[2016] JMSC Civ 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV02915

BETWEEN	**OFFICE OF UTILITIES REGULATION**	**APPLICANT**
AND	**CONTRACTOR GENERAL**	**RESPONDENT**

Ransford Braham QC and Daniella Gentles-Silvera instructed by Livingston Alexander & Levy for the Applicant

Nicole Foster-Pusey QC Solicitor General and Carlene Larmond, Director of Litigation instructed by the Director of State Proceedings for the Minister of Science, Technology, Energy and Mining in support of the application

Tameka Jordan and Gillian Pottinger instructed by Firmlaw for the Contractor General

November 13, December 4 & 5 2014; February 26, 2016

Application for leave for Judicial Review – Amenability of Contractor General Report to judicial review - Reputational damage

D. FRASER J

THE BACKGROUND TO THE APPLICATION

[1] I will utilise the outline of the background in the written submissions of the applicant with necessary amendments.

[2] The Office of Utilities Regulation (OUR) is a body corporate established under the Office of Utilities Regulation Act (hereinafter referred to as “the OUR Act”) which functions as regulator of utility services which includes the generation, transmission, distribution and supply of electricity.

[3] The OUR also receives and processes applications for licences to provide such services and makes recommendations to the appropriate Minister in relation to applications for licences as the OUR considers necessary according to the OUR Act or other relevant legislation. In relation to the generation, transmission, distribution and supply of electricity, the responsible Minister is the Minister of Science, Technology, Energy and Mining, the Honourable Phillip Paulwell.

[4] The respondent, the Contractor-General (CG), is a Commission of Parliament appointed by the Governor General and whose functions are defined by the Contractor-General Act. The CG heads the Office of the Contractor-General (OCG).

[5] The National Contracts Commission (NCC) is a body corporate established pursuant to the Contractor-General Act.

[6] In or about December 2010 the OUR issued a Request for Proposal inviting applications to submit proposals to provide new generation capacity amounting to 480 megawatts net to the National Grid of Jamaica on a build, own and operate basis to replace approximately 292 megawatts of inefficient aged plants with the remainder to provide for load growth.

[7] The Jamaica Public Service Company Limited (hereinafter referred to as "JPS"), the sole bidder, submitted four (4) bids. The OUR formed the view on its initial evaluation that the bids submitted were below the par standard specified in the evaluation criteria.

[8] Nevertheless, the OUR negotiated with the JPS to arrive at an acceptable bid for 360 megawatt of generation capacity.

[9] The plan proposed by JPS was to use natural gas that should have been provided or procured by the Government of Jamaica. In effect the implementation of the 360 megawatt project was dependent on the finalization of the gas supply and infrastructure arrangements. The provision of the gas supply was a separate

project being undertaken by the Government of Jamaica. Indeed between 2010-2011 the Government of Jamaica conducted procurement processes for natural gas supply and construction of the infrastructure.

[10] The Government of Jamaica sometime in September 2013 abandoned the procurement of natural gas and indicated to JPS that JPS should secure their own fuel supply.

[11] From December 2011 to January 2013 the OUR sought to have the JPS finalize the project agreement for the implementation of the 360 megawatt project but was unsuccessful in doing so.

[12] On January 30, 2013, the last day of what was the third extension to the bid validity period, JPS requested a further thirty-day extension from the OUR purportedly to clarify "fuel source and supply and validity of current plant configuration if that fuels source is not forthcoming".

[13] Notwithstanding the fact that JPS had applied for extension of time, JPS had failed to supply any details that would allow the OUR to assess its application, particularly whether an extension of time would provide any certainty as to the future of the project and JPS had indicated that it was either unable or unwilling to fulfill the requirement of providing a current bid security.

[14] In light of JPS's position and conduct, the OUR concluded that the project for the procurement of the 360 megawatt generation capacity was terminated by reason of effluxion of time which was confirmed to JPS by the OUR by letter dated 1 February 2013.

[15] On 31 January 2013 JPS provided to the OUR a summary of an alternative or further proposal for the provision of electricity generating capacity. This proposal was not considered by the OUR as a part of the project for the provision of the 360 megawatt generation capacity; that process having been terminated by effluxion of time. Whether or not the JPS proposal of 31 January 2013 was a part

of or a continuation in some way of the project for the provision of the 360 megawatt generation capacity is one of the disagreements between the OUR and the OCG.

[16] The OUR responded to JPS and indicated that it, the OUR, would seek government clarification or policy decision in relation to the securing of additional generation capacity.

[17] Following the termination of the 360 megawatt project other entities contacted the OUR expressing a desire to provide a solution for Jamaica's electricity needs. These entities, apart from JPS were Armourview Holdings Limited and Complant-Engineering, Jamaica.

[18] The OUR advised JPS and the other entities that expressed a desire to provide a solution to Jamaica's energy needs that they would be given an opportunity to clarify and submit details of their proposal and indicated to them that such clarification should be provided by 15 March 2013.

[19] The OUR on 18th February 2013 issued a media release whereby it informed the nation *inter alia* that:

(1) It had received what it termed unsolicited proposals from entities including JPS;

(2) It intended to complete a review of those proposals by end of March 2013;

(3) After the completion of the review by the OUR, it would determine the feasibility of the proposals and advise the Government as to whether it was worthwhile to proceed to enter into negotiations with any of the entities;

(4) All proposals/submissions would be treated as unsolicited bids.

[20] Central to the dispute in this matter is the true nature and effect of the media release of February 18, 2013 and whether or not the proposals were unsolicited as contended by the OUR.

[21] The OUR maintains it did not invite any tenders or provide any technical data or instructions typical of a bidding process in the media release.

[22] At the close of business on 15th March 2013 the OUR had received five (5) proposals which they considered unsolicited. Two (2) were from entities that had sent in proposals before the media release of 18th February 2013 being JPS and Armourview Holdings Limited. The other three (3) unsolicited proposals were from Azurest-Cambridge, JAMALCO and Optimal Energy. Complant-Engineering who had previously sent in a proposal did not send any further information.

