[2016] JMSC CIV 101

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01886

IN THE MATTER OF AN APPLICATION BY EVERTON TABANNAH AND WORRELL LATCHMAN

V

THE INDEPENDENT COMMISSION OF INVESTIGATIONS

BETWEEN	**EVERTON TABANNAH**	**FIRST APPLICANT**
AND	**WORRELL LATCHMAN**	**SECOND APPLICANT**
AND	**THE INDEPENDENT COMMISSION OF INVESTIGATIONS**	**RESPONDENT**

IN CHAMBERS

Althea Grant and Wesley Watson for the applicants

Richard Small and Courtney Foster for the respondent

May 27, 30, 31 and June 23, 2016

JUDICIAL REVIEW – APPLICATION FOR JUDICIAL REVIEW – INTERIM RELIEF – SECTIONS 17, 23, 24 AND 28 OF THE INDEPENDENT COMMISSION OF INVESTIGATION ACT

SYKES J

An injunction and an application for leave to apply for judicial review

[1] The Independent Commission of Investigations ('Indecom' or 'the Commission') has recommended that these two police officers, Deputy Superintendent Everton Tabannah and Constable Worrell Latchman, be charged with giving a false statement to mislead the Commission contrary to section 33 of the Independent Commission of Investigation Act and murder respectively.

[2] Both men have applied for an injunction restraining Indecom from charging them until the application for leave to apply for judicial review has been heard and decided.

[3] The applicants wish to secure leave to seek a number of declarations, an order of mandamus and injunctions restraining Indecom from charging them with the offences mentioned in the first paragraph.

[4] Many of the declarations sought appear repetitive and do not add much to the main declarations sought. The court will refer to three of the reliefs sought in order to give a flavour of what is sought:

> *(a) A declaration order that the failure of [Indecom] to disclose relevant documents that [were] requested via the letter dated 23rd day of April 2016 was a procedural error and a breach of the principles of natural justice.*
>
> *(b) A declaration that the failure of [Indecom] to grant the request via the letter dated 23rd day of April 2016 for the disclosure of the documents will hamper the applicants' opportunity to proceed effectively with their application for leave to apply for judicial review.*
>
> *…*
>
> *(i) An order of mandamus to compel [Indecom] to disclose the documents as requested in the letter dated the 23rd day of April*

2016, namely the statements and the scientific evidence which touch and concern the fatal shooting of Donald Chin.

[5] This matter initially came before this court as an application for interim relief. Specifically it was an injunction. The applicants had initially filed an application for leave to apply for judicial and the date given by the registry was September 2016. This is contrary to the express provision of the Civil Procedure Rules. Those rules expressly state that an application for leave must be placed before a judge 'forthwith.' It was after this date was received that the applicants applied for an injunction. The date was set for the hearing of the injunction. At the hearing for the injunction, the parties agreed that the application for leave should be heard at the same time as the injunction application. These reasons for judgment are for both applications.

The evidence

[6] The court will summarise all the evidence in the case. The applicants and the Commission have filed affidavits. In respect of the affidavits filed by both applicants there is not much difference between and what is about to be stated comes to both affidavits. The court will identify, where necessary, any difference between the two. The Commission responded to the affidavits of the applicants through Mr Terrence Williams who is the Commissioner appointed under the relevant statute ('the Commissioner').

[7] The applicants are members of the Jamaica Constabulary Force ('JCF'). Both are attached to the Mobile Reserve Branch which is a major operational arm of the JCF that is not attached to any specific geographical location and are deployed throughout the island where necessary in support of police officers in police divisions.

[8] On October 31, 2012, there was joint police/military operation in the parish of St James. The operation took both men to Rose Heights in the parish of St James. At the end of the operation a male was shot and killed. A formal notice of investigation was served on both men by Indecom. The notice required them to provide a witness statement in respect of the incident. After that notice, both men were required to submit to what they call a question and answer session which was alleged to be connected with the fatal shooting.

[9] The applicants say that a third notice was served requiring them to submit to another question and answer session. They say that at this second question and answer session they were treated as witnesses and not suspects.

[10] In April of 2016 they each received correspondence from the Commissioner informing them that the Commission had recommended that Constable Latchman be charged with murder and Deputy Superintendent Tabannah be charged with giving a false statement.

[11] The letter they each received told them that if they are not satisfied with the recommendation made they have the right to seek judicial review of the decision. Among the documents they received was a report which summarised the material in the possession of the Commission. By letter dated April 23, 2016 their attorney at law requested copies of

(i) a copy of the compact disc which recorded the question and answer of both men;

(ii) copies of the witness statements of the witnesses referred to and relied on in the report;

(iii) a copy of the post mortem report, ballistic certificate in respect of the swabbing and firearms, the crime scene report of Mr Peter Parkinson.

[12] The letter explicitly states that 'it is their intention to apply for judicial review in respect of the recommendations which was (sic) in the said report.'

[13] The Commission responded by letter dated April 29, 2016:

> *Reference is made to the matter at caption and to your letter of the 23rd instant advising of your retainer by Deputy Superintendent Everton Tabannah and Constable Worrell Latchman for the captioned purposes.*

> *As regards your request that you be furnished with certain documents from our Investigations File (sic); please be advised that having regard to* ***Section 28*** *of the Independent Commission of Investigations Act, we do not disclose statements received pursuant to our investigations unless to further an investigative purpose, or by way of disclosure after charges have been laid, as:*
>
> *[a] the concerned officers have not yet been charged; and*
>
> *[b] we are concerned for the security of the witnesses on which the prosecution intends to rely.*
>
> *We will only disclose after charges have been laid and the appropriate orders have been made.*

[14] Thus it is this decision embodied in this letter that has sparked the application for leave to apply for judicial review.

