

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

SAINT LUCIA

SLUHCVP2023/0025

BETWEEN:

ALLEN CHASTANET

Appellant

and

**[1] COMPTROLLER OF CUSTOMS
[2] PAUL NOEL**

Respondents

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Eddy Ventose
The Hon. Mr. Gerard St. C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Garth Patterson KC with him Mr. Mark Maragh and Ms. Tanya Alexis-Francis
for the Appellant
Mr. Anthony Astaphan SC with him Mr. Seryozha Cenac for the Respondents

2024: March 11;
April 17.

Civil Appeal – Judicial Review – Application for leave – Whether the threshold test for the application for leave to commence judicial review proceedings has been satisfied – Prosecutorial powers – Powers of the Director of Public Prosecutions under the Constitution – Prosecutorial powers granted expressly to a public officer by statute – Section 119 of the Customs (Control and Management) Act of Saint Lucia – Discontinuance or withdrawal of criminal proceedings – Whether the power to discontinue or withdraw criminal proceedings commenced by the Comptroller of Customs and Excise is a necessary compendium to the power to institute criminal proceedings or one reasonably incidental to it – Costs – Costs

awards in administrative proceedings – The circumstances in which the court will make an order for costs against an applicant for an administrative order

This is an appeal against the High Court judge's decision dismissing the appellant's application for leave to commence judicial review proceedings against the decision of the respondents to discontinue or withdraw criminal proceedings against Dr. Ernest Hilaire ("Dr. Hilaire").

The relevant background to this appeal begins in or around November 2017 when the Director of Finance sent a memorandum to the then Comptroller of Customs ("Mr. Chiquot") in 2017 raising concerns about a missing Government vehicle, and further requesting that an investigation be conducted into the importation of a Land Rover ("the vehicle") by Dr. Hilaire on 18th December 2015. What followed was a three-year long investigation by the Customs and Excise Department leading to Mr. Chiquot making a request for Dr. Hilaire, under section 102(2) of the Customs (Control and Management) Act ("the Act" or "the Customs Management Act"), to produce information, more specifically, a copy of the commercial invoice from the supplier of the vehicle.

Empowered by section 119 of the Act, the respondents instituted criminal proceedings in the name of the second respondent against Dr. Hilaire in or around October 2020, for his alleged failure, without reasonable cause, to produce the requested documents and information. The said charges having been put before a Magistrate, a "mediation" process ensued in which Dr. Hilaire was represented by Mr. Leslie Mondesir, then private legal practitioner, who subsequently was appointed as Attorney General of Saint Lucia ("the Attorney General"). Subsequent to the charges being brought against Dr. Hilaire, the respondents were, on several occasions, represented at hearings before the Magistrate by legal counsel from the Office of the Director of Public Prosecutions. However, the first respondent, ("Comptroller Emmanuel"), made the decision to discontinue or withdraw those proceedings, having reached the conclusion that they could not be legally or factually sustained. On 2nd December 2021, the Magistrate, in his formal order, noted the discontinuance of the said charges against Dr. Hilaire and made certain consequential orders which resulted in the return of the vehicle to Dr. Hilaire.

The appellant, the former Prime Minister of Saint Lucia and current Leader of the Opposition, being dissatisfied with the decision to discontinue the criminal proceedings against Dr. Hilaire ("the Decision"), sought leave of the High Court of Justice to commence judicial review of the Decision pursuant to rule 56.3 of the Civil Procedure Rules 2000. The main issues raised on the leave application were: whether section 119 of the Act authorised the respondents to discontinue criminal proceedings; whether the Director of Public Prosecutions ("DPP") took over the prosecution of Dr. Hilaire and whether the power to discontinue those proceedings was vested in him under section 73(2)(c) of the Constitution; and whether Comptroller Emmanuel consulted and obtained legal advice from the Attorney General prior to discontinuing the charges ("the political interference point").