[23] The OUR sent these proposals to the consultant engineers, Mott MacDonald, for evaluation. Mott MacDonald submitted a preliminary report dated 13th April 2013, a draft final report dated 21st April 2013 and a final report on 13th May 2013. In these reports Mott MacDonald conclude *inter alia* that:

> "None of the bidders have provided firm commitments to OUR for the financing structure, confirmed pricing and commitments for capital and operating cost or a significant acceptance of risk of these items from the OUR. There are differences in the maturity and therefore overall feasibility of the projects as presented and we would provide an indicative ranking purely on the information provided from a financial stand point."

[24] Further, Mott MacDonald indicated that the proposal from Jamalco could not be evaluated based on the lack of critical information on the project. It also indicated that the proposal from Optimal did not merit further consideration given that the solution offered was primarily based on heavy fuel oil and the indicative price of natural gas provided was not supported by any indication as to probability, availability and timing.

[25] The OUR, based on the findings of Mott MacDonald, was of the view that none of the unsolicited proposals were complete and ready for implementation and that if the Government of Jamaica was to proceed, significant negotiations to arrive at an acceptable proposal would be required.

[26] The OUR having received the draft final report on 21st April 2013 advised the Cabinet of Mott MacDonald's initial analysis and of the OUR's recommendation to engage the three short listed entities (Armourview, Azurest and JPS) in further discussions. This recommendation was endorsed by Cabinet, however, the OUR was advised on or about 21st April 2013 by the Cabinet Secretary that the Government of Jamaica through the Minister of Science, Technology, Energy and Mining, had received a proposal from Energy World International (hereinafter referred to as "EWI") and that the Cabinet wished the OUR to consider this proposal.

[27] The OUR by letter dated 23rd April 2013 advised the NCC that it had received unsolicited proposals, the outcome of the preliminary review of these proposals and that three proposals were being selected for further consideration. The OUR further indicated to the NCC that the OUR proposed to engage in simultaneous negotiations with the three entities to ascertain which best served the needs of the country. The OUR sought the NCC's permission and/or guidance to proceed along the lines it had proposed and had sought directives as to how best to proceed in the circumstances.

[28] The OUR in the said letter advised the NCC that it had been verbally advised by the Cabinet Office of the existence of another proposal and that the Cabinet Office had requested the OUR to review this other proposal. The OUR advised the NCC that it would in time seek further guidance from the NCC as to how to proceed in relation to the proposal referred to by Cabinet.

[29] On 29th April 2013 the OUR received a letter dated 26th April 2013 from the Cabinet Secretary advising that the Cabinet, by its Decision dated 16/13 dated

21st April 2013, had endorsed the recommendation that the OUR evaluate the three (3) entities that had been shortlisted and also an unsolicited proposal received by the Minister of Science, Technology, Energy and Mining from EWI on 21st April 2013.

[30] The NCC in a letter dated 9th May, 2013 to the Cabinet Secretary which was copied to the Contractor General and the OUR, advised that they had no objection to the process outlined by the OUR in its letter dated 7th May 2013 and advised that the OUR could receive other proposals on the terms outlined in the letter. The NCC further advised *inter alia* that the OUR should:

(1) advise the entities that the OUR was conducting negotiations and that the OUR was not obliged to award a contract;

(2) indicate the weakness/deficiencies of each entity's proposal;

(3) give a time schedule to be followed;

(4) include as a criterion for the assessment, the track record of each entity;

(5) advise the entities of the methodology/scoring of final proposals;

(6) inform those who had not made the shortlist that they had not made the shortlist and the reasons for same; and

(7) upon receiving and analyzing each proposal, select the candidate whose proposal was considered most advantageous to the Government of Jamaica and the people of Jamaica.

[31] The NCC in its said letter dated 9th May 2013 specifically stated that the OUR should:

(1) Advise the Cabinet Office of a final "cut-off" date for receipt of any other detailed proposal (including the promised one from a company based in Hong Kong);

(2) Carry out an evaluation of any other proposals received before the final "cut-off date" on the same basis and in the same manner as the previous evaluation exercise; and

(3) Inform the proponent(s), the NCC and other involved parties of the results of the preliminary review and evaluation.

[32] Having regard to the NCC's letter dated 9th May 2013 the OUR convened a meeting of its technical staff on the 20th May 2013 and the following decisions were made:

(1) A letter would be sent to the Cabinet Secretary advising of the cut-off date for looking at any further unsolicited proposal would be 22nd May 2013;

(2) Given the NCC's letter dated 9th May 2013 the OUR would need to assess for inclusion any proposal submitted on or before the cut-off date;

(3) Any proposal submitted on or before the cut-off date would have to meet the threshold that were used to eliminate the proposals from Jamalco and Optimal (*viz* clear fuel supply plan, tariff and clear indication that plans for the facility indicate a realistic chance that it could be constructed in the required period) to be included among the selected entities invited to submit final offers;

(4) The technical staff would formalize a document (that is instructions for final proposal) to be issued to all entities who were selected to submit final proposals;

(5) Immediately upon the passing of the cut-off date, the OUR would begin to convene meetings with the entities to brief them on the way forward. The meeting was set for 24th May, 2013.

(6) The OUR would not conduct simultaneous negotiations as proposed by NCC but commenced a new procurement procedure through a limited tender.

[33] Consequent on the decisions made in the meeting, on 20th May 2013, the OUR by letter dated 20th May 2013 advised the Cabinet Secretary that the cut-off date was 22nd May 2013. On the 21st May 2013 the OUR indicated by letter to all the entities excluding EWI, that the formal process had now commenced.

[34] The OUR further issued a media release on 22nd May 2013 wherein it was stated that the OUR would begin to meet with the shortlisted entities. The media release stated *inter alia* that the OUR advised the Cabinet that as at 22nd May 2013 the OUR would not review any more unsolicited offers for the supply of new generation capacity.

[35] On 22nd May 2013 the OUR received electronically EWI proposal.

[36] Based on the results of Mott MacDonald's Report regarding the state of readiness of the proposals submitted on or prior to 15th March 2013, the OUR applied the following considerations to EWI's proposal to determine whether it should be excluded from the "Instructions for Final Proposal" (IFFP) process. The considerations were:

(1) Ability to complete the project in the required timeframe; and

(2) Diversification of fuel source that would have the prospect of significantly lowering the price of electricity.

[37] In the OUR's estimation EWI's proposal met the required threshold and therefore was included in the process. Thereafter the OUR dispatched the EWI proposal for further evaluation by Mott MacDonald.