[15] The Commission's response came through the affidavit of the Commissioner, Mr Terrence Williams. He begins by outlining his responsibilities, the structure of the Indecom and the like. The Commissioner speaks to a protocol developed between Indecom and JCF regarding the arrest of members of the JCF.

[16] The Commissioner states that in some reports the whereabouts of witnesses are undisclosed where there are good reasons for doing so. Generally, this will be done to protect witnesses who are fearful or who 'might be at risk of intimidation or tampering.' The Commissioner states that in his experience as prosecuting counsel and as Commissioner he has become aware of 'many witnesses who often express anxiety in giving statements against police officers.' The cause of this anxiety is said to be 'the perception that police officers may discover their whereabouts and interfere with them.' The Commission therefore 'conducts its operations in an endeavour to calm this anxiety, foster public confidence, and diminish the opportunity for witness tampering.'

[17] The Commissioner explains that section 28 prevents him from disclosing evidence before charges are laid against the police officers. Further he said that he did not permit disclosure of evidence collected in his investigations unless it is intended to further their function. The policy, said the Commissioner, 'is grounded in our respectful

view that such disclosure would be unlawful and for the concerns raised in the previous paragraph.' The previous paragraphs spoke about the fear of witnesses. He continued that if he were to disclose the material the Commission's institutional reputation would be harmed and worsen the difficulties in getting witnesses to give statements.

[18] The affidavit added that the Commission recognised that once the matter was before the court there is a duty to disclose. The Commissioner noted the delay in getting ballistic certificates in this particular fatal shooting. The Commissioner stated that he personally reviewed the case file. Next comes the sequence of events in this particular case.

[19] In this particular case it is said that the Commissioner received the applicants' letter. The Commissioner said that it made arrangements for the applicants to be placed before the Parish Court and caused copies of the evidence to be made for the purpose of disclosure. The Commission's investigator was given instructions on what order to request from the court.

[20] The Commissioner said that he received the applications and supporting affidavits. He repeated in the affidavit what the practice of Indecom was.

[21] The applicants did not appear at Freeport Police Station in St James in order to be charged. There was telephone contact between the applicants' counsel and the Commissioner. Out of the telephone conversations came clarity and both sides with the result that this application was filed. The Commission raised a number of objections to leave and imputed questionable motivations to the applicants. The court will now examine the objections and then determine whether the applicants have made their case for leave to be granted. Before doing that a few points need to be made.

[22] That Parliament accepted that the Commission is a public body and therefore subject to judicial review was confirmed by section 24 which read:

> *The Commission shall take such steps as are necessary to ensure that a complaint, concerned officers or concerned official, as the case may be, who is not satisfied with a decision of the*

Commission in relation to an investigation, is advised of the right to seek judicial review of that decision.

[23] It is to be noted that the word used is decision. A word of wide import; wider than recommendation since a recommendation is just one kind of decision.

[24] The word 'decision' is not defined in the statute. The word means 'a conclusion or resolution reached after consideration' (http://www.oxforddictionaries.com/definition/english/decision) (accessed June 6, 2016 at 1655hrs). The word decision is wider that recommendations which is defined in the same dictionary as 'a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body' (http://www.oxforddictionaries.com/definition/english/recommendation (accessed June 6, 2016 at 1703hrs). Under section 23 the body or force required to carry out the recommendations do not seem to have a choice in the matter unless perhaps it applies to a court for some kind of relief and is successful.

[25] According to the structure of the statute the recommendation can only be arrived at after a statutorily prescribed process. That process must be followed. The relevant subsections of section 17 are ss 7 - 10:

(7) On the completion of the investigation, the investigator shall submit a final investigation report and proposed recommendations thereon to the Director of Complaints who shall submit it to the Commissions.

(8) After receiving and considering a final investigation report submitted under subsection (7), the Commission shall make its own assessment of the investigation and form its own opinion as to the matter under investigation.

(9) The Commission shall then prepare a report on the investigation including its recommendations arising therefrom (whether or not confirming any of the proposed recommendations) as are to be acted upon (hereinafter referred to as "recommendations for action").

(10) The Commission shall furnish a copy of the report of the Commission to

(a) the complainant;

(b) the concerned officer or the concerned official;

(c) …

...

(h) …

[26] The statute names the concerned officer as one of, at least, eight person who must be served with the report. The report must contain the Commission's own recommendations regardless of whether or not it is confirming any recommendation made by the investigator into the complaint.

[27] When one examines section 17 (10) along with section 24, the idea must be that the affected persons such as the complainant or the concerned officer or concerned official can, among other things, seek judicial review of the recommendations or any decision of the Commission. If it were not so, then section 24 makes no sense. Section 24 is not conferring the right of judicial review what it is doing is placing a mandatory duty on the Commission to make sure that the affected persons are informed of their rights. No such duty is imposed on police officers or indeed the JCF by statute or by common law.

[28] Section 23 states that where the Commission's report contains recommendations for action the relevant body or force shall comply and give effect to the recommendations in the manner and within the time specified. The head of the relevant force or body is to provide a progress report regarding effecting the recommendations. Failure to comply with the recommendations has serious reputational consequences for the force or body. The Commission is required to make a report of the non-compliance and that report is to be laid on the table of each of the Houses of Parliament. It is a name and shame consequence.

[29] With this back ground the court will now proceed to examine the various objections to the application for leave to apply for judicial review.

Whether the applicants have engaged in conduct designed to frustrate the due process of law

[30] In the written and oral submissions, Mr Small insisted that the applicants' desire to pursue judicial review is designed to frustrate the due process of law. The strong submission was that their purpose and objective was to delay the process. He submitted that the Commissioner was concerned about the delay already caused in this matter and that the two applicants have breached the protocol established between the Commissioner and the JCF. As will be seen the delay was not caused by any of the applicants. Mr Small strongly urged the applicants to abide by the protocol, be arrested and charged, placed before the court and then they will receive disclosure.

