[2015] JMSC Civ 182

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04155

IN THE MATTER of an application by Miguel Pine for Judicial Review

AND

IN THE MATTER of the decision of the Commissioner of Police

AND

IN THE MATTER of the Constitution of Jamaica1962 and the Police Service Regulation 1961

BETWEEN	**MIGUEL PINE**	**CLAIMANT/APPLICANT**
AND	**COMMISSIONER OF POLICE**	**DEFENDANT**

IN CHAMBERS

Miss Allison Lawrence instructed by Nigel Jones & Company for the Claimant/ Applicant.

Mrs. Tamara Dickens and Miss Celia Middleton instructed by the Director of State Proceedings for the Defendant.

Heard: 3rd February 2015 and 21st September 2015.

Judicial Review – Application for leave to apply for Judicial Review – Breach of Natural Justice – Fair Hearing – Remedies – Mandamus – Reinstatement of Probationary Officer – Usurpation of Statutory Authority – Sparing exercise of Court's discretion to reinstate – Conflict of evidence between Parties - Public interest element – Mandamus imposed where there is a clear duty and not mere

discretion – Promptness of Application for leave – Delay – Whether there is a good reason for Delay – Arguable ground with a Real Prospect of Success.

CAMPBELL J,

Background

[1] The Applicant, Miguel Pine was enlisted in the Jamaica Constabulary Force (JCF) on or about November 3, 2008. He was placed on probation for two (2) years, which would have ended on or about November 3, 2010. However, on or about October 22, 2010, during his probationary period the Applicant was arrested and charged for receiving stolen property, conspiracy to defraud, larceny of a motor vehicle and simple larceny.

[2] The trial commenced in August 2011 and in January 2014, the charges laid against the Applicant were dismissed. The Applicant asserts that since then he has been trying to seek audience with the Commission of Police to determine his status in the JCF.

[3] The Applicant contends that he has not received a letter of dismissal, suspension or has been placed on interdiction. Further, that he was only afforded a five (5) minutes interview, where the Commissioner of Police refused to hear his version of events. Based on the foregoing, the Applicant is now seeking leave to apply for judicial review.

The Application

[4] By way of a Notice of Application for Court Orders filed 29th August 2014, the Applicant seeks the following Orders;

1. The Claimant be granted leave to apply for Judicial Review and to file a Fixed Date Claim Form seeking the following remedies;

    (a) An Order of Mandamus compelling the Defendant to restore the Claimant to the position of Constable in the Jamaica Constabulary Force; and

    (b) A Declaration that the Claimant has been confirmed as a member of the Jamaica Constabulary Force;

2. Damages;

3. Further and such other relief as this Honorable Court deems fit; and

4. Costs to be costs in the claim.

[5] The grounds for the application are as follows;

i. The Claimant enlisted in the Jamaica Constabulary Force; on or about November 3, 2008;

ii. The Claimant was placed on two (2) years probation which ended on or about November 3, 2010;

iii. On or about October 22, 2010, the Claimant was arrested and charged for receiving stolen property, conspiracy to defraud, larceny of a motor car vehicle and simple larceny;

iv. The matter was set for trial which commenced in August 2011. Eventually, all charges laid against the Claimant were dropped and was discharged by Her Honour Ms. S. Maddix;

v. Since being discharged the Claimant has been unable to determine his present status of employment with the Jamaica Constabulary Force;

vi. The Claimant was advised by the Sub-Officer in charge of the Motorized Patrol Division that; "*he thinks the Claimant was dismissed.*" However, the Claimant has not received any letter or other confirmation that he was actually dismissed from the Jamaica Constabulary Force;

vii. The Claimant has tried to arrange a meeting with the Defendant in order to state his case but this meeting was not afforded;

viii. That the failure and/or neglect of the Defendant to give the Claimant audience with him to state his case constitutes a breach of the Claimant's legitimate expectation to have his status with the Jamaica Constabulary Force addressed in a meeting with the Defendant;

ix. The Claimant's probation period ended on or about November 3, 2010 and at that date he was not dismissed from the Jamaica Constabulary Force;

x. Section 24(6)(b) of the Police Service Regulations 1961 states; "*On first appointment to the Force, a Constable shall – (a) during the period of his training be deemed to be on probation and if during*

