13, 1999; *Worme v Bend (Magistrate for District "B" Oistins Court) and the Attorney-General* (unreported) Suit No. 775 of 2001, Decision of April 9, 2002*; Brathwaite v Chief Personnel Officer, Public Services Commission and Attorney-General* (unreported) Suit No 687 of 2007, Decision of May 8, 2009 and ***Lt Col. Trevor Browne v Chief of Staff of the Barbados Defence Force et al* (unreported) Suit No. 1343 of 2008, Decision of November 7, 2012**.

[91] An entirely different position to that in the cases described above was taken by **Moore J.** in ***IDM Direct Marketing Corporation v the Attorney-General et al* (unreported) Suit No. 1188 of 1996, Decision of November 19, 1997**. In ***IDM Direct Marketing Corporation***, the administrative act or omission against which the judicial review application was brought was the execution of search warrants on the premises of the applicant. The Applicant instituted his action against, among others, the Attorney-General, contending that the Attorney-General was the Minister with responsibility for the police and the Judiciary and in that capacity it was proper to make him a party to these proceedings. The Respondents applied *in limine* for the Attorney-General to be struck out as a party.

[92] In considering the application, **Moore J** observed that the Constitution appointed the Attorney-General as the principal legal adviser of the Government but neither it nor any other statutory provision granted the Attorney-General any powers in connection to the issue of a search warrant. Any relief obtained against him would therefore be pointless.

[93] The learned judge also agreed with **King J**. in ***Scotland District Association*** that proceedings for judicial review under the ***Administrative Justice Act*** were different from ordinary civil proceedings against the Crown to which ***section 18*** of the ***Civil Proceedings Act*** applied. Under the ***Civil Proceedings Act***, the Attorney-General had to be made a respondent in such proceedings but there was no similar requirement with respect to judicial review proceedings.

[94] In light of this, he concluded that the Attorney-General was not a proper party and upheld the application to discharge him.

[95] The conclusion to which **Moore J**. arrived was also reached by **King J.** in the earlier decision of ***Scotland District Association Inc. v Attorney-General*** **(unreported) Suit No. 938 of 1996, Decision of August 29, 1996** where the Applicant instituted an action under the Administrative Justice Act, challenging the approval by the Minister responsible for Town and Country Planning of an application to use a portion of the Greenland district

as a sanitary landfill. The action was brought against the Minister Responsible for Town and Country Planning, the Minister Responsible for Heal and the Attorney-General.

[96] Counsel for the Respondents contended that the Attorney-General had no public duty to perform in relation to the administrative decision being challenged, pointing out that the decision being challenged was not a decision of the Attorney-General and that no relief was sought against him. He further argued that the proceedings were different from the ordinary civil suit against the Crown in which the Attorney-General had to be sued on behalf of the Crown pursuant to section 18 of the ***Crown Proceedings Act***. In support of this submission he relied upon the Court of Appeal decision in ***C.O. Williams v Blackman.***

[97] Counsel also referred to the decision in ***Hochoy v Nuge*** and distinguished it from the case before the Court by submitting that in ***Hochoy*** the Attorney-General had been joined as the application for judicial review had been against the exercise by Cabinet of its statutory power. Cabinet had not been exercising any statutory power or function in ***Scotland District Association*** and his joinder was therefore unnecessary.

[98] The Court found the submissions of Counsel for the Respondent to be supported by precedents and to be "generally sound and tenable". **King, J.**

therefore concluded that it was apparent that "*there was, and could be, no case against either and that in the event this matter went on for trial it would fail against the two*."

[99] Finally, there are other applications for judicial review where the Attorney-General was never added as a party and proceedings nonetheless continued without difficulty. These include ***Young v Chief of Staff of the Barbados Defence Force*** **(unreported) No. 48 of 1990, Decision of November 19, 1993;** ***Bovell v Commissioner of Police (unreported) Suit No. 1622 of 1993, Decision of June 9, 1995***, ***Boyce v Beckles (Magistrate for District 'A')*** **(unreported) Suit No. 1009 of 2003, Decision of January 4, 2004*;*** ***Cable & Wireless (Barbados) Ltd v Fair Trading Commission et al*** **(unreported) Suit No. 1970 of 2003, Decision of November 20, 2003*;*** ***Griffith v Commissioner of Police (unreported) Suit No. 927 of 1992,*** **Decision of December 30, 1994;** ***Cools v Medical Council (unreported) Suit No. 1640 of 1996, Decision of September 21, 2000*** and ***Walcott et al v the Barbados Cricket Association*** **(unreported) Civil Appeal No. 32 of 2000, Decision of May 10, 2001**.