[31] A court must always be cautious before attributing improper motives to litigants. A court must also be cautious before accepting any submission that may result in the permanent deprivation of the right of a citizen to ask the court to determine his rights. Courts exist to resolve legal and factual disputes that the parties are unable to resolve themselves. It is their constitutional right to approach the court regardless of what their opponents may think. Police officers, like all other citizens, have the right to ask a court to determine a matter that is of concern to them.

[32] It does seem a bit odd that the Commissioner is mandated by law under section 24 to make sure that the affected persons know of their right to challenge by way of judicial review 'a decision' made by the Commission and when they seek to give effect to the right they are being told that their conduct is designed to deliberately delay the process.

[33] Mr Small submitted that the applicants were 'quite happy' with the setting of a September 2016 date to hear the application for leave to apply for judicial review and yet were able to secure an early date for the hearing of the injunction after the

Commissioner pointed out that an application for leave to apply for judicial review did not in and of itself operate as a stay of the power to arrest the applicants.

[34] It is an unfortunate fact that the Supreme Court did not initially handle the application for leave to apply for judicial review with the required degree of alacrity. The rule says that such an application must be placed before a judge forthwith. It is not easy to see what other form of words could be used in the CPR to communicate the speed with which these applications are to be dealt with. There is no evidence that the applicants requested a September 2016 date. There is absolutely no evidence that the applicants had any hand in the selection of the date whether for the hearing of the application for leave or the injunction. The usual course is that the applicant file the documents and it is the registry that assigns the date. There is no evidence to suggest that that process was not followed. Thus if the assignment of the date was solely and purely the decision of the registry then there is no evidential basis for suggesting that the applicants were in any way responsible for that date. It is not accurate to say that they were happy with the date. They got a date presumably on the basis that that was the earliest possible date.

[35] It is appropriate to set out the sequence of events from the date of the incident to now. The objective evidence is this:

(a) on October 11, 2012, a joint police/military operation took place in Rose Heights, Montego Bay, St James;

(b) Mr Donald Chin died during the operation;

(c) the Commission began an investigation;

(d) the investigation was completed in either 2015 or 2016;

(e) the Commission wrote by letter dated April 14, 2016 to Ms Alice Allen, Rose Heights, indicating its recommendations that Constable Latchman and another police officer be charged with the offence of

murder and Deputy Superintendent Everton Tabannah be charged with giving a misleading statement;

(f) the applicants wrote to the Commissioner by letter dated April 23, 2016 requesting disclosure of certain documents;

(g) the Commissioner replied by letter dated April 29, 2016 indicating that he would not;

(h) the applicants drafted their applications for leave to apply for judicial review with supporting affidavits and filed them on May 9, 2016 which was set by the registry of the Supreme Court for September 2016;

(i) the date stamp shows that the notice of the application for leave was served on Indecom on May 9, 2016;

(j) communication between the applicants' lawyer and the Commissioner followed;

(k) notice of application for injunction filed and served on May 13, 2016.

[36] Between April 14, 2016 and May 13, 2016, the objective record shows that the applicants filed and served two applications with supporting affidavits. This is significant speed on their part.

[37] Mr Small had said that the Commissioner was concerned about the delay in the matter. The Commissioner gave an explanation for the over-three-year delay in delivering its recommendation. He attributed the delay to the failure of the forensic laboratory to provide the two certificates until January 2014 and March 2015 respectively. In addition the Commissioner said that the investigation was complex. In fact the Commissioner states explicitly that '[a]waiting these certificates and the complexity of the investigation contributed to the delay in the completion of the investigation' (see para 11 of affidavit of the Commissioner). The Commissioner has not even attempted to suggest that the applicants were complicit in or hindered the course of the investigation. There is no evidence that the applicants had any role in that delay.

[38] The time line shows that after the Commission received the second certificate in March 2015 it took a further thirteen months to communicate its recommendations. The applicants, through their counsel, wrote to the Commission by letter dated April 23, 2016, asking for disclosure. No delay there. The Commission responded by letter dated April 29, 2016. No delay there. The applicants file and serve their application for leave on May 9, 2016. No delay there. After the error on their understanding was pointed out by the Commissioner, they filed the injunction application on May 13, 2016. No delay there. It is an exaggeration to accuse the applicants of delay when they filed applications in court on the twenty fifth and twenty ninth days (that is two applications filed and served on the Monday and Friday of the same week of May 8) after receiving notification of an adverse decision are being accused of deliberate delay

[39] Mr Small referred to the protocol (JCF/Indecom) and invited the court to examine it. The court has examined the protocol exhibited. It refers to another document that was not exhibited. The parties are to be commended on arriving at a position for investigations carried out by Indecom. Respectfully, the protocol does not address what is to happen if a member of the JCF wishes to exercise is undoubted legal right to seek judicial review of any decision made by the Commissioner. In the absence of any reference to judicial review it means that the JCF and Indecom, assuming they addressed their minds to it, made the deliberate decision that no reference to judicial review would be included in the protocol. Since the protocol parties did not address the undoubted right of police officers to seek judicial review it cannot be right to criticize them for exercising their constitutional right to have a court decide on their civil rights and obligations. The protocol is not an Act of Parliament and neither is it subsidiary legislation. It has no legal status. To put the matter very strongly no arrangement between the JCF and the Commission can ever deprive a police officer of a right given to him by law. The protocol is not a legal document, has no force of law and cannot alter, confer or take away rights of police officers. It is at best and no more than that what is considered to be best practice by the JCF and the Commission when it comes to the arrest and charge of police officers.

