



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. SU2020CV02416**

IN THE MATTER OF an application for
leave Administrative Orders

AND

IN THE MATTER OF Section 54(3)(b)
and 54(5) of the Integrity Commission
Act

BETWEEN DR. ANDREW WHEATLEY CLAIMANT

AND INTEGRITY COMMISSION RESPONDENT

IN CHAMBERS

Mr. Chuwuekema Cameron and Mrs. Carolyn Reid Cameron Q.C. for the Applicant

Mrs. Jacqueline Samuels Brown Q.C., Mr. Lorenzo Eccleston for the Respondent

HEARD on 31st July 2020

Application for leave to apply for judicial review—whether recommendations are amenable to judicial review- administrative orders

CORAM: GEORGE, J.

Extent and context of the application

[1] This is an application for leave to apply for judicial review which was initiated by the filing of a Notice of Application for Court Orders on the 7th day of July 2020. This application is supported by an affidavit of the Applicant filed on the same

date. The Applicant has sought leave to apply for judicial review on two general grounds, which are as follows:

- (a) “to review the lawfulness and fairness of the conclusions about the Applicant and recommendations of the Respondent made on or around October 2019 in the Integrity Commission Special Report of Investigation conducted into certain allegations...” and;
- (b) “to review the decision of the Respondent to recommend that the Applicant be prosecuted for perjury...”

[2] The Respondent is opposed to the application and has accordingly filed two affidavits in response to the Applicant’s affidavit. These affidavits were filed on the 24th July 2020 and the 30th July 2020 and were sworn to by Sashein Wright-Chin, the Chief Investigator in the Investigation Division of the Respondent.

[3] The Applicant’s contention is that by virtue of the conclusions, recommendations and findings of the Respondent’s Director of Investigations, *“the Applicant’s reputation has been brought into disrepute and he is now facing the possibility of a criminal prosecution as a result of the perverse and irrational conclusions made by the Director of Investigation.”* Consequent on this, the Applicant avers that *“where a report calls a person’s reputation into question in a direct way, both that person and the public generally have an interest in ensuring that any criticism is made upon a proper legal basis. It would be contrary to the public interest if the Courts were not prepared to protect the right to reputation in such a context.”*

[4] The Respondent’s resistance to the application for judicial review is founded on the view that the application is premature given that the recommendation of the Director of Investigation has not been acted upon. In any event, it is advanced, that even if the recommendation to refer the Applicant in relation to a possible charge of perjury is acted upon and criminal proceedings are instituted against the

Applicant, the Applicant's grouse can be sufficiently addressed in those proceedings

Background to the Proceedings

- [5] The Applicant was at the material time the Minister of Science, Energy and Technology of Jamaica. Petrojam Limited fell under the purview of this Ministry.
- [6] Sometime in or around May 2018 there were "allegations of concerning acts of impropriety and/or irregularity, conflict of interest, corruption, nepotism, cronyism and favouritism at Petrojam Limited" (see report of Integrity Commission page 4).
- [7] As a result of this an investigation was instituted by the Respondent through its Director of Investigation. The findings of that investigation are contained in report dated October 2019.
- [8] The Applicant is displeased with a number of the conclusions arrived at by the Respondent's Director of Investigation and as such instituted these proceedings seeking judicial review of those conclusions

Law and Analysis

- [9] Section 6(3)(a) of the Integrity Commission Act provides that:

"In the exercise of its powers and performance of its functions under this Act, the Commission, shall not be subject to the direction or control of any other person or authority other than the Court by way of judicial review"

- [10] By Rule 56 of the Civil Procedure Rules, judicial review is available to "any person, group or body which has sufficient interest in the subject matter of the application" (see Rule 56.2(1)). This includes "any person who has been adversely affected by the decision which is the subject of the application" (Rule 56.2(2)(a)). Cases such as **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 ALL ER 935 19, explores the issue of 'sufficient interest'. The Court need not be detained by questions of whether the Applicant has 'sufficient interest' or

whether or not he should be considered to have the requisite locus standi, as there is no dispute in this regard between the Applicant and the Respondent. “The Respondent takes no issue with whether the Applicant has locus standi; being a person who has sufficient interest in the subject matter of this application or, as claimed by him, to be adversely affected by a “decision” which is the subject of this Application.” **(para. 20 Respondent’s written submissions).**