[38] Notwithstanding that the OUR had initially decided not to permit Optimal's proposal to form part of the process, it decided to allow Optimal to be included on

the basis it stated that Optimal had now indicated that it was in a position to submit a proposal that included natural gas as the fuel source.

[39] Between the 24th May 2014 and 27th May 2013 the OUR met with the shortlisted entities and advised them that it would provide them with rules of engagement and required each entity to submit their final proposal within 21 days.

[40] The Office of the Contractor General by letter dated 21st May 2013 to the OUR advised the OUR that in its opinion no other "bid(s)/proposal(s)" should be considered, meaning EWI, as the deadline of the 15th March 2013 had expired, evaluation of the proposals received prior to the deadline date had already been concluded and the evaluation of any other proposal might compromise the integrity of the process. This opinion was contrary to the NCC's recommendations as set out in its letter dated 9th May 2013.

[41] After the 21st May 2013 the OUR commenced a limited tender process with the entities from whom it had received what it termed unsolicited proposals.

[42] On 27th May 2013 the OUR issued to these entities a document designated "Instructions for Final Proposal" (IFFP) which invited further submissions and indicated *inter alia* terms and conditions, bid requirements, timetable and proposed assessment criteria with return date initially established for 17th June 2013.

[43] Consequent on the limited tender process Azurest-Cambridge was ranked the highest. On 16th September 2013 on the eve of the OUR press briefing to announce Azurest as the preferred bidder, the Contractor General released a report dated September 2013. The Report is entitled "Report of Special Investigations – Right to Supply 360 Megawatts of Power to the National Grid, Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining" (hereinafter referred to as "the Report").

[44] The Report was laid in Parliament on 17th September 2013. In this Report the Contractor General found *inter alia* that:

(1) it was wrong/improper to have included EWI in the process;

(2) the OUR called the process informal to justify its facilitation of EWI's proposal and to include EWI on the shortlist,

(3) the OUR re-introduced Optimal's proposal so there would be no appearance of bias;

(4) it was inappropriate or irregular for the Minister to meet with EWI while the process was underway especially as no other prospective bidder was accorded similar opportunity and there was a perceived notion of bias, hence EWI's proposal in these circumstances should not have been entertained.

(5) the proposals were in the form of expression of interest and not unsolicited proposals and therefore the process undertaken was not applicable.

THE APPLICATION

[45] On June 17, 2014 the applicant Office of Utilities Regulation (OUR) of 36 Trafalgar Road, Kingston 10 in the parish of St. Andrew, filed a Without Notice Application for Leave to Apply for Judicial Review. The applicant seeks against the respondent, The Contractor-General (CG) of 16 Oxford Road, Kingston 5 in the parish of St. Andrew, the following Orders and Declarations:

(1) The Applicant is granted leave to apply for Judicial Review of the decision of the Contractor General contained in Report of Special Investigation – Right to Supply 360 Megawatts of Power to the National Grid Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining laid in Parliament on the 16th September, 2013.

(2) Alternatively the Applicant is permitted to proceed by way of Administrative Orders in relation to the Declarations sought herein (if necessary).

(3) The time within which to apply for Judicial Review is hereby extended to the date of filing of the Without Notice Application for Leave to Apply for Judicial Review or such other date as this Honourable Court deems just.

(4) The hearing of the application for Judicial Review is to be fixed for such date as this Honourable Court deems fit.

(5) Costs of the application be costs in the claim.

(6) Such other relief, directions or orders as this Honourable Court may deem just.

[46] The details of the relief sought in the application are:

1. A Declaration that the decisions of the Contractor General contained in Report of Special Investigation – Right to Supply 360 Megawatts of Power to the National Grid Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining dated September, 2013 is invalid, unlawful and without legal effect.
2. A Declaration that the finding of the Contractor General that the inclusion of Optimal Energy was to justify Energy World International's inclusion in the process is not supported by the evidence and / or is a finding which is contrary to the evidence and/or unreasonable and is therefore unlawful, invalid and /or of no legal effect.
3. A Declaration that the Contractor General's finding that the Office of Utilities Regulation moved the goal post to facilitate Energy World International's proposal is contrary to the weight of evidence and/or is unreasonable.
4. A Declaration that the Supply of additional generating capacity to the National Grid was a project for the supply of goods and/or the provision of works and was therefore governed by the Handbook of Public Sector Procurement Procedures for the Procurement of Goods, General Services and Works (Vol.2) made pursuant to the Public Sector Procurement Regulations 2008.
5. A Declaration that the Contractor General's determination that the proposals received by the Office of Utilities Regulation were not unsolicited bids but expressions of interest with a deadline of the 15th March, 2013 was unlawful, having regard to the fact that expressions of interest is a procedure provided for in the Handbook of Public Sector Procurement Procedures for the Procurement of Consulting Services (Vol. 3) which is designed for consultants and therefore was wholly inapplicable for the procurement of additional generating capacity to the National Grid which is a project for the provision of works and/or goods.