[40] It is this court's conclusion that having regard to all the evidence presented there is no rational basis for suggesting that the applicants are guilty of taking steps to frustrate the due process of law unless the unstated premise is that the police officers should simply comply with the protocol regardless of their concerns about the legality of the process. If that is the premise it is not one accepted by this court.

Disclosure

[41] Mr Small submitted that there is no issue as to disclosure because the Commissioner has agreed to make full disclosure but only after both applicants are placed before the court. It is not quite so clear cut. It is this court's view that the issue is a bit more subtle than that. The issue is not whether there should be disclosure when but when there should be disclosure.

[42] Mr Small cited the decision of **R v Director of Public Prosecutions, Ex parte Lee** [1999] 2 All ER 737. The applicant had been arrested and charged with the offence of murder. He had been in custody for some time and although some disclosure had taken place he was dissatisfied with the level of disclosure. The Crown Prosecuting Service ('CPS') took the view that he was not entitled to more disclosure until after the committal proceedings had taken place. The CPS also took the view that he was not entitled to the disclosure that had taken place so far because no committal had taken place. Counsel for the applicant contended that once the defendant is taken into custody and charged the obligation to disclose arises and is continuous thereafter. Mr Lee sought to review the CPS's policy of refusing disclosure prior to committal proceedings. The relief sought was a stay of the committal proceedings, an order of certiorari to quash the decision and orders of mandamus requiring the prosecution service to consider making disclosure to the applicant and to make disclosure to the applicant. At the time this case arose, disclosure was governed by the Criminal Procedure and Investigations Act, 1996.

[43] It seemed to have been common ground that in relation to an indictable offence the disclosure provisions of Part 1 of the 1996 Act did not apply until after the committal. Kennedy LJ reviewed the law of disclosure before the statute and under the statute. His

Lordship noted that under the statutory regime disclosure was less extensive in the early stage of the process and that more disclosure came at later stages. The learned Lord Justice noted that the statute **did not** address the period between arrest and committal. Mr Lee's position was that notwithstanding the fact that he was entitled to disclosure later in the process he may still be entitled to disclosure at the earlier stage. It appears that Kennedy LJ accepted that basic proposition. If that were not the case his Lordship could not have stated the following at page 749:

> *(5)* ***The 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage.*** *Examples canvassed before us were:*
>
> *(a) Previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail;*
>
> ***(b) Material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process:***
>
> ***(c) Material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all:***
>
> *(d) Material which will enable the defendant and his legal advisors to make preparations for trial which may be significantly less effective if disclosure is delayed (eg names of eye witnesses who the prosecution do not intend to use)."*
>
> *(6) Clearly any disclosure by the prosecution prior to committal* ***cannot normally*** *exceed the primary disclosure which after committal would be required by s.3 of the 1996 Act (i.e. disclosure of material which in the prosecutor's opinion might undermine the*

> *case for the prosecution). However, to the extent that a defendant or his solicitor chooses to reveal what he would normally only disclose in his defence statement the prosecutor may in advance give the secondary disclosure which such a revelation would trigger, so whereas no difficulty would arise in relation to disclosing material of the type referred to in sub-para 5(a)(b) and (c) above, and I accept that such material should be disclosed, the disclosure of material of the type referred to in sub-para 5(d) would depend very much on what the defendant chose to reveal about his case.* (emphasis added)

[44] Despite the statutory regime, Kennedy LJ accepted that in some instances it may be prudent to make disclosure before the defendant would be entitled to full disclosure. It is to be noted as well that the court did not take the obvious point that more disclosure would come after committal and therefore Mr Lee should wait. In other words the court did not take the view that his remedy could be accommodated within the existing statutory regime and therefore declined to entertain his application. Not only was leave granted but it was fully argued on the merits. Neither was another technical point taken which might have been taken by the CPS namely that the application was late. By the time of the application Mr Lee had been in custody for some time.

[45] In this case Mr Small submitted that the Commission was prohibited by section 28 from making disclosure before the applicants are arrested and charged. Mr Small submitted that after the applicants are placed before the court then they are entitled to full disclosure. The statute does not actually say that the applicants are entitled to full disclosure after arrest, charge and being placed before the court. This position of Mr Small, if correct, is not based on a textual analysis of the statute but must rest on some other source of law. Mr Small did not rely on any other statute or subsidiary legislation for his conclusion and therefore it is reasonable to conclude that counsel was relying on the case law on disclosure for that conclusion.

[46] Section 28 reads:

> *(1) The Commissioner and every person concerned with the administration of this Act shall regard as secret and confidential all documents, information and things disclosed to them in the*

execution of any of the provisions of this Act, except that no disclosure

(a) made by the Commissioner or any such person in proceedings for an offence under section 33 of this Act or under the Perjury Act by virtue of section 21 (3) of this Act; or

(b) which the Commissioner or any such person thinks necessary to make in the discharge of their functions, and which would not prejudice the security, defence or international relations of Jamaica, shall be deemed inconsistent with any duty imposed by this section

(2) Neither the Commissioner nor any of the person aforesaid shall be called upon to give evidence in respect of, or produce any such document, information or thing in any proceedings, other than proceedings mentioned in subsection (1) or section 25.