The High Court judge determined that the appellant did not meet the threshold for the grant of leave as he did not advance any arguable ground for judicial review which had a realistic prospect of success. The judge found 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 prosecutions with the leave of the court. In any event, the judge found that there was no evidence that the DPP took over and continued the prosecution. The judge also found that the facts presented by the appellant did not support the argument that the decision to discontinue or withdraw the prosecution was the subject of political influence.

The appellant advanced 9 grounds of appeal to this Court. Ground 1 concerned whether the judge erred in concluding that the appellant failed to meet the threshold for the grant of leave to commence judicial review proceedings. Grounds 2-6 concerned whether the DPP took over the prosecution of the case, an issue which was central to the determination of the appeal. Grounds 7 and 8 concerned the allegations of political interference. Finally, Ground 9 concerned whether the judge erred in making a costs award in favour of the respondents.

Held: Dismissing the appeal with the exception of ground 9, setting aside the costs order below, and making no order as to costs on appeal, that:

1. The test for leave to bring a claim for judicial review is whether the applicant has an arguable case with a realistic prospect of success. While that test is generally a low one, it is also a flexible one. Accordingly, a “modified threshold test” may be applied where warranted, which would allow the court to apply a higher hurdle in certain circumstances having taken into account 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 where it is well-settled that a heightened threshold test is to be adopted and applied is where the challenge is against the exercise of a discretionary prosecutorial power. While it is well-established that ordinarily the exercise of an independent discretionary prosecutorial power is susceptible to judicial review, it is a highly exceptional remedy and one which is sparingly exercised. This is borne out of the court’s extreme reluctance to disturb decisions by independent prosecutorial authorities by way of judicial review proceedings, where a DPP or some other prosecutorial authority would be expected to take into account and to weigh a range of relevant factors in reaching his or her decision either to prosecute or not to prosecute or to discontinue a prosecution already commenced. In such circumstances, absent dishonesty, mala fides or exceptional circumstances, the decision to prosecute is not amenable to judicial review. On the other hand, the decision not to prosecute is ordinarily amenable to judicial review. However, this jurisdiction must be exercised by the courts sparingly, applying established principles of judicial review. While not an exhaustive list, it is accepted that decisions not to prosecute or to withdraw or discontinue prosecutions are reviewable where the DPP or other prosecutorial authority could be shown to have acted under the direction of another person or authority, as opposed to their own independent discretion; or where they have acted in bad faith; or have abused the court’s process; or have fettered their discretion by a rigid policy.

Matalulu and another v DPP [2003] 4 LRC 712 applied; **Mohit v Director of Public Prosecutions of Mauritius** [2006] UKPC 20 applied; **Sharma v Brown-Antoine and others** [2006] UKPC 57 applied; **Sonya Young v Vynette Frederick** Civil Appeal No. 22 of 2011 (delivered 31st May 2012, unreported) applied; **Commissioner of Police and another v Steadroy C. O. Benjamin** [2014] UKPC 8 applied; **Attorney General of Trinidad and Tobago v Ayers Caesar (Trinidad and Tobago)** [2019] UKPC 44 applied; **R (on the application of Federation of Technological Industries) v Customs and Excise Commissioners** [2004] EWHC 254 (Admin) applied; **Mass Energy Ltd v Birmingham City Council** [1994] Env LR 298 applied; **R v Horseferry Road Magistrates' Court, ex parte Bennett** [1994] 1 AC 42 applied; **R v Director of Public Prosecutions, ex parte Kebilene and others** [2000] 2 AC 326 applied; **Director of Public Prosecutions v Humphrys** [1977] AC 1 applied

2. The Comptroller of Customs' power to institute criminal proceedings for an offence under any customs enactment lies in section 119 of the Customs Management Act. It is a power made expressly subject to the powers of the DPP under section 73 of the Constitution. Even though section 119 does not expressly give the Comptroller of Customs the power to discontinue or withdraw criminal prosecutions commenced by them, the power to do so is to be implied as a reasonably necessary compendium to the power to institute criminal proceedings or as one reasonably incidental to it pursuant to section 17(3) of the Interpretation Act, Chapter 1.03. The exercise of the power of discontinuance is also subject to the leave of the court pursuant to the proviso to section 73(4) of the Constitution, and to the powers of the DPP to take over and continue any such criminal proceedings or to discontinue such proceedings at any stage before judgment is delivered.