6. A Declaration that having regard to the fact that the power project was for the provision of goods and/or works and therefore governed by the Handbook of Public Sector Procurement Procedures for the Procurement of Goods, General Services and Works (Vol. 2) the proposals received by the Office of Utilities Regulation from Azurest-Cambridge (Joint Venture in association with Waller Marine Inc.), Jamaica Public Service Company Limited, Jamalco, Armourview Holdings Limited Kingston (EIG Global Energy Partners, Tank Weld Limited, Armourview Holdings Limited), Optimal Energy and Energy World International were unsolicited proposals and not expressions of interest.
7. Alternatively, a Declaration that the Office of Utilities Regulation and the procurement of the project for the supply of additional generating capacity to the national grid was not subject to the Public Sector Procurement Procedures.
8. A Declaration that the Media Release issued by the Office of Utilities Regulation on the 18th February, 2013 was not a bidding document.
9. A Declaration that none of the proposals received by the Office of Utilities Regulation from Azurest-Cambridge (Joint Venture in association with Waller Marine Inc.), Jamaica Public Service Company Limited, Jamalco, Armourview Holdings Limited Kingston (EIG Global Energy Partners, Tank Weld Limited, Armourview Holdings Limited), Optimal Energy and Energy World International were solicited.
10. A Declaration that the criteria to evaluate the proposals from Azurest-Cambridge (Joint Venture in association with Waller Marine Inc.), Jamaica Public Service Company Limited, Jamalco, Armourview Holdings Limited Kingston (EIG Global Energy Partners, Tank Weld Limited, Armourview Holdings Limited) and Optimal Energy was the same criteria used to evaluate Energy World International.
11. A Declaration that the procedures followed by the Office of Utilities Regulation for the additional of generating capacity to the National Grid project were not irregular or improper but in accordance with the law and their duties as prescribed by the Office of Utilities Regulation Act.
12. A Declaration that the Office of Utilities Regulation's acceptance and consideration of Energy World International's proposal was not in breach of the procurement rules.
13. A Declaration that the Office of Utilities Regulation had no legal duty to correct erroneous information circulating in the public domain about the power project for the National Grid.
14. A Declaration that the Contractor General has no jurisdiction over the OUR or concerning the Office of Utilities Regulation when the Office of Utilities Regulation is carrying out its responsibilities pursuant to Section 4(1)(b) of the Office of Utilities Regulation Act.
15. Further and/or in the alternative a Declaration that in circumstances where the Office of Utilities Regulation is carrying out its responsibilities

and/or duties pursuant to Section 4(1)(b) of the Office of Utilities Regulation Act, National Contracts Commission has jurisdiction in relation thereto to the exclusion of the Contractor General.

16. An order for certiorari to quash the Report of Special Investigation –Right to Supply 360 Megawatts of Power to the National Grid, Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining.
17. Alternatively, an order of certiorari to quash the following decisions of the Office of the Contractor General contained in Report of Special Investigation – Right to Supply 360 Megawatts of Power to the National Grid, Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining:
    a. The Office of Utilities Regulation's failure to correct erroneous information being circulated in the public was a clear dereliction of their duties.
    b. The process adopted by the Office of Utilities Regulation was an expression of interest and therefore they should have been guided by the Handbook of Public Sector Procurement Procedures for the Procurement of Consulting Services (Vol.3).
    c. The media release issued by the Office of Utilities Regulation on the 18th February, 2013 qualifies as a bidding document.
    d. The acceptance and consideration of Energy World International's proposal was unfair and compromised the integrity of the process.
    e. Granting an extension of time after the expiration of the evaluation time on the 15th March, 2013 was done to facilitate the receipt of the proposal by Energy World International.

THE APPLICATION BY THE ATTORNEY GENERAL TO INTERVENE IN SUPPORT OF THE APPLICATION

[47] At the commencement of the hearing on November 13, 2014 an application was made by the Solicitor General on behalf of the Minister of Science, Technology, Energy and Mining for permission to participate in the hearing of the application by the OUR for leave to apply for judicial review. The application to participate in the hearing was supported by the applicant and opposed by the respondent. The Attorney General's Chambers had always been present when the matter came before the court. The issue was whether the Attorney General should be allowed to participate.

[48] The court noted that the proceedings were at the stage of an application for leave which was going to be a detailed *inter partes* hearing. It was always desirable for the court to have the benefit of the input of parties who may have been affected by any decision sought to be impugned and who may have an interest in the outcome of the court's decision. The court therefore ruled that counsel from the Office of the Attorney General were permitted to make submissions on behalf of the Hon. Minister in support of the OUR's application.

THE ISSUES RAISED IN THE APPLICATION

[49] ***Jurisdictional Issues***

i) Is the Report of the Contractor-General amenable to judicial review?

ii) Pursuant to the Civil Procedure Rules (CPR) rule 56.2 (1), does the applicant have sufficient interest in the subject matter of the application?

Procedural Issues

iii) Should the applicant be granted an extension of time to apply for leave?

Substantive/Procedural Issues

iv) Is there a need for the applicant to obtain leave to pursue the relief of declarations? If leave is not granted to pursue a claim to obtain the relief of certiorari, can leave to apply for judicial review be granted only in respect of the declarations sought?

Substantive Issues

v) Is the matter now academic?

vi) Is there an arguable case with a reasonable prospect of success that the Report on the Right to Supply 360 Megawatts of Power to the National Grid,

Office of Utilities Regulation, Ministry of Science, Technology, Energy and Mining, or aspects of that Report, should be quashed

Jurisdictional Issues

i) Is the Report of the Contractor-General amenable to judicial review?

[50] Counsel for the applicant noted that the courts had advanced two broadtests concerning whether a body is susceptible to judicial review. The first test stipulates that if the source of the power of the body whose decision is being challenged is statutory then that decision is amenable to judicial review. (See De Smith's **Judicial Review 6th Ed.**, para 3-030 page 124*).* The CGs power to monitor and investigate derives from sections 4(1) and 15 respectively of the CGA. His power to publish reports from s. 28 of the CGA. It was therefore submitted that the first test was satisfied and the actions of the CG would accordingly be amenable to judicial review.

[51] Where the statutory source test does not provide an answer, the second test indicates that judicial review would be available if the body whose decision is subject to challenge is carrying out a public function. (See De Smith's **Judicial Review 6th Ed.**, para 3-043). As the CG carries out a public function, it was submitted that his decisions are amenable to judicial review on this ground as well.

[52] Addressing the issue of whether The Report of the CG contained decisions recommendations and conclusions that could properly be the subject of judicial review, counsel cited **Judicial Review Principles and Procedure** by Auburn, Moffet and Sharland at 2.06 which states that:

> [T]he courts regularly entertain claims for judicial review of matters that do not directly affect an individual or alter an individual's legal rights or obligations, such as policies and guidance. They also

entertained claims for judicial review of non-binding recommendations and advice, and of reports that determine the facts of a matter but which do not have direct legal consequences.

[53] Counsel noted that the cases cited in support of the propositions do not expressly discuss the issue of whether a report containing non-binding recommendations and advice is amenable to judicial review as that was taken for granted. I will review these cases in the analysis as their details are important.

[54] Counsel for the respondent on the other hand submitted that the Report itself was not a decision and its recommendations and non-binding finding of facts were not susceptible to judicial review. Counsel relied on the case of ***George Anthony Levy v The General Legal Council*** [2013] JMSC Civ 1 to indicate that a decision was defined as one that must have consequences which affects the person other than the decision maker, and which alters the rights of the person affected.

