

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2023/0025

BETWEEN:

ALLEN CHASTANET

Applicant

and

[1] COMPTROLLER OF CUSTOMS

[2] PAUL NOEL

Respondents

Before:

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Garth Patterson KC with him, Ms. Tanya Alexis-Francis and Mr. Mark Maragh
for the Applicant

Mr. Anthony Astaphan SC with him, Mr. Seryozha Cenac for the Respondents

2024: October 16;
November 26.

Application for conditional leave to appeal to the Caribbean Court of Justice – Section 108(1)(c) of the Constitution of Saint Lucia – Appeal as of right – Whether leave to appeal ought to be granted as of right to the CCJ – Application test - Whether decision sought to be appealed is a final decision - Section 108(2)(a) of the Constitution – Great general or public importance or otherwise – Whether the intended appeal raises questions of great general or public importance or otherwise ought to be submitted to the CCJ for determination

By notice of application filed 17th May 2024, the applicant sought leave to appeal the decision of the Court of Appeal dated 17th April 2024 (the “COA Judgment”) to the Caribbean Court of Justice (the “CCJ”) pursuant to section 108(1)(c) and (2)(a) of the Constitution of Saint Lucia (the “Constitution”). By the COA Judgment, the Court dismissed the applicant’s appeal

against the High Court's decision refusing the applicant's application for leave to commence judicial review proceedings against the respondents. The decision sought to be challenged by the applicant by way of judicial review proceedings concerned the exercise of prosecutorial discretion by the First Respondent, the Comptroller of Customs, in discontinuing certain criminal charges against Dr. Hilaire instituted by the previous comptroller of customs in the Magistrate's Court under section 119 of the Customs (Control and Management) Act (the "Act").

The applicant contended that his proposed appeal to the CCJ lay as of right pursuant to section 108(1)(c) on the Constitution as the decision of the Court of Appeal was a 'final' decision in civil proceedings concerning the interpretation of certain provisions of the Constitution thereby entitling him to appeal as of right to the CCJ. The applicant contended that as a matter of construction, relevant case law, and the application test as confirmed by the Judicial Committee of the Privy Council in *Chhina v Ismail and another*, the COA Judgment is a final decision. The applicant also contended that, in determining whether a decision sought to be appealed to the CCJ was a 'final' one, the application test ought not to be applied to the underlying decision of the High Court from which the appeal arose, but to the decision of the Court of Appeal sought to be appealed to the CCJ. The applicant argued that in applying the application test to the COA Judgment in the instant matter, whichever way the decision went, it would have finally determined the appeal before the Court of Appeal on the issue of whether the application for leave to commence judicial review proceedings before the High Court had been correctly refused by the judge, and it was thus a final decision giving rise to an appeal as of right to the CCJ under section 108(1)(c) of the Constitution.

The respondents countered that the proceedings before the High Court and the appeal to the Court of Appeal, are both concerned with the refusal by the judge below to grant leave to commence judicial review proceedings against the Comptroller of Customs. Had the judge below or the Court of Appeal granted leave to apply for judicial review, the substantive matter in dispute would have had to go to trial for final determination of the issues between the parties. Thus, in applying the application test, the decision of the Court of Appeal was not a final decision, but a decision in an appeal against an interlocutory order made by the judge below and, accordingly, the applicant's appeal did not lie as of right to the CCJ.

On the second ground of the application, the applicant contended that the proposed appeal to the CCJ raises several questions as to the interpretation of the Constitution and which are of great general or public importance within the meaning of those terms in section 108(2)(a) of the Constitution. These include, but are not limited to, questions concerning the exercise of prosecutorial discretion by the Comptroller of Customs, and the interaction of such discretion with the requirement for the grant of leave to commence judicial review proceedings under Part 56 of the Civil Procedure Rules 2000 ("CPR 2000") and the powers of the Director of Public Prosecutions (the "DPP") under section 71 of the Constitution to take over and to continue prosecutions commenced by certain functionaries or statutory bodies under applicable statutory provisions. The respondents objected to this ground on the basis that the questions and issues identified by the applicant as concerning the interpretation of the Constitution and/or being of great general or public importance, were

either not issues concerning the interpretation of the Constitution nor were they serious legal questions or issues which rose to the level of being of great general or public importance.

Held: granting the application for conditional leave to appeal to the CCJ under section 108(2)(a) of the Constitution and making the orders at paragraph 59 of this judgment, that:

1. Section 108(1)(c) provides for appeals as of right from decisions of the Court of Appeal to the CCJ. To qualify as an appeal as of right, the decision of the Court of Appeal sought to be appealed must be a 'final' decision in a civil or criminal matter. In the instant matter, the decision of the High Court refusing the application to commence judicial review proceedings was clearly interlocutory, as it concerned an application under Part 56.3 of CPR 2000 for leave to commence judicial review proceedings. It is not a substantive claim or proceeding to decide upon the merits of a claim for judicial review under rule 56.7 of the CPR 2000. It did not determine and could not have been determinative of the underlying merits of the dispute or judicial review claim. The said application below dealt with the question of whether the applicant had met the threshold test for the grant of permission to commence judicial review proceedings and to have the merits of that claim determined after a full hearing of the matter. Likewise, what was before the Court of Appeal was an appeal from the refusal of the decision of the lower court on the said interlocutory application. Applying the application test, the COA Judgment was not determinative of the merits of the substantive dispute between the parties. The decision of the Court of Appeal was a decision from an interlocutory judgment, which, if it had been decided in favour of the applicant, would have resulted in leave being granted for the substantive issues to be heard and determined by the lower court. This matter was therefore distinguishable from the issues which arose in decisions of the Judicial Committee in such cases as *Chhina v Ismail and another*, *Jacpot Ltd v Gambling Regulatory Authority* and *Meyer v Baynes*. Consequently, the COA Judgment was an interlocutory decision, and not a final decision giving rise to the applicant having an appeal as of right to the CCJ under section 108(1)(c) of the Constitution.

Wycliffe H. Baird v David Goldgar et al SKBHC VAP2019/0038 (delivered 15th April 2024, unreported) distinguished; **Meyer v Baynes** [2019] UKPC 3 distinguished; **Chhina v Ismail and another** [2024] 1 WLR 2459 distinguished; **Jacpot Ltd v Gambling Regulatory Authority** [2018] UKPC 16 distinguished.

2. The phrase 'great general or public importance' in section 108(2)(a) of the Constitution refers to serious issues of law, a constitutional provision that has not been settled, an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public. Thus, leave to appeal should not be granted where, upon a proper analysis, there is no genuine dispute or uncertainty as to the applicable principles of law or as to the correct interpretation of an applicable constitutional or statutory provision. In such circumstances, a question of great general or public importance does not ordinarily arise, and the application ought to be refused by the Court of Appeal. Furthermore, where the real question on the proposed appeal concerns the way the Court of Appeal has applied settled law or

principles to the particular facts of the case, or whether the lower court's judicial discretion was properly exercised when applying such settled and clear principles, leave to appeal would not ordinarily be granted.