[100] Based on the foregoing it cannot be definitively stated that there appears to have developed a practice in Barbados for applicants of judicial review to join the Attorney-General as party to an application whether or not the

judicial review application in question concerns an administrative act or omission of his own or one over which he has control or whether it is an administrative action or omission of the Governor-General or the Cabinet in the exercise of its executive power.

[101] In any event, any practice which has evolved cannot be reasonably grounded in the ***Crown Proceedings Act*** because it is quite clear that this Act did not contemplate proceedings against the Crown in the nature of judicial review (or constitutional redress) and the Act cannot be used to justify adding the Attorney-General as a party to each and every claim for judicial review instituted either under the common law or the ***Administrative Justice Act***.

[102] It should be noted that the ***Judicial Review (Application) Rules,*** **1983** enacted pursuant to **section 12** of the ***Administrative Justice Act*** require by **Rule 2(3)** that all Applicants serve the application for judicial review and all supporting affidavits and other documents on the Attorney-General, thsi Court generally find favour with the approach of the Privy Council that the addition of the Attorney-General be restricted is to be commended more in in line with the overriding objective of the new civil procedure regime which seeks to reduce cost while delivering justice.

[103] However, for the purposes of this case, I consider that the Attorney-General has been properly added as a party. The duties of the Attorney-General are

set out in the ***Constitution of Barbados*** which in ***section 72(1)*** describes him as the principal legal adviser of the Government. It also empowers him to give general or special directions to the Director of Public Prosecutions (***section 79A***). The Constitution does not grant the Attorney-General any powers and responsibilities in connection with the police force and he is not mentioned in the ***Police Act,*** **Cap 167 of the Laws of Barbados**. Nevertheless, pursuant to ***section 8*** of the ***Police Act***, the Governor-General is ultimately responsible for the efficient administration and government of the Police Force and the Commissioner of Police, who has command of the force, is responsible to him. Accordingly, on the basis of the practice recommended in ***Hochoy v Nuge (supra)***, where the Attorney-General is named as the Respondent when the Governor-General is sued in his official capacity, the Attorney-General has been properly added to this action and any application to strike him out should be dismissed.

[104] I turn now to the second issue, namely whether the Court should refuse to grant the relief sought by the Applicant on the ground of undue delay in instituting the claim.

[105] **Section 8** of the ***Administrative Justice Act (AJA),*** **Cap 109B of the Laws of Barbados** provides as follows:

> "The Court may if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the

> application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be detrimental to good administration."

[106] **Section 8** permits the Court to refuse to grant relief in the following three instances:

> (i) where it finds that there has been undue delay in making the application for judicial review and that the grant of the relief sought would cause substantial hardship to any person; or
> (b) where it finds that there has been undue delay in making the application for judicial review and that the grant of the relief sought would substantially prejudice the rights of any person or;
> (c) where it finds that there has been undue delay in making the application for judicial review and that the grant of the relief sought would be detrimental to good administration.

[107] The section was considered by the Court of Appeal in ***Judy Lloyd v Attorney-General*** **(unreported) Civil Appeal No. 9 of 1998, Decision of May 2, 2000** where the Court held that the grant or refusal of relief was "not a matter that falls to be determined at the initial or preliminary stage of a trial…[but] is decided upon after a substantive hearing".

[108] The Court's discretion under **section 8** can only be exercised after the Court has considered the substantive issues that arise in this case and is satisfied that there was an administrative act or omission by the First or Second Respondent that entitled the Applicant to relief under the act or common law.

[109] The court turns now to address the substantive application for judicial review before it, namely the applications for *certiorari, mandamus*, restitution and damages.

SUBMISSIONS

[110] The crux of the Applicant's submissions is that the Claimant had a legitimate expectation that he be heard before his salary was stopped. Part of this argument rests on the connected proposition that the courts having established a substantive legitimate expectation for the claimant to be granted permission to attend law school, the COP acted unreasonably in refusing to complete his application form and grant permission. He also argues that he had a legitimate expectation that he could attend law school pending the formal grant of permission to attend law school. It was a convoluted and at times not totally comprehensible argument.