Arguable Ground with a Realistic prospect of success

[11] It being accepted that the Applicant is a suitable person to seek judicial review, the consideration for the Court is whether he has shown an arguable ground with a realistic prospect of success. Before undertaking such a determination, it is of some utility to set out in full the orders which the Applicant intends to pursue should leave for judicial review be granted. The Applicant has sought to challenge not only the conclusions arrived at by the Respondent but also recommendations made by it. Specifically, the Applicant has sought the following:

- 1 To review the lawfulness and fairness of conclusions about the Applicant and recommendations of the Respondent made on or around October 2019 in the Integrity Commission Special Report of Investigation conducted into certain allegations. In particular conclusions that:
 - a. Dr. Wheatley was less than truthful and dishonest in his representation to the Director of Investigation when he described Sophia Deer as his former technical assistant,
 - b. Dr. Wheatley’s representation that he divested all matters pertaining to donations within his constituency to the late Councillor Palmer was insincere.

The suggestion that strategic placement of certain individuals in key positions at Petrojam Limited served as a corruption enabling mechanism

- c. An order of Mandamus requiring the Director of Investigation to recommend to the Commission to publicly exonerate Dr. Andrew Wheatley of allegations concerning acts of impropriety and nepotism.
 - d. An order of Certiorari quashing adverse conclusions, recommendations and findings made against the Applicant that were not grounded in fact nor law.
 - e. A Declaration that the adverse findings and recommendations and criticisms made of the Applicant in the report were invalid to the extent that they were founded on invalid findings of fact
 - f. A Declaration that where a Commission calls a person's reputation into question in a direct way, any criticism which is made must be made upon a proper legal basis.
 - g. A Declaration that where a Commission makes a finding, in the exercise of an investigative jurisdiction, the Commission must base its decision upon evidence that has some probative value.
 - h. A Declaration that the Applicant had a legitimate expectation that the Respondent would have conducted the investigation in a manner which achieves transparency, accountability, and fairness.
2. To review the decision of the Respondent to recommend that the Applicant be prosecuted for perjury and in particular, the Applicant will seek the following Administrative Orders:
- a. An order of Certiorari to quash the decision of the Director of Investigations to refer the issue of the representations made by the Applicant concerning Ms. Sophia Deer to the Director of Corruption Prosecution.

- b. An order of Mandamus compelling the Director of Investigation to recommend to the Commission to publicly exonerate the Applicant of the offence of perjury that he was accused of.
- c. A Declaration that the Director of Investigation has not established through the evidence presented that there are reasonable grounds for suspecting that the Applicant made a false statement when he stated that Ms. Deer was his former Technical Assistant.
- d. A Declaration that the statement made by the Applicant to wit; that Ms. Deer was his former Technical Assistant, was truthful as evidenced by the employment contract of Sophia Deer dated March 15, 2020
- e. A Declaration that the decision of the Respondent to refer the report to the Director of Corruption Prosecution was ultra vires and irrational.

[12] As stated earlier, the Court's first consideration must be whether the Applicant has satisfied the threshold which must be attained before leave is granted. The Privy Council in its decision in **Sharma v Antoine and others** [2006] UKPC 57 explained the threshold thus; *"the ordinary rule 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."*

[13] It is the Respondent's submission that the Applicant has not disclosed any arguable ground with a reasonable prospect for success on an application for judicial review. They premise this on a central proposition that the recommendations in the report were not decisions and therefore not subject to judicial review. The Applicant's contend that 'an alleged error of law made by a commission of investigation in its report which materially affects a matter of substance relating to a finding is in general reviewable by Court proceedings. The reason for exercising that power of review is stronger where that error damages

the reputation of any person directly concerned in the investigation.” (para 26). They also contend that the nature of the recommendations and findings were such, that in the circumstances, made them amenable to judicial review. The Applicant is required in the context of this particular Application, to show that the findings and recommendations in the report are reviewable. If they are not reviewable, then clearly, he will not satisfy this Court that he has an arguable ground with a reasonable prospect of success.