Renaissance Ventures Ltd et al v Comodo Holdings Ltd BVIHCP2018/0005 and BVIHCP2018/0008 (delivered 8th October 2018, unreported) followed; **Siddiqui and others v Athene Holding Ltd** (2019) 95 WIR 342 considered; **Matalulu v DPP** [2003] 4 LRC 712 considered; **The Landings Proprietors Unit Plan No. 2 of 2007 v The Development Control Authority et al** SLUHCVP2019/0019 (delivered 6th October 2023, unreported) followed; **Martinus Francois v The Attorney General** Saint Lucia Civil Appeal No. 37 of 2003 (delivered 7th June 2004, unreported) followed; **Emmerson International Corporation v Viktor Vekselberg et al** BVIHCP2019/0020 (delivered 27th July 2023, unreported) followed.

3. In the instant matter, the proposed appeal and the decision of the Court of Appeal raised several serious legal and constitutional issues which have not had, but which could benefit from, the highest judicial pronouncement. It is not correct to say that the matter purely concerned whether the evidence adduced by the applicant in support of his application to the High Court for leave to commence judicial review proceedings met the threshold of an arguable case with some realistic prospect of success, or to say that the appeal was purely a challenge to the way in which the judge below exercised the discretion in determining the said application. While these were all important issues, interconnected with them were several serious issues of law or of mixed law and fact relevant to the determination of the said application and to the appeal itself. Examples of these issues included: the correctness in holding that the power of discontinuance can be implied under section 119 of the Act by virtue of the provisions of the Interpretation Act and/or the proviso to section 73(4) of the Constitution; the legal standard applicable to a review by the courts of the exercise of prosecutorial discretion by statutory functionaries such as the Comptroller of Customs, and whether such reviews ought to be circumscribed in the same way and to the same standard applicable to a review of such powers imbued in the constitutional office of the DPP; whether the Court of Appeal was wrong in concluding, as did the judge below, that, on the evidence the DPP had not taken over the prosecution of Dr. Hilaire; and whether it was not at least arguable that the DPP had taken over, in exercise of his constitutional powers, the prosecution of Dr. Hilaire, such that any exercise of such power, to the extent that it was or had been reposed in the Comptroller, had been completely foreclosed in relation to the said charges and prosecution, including any power to discontinue or to withdraw the charges. These are all issues of great general or public importance which ought to be submitted to the CCJ for its consideration and determination as to the correctness of the decision of the Court of Appeal. Consequently, the applicant has met the requirement for the grant of leave to appeal to the CCJ under section 108(2)(a) of the Constitution. Accordingly, it was unnecessary for the Court to go on to consider the 'or otherwise' limb of section 108(2)(a).

JUDGMENT

- [1] **FARARA JA [AG.]:** By notice of application filed 17th May 2024, Mr. Allen Chastanet (the “applicant”) applied pursuant to section 108(1)(c) and (2)(a) of the **Constitution of Saint Lucia**¹ (the “**Constitution**”) for leave to appeal to the Caribbean Court of Justice (“the CCJ”) against the decision of the Court of Appeal dated 17th April 2024. By the said judgment, this Court dismissed the applicant’s appeal against the decision of the High Court made on 18th August 2023 refusing the applicant’s Part 56 application for leave to commence judicial review proceedings against the respondents (“the Part 56 application”). By the Part 56 application (which, incidentally, was brought under the now repealed and replaced **Civil Procedure Rules 2000** (“**CPR 2000**”)), the applicant sought permission to apply for judicial review of the respondents’ decision to discontinue the prosecution of certain criminal charges against Dr. Hilaire instituted by the previous comptroller of customs in the Magistrate’s Court under section 119 of the **Customs (Control and Management) Act**² (the “**Act**”).
- [2] The applicant grounds his application for leave to appeal to the CCJ, the apex court for the State of Saint Lucia, under the provisions of section 108 of the **Constitution**. First, under section 108(1)(c), that the prospective appeal lies as of right to the CCJ as the decision of the Court of Appeal is a final decision in civil proceedings involving a question as to the interpretation of the **Constitution**. Second, under section 108(2)(a), on the basis that the prospective appeal involves questions of great general or public importance or otherwise ought to be submitted to the CCJ for its determination. To be entirely correct, this second ground under section 108(2)(a) incapsulates two grounds. The first concerns questions of great general or public importance; and the second, and separate limb, that the prospective appeal raises questions or issues of law which, while perhaps not satisfying the legal test or standard of great general or public importance, nevertheless are

¹ Chap. 1:01 of the Revised laws of Saint Lucia.

² Chap. 15:05 of the Revised laws of Saint Lucia.

sufficiently serious or novel as to justify or benefit from being submitted to the apex court for its pronouncement or determination.

- [3] The application for leave to appeal to the CCJ is stoutly resisted by the first respondent. In summary, his case in opposition to the first ground (appeal as of right), is that the decision of the Court of Appeal is, on a proper construction of section 108(1)(c) and the application of the application test, not a 'final' decision, but rather an interlocutory decision on appeal from what was clearly an interlocutory application and order of the court below, namely, the application for permission or leave to commence judicial review proceedings. As to the second and third limbs, the respondents argue that the decision of the Court of Appeal upheld the decision of the High Court judge that, on the evidence before the court, the threshold for permission to commence judicial review proceedings had not been met by the applicant. Furthermore, it is the respondents' case, that none of the questions or issues identified by the applicant in support of his application for leave under these grounds, satisfy the test of being questions of great general or public importance, nor are they serious or novel questions of law or procedure which, in the discretion of this Court, ought 'otherwise' to be submitted for the review and determination of the CCJ.

Appeal as of Right – Final or Interlocutory Decision Applicant's Case

- [4] The argument posited by the applicant in support of the contention that the decision of the Court of Appeal was a 'final' one entitling him to appeal as of right to the CCJ, rests on several cornerstones. The first, which is not in dispute, is that it is settled law that for the purposes of section 108(1)(c) the question whether a decision is final is to be determined by the application test (see **Chhina v Ismail and another**).³ The

³ [2024] 1 WLR 2459 at para. 50.

second is that an order is final if it results from an application which will finally determine the matter, and not from the terms of the order itself.⁴

- [5] The third, is that, as a matter of construction and of authoritative case law, the application test is to be applied to the decision of the Court of Appeal with respect to which leave to appeal to the CCJ is being sought, and not by reference to the underlying decision made by the High Court. Put simply, it is a central point or plank of the applicant's case under this first ground, that the application test is to be applied to the decision on the proceedings which were before the Court of Appeal, pursuant to which the order sought to be appealed was made. Thus, in determining this ground, this Court ought to confine itself when applying the application test to an assessment of whether, having regard to the nature of the application or matter before the Court of Appeal, the proceedings before the Court of Appeal would have determined that matter whichever way it was decided.
- [6] Accordingly, as this argument goes, the decision of the High Court from which the appeal stemmed is immaterial. Equally immaterial is the question of whether the decision of the Court of Appeal would have brought an end to the proceedings in the High Court. Applying the application test in this way, says the applicant, the decision of the Court of Appeal from which leave to appeal to the CCJ is being sought, was clearly a final one entitling the applicant to appeal as of right to the CCJ under section 108(1)(c) of the **Constitution**, because whichever way the decision went, it would have finally determined the appeal before the Court of Appeal on the issue of whether the application for leave to commence judicial review proceedings before the High Court had been correctly refused by the judge.
- [7] The correctness of this proposition is made out, argues the applicant, firstly upon a correct interpretation of the provisions of section 108(1)(c) itself, which clearly states

⁴ See *Salaman v Warner* [1891] 1 QB 734; *TSJ Engineering Consulting Ltd v Al-Rushaid Petroleum Investment Company et al* BVIHCVAP2010/013 (delivered 27th July 2010, unreported); and *Oliver McDonna v Benjamin Wilson Richardson Anguilla* Civil Appeal No. 3 of 2005 (delivered 29th June 2007, unreported).

that leave to appeal as of right is ‘from decisions of the Court of Appeal’, not from decisions of the lower court. This much is indisputable and uncontroversial.