[111] Mr. Graham argued first that the *audi alteram partim* provided that in certain circumstances before a decision could be made in relation to the exercise of statutory power that may adversely affect the interests of an individual, those individuals whose interests may be adversely affected should be given not only the reasons for the decision but a reasonable opportunity to make representations.

[112] Mr. Graham argued that the First Respondent as the principal legal officer of the Crown and the Minister responsible for the Police Force must have been aware of the difficulty encountered by the Applicant in obtaining the support of the Third Respondent who had refused to complete the forms pertaining to his application for study leave. Further, the First Respondent also knew or ought to have known that the Applicant had taken the matter to court seeking judicial review and had been successful in his action. In light of this, Counsel argued that the First Respondent had a duty to either direct the Third Respondent to set up a hearing pointing out the reasons why the application form was not completed by the Third Respondent and as the Third Respondent's failure adversely affected the Applicant, allowing the Applicant an opportunity to make representations so as to defend himself, if necessary.

[113] While Counsel conceded that relief had not been sought directly against First Respondent, he argued that this was not fatal as the Applicant had asked for all such further orders or directions as the Court may deem appropriate.

[114] In so far as it related to salary of the Applicant, Mr. Graham contended that the Second Respondent should have been alerted when payment of his salary was halted. It then became their duty to enquire why the salary was being stopped and to provide him with a hearing before this was done.

[115] Counsel contended that the decision of the Third Respondent to halt the salary of the Applicant is the decision that should be quashed. The decision should not have been made unilaterally without informing the Service Commission or the Applicant.

[116] As to legitimate expectation, Counsel contended that although the doctrine was not specifically pleaded in this matter it naturally sprung from the doctrine of natural justice. Legitimate expectation, he submitted, had to do with a promise or undertaking or past practice. He argued that police officers who had studied law at Cave Hill had proceeded to law school without first obtaining permission for study leave and the Applicant's decision to do so was not therefore "*anything new*" and the Applicant had therefore been reasonable in coming to the conclusion that there was a practice in the police force that this be done.

[117] Counsel for the Applicant further contended that the Applicant also had a legitimate expectation that (i) he would be heard before a benefit which he enjoyed be withdrawn; and (ii) he be given reasons for the withdrawal.

[118] Mr. Leslie Haynes, QC who appeared on behalf of the First and Third Respondents submitted firstly that mandamus was a command from the High Court to a lower tribunal and could not be granted to procure the performance of a private duty. He argued, *relying on* ***R v Barnet***

***Magistrate's court ex parte Cantor* [1998] 2 All ER 333**, that an award in damages and the payment of salary sought by the Applicant in this case was sought in relation to the performance of a private duty; mandamus could not therefore issue.

[119] Secondly, learned Queen's Counsel pointed out that under **section 2** of the ***Administrative Justice Act*** an administrative act or omission referred to an act or omission of authority of the Government of Barbados in which the Government exercised or purported to exercise any power or duty conferred or imposed by the Constitution or by any enactment and pursuant to ***section 3 of the AJA*** relief could be sought against an administrative act or omission by way of an application for judicial review. While it was not disputed that the Second and Third Respondents were public authorities, the Applicant had failed to identify in his statement of case or in any of his affidavits the administrative act/s or omission/s against which he complains and which form the basis of his application for relief.

[120] It was Mr. Haynes' submission that a review of the facts in the case showed that the only administrative act or omission of which the Applicant could reasonably complain was either the order of the Third Respondent that salary be no longer paid to the Applicant as of January 2006 or the omission by the Third Respondent to sign the Applicant's form for study leave. He noted

that Applicant had, however, failed to challenge either the administrative act or omission.

[121] In respect of the first of these acts, the decision of the Third Respondent to order payment of the Applicant's salary to be ceased, Counsel directed the Court to ***section 29(i) of the Police Act,*** **Cap 167 of the Laws of Barbados** which provided that every constable who absented himself from roll call and from duty for the space of 48 hours without lawful excuse shall be taken to have illegally resigned from or left the police force. He argued that this section applied here and as the Applicant had been absent from the force without lawful excuse he was deemed either to have illegally resigned from or to have left the force.

[122] Insofar as it concerns the administrative omission identified by Mr. Haynes, Mr. Haynes further argued that because an application for study leave had never been set down before the appropriate body (i.e. the Second Respondent) the Second Respondent could not be accused of performing an administrative act or omission.