that period he is of the opinion of the Commissioner found wanting in any such qualities as are likely to render him a useful member of the Force, his services ***may*** *be forthwith dispensed with by the Commissioner; and (b) at the end of the period aforesaid if his services have not been dispensed with, be deemed to have been duly confirmed as respects his enlistment*"; [**Emphasis mine**]

xi. Based on Section 26(6) of the **Police Service Regulation**, 1961, the Claimant's enlistment to the Jamaica Constabulary Force; was automatically confirmed at the end of his probation on November 3, 2010 as he was not dismissed from the Jamaica Constabulary Force as at that date;

xii. That the failure of the Defendant to confirm the Claimant's appointment into the Jamaica Constabulary Force at the end of his probation period, in keeping with the Police Service Regulation 1961 constitutes a procedural irregularity. The Claimant should not be punished for the failure of the Defendant to adhere to the **Police Service Regulations**;

xiii. That the failure of the Defendant to confirm the Claimant's appointment into the Jamaica Constabulary Force at the end of his probation period, in keeping with the **Police Service Regulations**, 1961 constitutes a breach of the Claimant's legitimate expectation to be confirmed into the Jamaica Constabulary Force at the end of his probation;

xiv. The Claimant is now in a state of limbo with regard to his employment status at the Jamaica Constabulary Force;

xv. There is no alterative form of redress;

xvi. The Defendant has failed to respond positively to the repeated demands of the Claimant to afford him audience;

xvii. No time limit has been exceeded and if any has been exceeded it is with good reason as the Claimant was engaged in discussions with the Defendant.

The Applicant's Submission

[6] Counsel for the Applicant contends that the Applicant has not received any notice of dismissal or suspension, nor has he been placed on interdiction. Counsel also

complains that despite his probation ending on or about the 3rd November 2010, the Applicant has not received any notification from the JCF to say that he has been restored to the rank of constable. It was noted that since the time of his arrest in 2012, the Applicant has not received his salary.

[7] Counsel focused on the question of whether the Claimant has an arguable ground for judicial review having a realistic prospect of success? Reliance was placed on the **White Book Volume 1,** 2009 at section 54.4.2, which required that, in order for the Applicant to obtain leave for judicial review; *"Permission will be granted only where the Court is satisfied that the papers disclose that there is an arguable case."* In **Gorstew Limited and the Honourable Gordon Stewart O.J. v The Contractor General**, Claim No. 2012 HCV 04918, the court applied the test in the Privy Council case of **Sharma v Brown-Antoine and others** [2007] 1 WLR 780, which states;

> *"The ordinary rule now is that the Court will refuse to claim judicial review unless satisfied that there is **an arguable ground for judicial review having a realistic prospect of success** and not subject to a discretionary bar such as delay or an alternative remedy."* **[Emphasis added].**

[8] There are several bases on which this application is sought. The first is; error of law or illegality. That the Commissioner of Police is not compliant with section 24(6)(b) of the **Police Service Regulations,** 1961 ("PSR"); which requires that; "*on first appointment to the Force, a Constable shall – at the end of his period of probation, if his service is not dispensed with be deemed to have been confirmed in his enlistment*". The Applicant should have been automatically confirmed as his services were not dispensed with.

[9] Further section 44 of the **PSR** outlines that;

> *"a member acquitted of a criminal charge shall be restored to his rank and be paid the full amount of his salary for the period of his interdiction or suspension."*

It is submitted that this section applies to the Applicant's case. The Applicant has not received any pay from the Defendant since the time of his arrest. It is clear that the Defendant has unlawfully breached this section.

[10] The Commissioner has the power to dismiss the Applicant pursuant to the procedure set out in section 37 of the **PSR**' particularly **Part V(B).** However, the Applicant must be informed of the whole case against him and have an

opportunity to prepare his defence. A fulsome investigation must be done. Thus, the Defendant acted unfairly and ultra vires in refusing to give the Applicant audience and seemingly using unsubstantiated allegations against the Applicant.

[11] Counsel alleged procedural impropriety and made reference to Paragraph 54.1.6 of the **White Book** which speaks to the breach of the common law rules of natural justice or procedural fairness and legitimate expectation to ground the Applicant's case. (See also; **Berrington Gordon v Commissioner of Police,** Claim No**.** 2009 HCV 05590; and **Wood and Thompson v DPP** [2012] JMCA Misc 1).