[8] However, the applicant goes further. He argues that the stipulation in sub-paragraph (c) of section 108 that the decision sought to be appealed must be a ‘final’ one, must and can only be sensibly construed in the context of or in relation to the stipulation in subparagraph (1) that an appeal as of right is from a decision of the Court of Appeal. It therefore follows that it is the decision of the Court of Appeal sought to be appealed further which must be a final one when the application test is applied, such that whichever way that decision goes it would finally determine the matter before the Court of Appeal, and not by reference to the matter pending before or dealt with by the lower court or whether that matter or order was a final decision or an interlocutory one.

[9] It is the applicant’s case in support of this first ground of his application, that the decision of the Court of Appeal with respect to which leave is sought to appeal to the CCJ, is unquestionably a final one, having been dispositive of the substantive appeal itself, which the Court heard and finally determined. It was not a decision with respect to an interlocutory application such as in **Chhina v Ismail** and **Wycliffe H. Baird v David Goldgar et al.**⁵ To the contrary, that decision was determinative of the appeal itself and therefore final. In this respect, the applicant relies on the decision of the Board at paragraph 10 in **Jacpot Ltd v Gambling Regulatory Authority**⁶ on the issue of what is a ‘final’ decision. In **Jacpot**, that appeal was from the underlying order of the High Court refusing the application for leave to commence judicial review proceedings under Part 56 of the then applicable civil procedure rules. Applying the application test, the substantive appeal against the underlying order would have been finally determined whichever way the Court of Appeal had decided the appeal, bringing the appeal and the matters in dispute in it to an end. Moreover, submits the applicant, it is irrelevant that the underlying decision which was the subject of the

⁵ SKBHC VAP2019/0038 (delivered 15th April 2024, unreported).

⁶ [2018] UKPC 16.

appeal was considered to be interlocutory, and likewise, it is irrelevant that, had the appeal succeeded, leave to apply for judicial review would have been granted and the judicial review proceedings would have been commenced and continued before the High Court.

- [10] Finally, it is also the submission of the applicant in relation to the other requirements in section 108(1)(c) of the **Constitution** that the proposed appeal does raise genuinely disputable issues in civil proceedings, which involve a question or questions as to the interpretation of the **Constitution** of Saint Lucia. These questions were neatly summarised at subparagraphs (i) to (vi) of paragraph 17 of the applicant's skeleton argument. They are also repeated in relation to the second ground of great general or public importance and in relation to the third, 'or otherwise' ground. I do not intend to deal with the merits of these questions or issues under ground 1 but will treat with them when considering ground 2 (great general or public importance) and, if necessary, ground 3 (or otherwise).

Respondents' Case

- [11] As mentioned above, the respondents dispute the applicant's main contention under this first ground that the decision of the Court of Appeal dismissing the appeal from the decision of the judge in the court below dismissing the application for leave to commence judicial review proceedings, is a final decision within the meaning of that term in section 108(1)(c) of the **Constitution**. It is important to note that the respondents do not dispute, as a matter of principle, that section 108(1)(c) is concerned with leave to appeal from a decision of the Court of Appeal, or that an application for leave to appeal to the CCJ is concerned with that decision, and not with permission to appeal the underlying decision of the lower court.
- [12] It is the respondents' case on this issue, that the decision of the Court of Appeal did not finally determine the substantive dispute between the parties and its decision is therefore not a final decision. Put succinctly, it is the respondents' submission that the application for leave to appeal to the CCJ and the appeal to the Court of Appeal,

both are concerned with the refusal by the judge below to grant leave to apply for or to commence judicial review proceedings against the comptroller; and had the judge or the Court of Appeal granted leave to apply for judicial review, the substantive matter in dispute would have to go to trial for final determination of the issues between the parties. Moreover, applying the application test, the decision of the Court of Appeal is not a final decision, but a decision in an appeal against an interlocutory order made by the judge below refusing to grant the application for leave to commence judicial review proceedings. This point, in their submission, underscores the interlocutory nature of the matter both at the High Court and Court of Appeal levels, which cannot mysteriously now be transformed into a final decision leading to an appeal as of right to the CCJ.

- [13] The respondents accept (as they must) that it is the application test which is to be deployed when determining whether the decision of the Court of Appeal sought to be appealed is a final one. This is equally so for appeals to the CCJ as it is for appeals to the Judicial Committee of the Privy Council. This was confirmed by the CCJ itself in **Glenroy Cuffy and others v Melissa Skerit and others**.⁷ Reliance was also placed on the dicta of the Board in **Chhina v Ismail** at paragraph 50.
- [14] At paragraphs 17 to 20 of their skeleton arguments, the respondents set out the reasons why they submit that the applicant's contention that the decision of the Court of Appeal in this matter is final, is wrong. The first point is that their Lordships in **Chhina v Ismail** did not state that in the opinion of the Board the application test is only referable to the decision of the Court of Appeal, and is not referable to the underlying decision of the court below appealed to the Court of Appeal. In that case, the Board was clearly dealing only with a prospective appeal from an interlocutory order of the Court of Appeal made on an application before it to strike out the appeal. Consequently, the application test was obviously only referable to that decision. Secondly, and likewise, the Privy Council in **Meyer v Baynes**⁸ did not rule that the

⁷ [2022] CCJ 12 (AJ) DM.

⁸ [2019] UKPC 3.

application test was referable only to the decision of the Court of Appeal, since the Board did not address the application test at all, and the parties had accepted that the decision of the Court of Appeal was final and the threshold under the relevant provision of the Constitution had been met.

[15] Thirdly, the respondents disagree with the applicant's submission that when the application test is applied the decision of the Court of Appeal in this matter is final. The critical question, the respondents submit, is "what would have been the effect and consequence had the Court of Appeal granted the appeal? The answer is simple: the applicant would have been granted leave and the matter would have proceeded to trial."

[16] Fourthly, the respondents submit that, in any event, the proposed appeal does not raise any genuinely disputable issues involving a question as to the interpretation of the **Constitution**, as the appeal was lost on the core ground of the failure of the applicant to meet the required threshold on the evidence, and not on the legal issues. Additionally, the interpretation of the **Constitution** did not determine the substantial issues as there was no determination of those issues on the merit; and "what had determined the application for leave to commence judicial review proceedings was the evidential failure of the [applicant] by the High Court", as upheld on appeal.

[17] Finally on this ground, the respondents submit as follows:

"The effect of the judge's refusal, and decision of the Court of Appeal, was that the claim for judicial review could not be heard on its merits. On the other hand, had the learned judge granted leave, or the Court of Appeal allowed the appeal, the claim for judicial review would have had to be determined by the High Court on its merits. Consequently, the order refusing the Applicant leave to apply for judicial review, and decision of the Court of Appeal upholding the judge's ruling are both interlocutory, and are not final decisions. Therefore, the Applicant has no right of appeal under section 108(1)(c) of the Constitution."