[55] It was submitted that The Report did not: a) make a decision that was binding on anyone, b) alter the applicant's rights, nor c) have any consequence for the applicant as it continued its process culminating with the Minister issuing a License to EWI and subsequently revoking same for reasons unconnected with The Report.

[56] However in the alternative counsel submitted that even if The Report could be susceptible to Judicial Review it was not open to the court in a matter such as this to form its own preferred view of the evidence. (See ***Reid v. Secretary of State for Scotland*** [1999] 2 AC 512.

Analysis

[57] There is no issue that source of the power of the CG is derived from a statute, the CGA, and that the Office of the Contractor General is a public body. Therefore on both grounds decisions of the CG would be susceptible to judicial review. There have been several cases where it has been acknowledged that decisions of the CG may be subject to judicial review.

[58] The real issue is whether or not the nature and effect of the Report and/or the recommendations and advice it contains makes The Report or aspects of it amenable to judicial review. It is important to examine the cases that were referred to in **Judicial Review Principles and Procedure** cited by counsel for the applicant to support the point that the courts have *"entertained claims for judicial review of non-binding recommendations and advice, and of reports that determine the facts of a matter but which do not have direct legal consequences"*.

[59] In ***R v Hallstrom, ex p. W; R v Gardener & Anor exp L*** [1986] QB 1090, W and L were each successful in judicial review applications against the respective recommendations of doctors to have W treated as an inpatient for one night and L detained for treatment when the statutory requirements for those recommendations had not been satisfied.

[60] In ***R (Eisai) Ltd v National Institute for Clinical Excellence (NICE)*** [2008] EWCA Civ 438 NICE had issued fresh guidance reducing the number of patients recommended to receive certain types of drugs. Prior to issuing that fresh guidance NICE had conducted consultations with a number of entities including the applicant Eisai, a pharmaceutical company that marketed one of the drugs concerned. The applicant sought judicial review of the guidance. At first instance there was partial success in relation to some anti-discrimination legislation but they failed on the issues of procedural fairness and irrationality. On appeal only

the issue of procedural fairness was pursued. The complaint was that NICE only disclosed to the applicant a read only but not a fully executable economic version of a model that was being used to appraise the cost effectiveness of a drug. Eisai was successful on the procedural fairness point on the basis that the failure hampered the company from being able to properly test and challenge the economic modelling used to inform the guidance issued.

[61] In ***R v Department of Health ex p Source Informatics Ltd*** [2001] QB 422, the applicant Source informatics obtained anonymised information from prescriptions and sold it to pharmaceutical companies who used it for marketing purposes. The Department of Health issued policy guidance indicating that such anonymisation would not remove the duty of confidence owed to patients and that general practitioners and pharmacists would incur legal risks if they participated in the scheme. At first instance the applicant's application for judicial review was refused. On appeal the applicant obtained (1) a declaration that the guidance was erroneous in law and (2) a declaration that disclosure by doctors and pharmacists to a third party of anonymous information, i. e. information from which the identity of patients might not be determined, did not constitute a breach of confidentiality.

[62] In ***Regina v Secretary of State for the Environment, Ex parte Greenwich London Borough Council*** 17 May, 1989 a poll-tax leaflet distributed to the public by a government department failed to make any reference to the joint liability of spouses or people living together. Judicial review seeking to prohibit the Secretary of State from further distributing the leaflet in its current form was refused as it could not be said to be inaccurate or to have misled its readers by the omission.

[63] The cases on recommendations and guidance just reviewed have to be considered in light of the standard test for what makes decisions actions or inactions susceptible to judicial review as outlined in ***George Anthony Levy v***

The General Legal Council. Even though in the extract from **Auburn** it is said the courts have, *"entertained claims for judicial review of non-binding recommendations and advice, and of reports that determine the facts of a matter but which do not have direct legal consequences",* in each of the cases where judicial review was permitted some practical consequence which negatively altered the rights of the applicant flowed from the recommendation or guidance which was challenged.

[64] That does not appear to have been the situation in the instant case. As pointed out by counsel for the CG, despite The Report, the OUR carried through the process on which it was embarked culminating with the Minister eventually issuing a License to EWI and subsequently revoking same for reasons not proven to be connected with The Report. In fact even before the Report was issued the OUR did not accept the recommendation of the CG that no other "bids/proposals" received after March 15, 2013 should be considered. I therefore agree with counsel for the respondent that the Report does not contain any decisions, conclusions or recommendations that would be amenable to judicial review as no rights of the OUR have been affected by the non-binding Report.

[65] The question of potential reputational damage does not qualify as a consequence that would make the Report or aspects of the Report amenable to judicial review. The OURs powers are granted by statute. The statutory powers of the OUR are not diminished by any impact of the Report on the OURs reputation.

[66] Reputational damage is significant in relation to the question of sufficient interest which is a related but different concept from amenability to judicial review. This was noted by Mangatal J at paragraph 47 of ***Tyndall & Others v Carey et al***. Claim No. 2010HCV00474 (February 12, 2010). In the case of ***Tyndall et al vs Carey et al*** on this point, Mangatal J in dealing with an application for leave to subject the proceedings of a Commission of Enquiry to judicial review, found

that persons whose reputations could possibly be adversely affected by the determinations and procedures that may occur at the Commission of Enquiry had a sufficient interest. See CPR 56.2 (1) & 2. There is no question that the OUR has sufficient interest. The issue is that the Report is not amenable to judicial review.

[67] As submitted by counsel for the OCG there has also been no challenge to the processes undertaken by the OCG in arriving at the publication of the Report. The issue lies with some of the conclusions and findings therein which the OUR and the Minister contend are flawed.

[68] Though the finding that the Report does not contain any decisions, conclusions or recommendations that would be amenable to judicial review is determinative of the application I will deal with some questions I requested counsel to address during the hearing, especially since some of the declarations sought address jurisdictional issues based on statute which raises the issue of their amenability to judicial review.