[12] It was submitted that the Commissioner acted irrationally. According to the principles adumbrated in the **White Book** at paragraph 54.1.7; and the case of **Associated Picture Houses Ltd v Wednesbury Corp** [1948] 1 K.B. 223, no other person with these same facts would have arrived at such decision.

[13] On the issue promptness of the application, the **Civil Procedure Rules (CPR)**, make this requirement apparent. Rule 56.6(1) of the **CPR** states that; "*an application for leave to apply for judicial review must be made promptly and in event within three months from the date when the grounds for the application first arose*." Rule 56.6(2) of the CPR further states; "*however the Court may extend the time if good reason for doing so is shown."*

[14] The Applicant contends that it cannot be said that the three (3) months period has elapsed in light of the fact that he has not yet had an opportunity to meet with the Defendant to determine his status in the Force. The Applicant has been acquitted of the charges since January 2014 and has been seeking audience but to no avail. As a result, the Application for leave for Judicial Review was filed on August 29, 2014, due to the Defendant's unresponsiveness.

[15] Further, the Applicant had difficulty obtaining legal representation. At paragraph 26 of the Affidavit, filed on 29th August 2014, the Applicant outlines the challenges he had in securing representation and financing the litigation. He stated that he applied for monetary assistance from the JCF but his actions were futile. This was what contributed to the delay. He relies on Rule 56.6(5) of the **CPR** which states that "*when considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to – (a) cause substantial hardship to or substantially prejudice the rights of any person or (b) be detrimental to good administration*." There could be no prejudice to the Defendant because they have been aware for several months that the Applicant was seeking audience to have his status

determined. (See; **Gorstew Limited and the Honourable Gordon Stewart O.J. v The Contractor General**, Claim No. 2012 HCV 04918, which relied on **R v Home Secretary, Ex p Ruddock** [1987] WLR 1482.)

The Defendant's submission

[16] Counsel for the Defendant contends that the application before the court is premature. The evidence been presented before the court is not supported by any exhibits at all. As such, there is no sufficient material before the court to decide whether it could grant leave for judicial review.

[17] One of the proposed reliefs is mandamus to restore the Claimant to Constable in the JCF. Pursuant to Section 24(1) of the **PSR**, the Constable has to be on probation until a two (2) year period has elapsed. Thereafter, he may be deemed a Constable. The evidence of the Applicant is that he was enlisted on November 3, 2008, hence is probation would have elapsed on November 3, 2010.

[18] Section 24(6)(b) of the **PSR** states;

> "*at the end of the period aforesaid, if his service have not been dispensed with, be deemed to have been duly confirmed as respects his enlistment.*"

If on November 3, 2010, there is no communication dispensing with the Applicant's services, he ought to be deemed confirmed. If it is argued that the Applicant is entitled to mandamus, to be confirmed in the post of Constable, the relevant time to bring the judicial review proceeding would have been around 2010.

[19] The Defendant was not obliged, pursuant to Regulation 44 of the **PSR**; to restore the Applicant to his rank, despite not having placed the Applicant on interdiction or suspension. The provisions of Section 24(6)(b) of the **PSR** deem the Applicant as a member of the JCF. As such, this would require him to reenlist before the expiration of the five (5) year period; that is November 2, 2013.

[20] In January 2014, the Applicant was acquitted of the charges and at that time he would not have been a member of the Force. So while the charges were pending the Applicant should have reenlisted. He could have been reenlisted and placed on interdiction. In his evidence the Applicant say he made an application for reenlistment in November 2013, but did not say if it was before November 2, 2013. The Applicant also states that his last salary was in October 2012.

[21] There are some concerns about whether the Applicant has an arguable case with a real prospect of success. By the Applicant's failure to apply prior to the expiration of his tenure of employment, he does not have an arguable case with a real prospect of success, as he is not a member of the JCF. At this time, he cannot be restored as a member, as the time has elapsed. All that was said in Paragraph 14 of his Affidavit is; "*That* ***in or about November 2013****, I applied for reenlistment in the Jamaica Constabulary Force but I was told that my application would not be accepted."* **[Emphasis added].**

[22] The relevant time noted is November 2010, the end of the two (2) year probation period. If we use January 2014 as the date of the acquittal, there has been approximately a one (1) year delay. If we use November 2010 as the date the Applicant ought to be confirmed, there has been approximately a four (4) year delay. Part 56.6(1) of the **CPR**, requires that an application for leave for judicial review must be made promptly and within three (3) months. There is no Notice of Application for Court Orders seeking an extension of time.