[47] According to Mr Small the statute prohibits disclosure unless the exceptions apply. The exceptions are:

(a) proceeding for an offence under section 33 of the Act;

(b) proceeding for an offence under the Perjury Act because of section 21 (3) of the Act;

(c) where the Commissioner or any person administering the Act thinks it necessary to discharge their functions and such disclosure does not prejudice security, defence or international relations of Jamaica;

[48] The context then of section 28 is that after the investigation is completed, the investigator is to submit his final report with recommendations to the Director of Investigations. The Director forwards the report to the Commission. The Commission makes its own recommendations whether or not they are the same as the investigator's. The Commission is under a statutory duty to provide a copy of the report to the affected person. Section 24 mandates that the Commission takes steps to notify the '*complainant, concerned officer or concerned official*' of their right to seek judicial review

of any decision made by the Commission. As noted earlier, the word 'decision' is wide enough to cover 'recommendation.'

[49] One of the recommendations in this case is that Deputy Superintendent Tabannah be charged with an offence under section 33 of the statute. Section 33 criminalises wilfully making false statements to mislead or attempting to mislead the Commission or an investigator or any person carrying out any function under the Act. The rub here is that a recommendation is a decision and section 24 reminds that decisions of the Commission are reviewable. The statute does not in either express or implicit terms exclude decisions or recommendations for the arrest and charge of police officers from judicial review. Since decisions are subject to judicial it is entirely possible for different decisions made at different stages are reviewable.

[50] The recommendation is that Constable Latchman be charged with murder. This is not a section 33 offence and neither is it an offence under the Perjury Act. This leaves the third exception namely, where the Commissioner or any person administering the Act thinks it necessary to discharge their functions and the disclosure does not prejudice security, defence or international relations in Jamaica. It is not immediately obvious that this exception applies to murder or indeed any other offence. An argument could be made that the phrase '*not prejudice the security, defence or international relations of Jamaica*' does not easily accommodate safety of witnesses. This means that it could conceivably be argued that section 28 does not allow disclosure even in respect of a charge of murder. The point being made is that section 28 is not comprehensive. Since section 28 is not a comprehensive code regarding disclosure and it is supplemented by the common law then it is open to question whether that section on a proper interpretation prohibits disclosure at an earlier point in the process. The court at this stage is not embarking upon a comprehensive analysis of section 28 but is simply showing that the view advanced by Mr Small is not beyond challenge and whether he is correct should be determined at a full hearing.

[51] One of the points made by Miss Grant was that summaries regardless of conscientiously made may be defective. This was the point made in **Tweed v Parades**

Commission for Northern Ireland [2007] 1 AC 650 Lord Bingham, on the question of summarised documents stated at paragraph 4:

> *4 Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.*

[52] In this case the Commission summarised the evidence but as Lord Bingham pointed out such an effort may still not be enough.

[53] It may be said that the Commission has made recommendations and not decisions. In **OUR v Contractor General** [2016] JMSC Civ 27, David Fraser J reviewed cases from England and Wales and demonstrated that recommendations, in certain circumstances, can properly be the subject of judicial review (**[57] – [63]**). Those circumstances include an adverse recommendation directed at someone or even if not directed at someone it would have an adverse impact on the person.

[54] The Commission stated that its policy is not to disclose such evidence before an officer is charged because it would be unlawful and amount to a breach of confidentiality that would undermine the effectiveness of the Commission's work. The unlawfulness part was based on section 28 and the court has dealt with that already. One of the arguments made by Miss Grant in response to this submission is the following: the Commission has stated in the affidavit that in some instances it does not give sufficient evidence to enable identification of witnesses because of the concern for their safety and risk of intimidation. In this case since the Commission in fact provided sufficient

evidence to enable identification of the proposed witnesses one possible conclusion is that in this particular case the concern that the Commission has generally did not arise in this case. If it did then the particulars of identification given would be surprising.

[55] The implication of Miss Grant's submission is that the Commission applied a blanket policy without addressing its mind to whether the concerns that it has arose in this case.

[56] There is authority to support Miss Grant's views on the matter. In **British Oxygen Co Ltd v Minister of Technology** [1971] AC 610, Lord Reid speaking for a unanimous House of Lords said at page 625:

> *The general rule is that anyone who has to exercise a statutory discretion must not "shut his ears to an application" (to adapt from Bankes L.J. on p. 183). I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing. In the present case the respondent's officers have carefully considered all that the appellants have had to say and I have no doubt that they will continue to do so. The respondent might at any time change his mind and therefore I think that the appellants are entitled to have a decision whether these cylinders are eligible for grant.*

[57] The principle outlined here is that it is appropriate for the Commission to have a policy but that policy cannot mean that in all cases it is applied without considering the facts and circumstances of a particular case. The submission from Miss Grant is that in this particular case that policy cannot apply with the same rigidity because the main reasons, (a) section 28 and (b) safety of witnesses, do not apply at all or with the same strictness because the content of the material already provided effectively undermines

those positions. In the context of this case, that submission is quite correct. This is all the more reason for saying that even if there is a policy each case needs to be assessed on its individual circumstance in order to see whether the particular case justifies a departure from the policy. The affidavit from the Commission does not address the individual merits of this case but simply says that it made the decision not to disclose based on its policy.

[58] What has just been said is consistent with **Ex parte Lee**. Kennedy LJ had no difficulty with the CPS's policy but correctly took the view that it should be alive to the possibility that in some cases the policy cannot be applied without modification. The court wishes to note that no order was made in favour of Mr Lee because the prosecution in fact made the disclosure wanted and therefore it became unnecessary to make any order.

[59] Miss Grant is also saying that because the Commission applied a blanket policy without considering the merits of this particular case then it may have acted unfairly. In **Regina v Secretary of State for the Home Department Ex parte Doody** [1994] 1 AC 531 Lord Mustill at page 560 stated:

> *What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the*

> *decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.*

[60] In this passage, Lord Mustill stated that fairness is not an absolute and inflexible standard that is the same in all circumstances. Its content varies according to context. The applicants raise in their application the question of fairness of the Commission's determination that full disclosure is not possible before being arrested and charged. Does such a position constitute fairness in the circumstances? That is a good arguable case.