- [14] In relation to the contention of the Respondent, the Court in **Dale Austin v The Solicitor General of Jamaica and The Permanent Secretary of the Ministry of Justice** [2018] JMSC Civ. 1 is authority for contrary position. In this case it was confirmed that some recommendations are susceptible to judicial review. Based on the dicta in that authority it is evident that whether a recommendation is amenable to judicial review is dependent on the “*type of recommendation and its status in the decision making process.*” **Thus in Dale Austin v The Solicitor General & Anor,** the Court undertook a distinguishing exercise between the circumstances in that case and those which existed in the case of **Deborah Patrick-Gardner v Mendez and another** [2016] JMSC Civ. 121. The Court found that the recommendation in the latter case was subject to judicial review as it had “*great weight and significance because it will be followed unless there is some unusual development. Thus in a sense the recommendation in that context is tantamount to the decision.*” Clearly therefore, although no final decision is made, if the circumstances surrounding a recommendation are such that it will inevitably be followed as it would be ‘tantamount to a decision’, then such a recommendation is equivalent to a decision and hence may be judicially reviewed. Sykes J.A (as he was then) “agreed with Mr Foster QC’s submission that in the present case the recommendation from the Solicitor General did not affect any rights of Mr Austin. It was some distance away from and therefore not proximate enough to any final decision that may have been made. This stands in sharp contrast with Mrs Patrick-Gardner who stood to be separated from her job based on the recommendation which would be the final decision unless it was deflected.”

- [15] Of importance, as well, is the case of **Office of Utilities Regulation v Contractor General**. In this decision reliance was placed on the view of authors Auburn, Moffett and Sharland in the text **Judicial Review and Principles** that: “*the courts regularly entertain claims for judicial review of matters that do not directly affect an individual or alter an individual’s legal rights or obligations, such as policies and guidance. They also entertained claims for judicial review of non-binding recommendations and advice, and of reports that determine the facts of a matter but which do not have direct legal consequence.*” The Court whilst not rejecting this position was of the view that “*in each of the cases where judicial review was permitted some practical consequence which negatively altered the rights of the applicant flowed from the recommendation or guidance which was challenged.*” It therefore follows from all of the above that (1) recommendations are reviewable in certain circumstances such as where the decision will very likely be followed, as for example, where it is merely ‘rubber stamped’ and (ii) where there is a breach of a legitimate expectation or some negative alteration of the rights of the Applicant as a result of the recommendations being challenged.
- [16] Thus given the totality of the foregoing, it would appear that the consideration of the Court ought to be whether the (i) the recommendations/conclusions or findings can be considered to be tantamount to decisions and (ii) whether findings of the Respondent have negatively affected the rights of the Applicant or has breached some legitimate expectation. It is with these considerations in mind that the Court has to assess whether this is an appropriate case for the granting of leave to apply for judicial review.
- [17] A relevant backdrop to this process is the quote below by the Learned Mangatal J in **Hon. Shirley Tyndall, O.J, and others v Hon. Justice Boyd Carey (ret’d) and others** Claim No. 2010 HCV00474. In applying the principle postulated in **Sharma** (supra) Her Ladyship stated that “*it is to be noted that an arguable ground with a realistic prospect of success, is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground*

with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success.”

- [18] This an appropriate juncture to state that this Court’s consideration will be centred around whether the orders of mandamus and certiorari which are being sought have a realistic prospect of success. The Court will not undertake an assessment in respect of the declarations which the Applicant intends to seek. This approach is consistent with that taken in **Office of Utilities Regulation v Contractor General** (supra), where it was considered whether an Applicant needed to seek leave to apply for the administrative order of a declaration. In referencing an earlier decision of the Supreme Court in **Audrey Bernard Kilbourne v The Board of Management of Maldon Primary School** [2015] JMSC Civ 170 it was held at paragraphs 86-90 as follows:

“86 ...there is no need for leave to be applied for in respect of “public law” declarations. I go further... Not only is there no need, there is no basis on which the court can properly consider the question of leave in relation to declarations.