[23] In **City of Kingston Co-operative Credit Union Limited v Registrar of Co-Operatives Societies and Friendly Societies et al,** Claim No. 2010 HCV 0204**,** which applied **O'Reilly v Mackman** [1983] 2 AC 237, at 280F-281D; Sykes J, noted; first, the leave requirement is not a mere formality but an important screening device to bar unmertious applications. **Second, there is a strong rule of practice that applications for leave for judicial review should be made promptly. Third, so strong is the rule promptness requirement that an applicant who is cut of time must apply for an extension of time failing which a court cannot grant leave to apply for judicial review**. Fourth, the principle of not keeping the decision maker and the beneficiary of the decision in suspense was thought to be so important that the pre-order 53 of six months to apply for judicial review was reduced to three. According to learned counsel, these considerations apply with equal force today to Part 56 of the **CPR [Emphasis added]**.

[24] Whether the date of the acquittal was in January 2014, or even the date of the confirmation which ought to have been made in 2010, there is a one (1) year and four (4) year delay respectively. An application for extension of time was necessary in this case. There is no application for an extension here before the court and as such the application for leave to apply for judicial review must fail. In paragraph 26 of the Applicant's Affidavit, he does not say what kind of assistance he was seeking and, did not say when conversation was had. There has been allegation of repeated calls to the Police Federation but does not say when and to whom he spoke to. This evidence cannot be accepted by the court.

[25] Counsel for the Applicant in reply stated there are good grounds for delay. The explanation for the delay in 2014 is stated in paragraph 26 g-m of the Applicant's Affidavit. In addition, nothing precludes an oral application for an extension of time. At the time we did not see it fit to make a written application for an extension of time as we felt we were in time. Counsel for the Defendant objected to this course and noted it was incumbent to make a written application and the course being embarked on is inappropriate.

Analysis and Findings

[26] Part 56 of the **CPR**, which deals with administrative applications, of which judicial review is a constituent part, is governed by special rules, which are designed for the protection of public bodies whose decisions are sought to be impugned for breach of an applicant's public law rights. Judicial Review applications were dealt with pursuant to R.S.C, Order 53, in the United Kingdom. The protective nature of the rules was emphasized by the court, in deciding the appropriate procedure to challenge a decision of a public body. In **Cocks v Thanets District Council** (1982) 3 App. Cases 1135, the Applicant had by way of an ordinary action sought to challenge a decision of a public body, the Housing Authority. The House of Lords held that the procedure to be followed to impugn a decision of a public body for an infringement of rights that are protected under public law, is by way of judicial review of the decision pursuant to Order 53 r(1). The Applicant had instituted an ordinary action by way of writ. Lord Bridge who wrote the leading judgment, expressed his agreement with the views of Lord Diplock in **O'Reilly v Mackman** [1983] 2 AC 237, in which Lord Diplock acknowledged the protection afforded to public authorities by Order 53. He said;

> *"It would… 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 Ord. 53 for the protection of such authorities."*

[27] The decision in **Cocks' case**, applied the dictum in **O'Reilly v Mackman**. In that case the applicant sought a remission of sentence to which the Appellants claimed they had a legitimate expectation that the usual practice of the Authority, would benefit them. Lord Bridge, who was a part of the panel in both judgments, highlighted what he termed as; "*procedures which protect public authorities from*

harassment" in applications where the authorities decisions were being impugned.

[28] These protective safeguards, included, the need to apply for leave on the basis of sworn evidence, with the requirement for full and frank disclosure, and that delay may be detrimental to the application. Lord Bridge said in **Cocks**, at page 1139 that the safeguards built into the Ord 53 procedure which protects from harassment. public authorities on whom Parliament has imposed a duty to make public law decisions and the inherent advantages of that procedure over proceedings begun by writ or originating summons for the purposes of investigating whether such decisions are open to challenge are of no less importance in relation to this type of decision than to the type of decision your Lordships have just been considering in **O'Reilly's case**. I have in mind, in particular, the need to obtain leave to apply on the basis of sworn evidence which makes frank disclosure of all relevant facts known to the applicant; the court's discretionary control of both discovery and cross-examination; the capacity of the court to act with the utmost speed when necessary; and the avoidance of the temptation for the court to substitute its own decision of fact for that of the housing authority. Undue delay in seeking a remedy on the part of an aggrieved applicant for accommodation under the 1977 Act is perhaps not often likely to present a problem, but since this appeal, unlike **O'Reilly's *case***, arises from proceedings commenced after the coming into operation of the Supreme Court Act 1981, it is an appropriate occasion to observe both that s 31 of that Act removes any doubt there may have been as to the vires of the 1977 amendment of Ord 53 and also that s 31(6), by expressly recognising that delay in seeking the public law remedies obtainable by application for judicial review may be detrimental to good administration, lends added weight to the consideration that the court, in the control of its own process, is fully justified in confining litigants to the use of procedural machinery which affords protection against such detrimental delay.