[123] Finally, it was the contention of Mr. Haynes that the Applicant's argument on legitimate expectation was fallacious because (i) during the time of his absence from duty or roll call without lawful excuse the Applicant had failed to submit an application for leave; and (ii) it was speculative to assert that if

the application had been presented to the Second Respondent it would have been approved and approved on what terms.

[124] On the basis of his submissions Mr. Haynes urged the Court to dismiss the application with costs to the Respondents.

[125] Mr. Barker, who appeared on behalf of the Second Respondent, briefly discussed the circumstances that led to the decision in Suit No. 1712 of 2005. He pointed out that in his judgment in that suit, **Simmons CJ** had rejected the contention that the Court could grant the Applicant study leave, holding that only the Second Respondent could do so and the Court could not substitute its decision for that of the Police Service Commission. The Chief Justice's decision had not granted the Applicant study leave but had simply quashed the decision of the Commissioner not to recommend him for the same. In making such an order, the Chief Justice, said Mr. Barker, clearly anticipated that Mr. Leacock would shortly thereafter make a second application. Indeed, this course of action had been recommended to the Applicant's counsel by letter dated November 1, 2005 from the Principal Training Officer of the Administrative Training Division.

[126] According to Counsel, as the Applicant had never submitted another application for study leave, the Second Respondent was neither required nor had a legal duty to consider such an application. Mr. Barker accordingly

contended that the action of which the Application now complains did not amount to an administrative act or omission within the meaning of the ***Administrative Justice Act*** and could not therefore underlie an application for judicial review.

[127] He pointed out that in Suit No. 1715 of 2005, the Applicant had specifically pleaded legitimate action by deposing that a practice had been established whereby police officers who had successfully read the LLB were granted study leave to attend HWLS to read for the LEC but that he was now contending that officers proceeded on study leave pending the approval of their application for the same.

[128] The position, he argued, was very different in this case as the Applicant had failed to show either that an express promise had been given to him that he would be given study leave or that there was a settled or regular practice that police officers proceeding to HWLS without study leave or on study leave pending the approval of their application for the same. Mentioning the name of one person was simply insufficient to establish settled practice of the retroactive approval of the study leave of public officers.

[129] Mr. Barker further submitted that as it was clear that the Applicant had been absent from roll call and duty without study leave or, indeed, any type of leave for the two years when he was studying at HWLS, he could not sustain

an action for his wages during that period. In making this submission Counsel referred the Court to ***Cresswell v Board of Inland Revenue*** **[1984] ICR 508** where it was held that an employee could not claim his wages where he had not performed his contractual duties. The holding in ***Royle v Trafford Borough Council*** **[1984] IRLR 185** and ***Sim v Rotherham Metropolitan Borough Council*** **[1986] IRLR 391**, to which the Court was also directed, was that where the employee had only completed part of his work he could only recover part of his pay.

[130] Mr. Barker also argued that as there was no evidence that the Second Respondent had acted in breach of natural justice or failed to observe the principles of natural justice, the application could not succeed and should therefore be dismissed with costs certified fit for two counsel.

[131] **THE LAW:** There is no doubt that the public bodies herein sued are susceptible to judicial review. This court rejects any argument that this is a matter constrained to the law of employment or contract.

[132] It is useful to briefly rehearse the legal principles upon which a procedural legitimate expectation and a substantive legitimate expectation may be established.

[133] Counsel for the Claimant has accepted that there is no right to be heard under s 29 (i) of the ***Police Act*** which provides that every Constable who

absented himself from roll call and from duty for 48 hours without lawful excuse shall be taken to have illegally resigned or left the force. His argument has two prongs; first of all, he states that the applicant had a legitimate expectation that there should have been a hearing before he was deemed to be absent. He argues also that the Attorney-General had a duty to set up a hearing, at which the applicant was given an opportunity to make representations into why the form was not completed.

[134] Secondly, if the Court understands his argument, he argues that the PSC acted unreasonably by not enquiring into the reasons why the applicant's salary was stopped.

The Requirement of Fairness and the *audi alterem partem* rule.