Analysis

- [18] In my considered opinion, the applicant's main contention that the Court of Appeal's decision dismissing the applicant's appeal against the decision and order of the High Court refusing the applicant's Part 56 application for permission to commence judicial review proceedings challenging the exercise of prosecutorial discretion by the comptroller of customs to discontinue certain criminal charges brought under section 119 of the **Act** is a final decision, is wrong as a matter of principle and interpretation of the provisions of section 108(1)(c) of the **Constitution**. As such, the applicant has no entitlement to an appeal as of right to the CCJ from the decision of the Court of Appeal.
- [19] It is indisputable that section 108(1)(c) provides for the right of appeal from decisions of the Court of Appeal. To qualify as an appeal as of right, the decision of the Court of Appeal sought to be appealed must be a 'final' decision. The section does not permit appeals, whether as of right or by exercise of the Court's discretion, of interlocutory decisions of the Court of Appeal. The other requirements under this limb of section 108 for the exercise of an appeal as of right to the CCJ, is that the decision sought to be appealed must have been made in either civil or criminal proceedings which involve a question as to the interpretation of the **Constitution**. There is no issue that in the instant matter, the decision of the Court of Appeal sought to be appealed was made in civil proceedings. In addition, the respondents also dispute that the decision sought to be appealed involves a question or questions as to the interpretation of the **Constitution** of Saint Lucia. However, in deciding this first issue or ground of appeal, I will assume for these purposes that the decision of the Court of Appeal does involve a question or questions as to the interpretation of certain provisions of the **Constitution**.
- [20] Is the decision of the Court of Appeal dated 17th April 2024 a final decision giving rise to an appeal as of right to the CCJ? Having given careful consideration to the cases cited and relied on by the applicant and his submissions in relation to each of them, I am of the view that none of these decisions, as authoritative as they are, support

the applicant's central proposition that the decision of the Court of Appeal having determined the appeal was, on the basis of the application test, a final decision.

[21] The applicant finds support for his interpretation of section 108 in the recent decision of this Court in **Baird v Goldgar**. This decision concerned an application for leave to appeal as of right under the corresponding section 99 of the Federation of St. Christopher and Nevis **Constitution Order 1983** (the "**Constitution of St. Christopher and Nevis**"). The decision in that case cleared up any uncertainty which then existed in the jurisdiction as to whether the application test (as opposed to the order test) was the test to be deployed when determining whether an applicant had an appeal as of right to His Majesty in Council from a final decision of the Court of Appeal. The decision of this Court in **Baird v Goldgar** also underscored that the use of the application test for that purpose is not grounded on the codification of that test under the **CPR 2000**, since leave to appeal to His Majesty in Council is grounded exclusively on section 99 of the **Constitution of St. Christopher and Nevis**. However, any remaining doubt as to the application test being the correct test to be applied to applications for leave to appeal to His Majesty in Council, was put to rest and made immutable by the subsequent decision of the Privy Council in **Chhina v Ismail**, a decision handed down by the Board on 14th May 2024. The decision in **Baird v Goldgar** concerned the result of the application test being applied to a decision of this Court striking out the substantive appeal as an abuse of process. Not unsurprising, it was determined that the decision or order sought to be appealed to the Judicial Committee of the Privy Council was not a final decision, but an interlocutory one.

[22] In the instant matter, the applicant prays in aid the *dicta* at paragraph [34] of the judgment in **Baird v Goldgar**, as supportive of two main points. The first is that in determining whether a decision is final giving rise to an appeal as of right under the relevant provision of the **Constitution**, this Court must look solely to what was the matter or application determined by the Court of Appeal, and not what application or matter had been determined by the lower court and the subject of the appeal itself to

the Court of Appeal. The second is that, in applying the application test, the question for determination is whether the decision of the Court of Appeal sought to be appealed as of right to the Privy Council or to the CCJ, would have been determinative of the substantive matter before the Court of Appeal, whichever way it went.

- [23] At paragraph [34] in **Baird v Goldgar**, Ventose JA, giving the unanimous judgment of the Court, states:

“[34] The issue that now needs to be determined is whether the order made by the Court of Appeal is a final order. This requires a determination of whether the order of the Court of Appeal striking out the appeal for abuse of process and or want of prosecution conclusively decided the substantive rights of the parties and brought an end to the litigation. The definition of the application test accepted in **[Othniel Sylvester v Satrohan Singh]**⁹ and subsequently applied numerous times by this Court is that an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given. In applying the application test to the order of the Court of Appeal in dismissing and or striking out the appeal, the legal dispute between the parties would have not been determined. The appeal would have remained extant, and the proceedings continued to enable a final determination by this Court of the legal dispute between the parties.”

- [24] The applicant also placed heavy reliance on the dicta of Lord Kitchin at paragraph [21] of the opinion of the Board in **Meyer**. In dealing with the issue of whether the Court of Appeal was wrong in holding that there was no appeal as of right when refusing the application for leave to appeal to the Privy Council, Lord Kitchin states:

“[21] It will be appreciated that the second issue cannot affect the outcome of this appeal. Nevertheless, it raises a question of some importance and the parties have asked the Board to address it. Section 122(1) of the Constitution Order provides that an appeal shall lie to the Judicial Committee of the Privy Council as of right against final decisions in cases such as the present which involve a claim concerning a right which had a value in excess of a prescribed threshold. Both parties accept that the decision of the Court of Appeal was final and that the threshold requirement was met. The question, therefore, is whether the Court of Appeal has retained any control over a further appeal.”

⁹ Saint Vincent and the Grenadines Civil Appeal No. 10 of 1992 (delivered 18th September 1995, unreported).

[25] It is obvious from paragraph [21], that the issue of whether the decision of the Court of Appeal in **Meyer** was a 'final' one was not actually determined by the Board, it having been accepted by both sides that it was final, and that the prescribed threshold in section 122(1) of the **Antigua and Barbuda Constitution Order 1981** had been met. The Board in its decision did not embark upon any assessment of this issue nor did it enter upon an application of the application test to the decision of the Court of Appeal. It did not come to a reasoned conclusion as to whether the said decision qualified or met the test of a final decision giving rise to an appeal as of right. This notwithstanding, the applicant stressed before us that although the underlying decision in the High Court in **Meyer** (a decision of a master to set aside a default judgment), was clearly not final applying the application test, the decision of the Court of Appeal setting aside the master's said decision was "unequivocally accepted as being a final decision for the purposes of the application for leave to appeal to the Board."

[26] The applicant also relies on the facts and decision of the Board in **Chhina v Ismail** as illustrative of the point that the application test must be applied to the decision of the Court of Appeal, and not to the underlying decision or order of the High Court. In **Chhina v Ismail** the underlying decision of the High Court was clearly a final decision, judgment having been given after a trial of the substantive dispute between the parties, entitling the party aggrieved to appeal as of right to the Court of Appeal. However, the actual application dealt with by the Court of Appeal from which permission was sought to appeal to the Privy Council, was an application made by the respondent in the Court of Appeal to strike out the appeal for want of prosecution. The decision of the Court of Appeal to strike out the appeal from which permission to appeal to the Privy Council was being sought, was therefore interlocutory and not final. Accordingly, the application for conditional leave to appeal to His Majesty in Council was refused on the ground that the defendant had no appeal as of right, and it was not an appropriate case in which to grant leave. The defendant's subsequent application to the Privy Council for special leave to appeal was also refused.