[61] Mr Small submitted that the applicants should go before the court and let the Parish Court judge rule on the issues raised in this application. Learned counsel cited a number of cases in support of his proposition. The first is **Scantlebury and others v Attorney General of Barbados** (2009) 76 WIR 86. The case was one in which the appellants were arrested and placed before the court for committal proceedings to take place with a view to their extradition to the United States. The proceedings actually commenced with evidence being led. It was after the evidence commenced and before conclusion that the appellants raised a number of issues. Judicial review proceedings commenced to challenge a number of rulings made by the magistrate. On appeal, it was held that appellants should have waited until the conclusion of the committal proceedings before raising their challenge. The court also held that section 20 of the Extradition Act provided an efficacious remedy. Miss Grant says that the substantive point of distinction between the instant case and **Scantlebury** is that the applicants have not yet been arrested, charged and no hearing as begun before any court other than these applications.

[62] The Commission's next case was **R v Secretary of State for the Home Department ex parte Norgren** [2000] QB 817. This was another extradition case.

There, the applicant's arrest and extradition was sought by the United States of America under a provisional warrant. He was arrested and placed on remand. He was then released on bail. His solicitors made representations to the Home Secretary who indicated that the authority to proceed would not be issued and the applicant was discharged. The solicitors sought reassurances from the Home Secretary that should another request be made they would like to make further submissions. The Home Secretary did not respond. A second request was made. The Home Secretary issued his authority to proceed and a warrant was issued for his arrest. At the time this was done the applicant was outside of the country. In the meantime the applicant has been arrested in Switzerland pursuant to a request for extradition from the United States. The applicant challenged the authority to proceed. Judicial review was granted.

[63] The Home Secretary took a preliminary point that applicant's challenge was academic because (a) the appellant was outside the country; (b) no sign that he will return; and (c) the warrant had not been executed and there was no realistic prospect of it being executed. Therefore the application served no useful purpose. The court did not agree because (a) the United States had not withdrawn its request and (b) it was of importance to the applicant to know whether he could return to the United Kingdom without the risk of arrest. The crucial point, for this court, is that despite the fact that he was not yet arrested in the United Kingdom Mr Norgren was allowed to make his challenge. The court did not say that he was submit to the process and utilise the remedies there.

[64] The next case is that of **Government of the United States of America v Bowe** (1989) 37 WIR 9. This was another extradition case where on October 4, 1985 the Mr Bowe was in fact arrested on a warrant issued under an order to proceed issued by the relevant minister. On October 28, 2005, Mr Bowe was refused leave by the Supreme Court seeking orders of certiorari and prohibition to quash the arrest warrant and prohibit the commencement of the extradition proceedings. On November 25, 1985, the magistrate held that the conspiracy charge on which Mr Bowe's extradition was sought was not an extradition crime. The United States Government sought to quash this finding and Mr Bowe moved to quash the warrant that was issued on October 4, 1985.

On February 5, 1986, the Supreme Court quashed the proceedings before the magistrate.

[65] Another round of proceedings began under an order purported signed on March 4, 1986. Mr Bowe was arrested on the same day the order was signed. On June 16, 1986, in respect of these second proceedings, the magistrate ruled that he had a case to answer. Mr Bowe applied for certiorari and prohibition. The Supreme Court said that his application was premature since the proceedings before the magistrate was not completed. In February 1987 the Court of Appeal reversed the Supreme Court and remitted the matter for hearing. On March 13, 1987, the Supreme Court quashed the magistrate's court proceedings. When the Court of Appeal reversed the Supreme Court in respect of these second proceedings it ordered costs against the United States Government which was appealed to the Privy Council.

[66] A third round of proceedings began in 1987. In respect of the first two rounds the continuous sticking point was that the order was signed by the Minister and not by the Governor General. In these third round proceedings, Mr Bowe was arrested. He sought certiorari and prohibition to quash the warrant and the proceedings before the magistrate.

[67] After resolving the legal issue Lord Lowry said at page 28:

> *The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their Lordships' decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that,* ***generally speaking****, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied.*

[68] Lord Lowry was suggesting a general proposition and not a universal absolute.

[69] The final case cited by Mr Small is that of **Coke v The Minister of Justice** Claim No 2010HCV02529 (unreported) (delivered June 9, 2010). That was another case of extradition in which the applicant sought leave to review the decision of the Minister of Justice to issue her authority proceed. McCalla CJ refused leave on the basis that he had alternative means of redress and he ought to avail himself of those.

[70] It may well be that the key to understanding the outcome in the extradition cases is the special nature of extraction. In **Scantlebury** Simmons CJ stated at paragraph 1:

> *These appeals raise issues specific to the law of extradition and highlight the special character of extradition proceedings. Although such proceedings are grounded in the criminal law, they are very much sui generis.*

[71] Simmons CJ stated at paragraph 72:

> ***[72]** …**Extradition proceedings, as we said in the introductory paragraph of this judgment, are sui generis. It is critically important to appreciate that a distinction must be drawn between the character of a court hearing proceedings for extradition and the character and functions of a court conducting a preliminary inquiry into an indictable offence**. These paragraphs from the Chief Justice arose because counsel the applicant had submitted that the applicant was deprived of his right to cross examination under section 18 of the Barbados Constitution. The Chief Justice was demonstrating why that right did not usually apply to extradition proceedings.*

[72] This means that some caution is necessary before talking the dicta in those cases an applying in another sphere which has its own peculiarities. Also, at least in Jamaica, after the committal process ends in extradition matters, the fugitive is able to raise all the matters that he alleges affects the validity of the process in an habeas corpus application at the Supreme Court. He can have the court examine the entire process from the issuing of the provisional warrant to the authority to proceeds, to the nature and quality of the evidence and whether the offence is properly an extradition offence. In those circumstances, it is not surprising that judicial review proceedings are not encouraged in extradition matters because the applicant can in real way and

substantive way challenge the entire process. He can, in the Court of Appeal, raise constitutional matters even though they were not raised in any of the courts below.