[135] Procedural fairness as a tenet of natural justice clearly requires that before a right or benefit be taken away from a person, or any sanction is otherwise applied, that there is a fair and transparent process. That process may include the right to a fair hearing and the right to be represented by legal counsel. The right is not of course absolute. The requirement to provide an affected person a right to be heard is not applicable where the public authority needs to act urgently to protect the rights or interests of the public authority or those of third parties. The hearing need not be oral, but where a hearing is necessary, the person should be allowed to make representations, which can

be made in writing. ***Rees v Crane*** **TT 1994 PC 1** is authority for the proposition that an affected party should be given an opportunity to deal with the allegations in the best way he thought fit, and not necessarily by oral hearing. In all circumstances the court must first determine if the requirement of statute or fairness establish that the applicant be heard.

[136] An effective legitimate expectation must have a promise, or a representation that gave rise to the expectation that is clear, unambiguous and unqualified. As **Professor Eddie Ventose** states in ***Commonwealth Caribbean Administrative Law*** **at page 196** " This is an essential requirement because the claimant cannot claim to have expected the public authority to act in a particular way if the representation was unclear or unambiguous, a fortiori if it was an unqualified one."

[137] Further, and as importantly, the person making the representation must have the actual or ostensible authority to do so.

[138] Procedural legitimate expectation arises where the applicant claims an expectation that they should be heard before a benefit is taken from them or a decision made which is adverse to their interests. Generally the claimant argues that he has a legitimate expectation that he should be allowed a right to be heard before any changes in policy are made or before a public authority reneges on a promise previously made (**Ventose,** *supra*, page 204).

[139] In comparison, substantive legitimate expectation establishes for the applicant an actual benefit that the public authority is bound to provide because of the promise or policy, both promise and policy being unchangeable with respect to him. In ***R v North and East Devon Health Authority, ex p Coughlan*** **[2001] QB 213** the concept was specifically recognised, and in ***Joseph & Boyce v Attorney General of Barbados*** **[2006]CCJ 3 (AJ)** referring, interestingly enough to the ***Pearson Leacock*** case **decided October 27, 2005**, observed:

> "In matters such as these the courts must carry out a balancing exercise. The courts must weigh the competing interests of the individual, who place legitimate trust in the state to consistently adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority."

[140] The courts are concerned with the merits of the application itself, not just procedural fairness.

[141] With the above principles in mind I turn now to consider whether the Second or Third Respondent acted in breach of the rules of natural justice and the principles of fairness or failed to perform their duty in accordance with the law.

[142] It is important that the Court establishes exactly what the decision in ***Pearson Leacock*** decided October 27, 2005 was, for on that decision rests the justification for the applicant's actions and application in this matter. Mr. Graham states that the applicant had been "successful in his action" but in what had been successful?

[143] In paras 50-51 of his decision, **Simmons CJ** was careful to stress that:

> "….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.
> 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)."

[144] What was the effect of the decision made by the Chief Justice? Firstly, it was declared that the actions of the Police Commissioner were null and void. This was clearly on the basis that Mr. Leacock had a legitimate expectation that he be granted study leave. However, **Simmons CJ** did not declare that

he had a right to study leave, believing (perhaps erroneously) that he did not have the power to establish a substantive legitimate expectation existed and to direct that study leave be granted. Instead he declared that the decision of the COP as an agent of the respondent (the Attorney-General) was an unreasonable and improper exercise of discretion and was null and void.

[145] The Court also granted an order of *certiorari*, quashing the decision. A quashing order, states **Supperstone, Goudie and Walker** in ***Judicial Review***, **3rd Ed. 2005** at para 15.6.1, is a constitutive remedy in the sense that the grant of such an order by itself destroys the legal validity of the action which is quashed by the order. The effect is generally retrospective. "No further action by the applicant or respondent is required to achieve this."

[146] What then was the status of the application for study leave? It is clear to this court that the decision of the Court in Suit No. 1712 of 2005, the Applicant's successful appeal did not entitle him to treat the judgment as approval of his application for study leave.

[147] Was he then required to submit a new application? It may be argued that had Mr. Leacock's application remained with the Police Service Commission that application, following the order for certiorari would have remained live and up for consideration by the respondents. Indeed Mr. Leacock gave evidence that he considered that that it was the duty of the Police

Commissioner to fill out the application in the proper manner and resubmit it to the TAD for approval. But it did not.