[27] In the cases of **Baird v Goldgar** and **Chhina v Ismail**, the Court of Appeal dealt with applications to strike out the appeal, not with the substantive appeal or merits of the appeal itself. Those applications and the resulting decision on them were clearly interlocutory as they did not concern the merits of the underlying dispute between the parties, the lower court's decision on which had been appealed to the Court of Appeal. In **Jacpot**, the application for leave or special leave to appeal to the Judicial Committee was from essentially a first instance decision of the Supreme Court on an application filed before it for judicial review of the decision of the Gambling Regulatory Authority of Mauritius. The Supreme Court's decision was made on the merits of the judicial review application. The Supreme Court's ruling that the decision of the Gambling Authority was unlawful and must be quashed, was clearly a final decision, as their Lordships held at paragraph 10 of the opinion of the Board. Notably, the Supreme Court of Mauritius was not considering an application for leave to commence judicial review proceedings, but the substantive judicial review claim and proceedings itself which were fully heard and determined.

[28] In **Meyer**, the master had set aside a judgment in default of defence on the basis that the applicant had established exceptional circumstances. The decision came on appeal to this Court which concluded that the master had erred in principle and in holding that Mr. Meyer had established exceptional circumstances justifying setting aside the judgment entered against him. Meyer's application to the Court of Appeal for leave to appeal as a matter of right on the basis that the decision of the Court of Appeal was final, was refused. However, he was subsequently granted special leave by the Board to appeal the decision of the Court of Appeal. Having filed a substantive appeal to the Judicial Committee, the Board, in its opinion delivered 21st January 2019, identified two issues which fell for its consideration. The first was whether the Court of Appeal had fallen into error in its finding that the defence advanced by Mr. Meyer did not amount to exceptional circumstances within the meaning of that phrase in rule 13.3(2) of **CPR 2000** warranting setting aside the default judgment. The second issue identified was whether Mr. Meyer had an appeal as of right under section 122(1)(a) of the **Antigua and Barbuda**

Constitution Order 1981. The Board ruled against Mr. Meyer on the first issue, having found that the Court of Appeal had not fallen into any error and were correct to have found that no exceptional circumstances had been made out such as would lead to setting aside the default judgment entered against Mr. Meyer on the claim.

[29] In the Board's view, its ruling on the first issue was dispositive of the appeal and said so at the beginning of paragraph 21. This notwithstanding, the Board went on to address the second issue (whether the decision of the Court of Appeal a final decision). However, in doing so in one short paragraph, the Board did not allude to, nor did it identify and apply the application test. Moreover, the Board made no determination of the issue, merely recording that both sides had accepted that the said decision was final. Accordingly, in my view, what is said at paragraph 21 does not assist or advance the applicant's central argument or submission on this issue.

[30] The applicant relies heavily on the decision of the Judicial Committee in **Jacpot**. In **Jacpot**, the Board considered an application for special leave to appeal from the dismissal by the Supreme Court of Mauritius of an application by Jacpot for judicial review challenging a decision of the Gambling Regulatory Authority to revoke a number of licenses previously issued to it authorising it to provide certain specified facilities for gambling. The Supreme Court refused Jacpot leave to appeal to the Judicial Committee of the Privy Council on the ground that Jacpot had no appeal as of right and, implicitly, the case was not a proper one for leave to be granted as a matter of discretion. Accordingly, in this case the application for judicial review originated in the Supreme Court, and it is the decision of the Supreme Court on that application which was assessed as to whether it was a final or interlocutory decision for the purposes of an appeal as of right to the Judicial Committee. In other words, the Supreme Court did not hear and was not considering an appeal by Jacpot from the decision of the Gambling Regulatory Authority to revoke its previously issued licenses. It had heard and determined the separate proceedings initiated before it challenging the lawfulness of the said decision by way of judicial review.

- [31] Article 81 of the **Constitution of Mauritius** deals with appeals as of right and discretionary appeals to the Judicial Committee. The provisions of Article 81 dealing with appeals as of right are substantially in *pari materia* with the provisions of section 108 of the **Saint Lucia Constitution**, in that it provides that appeals shall lie from decisions of the Court of Appeal or the Supreme Court from final decisions in civil cases. At the time of the decision in **Jacpot** (12th July 2018), the Board had not pronounced conclusively on whether applications for leave to appeal to it should be governed by the application test or the order test, and it declined to do so in **Jacpot**, because the Board concluded that the decision of the Supreme Court was a final decision regardless of which of the two tests were applied. This much was clearly indisputable and could not be in any serious doubt.
- [32] Certain *dicta* at paragraph 10 of the Board's opinion in **Jacpot** was relied on by the applicant in support of his purported right of appeal and the finality of the decision of the Court of Appeal. In dealing with this issue, the Board found the decision of the Supreme Court on the judicial review application, which had been fully heard and determined, to be a final decision regardless of which test or approach was applied to that question. At paragraph 10, Lord Sumption sums it up in this way (in part):
- “10. The relevant proceedings for this purpose are not the proceedings before the Gambling Regulatory Authority but the proceedings before the Supreme Court. The question at issue in those proceedings was whether the decision of the Authority was lawful. Under the order approach, the decision of the Supreme Court was final, because it finally determined that the decision of the Authority was lawful. The result was that it stood. Under the applications approach it was also final, because if it had gone the other way it would have finally determined that the decision of the Authority was unlawful. The result would have been that it would be quashed. The fact that in the latter case the Authority would have had (sic) to make a fresh decision is irrelevant, because the Authority's proceedings are distinct from those of the Supreme Court on review: see *Becker v Marion City Corpn* [1977] AC 271 (PC), at 282-283.”
- [33] I make a number of observations on the *dicta* at paragraph 10 of the opinion of the Board in **Jacpot**. First, as observed above, this paragraph dealt briefly with which of the two tests (application or order test) ought to be applicable to applications for

leave to appeal to the Privy Council, with the Board in that case declining to resolve the 'different views' expressed in various jurisdictions, for the reasons given there. My second observation is that the Board specifically stated that, in that case, it was not the proceedings before and decision of the Gambling Authority of Mauritius which were the 'relevant proceedings' for the purpose of determining whether the decision sought to be appealed was final, but it is the proceedings before and hence the decision of the Supreme Court which was relevant. In those judicial proceedings before the Supreme Court, the question to be decided was the lawfulness of the decision of the Authority. This issue was determined not by way of an appeal from the decision of the Authority.

[34] In my opinion, this all serves to underscore that the decision of the Supreme Court sought to be appealed, was a first instance decision on a judicial review application made after a full hearing on the merits. It is therefore wholly unsurprising that the Board in **Jacpot** concluded that the decision of the Supreme Court of Mauritius sought to be appealed to the Judicial Committee is a final decision. It is also unsurprising that their Lordships opined that were the outcome of the judicial review proceedings before the Supreme Court to be that the decision of the Authority was unlawful and must be quashed, it is immaterial or irrelevant this would result in the Authority having to make a fresh decision. This is to be contrasted with the instant matter where the matter before, and which was dealt with by the Court of Appeal, was by way of an appeal from a first instance decision of the High Court refusing leave to commence judicial review proceedings; clearly an interlocutory decision.