[29] Similar views were expressed in **O'Reilly**, where it was being contended, as it is here, that the applicant's rights under public law were being infringed. Lord Diplock noted at page 1130h, that;

> *"Under Order 53 both before and after 1977 provided for the respondent decision-making statutory tribunal or public authority against which the remedy of certiorari was sought protection against claims which it was not in the public interest for courts of justice to entertain. First, leave to apply for the Order was required. This had to be supported by a*

*statement setting out, the grounds on which the relief was sought and by affidavits verifying the facts relied on; so that a knowingly false statement of fact would amount to a criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make a full and frank disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit**...**The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision that the authority has reached in a purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. More recently in,* ***R v Institute of Chartered Accountants in England and Wales ex p. Andreau*** *(1996 8 Admin L.R. 557), the court pointed out that judicial review required strict adherence to the time limits contained in the rules. These rules are predicated on important public policy considerations."*

[30] The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for their consideration. The requirement that permission is required is designed to;

"prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived." (See; ***R v Island Revenue Commissioners ex p. National Federation of Self-employed and Small Businesses Ltd.*** *[1982] AC 617 at p. 642 per Lord Diplock.)*

[31] The Applicant was charged with several criminal offences in relation to a motor vehicle. At the time the charges were laid against him, he was in the final stages of his training period. The charges laid against him were later dismissed and he

claims that since his acquittal he has made efforts to determine his status in the JCF and had not received any information.

[32] Part V of the **PSR,** outlines the procedure to be followed on the institution of criminal charges against a member of the JCF. Section 35 of the **PSR,** outlines the procedure for placing the officer on interdiction and Sections 45 to 59 outline the procedure to be taken if a member is to be dismissed from the Force. There are clear procedures that should be followed on interdiction.

[33] There is some evidence that the Applicant has been trying to seek audience to determine his status, but his efforts have proven futile. There is no evidence before the court to say whether the Applicant was dismissed, suspended, or placed on interdiction. This supports the assertion that the Applicant was in limbo. The Defendant's argument is that the Applicant failed to reenlist and hence is no longer a member of the Force. The Applicant's answer is that he applied in November 2013 for reenlistment. There is obviously a need for further evidence which has not been presented before the court.

[34] It is clear that at the time, the criminal charges were levied at the Applicant he had not completed his training period. Section 26(6)(b) of the **PSR** deems his training period to be a probationary period. It is important to note that the essential nature of the prescribed period is for training of the enlisted officer, and to allow the Commissioner to be able to make a determination as to whether the member has such qualities as are likely to render him a useful member of the Force. In **R v Norfolk C.C** (1891) 60 L.J QB 329, Cave J, said;

> "*Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that, not withstanding it is not that particular thing; nevertheless, it is to be deemed to be that thing.*" (See also; **St. Aubyn v Attorney General (No. 2)** [1951] 2 All ER 473).

[35] Section 24(6)(b) of the **PSR**, provides that at the end of the training period, if his services have not been dispensed with, the member will be deemed to have been confirmed in respect to his enlistment. The Applicant's period of training has not ended; therefore it is impermissible to deem that he has been duly confirmed as respects his enlistment. He was neither confirmed nor can he be deemed confirmed. The member is deemed to be confirmed on completion of the period of training. Therefore, in the event a member's training period comes to an

end, and his services have not been dispensed with, this section serves to clothe him with the presumption of being duly confirmed. This deemed confirmation of the member in respect of enlistment may be dispelled or rebutted by evidence to the contrary.