- [19] Rule 56.3(a) indicates that certiorari is granted for quashing unlawful acts meanwhile by virtue of Rule 56.3(c) an order of mandamus requires the performance of a public duty, including a duty to make a decision or determination.

Proceeding on the premise of the foregoing, the issue to be resolved by the Court is whether in respect of the orders of mandamus and certiorari the Applicant has an arguable ground with a realistic prospect of success. **An order of Mandamus requiring the Director of Investigation to recommend to the Commission to publicly exonerate Dr. Andrew Wheatley of allegations concerning acts of impropriety and nepotism**

An order of Certiorari quashing adverse conclusions, recommendations and findings made against the Applicant that were not grounded in fact nor law.

- [20] The Applicant has grounded its pursuit of these orders on the basis that the Respondent was unfair and acted unlawfully when it concluded that:
- a. Dr. Wheatley was less than truthful and was dishonest in his representation to the Director of Investigation when he described Sophia Deer as his former technical assistant
 - b. Dr. Wheatley's representation that he divested all matters pertaining to donations within his constituency to the late Councillor Palmer was insincere.
 - c. The suggestion that the strategic placement of certain individuals in key positions at Petrojam Limited served as a corruption enabling mechanism.

Impugned Recommendations & Findings

- [21] (i) Dr. Wheatley was less than truthful and was dishonest in his representation to the Director of Investigation when he described Sophia Deer as his former technical assistant.

The Director of Investigation recommends that this Report be referred to the Director of Corruption Prosecution pursuant to Section 54 (3) (b) of the Integrity Commission Act in relation to whether Dr. Andrew Wheatley, MP, was dishonest in his representations concerning Ms. Sophia Deer and whether he sought to mislead and did mislead the Director of Investigation contrary to Section 48 (3) of the Integrity Commission Act, Section 1 IE of the Commission of Enquiry Act and Section 4 of the Perjury Act.

- [22] It is the contention of the Applicant that the Director of Investigation had no reasonable grounds as required by section 54(3) of the Act to refer the report to

the Director of Corruption Prosecution in relation to the description of the relationship of Ms. Deer to the Applicant. He argues that In the absence of reasonable grounds, this was irrational and ultra vires. The Respondent argues that this recommendation that the matter be referred to the Director of Corruption Prosecution is not final. This court agrees.

- [23] Unlike the case of **Deborah Patrick-Gardner v Mendez and another (supra)**, this recommendation is not tantamount to a decision and there is no evidence that it is likely to be followed. In fact, section 54 (3) gives the Director of Corruption Prosecution a discretion to do as he deems appropriate. As submitted by the Respondent “The recommendation by the Director of Investigation that the Report be referred to the Director of Corruption Prosecution has not crystallized into a decision by the Commission and there has been no initiation of criminal proceedings.” It is clear also that this application may be considered premature due to the lack of finality to the recommendation. See **R (on the application of Verna Wilson and Others v Coventry City Council** [2008] EWHC 2300, (a case cited by the Respondent). This recommendation is therefore not reviewable.
- [24] In any event, even if this recommendation amounted to a decision, in that it had some finality, Judicial Review would in all likelihood be an inappropriate method for its challenge. A decision to prosecute is rarely reviewable. **S v Crown Prosecution Service** [2015] EWHC 2868 (Admin) [2016], 1 WLR 804). The proper course for the airing of any grouse, if the recommendation is followed, lies in the criminal arena and any contest to the allegations or any charge(s) laid. A decision to prosecute leaves a defendant in criminal proceedings, free to challenge the prosecution's case in the usual way through the criminal court, arguing that there is no case to answer or that the decision to prosecute is an abuse of process.
- [25] Additionally, the Court finds little merit in the Applicant’s contention that there is no basis either in fact or law for the Director of Investigation’s conclusion, that the Applicant was ‘less than truthful’ and ‘dishonest’ in his representation to the Director of Investigation when he described Sophia Deer as his former technical