Procedural/Substantive Issue

[69] The applicant sought leave to apply for judicial review to obtain fifteen declarations and two orders of certiorari. During the course of the proceedings the court requested the parties to submit on two questions ***i)*** **is certiorari an appropriate relief to be sought given the facts of this case and *ii)* whether, if leave was not given to pursue a claim to obtain the remedy of certiorari, could leave to apply for judicial review be granted only in respect of the declarations sought?**

[70] In response to the first question counsel for the applicant submitted that if leave were granted it should be based on issues and the court should not at this stage determine what remedies would be most appropriate. The court should not at

the leave hearing seek to question if certiorari could be obtained. That should be for the full hearing if leave was granted.

[71] Concerning the second question counsel submitted that a parallel system has been created. Therefore notwithstanding the fact that a declaration may be independently applied for, there was no prohibition against applying for a declaration under judicial review. Counsel pointed out that CPR 56.1 (3) provides that judicial review includes the remedies of certiorari, prohibition and mandamus. He submitted the use of the word “includes” meant that declarations could still be sought under the aegis of judicial review. In any event he submitted that the declarations could be sent forwards by themselves if necessary or in the alternative this court could grant the declarations. See ***R v Secretary of State for the Home Department, Ex parte Salem.***

[72] In a rare occurrence during the hearing given that the Minister sought to support the application, Ms. Larmond counsel for the Minister, only supported in part the submissions of the applicant with regard to question 1, and did not support the position taken by the applicant in relation to question 2. Concerning question 1 she maintained that the question as framed was one for the final court if leave were granted. She however supported the application for certiorari and argued that leave must be linked to a realistic prospect of success in respect of the relief sought and not just based on issues because of the very test that is applied.

[73] She maintained that the nature of the facts complained of admitted of the possibility of certiorari being granted as the main premise on which they proceeded was a primary reliance on several errors of fact that the Minister maintained come out of the CG’s report.

[74] In respect of question 2, Ms. Larmond submitted that if leave for certiorari is not granted the court could not grant leave for the declarations alone. She argued that in the context of CPR 56.3, CPR 56.1(1) a and c and CPR 56.9 (1) a and c which all separate judicial review and declarations, the CPR intends for those

reliefs to be treated separately. She also highlighted the differing effects of the two remedies. Whereas a declaration speaks only to a state of affairs certiorari operates to quash an offending decision. Counsel acknowledged that the word “includes” was used in the definition of judicial review to widen the power. She however maintained that widening would not incorporate another remedy which was separately provided for.

[75] Counsel also raised the practical question of what would be the test or threshold to be applied for the grant for leave for judicial review as opposed to for declarations? She argued that the framers of the CPR did not provide for leave to be sought for declaratory relief. She maintained the correct course was that leave should only be sought for that which is required for judicial review and where other reliefs were sought which did not require leave, no leave should be sought. The CPR she submitted had taken a full break from the way declarations are to be sought in our former “parent” the United Kingdom.

[76] Counsel for the respondent in respect of question 1 submitted that she agreed with Ms. Larmond that the court should be focussed on the relief that was sought and not the issues, as CPR 56.4(8) empowered the court to “grant leave on such conditions or terms as appear just”. In support of her position counsel cited ***Sydney Bartley v The Children’s Advocate*** [2014] JMSC CIV. 74 in which Straw J only granted leave in respect of remedies sought in relation to the stop order and not in relation to the interpretation of the statute vis-à-vis the Children’s Advocate’s power to investigate allegations of sexual offences against children. In declining the remedies in relation to that point, the learned judge found at paragraph 53 of the judgment that there was no realistic prospect of success on the prerogative order seeking to compel the production of certain information during the investigations. Ultimately concerning the instant case counsel submitted that question 1 should be answered in the negative for the reasons outlined in her submissions on the question of the amenability of The Report or aspects of The Report to judicial review.

[77] In respect of question 2 Ms. Jordan adopted the submissions of Ms. Larmond which she said focussed on procedural impossibility. In her submissions she argued that there was also a legal impossibility for the applicant to obtain leave to pursue the declarations. Counsel submitted that there was no such thing as an administrative declaration. Rather a declaration is sui generis and its genesis was in equity, trust deeds and wills. Declarations resound largely in the court of equity. See The Declaratory Judgment page 51. Counsel argued that CPR 56.9 (1) supported the position that declarations have to accompany a prerogative order to be in the judicial review process; they cannot stand on their own. She relied on the well known case of ***O'Reilly v Mackman*** [1983] 2 AC 237 submitting that declarations should not be used to circumvent the safeguards of the judicial review process.

[78] Relying on the case of ***Orette Bruce Golding and The Attorney General of Jamaica v Portia Simpson-Miller*** SCCA 3/08 (April 11, 2008) counsel maintained that unless the CPR Part 56 establishes that you can take a particular action, that action cannot be supported by the import of other rules or laws into Part 56. Therefore unless the rules specifically said the court could send forward the declarations they could not be. See also ***Dale Austen v The Public Service Commission and The Attorney-General*** [2013] JMSC Civ 26.

Analysis

[79] The issue raised by question 1 has to be viewed for these purposes on the assumption that I am wrong in my finding that The Report does not contain decisions conclusions or recommendations that are amenable to judicial review. Both counsel for the applicant and for the Minister submitted that the question as framed would be one for the final court. However both counsel for the Minister and counsel for the respondent submitted that if leave was granted it would have to be in relation to particular relief sought and not just in respect of issues as argued by counsel for the applicant. I accept the position as demonstrated in the case of ***Sydney Bartley v The Children's Advocate,*** that any leave granted

would have had to be in respect of a relief or reliefs and not just in relation to issues.

[80] On reflection I agree with counsel that question 1 as framed would have been a question for the court before which a full hearing was conducted, if leave was going to be granted. The proper question at this stage would have been whether or not, if it is otherwise appropriate to grant leave, there is an arguable case with a realistic prospect that the applicant could successfully obtain the remedy of certiorari at a full hearing.

[81] The issue raised by question 2 is one which has stirred much debate since the CPR 2002 was introduced. CPR 56.1 states that:

> (1) This Part deals with applications -
> (a) for judicial review;
> (b) by way of originating motion or otherwise for relief under the Constitution;
> (c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and
> (d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.
>
> (2) In this part such applications are referred to generally as "**applications for an administrative order**".
>
> (3) "**Judicial Review**" includes the remedies (whether by way or writ or order) of -
> (a) certiorari, for quashing unlawful acts;
> (b) prohibition, for prohibiting unlawful acts; and
> (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.
>
> (4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant -
> (a) an injunction;
> (b) restitution or damages; or
> (c) an order for the return of any property, real or personal.