[36] Section 24(6) of the **PSR** is however, silent on the status of the member, if the period of training has not been concluded, or is there a procedure expressed for the Commissioner to follow in such an eventuality. The Applicant's services were not dispensed with by the Commissioner, however the Commissioner was without the Applicant's services due to the charges against him. It is only during the period of training that it is open to the Commissioner to dispense with the services of the probationary officer for the reason that; "*in the opinion of the Commissioner he is found wanting in such qualities as are likely to render him a useful member of the Force.*"

[37] The court has a discretion to reinstate a probationary Applicant who has been dismissed, but this discretion is exercised most sparingly. The court is anxious not to usurp the functions of the statutory authority, and to keep before it, that judicial review is concerned with the process and not the decision. The exceptions against ordering reinstatement of a probationary applicant arise when there is a conflict of evidence between the parties on the issues, which would require resolution under the disciplinary provisions of the **PSR**. The reluctance to grant reinstatement of the probationary applicant is so even when the decision of dismissal was found to be outrageous, unlawful and unfair. (See; ***Chief Constable of North Wales Police v Evans*** [1982] 1 WLR 1155**, *R (Bolt) v the Chief Constables of Merseyside Police and North Wales Police*** [2007] EWHC 2607, and ***McLaughlin v Governor of the Cayman Islands*** *[2007] 1 WLR 2839).*

[38] In **Chief Constable of North Wales Police v Evans**, the applicant, a probationary member of the North Wales Police Force, was given an option to resign or have the Chief Constable dispense with his services. The applicant resigned. On an application for judicial review of the Chief Constable's decision, the Chief Constable contended in affidavits that he had an absolute discretion to dispose of the Applicant's services and said that in coming to his decision he was concerned with three adverse factors, firstly, the Applicant had married a woman much older than himself, the former mistress of his uncle, which might give rise to some scandal, which would not be in the interest of the Force. Secondly, the Applicant and his wife were keeping four or five dogs in a house where he was only allowed to keep one. Thirdly, the Applicant and his wife lived a hippy lifestyle.

[39] On appeal to the Court of Appeal, the Applicant argued that the lower court having found that the decision made by the Chief Constable had been tainted with unfairness and was void, failed to make any order other than to costs. That Woolf J, had been wrong in law in holding that the court could give no remedy now that would enable the applicant to serve the period which he would have remained if his engagement had not been terminated.

[40] The Court of Appeal allowed the applicant's appeal, that the decision of the Chief Constable was void. The Chief Constable appealed to the House of Lords. The House of Lords although making declarations to the effect, refused to make a declaration that the Applicant was entitled to reinstatement. Lord Hailsham had described the treatment meted out to the applicant as being little short of outrageous. At page 1163h of the judgment, he says;

> *"My own belief is this would have pre-eminently a case which would have been dealt with most effectively either by re-engagement perhaps in a fresh term, with the appellant does not offer, or by substantial monetary compensation..."*

[41] Lord Brightman, after indicating that his personal choice, in contradistinction to the majority, would be to grant reinstatement, appreciated the weight of the objections to reinstatement, he said at page 1166 A;

> *"Great practical problems would arise in relation to his training and perhaps other matters from the fact that his service has been interrupted for nearly four years. Moreover human nature being what it is, if the North West Police Force had the respondent forced upon them by order of your Lordships House at the culmination of this lengthy litigation, there would be an obvious danger that an undercurrent of ill-feeling would affect his future relations with his superiors in the force ... an order of mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would be in the circumstances a remedy proper to be granted.* ***But it is unusual in a case such as the present, for the court to make an order of mandamus, and I think in practice it might border on usurpation on the powers of the Chief Constable, which is to be avoided.*** *With some reluctance and hesitation, I feel that the respondent will still have to content himself with the*

less satisfactory declaration that I have outlined.” ***[Emphasis added].***

[42] The case of **Evans** was examined in the matter of **R (on the application of Kay) v Chief Constable of Northumbria Police** [2010] All ER (D) 121. The court noted that the most important difference between **Evans'** ***case*** and the decision in the case of **Ms Kay** lies in the development of the law relating to the use of Regulation 13 to dismiss probationary constables in cases where there is a dispute of the facts alleged to constitute misconduct. It is now clear that in such a case the Regulation 13 procedure is not available to the Chief Constable. The only way that the probationary constable can be dismissed is as a result of formal misconduct proceedings. As is explained in **Bolt** the proceedings are determined by the panel and not by the Chief Constable. Thus it is not right to say, in this case, that the Chief Constable had the power to dismiss Ms Kay. Thus an order for reinstatement would not usurp the power of the Chief.