[35] In my opinion, **Jacpot** is not on all fours with the instant matter and is not authority for the proposition advanced by the applicant that an appeal against what is clearly an interlocutory proceeding and order can somehow become, by virtue of the decision of the appellate court disposing of such an appeal, a final proceeding or order, within the meaning of the word 'final' in section 108(1)(c) of the **Constitution** of Saint Lucia, giving rise to an appeal as of right to the CCJ. If this proposition were correct as a matter of proper interpretation of section 108(1)(c), it would lead to the

absurd consequence that every appeal from an interlocutory order would become miraculously transformed by virtue of the determination by the Court of Appeal of that appeal, into a final order for the purpose of section 108(1)(c) of the **Constitution**, giving rise to an appeal as of right to the CCJ or, for that matter, in an appeal to His Majesty in Council under similar provisions of other countries who retain the Judicial Committee of the Privy Council as their apex court.

[36] In the instant matter, the decision of the High Court refusing the application to commence judicial review proceedings was clearly interlocutory, as it is an application under Part 56.3 of the **CPR 2000** for leave to commence the substantive judicial review proceedings. It is not a substantive claim or proceeding to decide upon the merits of a claim for judicial review under CPR 56.7. It did not determine and could not have been determinative of the underlying merits of the dispute or judicial review claim. The said application below dealt with the question whether the applicant has met the threshold test for the grant of permission to commence the judicial review proceedings, and to thereby have the merits of those proceedings determined after a full hearing of the matter. Likewise, what was before the Court of Appeal was an appeal of the refusal decision of the lower court on the said interlocutory application. Viewed in this way and applying the application test, the decision of the Court of Appeal was not determinative of the merits of the substantive dispute between the parties giving rise to the application for leave to commence judicial review proceedings, whichever way the appeal could have been decided. The decision of the Court of Appeal is a decision from an interlocutory judgment, which, if decided in favour of the appellant would result in leave being granted for the substantive issues to be heard and determined by the lower court. Accordingly, it follows that the decision of the Court of Appeal is an interlocutory decision, and not a final decision giving rise to the applicant having an appeal as of right to the CCJ under section 108(1)(c) of the **Constitution**.

[37] It follows that, for the reasons given above, this first ground of the application for leave to appeal to the CCJ fails.

Great general or public importance

[38] In my opinion, in relation to this second ground of the application under section 108(2)(a) of the **Constitution**, the applicant is on more solid ground for this Court in the exercise of its discretion, to grant the application for leave to appeal the decision of the Court of Appeal to the CCJ. I reach this conclusion notwithstanding the respondents' stout opposition also to this ground. In summary, the respondents' opposition is on the basis that the questions and issues identified by the applicant in his written submissions as being of great general or public importance, are either not issues concerning the interpretation of the **Constitution** nor are they serious legal questions or issues which rise to the level of being of great general or public importance within the meaning of those words in the relevant case law.

[39] It is well established by decisions of this Court that the phrase 'great general or public importance' refers to serious issues of law, a constitutional provision that has not been settled, an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public.¹⁰

Applicant's Submissions

[40] In addition to the categories of matters which are said to give rise to the issues of great general or public importance identified at paragraph [39] above, the applicant submits that generally, the availability of judicial review in matters concerning the exercise of prosecutorial discretion by the Director of Public Prosecutions ("the DPP"), and its interaction with the requirement for the grant of leave to commence judicial review proceedings under Part 56, is quintessentially a matter of substantial or great general public interest in the administration of justice, lending such questions or issues suitable for determination by an apex court. In short, these are serious issues of law which can potentially impinge on the operation of the criminal

¹⁰ See *The Landings Proprietors Unit Plan No. 2 of 2007 v The Development Control Authority et al* SLUHCVP2019/0019 (delivered 6th October 2023, unreported), *Martinus Francois v The Attorney General Saint Lucia Civil Appeal No. 37 of 2003* (delivered 7th June 2004, unreported) at para. [13], *Emmerson International Corporation v Viktor Vekselberg et al* BVIHCP2019/0020 (delivered 27th July 2023, unreported) and also, the decision of the Court of Appeal of Bermuda in *Siddiqui and others v Athene Holding Ltd* (2019) 95 WIR 342 at paras. 50 and 55.

justice system. Accordingly, viewed in this way, they are the kind of questions or issues which are generally to be considered of great general or public importance, leading to the discretionary grant of leave to appeal to the CCJ under section 108(2)(a) of the **Constitution**. (See **Matalulu v DPP**).¹¹

- [41] Moreover, it is submitted by the applicant, that the availability of judicial review in connection with the exercise of prosecutorial discretion of the comptroller of customs as a part or implied part of his powers under section 119 of the **Act**, its interconnection with the leave requirement under CPR Part 56.3, and the application of the threshold test at the leave stage of the proceedings, are all matters of substantial general interest in the administration of the civil justice system, and of great public importance in the administration of the criminal justice system.
- [42] The applicant has helpfully set out or summarised (at paragraph 22 of his skeleton argument) the issues which he intends to have the CCJ determine in the appeal, if leave to appeal is granted by this Court. These questions or issues, set out in 19 subparagraphs, are all said to arise from the judgment of the Court of Appeal. I do not consider it necessary for the purpose of disposing of this ground of the application, to consider each and every one of them in determining whether they singularly meet the test of great general or public importance. In addition, the applicant has also set out in some detail (at paragraph 23) in 7 numbered subparagraphs, the essential facts on which his application for leave to appeal to the CCJ on this ground (and the 'or otherwise' ground) is based. Again, it is not necessary for the purpose of disposing of the application on this ground to give any detailed consideration to each of these factual matters.
- [43] The applicant submits from paragraph 24 onwards, that the questions and issues, both legal and factual, to be involved in the proposed appeal, are ones which by reason of their great general or public importance within the meaning of that expression in section 108(2)(a) of the **Constitution**, which ought to be submitted to

¹¹ [2003] 4 LRC 712 at page 731.

the CCJ. It is his submission that these issues generally involve serious questions of law; the interpretation and/or application of constitutional provisions at section 73 of the **Constitution** relating to the powers of the DDP to take over and to discontinue criminal prosecutions instituted by other functionaries or authorities by statute; relate to the powers of other functionaries vested by statute with prosecutorial powers to discontinue such prosecutions, which questions are not settled; and to questions as to the comptroller's power to withdraw or discontinue proceedings, all of which issues are said to be in dispute in the appeal. Reference has also been made as to what is the correct procedure to be followed by the DPP in exercising his/her constitutional powers under section 73 of the **Constitution** to take over and to discontinue criminal cases, which issue has not been decided; and the question of whether those powers include rendering prosecutorial assistance to a functionary, such as the comptroller of customs, without actually taking over the prosecution of the charges laid by such functionary.