[82] CPR 56.9 (1) states that:

> (1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for -
> (a) judicial review;
> (b) relief under the Constitution;
> (c) a declaration; or
> (d) some other administrative order (naming it), and must identify the nature of any relief sought.

[83] As is obvious, the remedy of a declaration is listed as a separate administrative order. What does this mean? Is it as counsel for the applicant stated that there is now a parallel system whereby declarations can be obtained within and without the judicial review procedure and can go forward to a full hearing unaccompanied by a prerogative order? Can declarations be sought both outside and within the judicial review procedure but must within the judicial review procedure accompany a prerogative order to go forward to a full hearing, as advanced by counsel for the respondent? Or is it as Ms. Larmond submitted that as no leave is required no leave should be sought for declarations to be pursued, whether by themselves or in addition to prerogative orders?

[84] In the case of ***Audrey Bernard Kilbourne v The Board of Management of Maldon Primary School*** 2015 JMSC Civ 170, I considered the fact that a claim was brought for declarations against the Board of Management of the School Board without an application for leave to apply for judicial review. It was submitted on behalf of the Board, that it was an abuse of process for the claim to have been brought in this fashion, as the safeguards inherent in the judicial review procedure were circumvented. In resolving the issue it was pointed out that with regard to declarations sought involving public bodies, the position in Jamaica is now different from that in England. It is necessary to quote extensively from the analysis in that judgment.

[85] At paragraphs 13 – 23 I stated:

[13] At the time of the decision of ***O'Reilly v Mackman*** Order 53 Rules of the Supreme Court was in force in England. It has now been replaced by Order 54. Paragraphs 1 and 2 of Order 53 provided as follows:

> (1) An application for-
>
> > (a) an order of mandamus, prohibition or certiorari, or
> > (b) an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act,
> >
> > shall be made by way of an application for judicial review in accordance with the provisions of this Order.
>
> (2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1)(b)) may be made by way of an application for judicial review, and on such an application a judge may grant the declaration or injunction claimed if he considers that, having regard to-
>
> > (a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
> > (b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and
> > (c) all the circumstances of the case,
>
> it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

[14] In outlining how Order 53 should be interpreted Lord Diplock who gave the judgment of the court had this to say at page 284 – 285:

> My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within

> Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case-to-case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.
>
> The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under 0.53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons Order 53 provided.
>
> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

[15] Lord Diplock was commenting on the effect of the new Order 53. Prior to its implementation, under the old Order 53 discovery could not have been obtained on an application for certiorari. Further leave to allow cross-examination of deponents to affidavits was

almost invariably refused. To circumvent those strictures litigants instead applied for a declaration of nullity of the impugned decision along with an injunction to prevent the challenged authority from acting on the decision. The courts “turned a blind eye” to the practice to avoid injustice. However with those impediments removed Lord Diplock indicated it was inappropriate to still proceed for a declaration against a public authority depriving the authority of the safeguards of judicial review in a context where the handicaps to a fair procedure had been removed.

[16] The current Part 54 of the Civil Procedure Rules in England appears to preserve the Order 53 position by providing that the judicial review procedure ***may*** be used for an application for a declaration or an injunction. It however goes one step further to provide that where an applicant is seeking a declaration or injunction in addition to a mandatory, prohibitory, or quashing order or an injunction under section 30 of the Supreme Court Act 1981 the judicial review procedure ***must*** be used.

[17] Therein lies the crucial difference in the Civil Procedure Rules of Jamaica and England in this area. Currently in England a declaration being sought in a public law context is addressed under the Part dealing with Judicial Review and Statutory Review. In Jamaica the applicable Part 56 of our Civil Procedure Rules treats declarations where one party is *“the State, a court, a tribunal or any other public body”*, as a separate administrative order. Essentially it is a public law declaration. Nowhere in the Jamaican rules is this type of declaration mentioned as needing to come under the aegis of judicial review. It is not even stated as in Part 54 of the United Kingdom Rules that where declarations are being sought in conjunction with the former prerogative orders the procedure must be by way of judicial review.

[18] I have come to this conclusion though mindful of the Court of Appeal decision of ***The Chairman, Penwood High School’s Board of Management and the AG v Loana Carty.*** In that case the appellants sought inter alia to have portions of the respondent’s claim struck out. These portions were where she: 1) sought a declaration that she was dismissed in breach of the Education Regulations 1980 and 2) sought damages for unfair dismissal. The application was refused in the Supreme Court and on appeal the issue in relation to point 1 was whether the aspects concerning the Education Regulations properly fell under the

auspices of public law and therefore, to institute them in a private law claim is an abuse of the process of the court.

[19] In the Court of Appeal, Brooks JA cited with approval the general rule in ***O'Reilly v Mackman*** relied on by the defendant Board in the instant case. He also referred to the rule in ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 All E R 705. This case provides an exception to the general rule stated in ***O'Reilly v Mackman.*** That exception provides that a litigant asserting his entitlement to a subsisting private law right, whether by way of claim or defence was not barred from seeking to establish that right by action, by the circumstance that the existence and extent of the private right asserted could incidentally involve the examination of a public law issue. The exception was however unable to assist the respondent as relief for unfair dismissal is available only from the Industrial Disputes Tribunal. Her claim was accordingly struck out.

[20] It is noteworthy however that the attention of the Court of Appeal in ***The Chairman, Penwood High School's Board of Management and the AG v Loana Carty*** was not adverted to CPR 56.1 (1) (c) as this court's attention has been. It does appear to this court that the Rules Committee of the Supreme Court in Jamaica though clearly aware of the decision in ***O'Reilly v Mackman*** has chosen a liberal approach. Our CPR therefore provides that a declaration against a public body can be obtained under CPR r. 56.1 1 (c) in the absence of an application for judicial review. This "public law" declaration is in contrast to the declaratory judgment obtainable under CPR r. 8.6 which provides, *"A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be obtained."* Rule 8.6 provides for declaratory judgments in a context where no limitation is imposed on the nature of a party that must be involved. It is the provision under which declarations in private law matters not involving administrative law are pursued.