[43] There are not many areas of dispute separating the parties. The complaint here is the paucity of information that has been forthcoming from the Applicant. Ex parte applications require full and frank disclosure. In this case the Applicant had charges laid against him, not as a consequence of his execution of his duties. The virtual complainant was a private citizen. There will be features of this case, to which the Commissioner qua employer will not be privy. The duty will rest on the Applicant, to make “*full and frank disclosure*” of the circumstances of the charges, being brought and dismissed.

[44] Counsel for the Defendant, has complained that material presented did not provide sufficient information in respect of the interviews that the Applicant claims were conducted, and is therefore inadequate for the court to consider whether judicial review should be granted or not. In respect of the dismissal of the criminal charges against the Applicant, it is not sufficient for the Applicant to show that the prosecution ended in his favour, as he would in a case of malicious prosecution. To my mind, he needs to go further and make disclosure of the circumstances of the dismissal. Did the dismissal come about by a verdict of acquittal, or by discontinuance of the prosecution because of unavailability of witness etc, or by quashing of the indictment for a defect in it? There is abundant authority that whether or not there was an arguable claim; a failure to act with candour could result in refusal of permission. There is a public interest element, in the protective safeguards being maintained, to ensure that the Commissioner has all the relevant information to form an opinion as to the suitability of the probationer.

[45] The facts on which the application is grounded indicates that; "*on or about October 12, 2010, the Applicant was confined to barracks, followed by his arrest on the 22nd October 22, 2010*" which is incompatible with his period of training and he would have been aware that his training period was not ended. The Applicant confirms his unemployed status since October 2010 (*See; Facts, page 10 of his written submission*). The grounds of the claim would have arisen some three (3) years and nine (9) months before the claim was filed.

[46] There is nothing in the Rules that would prevent, the Applicant from enquiring as to his status as a probationer, from October 2010. In any event, the criminal proceedings against him were dismissed on January 26th, 2012, according to an exhibit "MP1", a copy of a letter from the Resident Magistrate's Court (Criminal Division) dated February 26th, 2014 and referred to in paragraph 10 of the Applicant's affidavit sworn to on the 29th August 2014. Paragraph 10, does not state the date of dismissal, but only the date of that letter, February 26th 2014.

[47] The application for leave to apply for judicial review was filed on 29th August 2014. The affidavit at paragraph 26(g), states; "*that the criminal case against me was discharged on January 9th, 2014…*", which appears to be inconsistent with exhibit "MP1". The grounds on which the Applicant is seeking leave although it recites when criminal proceedings were commenced against the Applicant, is silent on the important date of when the proceedings were terminated. If the date of discharge was in fact 26th January 2012, as per exhibit "MP1", the application would have been filed some two and a half years (2 ½) after the grounds for the claim arose.

[48] The issue of delay is an important consideration in determining whether or not the court ought to grant leave to apply for judicial review. An application for leave for judicial review ought to be made promptly or within three (3) months after the grounds to make the claim first arose. There are cases that have been brought within three (3) months but have failed this promptitude test. The court must be satisfied that the application was made promptly. In the Court of Appeal case of **Aston Kane v Minister of Home Affairs and Justice** (1975) 13 JLR 109, the applicant had his firearm licence revoked and by letter dated July 24, 1972, he was advised that his appeal was refused. He had been denied an opportunity for a hearing of his appeal. He filed an application for leave on the 13th February 1973, outside of the one month period then allowed by the Civil Procedure Code. He sought to excuse the delay on the ground that he was unable to get the lawyer of his choice. However, the Court held that the failure to afford him a hearing was a breach of natural justice, however certiorari being discretionary, the inexcusable delay had disentitled him to redress.

[49] In **R v Secretary of State for Transport ex p. Presvac Engineering Ltd.** (1991) 4 Admin. L. Rep. 121 at pp. 133-134, the court noted that, *the time limit begins to run from the date when the grounds for the claim first arose*. The time does not run from the date when the claimant first learnt of the decision or action under challenge nor from the date when the claimant considers that he has adequate information to bring the claim, such matters may be relevant to the separate question of whether an extension of the time should be granted.