[148] I have found as a fact that after the decision of the court in 1712/2005, the application was returned to his attorneys. I am not at all sure that the TAD decision to do this was correct, but it is clear that all parties at that point must have been aware that no application form for Mr. Leacock was then with the PAD to be considered.

[149] It is also clear to the Court that had Mr. Gollop immediately returned to the application to the PAD, his argument would have been strengthened before me. But he did not. I have also found as a fact that despite the contrary evidence by Mr. Leacock, the application was not resubmitted until February 24, 2006 to the Office of the Attorney-General. In fact it should have been submitted to TAD. No explanation for this seemingly deliberate error has been forthcoming. The application nonetheless was sent to the Police Commissioner under cover of a memorandum dated February 28, 2006 from the Office of the Attorney General. It was clearly intended that he should endorse it. He declined to do so and recommended that the application be resubmitted to him, taking the pedantically correct position that the application had not been properly submitted to him.

[150] By this date, Mr. Leacock had been absent from the police force from January 1, 2006 without any leave of any kind being confirmed, and his salary had been stopped.

[151] It is here that Mr. Leacock's case falls apart. For by then, he had already been, since 2005, on a mixture of overseas vacation leave, or sick leave, full well knowing that no application for study leave had been approved (even if he were of the view that he did not have to submit a new application).

[152] To explain or justify this Mr. Leacock now argues that he had, not a legitimate expectation that he would get study leave, but a legitimate expectation that he could proceed on study leave upon the mere application for study leave. I say now argues, because legitimate expectation was not pleaded, but his counsel argued that it flows inevitably from the doctrine of natural justice. That is as it may be. In any event, he has failed totally to establish that such an expectation had been raised by any settled or regular practice that police officers proceeding to HWLS without approval for study leave or on a pending application for study leave.

[153] The General Orders defines study leave as leave granted to an officer to pursue a course of study or training which was negotiated by that officer on his own initiative regardless of its value to the Service and for which study

or training that officer may not necessarily have been selected in competition with other officers.

[154] Rule 7.8.1 of the General Orders provides that where an officer or an employee gains of his own initiative gains entry to or is registered as a student of a university or other institution, he may, subject to the exigencies of the Service either be (a) entitled to training leave (i.e. on full salary) and with expenses paid from public funds; (b) granted study leave on full or half pay with the possibility of a loan; and (c) be granted study leave on no pay. Which he receives depends upon whether the training is one of identified service-wide priorities, deemed useful to the service but not necessary at the time or has no immediate or direct value for public service purposes.

[155] Rule 7.9.1 further states that "Each application for study leave will be considered on its own merit. Officers should make sure of the conditions under which study leave may be granted in their particular case for given courses before finalizing their plans".

[156] In all the circumstances, was it unreasonable for the Commissioner of Police to decline to consider and approve such an application? I do not think so. Having been through the rigours of a trial on this same matter, it was in fact I think most reasonable that the Commissioner of Police demand that the letter of the law be adhered to. The evidence of the Commissioner of Police,

both in his affidavit and orally, was that the form submitted to him was already filled in with comments in Part B with which he could not agree, namely that the applicant "was a competent Policeman whose career was unquestionable". It was his responsibility as Head of Department, a fact I accept, to fill in that form. He required that the form be resubmitted to him without those comments, recommending that the application be processed in the "usual and approved manner". I consider that it was reasonable of the Respondent to do so, and this is so despite the fact that the Court looks askance at his evidence that if he had received the application he would not have signed it in any event. That action would certainly have attracted further litigation. However, the bald facts on this case are that no proper application was submitted to the Commissioner of Police, and therefore no decision was made in respect of it.

[157] It is clear as well that counsel for Mr. Leacock seeks to gloss over the facts by now cynically arguing that the applicant has a legitimate expectation that he could proceed to HWLS without study leave or on a pending application for study leave, for the evidence of one instance of this occurring could in no wise suffice. The evidence brought by the applicant does not reach the standard necessary to establish a legitimate expectation.

[158] I have carefully considered the evidence of the Applicant in this matter to discern the motivation for his actions. He was clearly under a misapprehension as to the effect of the decision of **Simmons CJ**. despite some favourable discussion as to the existence of a substantive legitimate expectation, the court was clear that it was establishing no such thing, although as I have said, it was well within its powers to do so on the evidence. The court issued a quashing order of the Commissioner's decision. In order for the Police Commissioner to reconsider the matter afresh he required an application, properly presented to him, submitted in the correct way through the proper channels.