[21] My conclusion is supported by what transpired in the unreported case of Claim No. 2009 HCV 00660 ***Legal Officers Staff Association (L.O.S.A) v. AG and Minister of Finance.*** In the paper **Judicial Review – Holding the State Accountable** presented at the Jamaican Bar Association Continuing Legal Education Seminar February 18, 2012, at paragraph 31 Mangatal J. in outlining what happened in the case stated that:

> An application for a declaration pursuant to Part 56 is separate from an application for judicial review and no leave is required in order to apply for a declaration. In this case, King J. had granted the applicants leave to apply for judicial review but his decision is on appeal. I accepted the submission made on behalf of L.O.S.A that as they were separate matters, a hearing for the Declarations could be set down notwithstanding that the issue of the grant of leave was on appeal. On appeal from my procedural decision, Norma McIntosh J.A. agreed with the proposition that they were indeed separate and that at a case management conference the court may direct that parts of a claim be dealt with separately. However, McIntosh J.A. ruled that since the Declarations being sought dealt with issues with which the leave application heard by King J. was also concerned, it was not desirable that the matters should proceed separately as both courts could potentially arrive at conflicting decisions. She therefore granted an application made by the Attorneys appearing for the Respondents staying the declarations hearing until the determination of the appeal.

[22] It should also be stated that in this new dispensation the concerns of potential abuse that were uppermost in Lord Diplock's mind in ***O'Reilly v Mackman*** are adequately addressed in Part 56 of our CPR. Detailed rules outline how an application for an administrative order should be made (CPR r. 56.9). The court has wide powers at the first hearing to provide for the expeditious and just hearing of the claim, including powers to provide for service of statements or affidavits, disclosure of documents and cross-examination of witnesses (CPR r. 56.13). CPR r. 56.13 also specifically imports the extensive general case management powers under Parts 25 to 27 of the CPR, which contain within them all the necessary tools with which the court can prevent and punish abuse of its process. The only safeguard that is peculiar to judicial review is the need for leave.

[23] Further there is power to direct that a matter that commences by ordinary claim should proceed as an action for an administrative order (CPR r. 56.7). All in the context of Part 56 being interpreted in keeping with the overriding objective in CPR r 1.2, for cases to

> be dealt with justly. I therefore hold that it is not an abuse of process for the matter to have been commenced other than by way of judicial review and there is no requirement for the matter to be converted to a claim for judicial review pursuant to CPR r. 56.7.

[86] On the basis of that analysis there is therefore now no need for leave to be applied for in respect of "public law" declarations. I go further. I find attractive the position advanced by Ms. Larmond. Not only is there no need, there is no basis on which the court can properly consider the question of leave in relation to declarations. It is not, as advanced by counsel for the applicant, that there are now parallel approaches (with or without leave) which can be taken with regard to pursuing declarations as a relief.

[87] The fact that judicial review is defined to include the prerogative remedies, suggesting that other remedies may fall under its aegis, does not mean that a declaration is contemplated as one such remedy, given that the relief of a declaration is specifically provided for as a separate administrative order in the same rule. There has, it seems, been a complete break with the past in the scheme of the CPR, where declarations involving public bodies are concerned.

[88] It follows that I also do not accept that though there is no need for leave to be sought to obtain declarations, if they are included in an application for leave to apply for judicial review, the applicant has to satisfy the leave test in relation to the declarations.

[89] I take this position being aware that in several cases since the new CPR declarations have been included in applications for leave to seek judicial review. Such matters have also come before this court including in the case of **Gorstew *Limited and Hon. Gordon Stewart O.J. v The Contractor General*** [2013] JMSC Civ 10 cited in this matter. However this point has not to my knowledge been taken or considered before in this fashion.

[90] The application for leave therefore only fell to be determined in relation to the relief of certiorari in relation to the Report or aspects of it. If leave had been granted the declarations could have been pursued together with the claim for certiorari. See CPR 56.9. Leave however will not be granted. The applicant may therefore consider whether it wishes to renew the application in open court or file a claim seeking the declarations only.

[91] I have gone through this issue in some detail despite my initial finding that The Report was not amenable to judicial review because counsel for the applicant submitted that if leave was not granted the court still could grant the declarations. He cited ***R v Secretary of State for the Home Department, Ex parte Salem*** [1999] 1 AC 451. In that case a Libyan national, arrived in the United Kingdom and claimed asylum. He was granted temporary admission and awarded social security benefits. On 7 May the Home Office, without telling him, recorded on an internal file that asylum had been refused and that his claim had been determined. On 5 November he was told by the Benefits Agency that his income support had been stopped because the Home Office had informed them that he had been refused asylum. The judge refused leave to apply for judicial review of the Secretary of State's decision to notify the Department of Social Security that the applicant's claim to asylum had been recorded as determined. The Court of Appeal granted leave but dismissed the substantive application by a majority, holding that the applicant's claim to asylum had been validly determined. The House of Lords granted an application by the applicant for leave to appeal. On 12 December 1998, following an appeal to a special adjudicator, the applicant was granted refugee status. When the appeal was called on in the House of Lords on 15 January 1999, it was stated on his behalf that his claim to social security benefits had now been met and that accordingly there was no live issue as to his position.

[92] ***Ex parte Salem*** is however clearly distinguishable from the instant situation. There leave had been granted on appeal by the Court of Appeal though the substantive application was dismissed. The applicant having obtained the

benefits denied prior to the appeal to the House of Lords the question was whether as there was no longer a live issue the appeal should be heard in the public interest. In the instant case leave has not been granted and there is no claim before the court on which any order could be made. In any event it being a leave application as well, there has not been a full hearing to justify the grant of any final order.

[93] During the hearing counsel for the applicant indicated that the declarations would have been sufficient had there not been a concern that the OUR was attempting to bypass the judicial review safeguards. The earlier reasoning of the court indicates the courts position on that. There are clearly a number of issues addressed by the declarations sought that this court believes it would be important to have finally clarified. However the finding of this court is that those cannot be so addressed within the aegis of judicial review.

Disposition

[94] Application for leave to seek judicial review in respect of the relief of certiorari refused.

[95] No leave is required in respect of application for declarations.

[96] No order as to costs.