assistant. While the Court makes no pronouncement on whether or not the Applicant was in fact truthful, the term “less than truthful” does not connote complete deceit but rather that there was not complete forthrightness by the Applicant. This is especially so when one considers that the question to the Applicant was framed in this way: “I am going to ask you now Dr. Wheatley some specific names and it is for you to indicate whether you have any relationship or affiliation and **any other relationship** (emphasis supplied) with any of the following persons.... Sophia Deer?” The “any other relationship” aspect of that question paints a picture of seeking disclosure of every type of relationship that the Applicant has with the persons he was being asked about. Hence, his response which limited his relationship with Ms. Deer to a professional context cannot without more be said to have been entirely forthright. Additionally, the Applicant was aware prior to going to the interview that the investigation was looking into, inter alia, matters such as nepotism and cronyism and so had every opportunity to disclose that not only was Ms Deer his technical assistant but that she was also the mother of his brother’s child. Consequently, the Court is not of the view that in respect of the order of certiorari that this is an arguable ground with a realistic prospect of success.

- [26] (ii) Dr Wheatley’s representation that he divested all matters pertaining to donations within his constituency to the late Councillor Palmer was insincere.

The Director of Investigation in paragraph 9 of the conclusions of the Report concluded that:

- a. *The Director of Investigation notes **the statements provided by Dr. Andrew Wheatley, Mr. Lionel Myrie, and Mr. Oswald Williams, regarding the alleged key involvement of the late Councillor Owen Palmer and questions the sincerity of the representations.** The Director of Investigation makes its conclusion on the basis that Mr. Owen Palmer is deceased and as a result the Director of Investigation is unable to corroborate the following:*

- ii) *The representation by Dr. Wheatley that he had divested all matters pertaining to donations within his constituency to the late Councillor Palmer;*
- iii) *The representation by Mr. Lionel Myrie that the late Councillor Palmer instructed him to forward emails requesting donations from Petrojam Limited on behalf of Homestead Citizens for Action Benevolent Society; and*
- iv) *The representation by Mr. Oswald Williams that the late Councillor Palmer verbally contracted him to construct the classrooms at the Homestead Primary School;*

[27] The Applicant submitted that “The Respondent without providing a reason rejected the evidence of witnesses that tended to support the assertion of the Applicant “that (the Respondent) had divested all matters pertaining to donations within his constituency to the late Councillor Palmer;”. In rejecting this corroborating and unchallenged evidence the Director of Investigations maliciously and irrationally concluded that the Applicant was insincere or in other words not being truthful.” However, a close reading of paragraph 9, indicates that the Director of Investigations did not say the representations were false or insincere. The Director said, he ‘questioned the sincerity’ of the statements. In other words, he is unsure as to whether they are true or not. It is true that the Director premised this on the absence of Mr. Palmer, he being dead. The context of this being that he was alleged to have been responsible for certain questionable activities, but being dead he was unavailable for the purpose of corroboration. The other witnesses do not strictly corroborate the Applicant. It is always open to a decision maker to desire corroboration, if he is unsure as to the credibility of a particular witness. It would have been desirable for the Director to state reasons as to why he questioned the sincerity of the statement made by the Applicant that he had divested dealings pertaining to donations to Mr. Palmer. However, I do not believe that this has injured the Applicant, as this conclusion does not negatively alter any of his rights

or breach any legitimate expectation. It does not injure his reputation as it does not assert that he was untruthful. It is in fact the Applicant's contention in his Notice of Application that "an alleged error of law made by a commission of investigation in its report **which materially affects a matter of substance relating to a finding is in general reviewable by Court proceedings**. The reason for exercising that power of review is stronger where that error damages the reputation of any person directly concerned in the investigation." I agree with this position. The Applicant has not shown that in relation to this particular heading, he has a realistic prospect of success.

(111) The suggestion that the strategic placement of certain individuals in key positions at Petrojam Limited served as a corruption enabling mechanism

Paragraph 8 of the conclusions of the report is as follows: "Based on the documentary evidence provided herein, the Director of Investigation questions whether the strategic placement of certain individuals in key positions at Petrojam Limited served as corruption enabling mechanisms.