[44] The applicant has identified certain specific issues and questions as being of great general or public importance and which ought to be submitted to the CCJ for that Court's determination. While not setting out all of them, I summarise certain of the main ones as follows:

- (a) whether the respondents had the express or implied power to withdraw or discontinue any prosecution commenced by the comptroller under section 119 of the **Act**;
- (b) whether the prosecutorial discretion of the comptroller stands on the same footing, and should be accorded the same weight and reverence, as that of the DPP which is a constitutional office;
- (c) whether the applicable principles and judicial constraints set out by the UK Supreme Court in **Matalulu**, applicable to the court's review of the exercise of prosecutorial powers and discretion by the DPP, a special and exalted constitutionally protected office with broad and constitutionally protected prosecutorial jurisdiction occupied by a

person trained and experienced in the law, are applicable to the holders of a statutory office empowered with some prosecutorial powers not derived from or protected by the **Constitution** such as the comptroller of customs, who are usually untrained in the law, but whose prosecutorial powers are expressly subject to the overriding power and discretion of the DPP under section 73 of the **Constitution**;

- (d) whether the Court of Appeal was wrong, as a matter of law, in holding that, in the circumstances of this case, the applicant had to meet a “modified threshold” test for the grant of leave to apply for judicial review of the decision of the respondents to discontinue the prosecution, and not the normal or usual low threshold of an arguable case with a realistic prospect of success, and that the prosecutorial discretion of the comptroller could only be reviewed in cases where the discretion was exercised dishonestly, corruptly, fraudulently, in bad faith, based on political interference or other exceptional circumstances, all of which correctly apply to the DPP but cannot justifiably be extended to a lesser functionary whose prosecutorial powers are not derived from the **Constitution**;
- (e) whether the Court of Appeal in its statement at paragraph [69] of the judgment committed an error of principle by failing to draw any distinctions between the constitutionally protected prosecutorial powers of the DPP and the prosecutorial powers conferred upon a lesser functionary by statute;
- (f) whether as a result of significant errors of law committed by the Court of Appeal and errors made in the assessment of the evidence and the application of incorrect standards of proof, significant injustice will be caused not just to the applicant, but also to the citizens of Saint Lucia, who have a vested interest in ensuring that the rule of law is maintained and that prosecutorial functions that are vested in functionaries by

statute are carried out and discharged without political interference and in accordance with the **Constitution** and ordinary principles of due process;

- (g) the case at its core involved an analysis of the DPP's powers under section 73 of the **Constitution** and the role that he/she plays in the context of criminal proceedings commenced by functionaries or authorities pursuant to statute, and whether, if the practice in fact exists of the DPP "assisting" in these kind of prosecution of criminal proceedings, it is desirable to obtain some definitive statement of law from the highest judicial authority on the question of whether that practice violates the powers and functions imbued in the DPP by the **Constitution**, a question of wide relevance to any prosecution instituted by a person or authority under any statute;
- (h) whether for the purpose of the DPP taking over the prosecution of criminal proceedings in the exercise of his/her constitutional powers under section 73, it is imperative that to the proper exercise of such powers that the DPP do so in a publicly visible way that conveys the decision to do so clearly to the court, to the person charged, and to the public, and whether the Court of Appeal was correct in adopting at paragraph [104] of the judgment the obiter remarks of the Privy Council in **Commissioner of Police and another v Steadroy C. O. Benjamin**;¹² and
- (i) the due prosecution of the Deputy Prime Minister of Saint Lucia for alleged offences under the **Act** is a matter of great public importance and interest, as the public has a vested interest in ensuring that the criminal justice system is not manipulated by those in power and that the law is applied equally to all, regardless of their political influence. An application for leave to commence judicial review proceedings of

¹² 2014 [UKPC] 8.

the decision of the comptroller to discontinue the criminal proceedings regularly instituted against the Deputy Prime Minister by the previous comptroller and allegedly taken over by the DPP, should not be dismissed on the basis of alleged factual deficiencies, in circumstances where adequate *prima facie* evidence had been placed before the High Court and the Court of Appeal to support a claim for judicial review. In doing so, both courts committed serious errors of law that may have a tendency to undermine public confidence in the administration of justice.

Respondents' Submissions

[45] The bases upon which the respondents ground their opposition to the application for leave on this limb of section 108(2)(a) are summarised at paragraph 25 of the skeleton argument. They are:

- (1) this matter concerns an application for leave to apply for judicial review of the first respondent's exercise of prosecutorial discretion to discontinue a prosecution under section 119 of the **Act**;
- (2) it is not disputed that the applicant did not challenge the decision of the magistrate granting leave to withdraw the charges;
- (3) the question involved in the appeal was whether the judge below was correct in the exercise of his jurisdiction to refuse to grant leave to apply for judicial review having regard to the threshold test and evidence;
- (4) the Court of Appeal properly applied the test in **Sharma v Brown-Antoine and others**¹³ in a flexible manner having regard to the context and the fact that the application and appeal concerned a decision not to prosecute (see paragraphs 50, 51, 52 and 73 of the judgment);

¹³ [2006] UKPC 57.

- (5) importantly, the application for leave and the appeal were dismissed substantially, if not solely, on the ground that the applicant's evidence was wholly insufficient and speculative, and therefore there existed no reasonable prospects of success;
- (6) there is no question or issue involved in the appeal which that by reason of its great general or public importance requires the grant of leave;
- (7) the High Court and Court of Appeal applied the evidence to clear provisions and principles of law; and
- (8) accordingly, the applicant cannot rely on section 108(1)(a) of the **Constitution** to ground his application for leave to appeal to the CCJ.

[46] In addition, the respondents submits that the substantial purpose of the application for leave to appeal is to have the CCJ review and re-examine the concurrent findings of fact made by the judge and the Court of Appeal, which is not permissible, and leave to appeal ought to be refused. Moreover, it would not be correct to grant leave since the core issue concerns the exercise of discretion by the first instance judge, as upheld by this Court. This is not a matter where the applicable principles of law are in dispute or unsettled or there is some genuine uncertainty surrounding the principles themselves, nor do these principles give rise to harsh or dire consequences or have a far-reaching effect. To the contrary, this is a matter where the real question involved in the proposed appeal is the way the judge and this Court applied settled principles to the particular evidence and facts of the application for leave to commence judicial review proceedings, and whether the judicial discretion in refusing leave was properly exercised. In such circumstances, leave to appeal ought to be refused.

[47] In support of this submission, the respondents rely on the statement of principles by this Court in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**,¹⁴ cited

¹⁴ BVIHMAP2018/0005 and BVIHMAP2018/0008 (delivered 8th October 2018, unreported).

approvingly in the decision of the Bermuda Court of Appeal in **Siddiqui and others v Athene Holding Ltd**¹⁵ at paragraph [54]:

“Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground.”

- [48] Accordingly, it is the respondents’ case in opposition to this ground of the application that there is no conflict of law or uncertainty of legal principles, and in any event, the decision by the lower court to refuse leave to commence judicial review proceedings and the upholding of that decision by this Court in dismissing the appeal, were no more than the exercise of a judicial discretion.

Applicable Principles

- [49] The principles set out in **Renaissance** and followed in **Siddiqui** applicable to circumstances where an appellate court is considering whether to grant leave to appeal, be it the Privy Council or the CCJ, on the basis that the proposed appeal raises questions or issues of great general or public importance and ought to be submitted to the apex court for determination, are well-established and uncontroversial. Thus, leave to appeal should not be granted where, upon a proper analysis, there is no genuine dispute or uncertainty as to the applicable principles of law or as to the correct interpretation of constitutional or statutory provisions applicable. In such circumstances, a question of great general or public importance does not ordinarily arise, and the application ought to be refused by the Court of Appeal. Furthermore, where the real question on the proposed appeal is: (i) the way the Court of Appeal has applied settled law or principles to the particular facts of the case; or (ii) whether the lower court’s judicial discretion was properly exercised when applying such settled and clear principles; leave to appeal would not ordinarily be granted. The question is whether this is such a case, as the respondents contend.

¹⁵ (2019) 95 WIR 342.