[159] I am therefore led ineluctably to the conclusion that no application for study leave had been properly before the Police Commissioner or the TAD for their consideration, and therefore no decision was made that could be impugned.

[160] As no application for study leave had been made, Mr. Leacock could not lawfully absent himself from duty.

[161] Did the requirement of fairness entail or did the applicant have a legitimate expectation that the applicant should be heard before his salary was stopped? Was the recommendation, act or advice of the Commissioner of Police to the

Police Service Commission unreasonable? Should the Police Service Commission restore the salary of the applicant?

[162] The applicant's salary was stopped in January 2006. I have set out the facts surrounding this above. The Applicant has not at any time argued that it was not within the authority of the COP to stop the pay of the applicant, merely that a hearing should have been held. It is the evidence of the COP that he had the authority to stop the pay of any policeman who is absent from duty, and that the practice was that he advise the Chief Personnel Officer of that decision.

[163] The following facts are of note: The Commissioner of Police never responded to the letter of the Applicant's then Attorney seeking information about the cessation of salary but instead wrote directly to the Applicant bringing the relevant statutory provisions to his attention and noting his absence from duty. The Applicant responded requesting an audience with the Commissioner, and was informed by the Assistant Commissioner of Police in July 2006 that he should report to the Office of the Senior Superintendent on December 23, 2006. The Applicant did not return to work until May 31, 2007, after completion of his certificate, and after having submitted a medical certificate dated December 21, 2006 for return to work on January 8, 2007. This was in all regards an extraordinary series of events.

[164] It is not denied that the applicant was absent during the period of his tenure at the HWLS. Nor is it denied that he sent in medical certificates claiming illness when he was in fact studying at HWLS with no apparent difficulty. The court takes judicial notice of the fact that his absence is engaging the attention of the Magistrate, and that the proceedings were stayed pending the outcome of this application.

[165] Section 29 (1) of the ***Police Act*** provides that

> 1) Every subordinate police officer or constable, as the case maybe, who-(a) absents himself from roll call and from duty for the space of forty eight hours without lawful excuse;... shall be deemed to have illegally resigned from or left the force..."

[166] I have already held that when the applicant absented himself from the force to attend law school, he did so without the proper study leave, and that he was aware of this. The evidence is that the Commissioner of Police requested that he report to the office of the Senior Superintendent in December 2006. He refused to do so. He has not disputed the fact that he was advised by letter of December 15, 2006 that he was absent without leave. The proper thing to have done was to appear as requested, and make the very application that the applicant has now made. Clearly he placed his intention to attend law school above all else.

[167] In the circumstances where, as in this case, the armed forces are involved, and there is a mandatory statutory requirement that the applicant be deemed

to have absented himself, I cannot find that any requirement of fairness must operate to grant the applicant a hearing before his pay is stopped.

[168] Further, the requirement of fairness would shrink from validating the actions an applicant in submitting a medical certificate while studying at law school. Further, in all the circumstances, I find that there is absolutely no evidence of a legitimate expectation as to a hearing before his salary was stopped. It cannot seriously be argued that a person falling squarely under section 29 (1) of the ***Police Act*** should continue to be paid his salary.

[169] In the circumstances, the order of *mandamus* directing the PSC to pay the full salary of the Applicant from May 31, 2007 is refused. The order of *mandamus* directing the COP to restore the duties of the applicant as a police officer and to have him recorded as having reported for work since May 31, 2007 is also refused. This court has found that when the applicant absented himself from the force to attend the HWLC he had no study leave to do so.

CONCLUSION

[170] In light of the foregoing, the Court finds that the Applicant is not entitled to the relief sought in his Originating Motion filed November 29, 2007 and the action instituted by that Originating Motion is accordingly hereby dismissed. I do not find that there has been undue delay in making the application for judicial review.

COSTS

[171] ***Rule 56.11*** of the ***Civil Procedure Rules, 2008*** authorizes the judge hearing an application for judicial review to make such orders as to cost as appear to her to be just.

[172] A previous costs order was made May 21, 2008 in favour of the applicant, also to be agreed or taxed. In delivering the oral decision in this matter I ordered that costs be granted against the claimant, but was unaware of the previous costs order. In those circumstances, I shall hear arguments as to costs.

Jacqueline A. R. Cornelius
Judge of the High Court