Section 119 of the **Customs (Control and Management) Act** Cap 15:05 of the Revised Laws of Saint Lucia applied; Section 73(2) of the **Constitution of Saint Lucia** Cap 1:01 of the Revised Laws of Saint Lucia applied.

3. The power of the DPP to discontinue criminal proceedings under section 73(2) of the Constitution does not in any way derogate from the conclusion that such power can and ought, as a matter of principle, to be implied under section 119 of the Customs Management Act. Moreover, the proviso to section 73(4) of the Constitution in no uncertain terms states broadly that, where any other person or authority has instituted criminal proceedings, nothing in the subsection shall prevent the withdrawal of proceedings by the instance of the person or authority and with the leave of the Court. It follows that in the instant matter, while Comptroller Emmanuel had the power under section 119 (by implication or as being reasonably incidental), to withdraw or discontinue the prosecution of the charges against Dr. Hilaire, he had to do so formally before the court.

Section 73(4) of the **Constitution of Saint Lucia** Cap 1:01 of the Revised Laws of Saint Lucia applied; Section 17(3) of the **Interpretation Act** Cap. 1.06 of the Revised Laws of Saint Lucia applied.

4. Accordingly, Comptroller Emmanuel had an implied power under section 119 of the Act to discontinue or to withdraw, with the leave of the court, the criminal proceedings previously instituted by Mr. Chiquot as Comptroller against Dr. Hilaire for his alleged breach of section 103 of the Customs Management Act, unless such prosecution had been taken over and continued by the DPP pursuant to his powers under section 73(2) of the Constitution.
5. The appellant's argument that even if Comptroller Emmanuel had a power of discontinuance, he failed to exercise it in compliance with the proviso to section 73(4) of the Constitution ("the proviso point") cannot be entertained as the decision of the Magistrate made on 2nd December 2021 was not the subject of the appellant's leave application for judicial review, which sought leave to challenge only the decision by the first respondent to withdraw or to discontinue the prosecution of Dr. Hilaire. The same applies to the appellant's submission that there was no authority granted to the Magistrate to order or to sanction the parties, as parties to criminal proceedings, submitting to mediation ("the mediation point"). Put simply, the appellant did not seek to challenge, by way of judicial review, the Magistrate's decision, and concomitantly, the leave point and the mediation point were not open to him to make at this stage of the proceedings.
6. The constitutional power of the DPP to take over and to continue a criminal prosecution instituted by another public officer or body must be done in a publicly visible way that conveys the decision to do so clearly to the court, to the person charged and to the public. Considering Mr. Chiquot's letter to the DPP dated 18th January 2021, where he forwarded the files for "information and onward prosecution" to the DPP, the Court finds that there was nothing therein confirmatory of a request for the DPP to takeover and to continue the criminal proceedings against Dr. Hilaire. There was also no evidence of a formal response by the DPP to Mr. Chiquot's letter stating that he would or has formally taken over and will continue the prosecution of Dr. Hilaire. Imperatively, the Court finds that there was also no affidavit or other evidence from the DPP showing that, having taken over the prosecution of these matters, it was not open to Comptroller Emmanuel to unilaterally discontinue or withdraw the prosecution of them. Accordingly, the Court finds that the appellant has failed to demonstrate an arguable case with a realistic prospect of success that the DPP had taken over and continued the prosecution of Dr. Hilaire in exercise of his powers under section 73(2) of the Constitution and that, accordingly, the power to discontinue or withdraw the said criminal proceedings did not continue to lie with the Comptroller of Customs.