Alternative remedies

[73] It has been said that when applying for judicial review the applicant needs to demonstrate that there is no other remedy. This court and quite others have gone along with this conventional understanding. But is this really so under the Jamaican rule relating to applications for leave to apply for judicial review?

[74] Rule 56.3 governs the application for leave. Rule 56.3 (1) says that the person seeking judicial review must apply for leave. The application may be made without notice (rule 56.3 (2)). Rule 56.3 (3) (d) states:

> *The application must state –*
>
> *(d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.*

[75] The wording of this provision must rest on the assumption that there may be other means of redress available and the applicant needs to justify why judicial review is more appropriate. If this is correct then it is no longer correct to say that judicial review can only be pursued if no alternative form of redress exists. What he can do is show why judicial review is more favoured than the others.

[76] There is a development that has occurred which was not addressed during the submissions. David Fraser J has decided that applications for declarations do not need leave (**OUR v Contractor General**; **Audrey Bernard Kilbourne v The Board of Management of Maldon Primary School** [2015] JMSC Civ 170). In the present case, the applicants have applied for a number of declarations and an order of mandamus. If his Lordship is correct then this court is really only considering whether leave should be given for mandamus since by virtue of his Lordship's reasoning leave is not required for declarations. This court will proceed on the basis that Fraser J is correct and that no

leave is needed to apply for declaration. However, the court will continue to assess the application as if leave is required.

[77] Mr Small took the position that due process of law in this case requires that persons against whom allegations are made should face those charges in the courts set up by the state. At paragraphs 40 - 58 of the Commission's written submissions it is stated that there is no claim that the applicants can raise in judicial review proceedings that cannot be raised before the Parish Judge or whomever tries a matter brought before them. It was also submitted that there is no issue which can be raised in judicial review proceedings that cannot be raised before the Circuit Court if the matter is committed to trial at the Circuit Court. This view presumably rests on the relevant paragraphs in the **Sharma v Brown-Antione** (2006) 69 WIR 379 where reference was made to the **Regina v Horseferry Road Magistrates' Court Ex parte Bennett** [1994] 1 AC 42 case. In the **Ex parte Bennett** case their Lordships accepted that inferior courts had inherent power to control abuse of process but that power was severely restricted to matters affecting the fairness of the trial itself.

[78] In **Ex parte Bennett** the allegation was that the defendant had been kidnapped and taken to England. Although there was the possibility of special arrangements for extradition between South African and England no such proceedings were brought. Before the magistrate he wanted to challenge the court's jurisdiction and sought an adjournment. It was refused and he was committed. He sought judicial review which was also refused on the ground that English courts could not enquire into how a person was brought before the court. That position was reversed by the House of Lords. The court also held that in the event that a question arose of deliberate abuse of the extradition process then the magistrate should adjourn the proceedings so that the Divisional Court could hear the matter. The matter was remitted to the Divisional Court for further consideration. In the course of judgment Lord Griffith stated at page 64:

> *I would accordingly affirm the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction. However, in the case of magistrates*

> *this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in Reg. v. Guildford Magistrates' Court, Ex parte Healy [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken.*

[79] From this dictum, it is clear that the Parish Judge could only consider whether the Commission's decision made or would make the trial unfair. Such a judge could not consider the any wider application of the abuse of process doctrine. That consideration could only be given by the Supreme Court.

[80] **Sharma's** case was one in which committal proceedings were to take place and the ultimate venue of trial was the High Court, a superior court of record, which could address the larger issues raised by any abuse of process allegation. It could be said that in this case that since Constable Latchman is to be tried for murder and that can only be before the Supreme Court which is a superior court of record it can address the wider issue of abuse of process. Deputy Superintendent Tabannah is to be tried for the Parish Court and thus following on from **Ex parte Bennet** the Parish Judge is restricted to question of the fairness of the trial.

[81] However, the law has moved on since **Ex parte Bennett**. In **Panday v Virgil** [2008] 1 AC 1386 the Privy Council have come to the conclusion that a magistrate can grant a remedy based on abuse of process if the circumstances warrant it. In that case Mr Panday was charged with knowingly making a false statement in relation to his financial affairs contrary to section 27 (1) (b) of the Public Life Act. After a trial the defendant was convicted of the offence. In the Court of Appeal, the conviction was

quashed on the basis of apparent bias on the part of the presiding magistrate. The Court of Appeal ordered a retrial before a different magistrate. Mr Panday appealed to the Privy Council contending among other things that the Court of Appeal should have ordered a stay of further proceedings because of there was an abuse of process, namely, the magistrate 'had been influenced by improper government pressure, a fundamental violation of the rule of law' and 'that in any event it would be an abuse of process now to retry him given his age (74), his state of health, and the substantial costs which he would incur in defending himself afresh (largely irrecoverable, even were he to be acquitted).' Strictly speaking the Board's decision on whether the magistrate could grant an appropriate remedy was obiter dictum but full arguments were addressed to their Lordships and so the Board gave its views since it may assist in future cases.