Summary of Decisions of the High Court and Court of Appeal

- [50] The decision of the Court of Appeal concerned an appeal from the decision of a judge of the lower court, in exercise of his judicial judgment and discretion, in refusing an application for leave to commence judicial review proceedings in relation to the exercise by the comptroller of customs of his power and discretion to discontinue the prosecution of criminal charges instituted by the previous comptroller under section 119 of the **Act** against Dr. Hilaire, who by then, held the position of Deputy Prime Minister of Saint Lucia. The applicant for leave to bring judicial review proceedings is the former Prime Minister of the State. In refusing leave, the judge found that the applicant had not met the threshold for the grant of leave as he did not advance on the evidence an arguable ground for judicial review which had a realistic prospect of success.
- [51] Among the judge's conclusions of law is the ruling that section 119 of the **Act** conferred prosecutorial powers on the comptroller, and the *proviso* to section 73(4) of the **Constitution** empowered the comptroller to discontinue or withdraw, with the leave of the court, prosecutions initiated under section 119. The judge also found that there was no evidence before him to establish that the DPP had taken over and continued the prosecution of Dr. Hilaire, or that the decision of the comptroller to discontinue or to withdraw such prosecution was subject to political influence.
- [52] This Court in its written judgment dated 17th April 2024 held, among other matters, that the test for leave to bring judicial review was an arguable case with a realistic prospect of success, and while that test is generally a low one, a "modified threshold test" may be applied where warranted, which would allow the court to apply a higher hurdle in certain circumstances having regard to certain factors, including the nature of the issue sought to be challenged by way of judicial review, the urgency of the resolution of the dispute, and how detailed and complete is the argument before the court for leave. One such circumstance of a heightened threshold test being where the challenge is to the exercise of discretionary

prosecutorial power, and the principle being applied differently where the decision is to prosecute as contrasted with the decision not to prosecute.

[53] This Court also held that the power of the comptroller under section 119 of the **Act** to bring prosecutions, is subject to the power of the DPP under section 73 of the **Constitution** to take over and continue or to discontinue such prosecutions under the **Act**; and while the power by the comptroller to discontinue prosecutions brought by him is not expressly stated in section 119, that power is either a reasonably necessary compendium to the power to institute criminal prosecutions or was reasonably incidental to such power pursuant to section 17(3) of the **Interpretation Act**.¹⁶ Such power to discontinue a prosecution is also subject to the leave of the court being obtained by the comptroller pursuant to the *proviso* to section 17(4) of the **Constitution**, and to the DPP's powers to take over and discontinue such prosecutions.

[54] It was also held by the Court of Appeal that the appellant's argument that, in any event, the comptroller failed to exercise any power of discontinuance of the prosecution in compliance with the proviso to section 73(4) of the **Constitution**, could not be entertained as the decision of the magistrate made on 2nd December 2021 withdrawing or discontinuing the charges had not been challenged in the applicant's leave application before the judge for judicial review.

[55] In summary, other matters held by the Court of Appeal in its judgment were that:

- (i) the taking over of criminal proceedings by the DPP in exercise of his constitutional powers must be done in a publicly visible way which conveys that decision clearly to the presiding court, the accused and the public, and that there was no evidence confirmatory of a request for the DPP to take over and to continue the criminal proceedings against

¹⁶ Chap. 1:06 of the Revised laws of Saint Lucia.

Dr. Hilaire, or of a response from the DPP that he had in fact taken over the said prosecution; and

- (ii) there was no cogent evidence supportive of the allegations of political interference by the Attorney General influencing the decision of the comptroller to discontinue the prosecution of Dr. Hilaire.

Accordingly, the Court of Appeal agreed with the judge below that the evidence led in support of the application did not demonstrate an arguable case with a realistic prospect of success, and the appeal was therefore dismissed.

Analysis and Conclusion

[56] In my considered view, the proposed appeal and the decision of the Court of Appeal raise several serious legal and constitutional issues that have not had, but that could benefit, from the highest judicial pronouncement. It is not correct, and I do not accept, that this matter was concerned purely with whether the evidence adduced by the applicant in support of his application to the High Court for leave to commence judicial review proceedings met the threshold of an arguable case with a good prospect of success. Likewise, I do not accept that the proposed appeal is purely a challenge to the way in which the judge below exercised the discretion in refusing the application for leave or the way the Court of Appeal upheld the said decision. While these were all major issues, interconnected with them were several issues of law or of mixed law and fact relevant or germane to and dispositive of the proper determination of that application for leave and the appeal itself from such determination by the judge. This is clear from any reasonable reading of the decision of the Court of Appeal, now sought to be appealed to the CCJ.

[57] Examples of these issues of law or of mixed fact and law (not meant to be exhaustive) are: the correctness in holding that the power of discontinuance can be implied under section 119 of the **Act** by virtue of the provisions of the **Interpretation Act** and/or the proviso to section 73(4) of the **Constitution**; the legal standard

applicable to a review by the courts of the exercise of prosecutorial discretion by statutory functionaries such as the comptroller of customs, and whether such reviews ought to be circumscribed in the same way and to the same standard applicable to a review of such powers imbued in the constitutional office of DPP; did the Court of Appeal err as a matter of principle or set too high a standard when formulating the applicable test for the grant of leave to commence judicial review of the exercise of prosecutorial discretion applicable to a functionary granted such powers by statute; and was the Court of Appeal wrong in concluding, as did the judge below, on the evidence, the DPP had not taken over the prosecution of Dr. Hilaire; was it not, on the evidence, at least arguable with a realistic prospect of success, that the DPP had taken over, in exercise of his constitutional powers, the prosecution of Dr. Hilaire, such that any such power, to the extent that it was imbued in the comptroller, had been completely foreclosed in relation to the said charges and prosecution, including any power to discontinue or to withdraw the charges. These are all, in my view, issues of great general or public importance which ought to be submitted to the CCJ for its consideration and determination as to the correctness of the decision of the Court of Appeal.

- [58] For these reasons, I am satisfied that the applicant has met the requirement for the grant of leave to appeal to the CCJ under section 108(2)(a) of the **Constitution**. It is therefore unnecessary to go on to consider the 'or otherwise' ground or limb of section 108(2)(a). I would therefore grant the application for leave to appeal the decision of the Court of Appeal to the CCJ on this ground that the proposed appeal raises issues or questions of great general or public importance.

Order

- [59] I make the following orders:
- (1) the application filed 17th May 2024 for leave to appeal to the Caribbean Court of Justice pursuant to section 108(2)(a) of the **Constitution** of Saint Lucia from the decision of the Court of Appeal dated 17th April 2024 is granted on the following conditions:

- (a) The applicant shall, within a period not exceeding ninety (90) days of the date of this judgment provide security for costs which the applicant may become liable or be ordered to pay in an amount not exceeding EC\$7,500.00; and
 - (b) The applicant shall provide to the Chief Registrar within a period not exceeding ninety (90) days of the date of this judgment a list proposing the documents which should be included in the record of appeal.
- (2) Upon compliance with the conditions herein stated, the Chief Registrar shall issue a Certificate of Compliance in conformity with Form 2A, Schedule 5 of the **Caribbean Court of Justice (Appellate Jurisdiction Rules), 2024** and within 7 days of its issue serve copies of the said Certificate on the applicant and the intended respondents and shall notify the Registrar of the Caribbean Court of Justice.
- (3) Costs of the application to be in the appeal to the Caribbean Court of Justice

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Eddy D. Ventose
Justice of Appeal

By the Court,

Deputy Chief Registrar