[50] In this case, the Applicant has by the conduct of his application circumvented the protective safeguards that Part 56 of the **CPR** provides for the public authority, the Commissioner of Police. There was no application for extension of time within which to file for leave. The inadequate information as to dates and place of the interview with the Commissioner is less than fulsome that would enable the Defendant to seek instructions to respond to the affidavit. In respect of his appearance before the Commissioner, he fixes the time as "*in or about 2011*". This falls short of the requirement for full and frank disclosure. The Applicant is clearly out of time using either the date of the acquittal; January 2014, or the date of the confirmation; November 2010. The court noted that the Applicant sought to make an oral application for an extension of time after this issue was raised as a defence.

[51] In considering the issue of delay, the court looked at one of the reasons put forward for the delay. The Applicant stated that he was trying to obtain legal representation or assistance, but his efforts were futile. In the case of **R v Stratford-upon-by Avon District Council ex p. Jackson** [1985] 1 W.L.R. 1319, the court noted that delay caused by factors outside the applicant's control such as delay in obtaining legal aid, may be excusable. Ackner LJ said;

> *"Although it was an essential requirement that applications for leave should be made promptly, in extending the time limit for applying for leave the court was not limited to reasons which would be acceptable in civil suits, since there was no true lis inter partes in judicial review proceedings. In particular difficulty in obtaining legal aid which was not caused by the applicant was sufficient reason for the court to extend the time limit. Although there had been a long delay resulting from the applicant's difficulties in obtaining legal aid she herself had not been at fault and she had acted with a proper sense of urgency. Accordingly, there was good reason for extending the time for her to make application and leave to apply would therefore be granted."*

[52] In Section 24(6) of the **PSR**, the language of the rule, indicates that the Commissioner had no statutory duty imposed on him. The rule provides the Commissioner with discretion which he may exercise, if he forms an opinion that the probationer is wanting in such qualities that are likely to make him a useful member of the Force. It is for the Commissioner and no one else to exercise the discretion in Section 24(6) of the **PSR**. In **Evans' case**, the House of Lords, held that a provision, that stated that; "*during his period of probation in the force the services of a constable may be dispensed with at any time if the chief officer of police considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable*" was not an absolute discretion, but was only exercisable after he had considered the suitability of the probationer. The House went on to hold, that an Order of Mandamus might border on usurpation of the functions of the Chief Constable. The Commissioner has a discretion to keep or dispense with the services of the probationer after he had considered the probationers suitability.

[53] The court in **Medical Council of Guyana v Dr Muhammad Mustapha Hafiz -** (2010) 77 WIR 277 stated that;

> *"It was a clear and settled principle of law* ***that the person compelled to the performance of an act by an order of mandamus must have had a clear duty imposed on him as opposed to a mere discretion.*** *In the instant case, while the law imposed a duty on the appellant to consider such an application, in the exercise of the duty to consider an application for registration, the appellant had a discretion whether to grant or refuse the application. Accordingly, the respondent was not entitled to an order of mandamus to compel the council to register him. Mandamus was not available to secure a reversal of the council's decision. The trial judge had substituted his own opinion on the merits of the application for that of the appellant and in so doing had exercised the discretion which was statutorily that of the appellant; the judge's finding that the respondent was entitled as of right to be registered as a medical practitioner was a finding on the merits of the application, which was a finding the appellant had been statutorily enjoined to make. The judge's role had been to conduct a review of the manner in which the appellant had arrived at its decision; the question for the judge's determination."* **[Emphasis Mine]**

[54] A proper application was not before the court and as such the application for leave to apply for judicial review is refused. The application for leave for judicial review is out of time. It is a settled principle of law that the rules in Part 56 of the **Civil Procedure Rules** are stringent and ought to be followed. The rules governing this section are not relaxed and as such litigants and their Attorneys ought to make every effort to follow them. I adopt the statement of my brother Sykes J in **City of Kingston Co-operative Credit Union v Registrar of Co-operative Societies and Friendly Societies et al,** where he said; "*natural justice has not closed her eyes to these difficulties, and they are real problems given the poor communication that sometimes takes place between decision makers and those affected by the decision. The solution for the out-of-time applicant is to apply for an extension of time to apply for judicial review*." As such, the Orders as per the Notice of Application for Court Orders filed 29th August 2014 are refused.