[82] Lord Brown, speaking for the Board, referred to **Ex parte Bennett**, and noted that Lord Griffiths 'initially [drew] the distinction between on the one hand "matters directly affecting the fairness of the trial ... such as delay or unfair manipulation of court procedures" and on the other hand "the wider supervisory jurisdiction" (the latter being described as "a horse of a very different colour from the narrower issues which arise when considering domestic criminal trial procedures")' (**[31]**). Lord Brown observed that 'Lord Griffiths had earlier in his speech noted with approval a number of authorities recognising the magistrate's power, albeit to be "most sparingly exercised", to decline to allow a criminal prosecution to proceed on the ground that it was oppressive or otherwise an abuse of the court's process' (**[32]**). Lord Brown concluded at paragraphs 33 and 34:

> ***33*** *Their Lordships have already mentioned the entrapment cases as an example of the Bennett principle in action. On one reading of Lord Griffiths's speech those cases too, like the unlawful extradition cases, could be said to involve "the wider supervisory jurisdiction" rather than "matters directly affecting the fairness of the trial". It is the Board's clear view, however, that if the defence of entrapment is raised before magistrates, rather than adjourn the proceedings for a judicial review application to be made, they should themselves decide on which side of the Looseley line the case falls: i e whether the defendant was incited to commit the offence or merely given the*

> *opportunity to do so. So too it would be for the trial court (whether magistrates or a judge) to decide whether a charge had been instituted in bad faith or oppressively, for example, in breach of an executive undertaking or indemnity.*
>
> ***34*** *The Divisional Court case R v Belmarsh Magistrates' Court, Ex p Watts [1999] 2 Cr App R 188 provides another useful illustration of where it is appropriate for the magistrate himself, even though the fairness of the trial is not itself threatened, to entertain what might broadly be regarded as a Bennett type defence, there a contention that the complainant's summons constituted a collateral attack upon his own conviction. If the Board have any criticism to make of Buxton LJ's analysis, at p 195, of the limited circumstances in which, pursuant to Ex p Bennett [1994] 1 AC 42, magistrates must themselves decline jurisdiction, it is that it does not go far enough in narrowing down that class of case. Indeed their Lordships find it difficult to think of any situation save where, as in Ex p Bennett itself, the accused has been unlawfully brought within the jurisdiction, in which the magistrates would have to adjourn the proceedings in favour of a judicial review challenge. The rationale for that particular exception must be that unlawful extradition introduces into the case cross-border considerations which may be of a sensitive character and which certainly range far outside the prosecution process itself.*

[83] From this it seems that the Board would have decided had it been necessary to do so that Mr Panday's complaints could be properly addressed through the trial process because the magistrate would have the power to consider most abuse of process matters save possibly a situation where it was being alleged that the executive engaged in very serious misconduct such as a person being unlawfully brought within the jurisdiction of the court.

[84] The cases of **Ex parte Bennett** and **Panday v Virgil** have indicated a strong tendency to permit abuse of process issues to be raised in the criminal trial rather than in judicial review proceedings. However, the narrow point raised by the applicants is whether they would be entitled to disclosure at an earlier stage. The Commissioner has said that he is prepared to make full disclosure after the applicants have been arrested and charged. This would mean that the applicants would have suffered the harm without

having an answer to their question of whether they are entitled to disclosure, in this case, earlier than the time proposed by the Commissioner. This explains why judicial review is necessary to have this question answered. After arrest and charge, the point becomes academic. When viewed in this way the court is inclined to grant leave to apply for judicial review. The court does not agree with Mr Small that the narrow question raised by the applicants can be properly addressed by the trial court.

Whether the applicants have met the test for judicial review

[85] The test for leave to apply for judicial review is that stated by the Privy Council in **Sharma**. The test is well known. It is found at paragraph 14 (4) in the joint judgment of Lord Bingham and Lord Walker:

> *(4) The ordinary rule now is that the court will refuse leave 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; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:*
>
> *'... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*
>
> *It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to*

> *issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733.*

[86] There is the test. This court has given very careful consideration to the applicants' case, the evidence in support, the Commission's evidence and submissions. The court has also examined all the authorities cited by the parties and the court has also examined another cases not cited by the parties.

[87] According to the applicants 'because the documents and reports were referred to and relied upon in The (sic) Commissioner's Report (sic) they formed the opinion that it was **fair and just** that the documents be served on them' (bold and underlining in original) (para 10 of written submissions). This way of putting the argument raises a direct challenge to the Commission's policy that it never makes disclosure until the matter is before the court. Is that policy fair in every case? That question cannot be adequately answered in the criminal process.

[88] Kennedy LJ noted that in **Ex parte Lee** that one reason for the defendant needing early disclosure is to enable him to decide whether he should make an abuse of process application. We do not know whether Mr Lee made a subsequent application on the ground of abuse of process. What the case does show is that it is legitimate to challenge a disclosure policy even if one of the purposes is to facilitate an abuse of process application.

[89] The applicants have satisfied the test. They are raised an arguable case with a real prospect of success and there are no discretionary bars.

Disposition

[90] The applicants do not need to apply for the declarations. However, if the court is wrong in that then the applicants have met the test and leave is granted to apply for the declarations and the other orders sought. The applicants have fourteen days from the date of this judgment to file their claim form.

[91] The court also orders by way of an injunction that the Commission, its servants, employees, agents or anyone acting or purporting to act on its behalf or by themselves is restrained from taking any steps or further steps to give effect to or implement the recommendation to have Everton Tabannah and Worrell Latchman charged with any offence whatsoever arising from the Commission's investigations into the death of Donald Chin including but not limited to the offences identified in the recommendation until the judicial review proceedings are heard and determined in the Supreme Court. Costs of this application to the applicants.

[92] Leave to appeal is granted. The applicants are reminded that they still need to comply with the fourteen day deadline despite the fact that leave to appeal has been granted. The leave to appeal does not stop the judicial review clock when it comes to filing the claim form.