- a. The strategic placement of certain individuals is evidenced by the appointment of Dr. Perceval Bahado-Singh and Mr. Richard Creary to the Board of Petrojam Limited. Dr. Bahado-Singh and Mr. Creary thereafter interviewed Mr. Floyd Grindley for the position as General Manager, Petrojam Limited, a post to which he was selected as the successful candidate. Mr. Floyd Grindley, after being appointed as the General Manager of Petrojam Limited, was a part of the three (3) member interview panel which recruited Mrs. Yolande Ramharrack as the Human Resource Development and Administration Manager, the position that oversees the grant of donations by the entity as well as the recruitment of staff

The Director of investigations has recommended referral to the police in relation to allegations of fraud and to the Financial Investigation Division in relation to some of the donations. He has made findings as to the depletion of Petrojam's budget for that financial year and the exponential increase in donations. He has outlined in his report the relationship between certain individuals, the positions they hold and possible conflict of interests that exists. It is in this context that he questioned 'whether the strategic placement of certain individuals in key positions at Petrojam Limited served as corruption enabling mechanisms'. This consisted of no decision or finding; nor does it without more, affect or injure the Applicant. This is too, has no realistic prospect of success...

[28] The failure of the Director of Investigations to recommend exoneration of the Applicant. By section 54(5) of the Act:

(5) Where the Director of Investigation finds that the matter which gave rise to the investigation does not constitute an act of corruption or any wrongdoing, he SHALL recommend to the Commission that the person who was the subject matter of the investigation be publicly exonerated of culpability, in such manner as the Commission deems fit, and the Commission may do so, unless the person concerned has requested the Commission in writing not to do so

[29] The applicant contends that such a recommendation should have been made and seeks judicial review of the decision not to have done so. It is clear that bearing in mind the terms of reference and the conclusions and recommendations, the Director of Investigations was under no compunction to refer the matter for the Applicant to be publicly exonerated. The section refers to where no 'corruption' or 'wrong doing'. Furthermore, the mandate of the Director of Investigations, includes investigating matters of wrong doing. The Director would not have been in a position to recommend that the Applicant be exonerated in circumstances where, he has referred the Applicant to the Director of Corruptions Prosecutions with a recommendation for the Applicant to be charged with perjury, in circumstances

where he believed that he was less than truthful; where he questions the Applicant's sincerity, in relation to statements made by him that he had divested dealings pertaining to donations to the now deceased, Mr, Palmer. To recommend exoneration would fly in the face of logic. The question of exoneration as to 'impropriety' is clearly addressed by the foregoing statements. In relation to the issue of nepotism, none was found. However, this by itself is insufficient for an exoneration as the Act speaks of any wrong doing. There is no realistic prospect of this ground succeeding.

Delay

- [30] Though an extension of time within which to apply for leave for judicial review, was included in the orders sought by the Applicant, it appears that it was included ex abundanti cautela. The Court has noted that the date endorsed on the report is October 2019. It would therefore appear that the recommendations and findings which are being challenged by the Applicant were made in October 2019, thus, any application for judicial review by virtue of Rule 56.6(1) ought to have been made within three months from the date when the grounds first arose
- [31] The Court however, takes notice of the fact that exhibited to the first affidavit of Sashein Wright-Chin is letter dated June 30, 2020 and addressed to the Speaker of the House of Representatives and the President of the Senate, by virtue of which the Report was submitted to Parliament, in pursuance of section 54(4) of the **Integrity Commission Act**. The letter and attachment was submitted to the Clerk of the Houses. Consequent on this, it is apparent that though the grounds first arose in October 2019, until the report was submitted to the Clerk of Houses, it remained an internal document of the Respondent. Accordingly, it cannot be envisioned that the Applicant would have been aware of the report or its contents prior to it being submitted to the Clerk of House of Parliament, of which he is a member. Note ably, the application was filed on July 07, 2020 some seven days after the Applicant could have reasonably ascertained the contents of the report.

Furthermore, there has been no contention by the Respondent that the application is barred because of delay.

[32] Consequently, the Court finds that in accordance with Rule 56.6(2) there is good reason to extend the time within which the Applicant is able to apply for leave to apply for judicial review.

Disposition

[33] Application for leave to seek judicial review denied;

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

[35] No order as to costs.