Section 73(2) of the **Constitution of Saint Lucia** Cap 1:01 of the Revised Laws of Saint Lucia considered; **Commissioner of Police and another v Steadroy C. O. Benjamin** [2014] UKPC 8 applied.

7. In relation to the political interference point, the assertion that Comptroller Emmanuel consulted with the Attorney General about the prosecution prior to making the decision to discontinue them, or that his decision to withdraw or to discontinue the said prosecution was influenced by political interference, amounts to mere speculation. There is no cogent evidence supportive of this from the appellant or any of his witnesses, including Mr. Chiquot. Accordingly, there is no basis upon which this Court ought to disturb the judge's finding on this ground.
8. Accordingly, the Court agrees with the learned judge in his conclusion that the grounds advanced by the appellant contained in his application for leave to commence judicial review proceedings do not demonstrate that he has an arguable case with a realistic prospect of success.
9. The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. On this basis, the Court agrees with the appellant, and the respondents do not demur, that the High Court judge erred in making a costs order against the appellant, that the said costs order ought to be set aside, and an order of no order as to costs substituted. Similarly, as it relates to costs in the appeal, the Court finds that there is no good reason to deviate from the general rule.

Rule 56.13(6) of the Eastern Caribbean Supreme Court **Civil Procedure Rules 2000** applied; **The Attorney General v Martinus Francois** Civil Appeal No. 37 of 2003 (delivered 29th March 2004, unreported) applied; **Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States** Civil Appeal No. 9 of 2006 (delivered 1st March 2007, unreported) applied; **Judicial and Legal Services Commission v Horace Fraser et al** Civil Appeal No. 24 of 2005 (delivered 28th November 2005, unreported) applied; **George Rick James v Hon. Gaston Browne et al** ANUHCVP2016/0015 (delivered 13th October 2020, unreported) applied; **Global Education Providers Inc. v The Honourable Petter Saint Jean et al** DOMHCVAP2012/0009 (delivered 4th May 2018, unreported) applied; **Cerise Jacobs v Minister of Tourism et al** ANUHCVP2019/0011 (delivered 24th May 2022, unreported) applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal against the judgment and order of a judge of the High Court (“the learned judge”) dated 18th August 2023 dismissing the appellant’s application for leave to commence a claim for judicial review of the decision of the first respondent, Mr. Sherman Emmanuel, the Comptroller of

Customs, (“the Comptroller” or “Comptroller Emmanuel”) and the second respondent, Mr. Paul Noel, a Customs Inspector, on 2nd December 2021, to withdraw or discontinue the prosecution of Dr. Ernest Hilaire (“Dr. Hilaire”) on three criminal informations for offences under section 102 of the **Customs (Control and Management) Act** (“**the Act**” or “**the Customs Management Act**”)¹ for failing to comply with the lawful written requests of Mr. Peter D. Chiquot, the then Comptroller of Customs, (“Mr. Chiquot”). These three charges were laid, and the criminal proceedings commenced in the First District Court in the name of the second respondent, as the chief investigative officer, pursuant to the powers conferred by section 119(1) of **the Act**. Leave to appeal having been granted on 11th October 2023 by the learned judge, the appellant filed a notice of appeal on 31st October 2023 challenging the judge’s decision on nine grounds.

The Institution of Criminal Proceedings

- [2] The three criminal charges were brought in or about October 2020 in the name of the second respondent on three separate informations. Section 119(1) and (3) of **the Act** provide for the institution of criminal proceedings for offences under any customs enactment. It states (in material part) as follows:

“119(1). INSTITUTION OF PROCEEDINGS

Subject to the provisions of subsection (3), and **to the powers of the Director of Public Prosecutions under section 73 of the Constitution**, proceedings for an offence under any customs enactment, or for condemnation under Schedule 4, shall not be commenced except –

- (a) by order of the Comptroller in writing; and
 - (b) In the name of an officer.
- (emphasis added)

...

(3) Despite anything in the foregoing provisions of this section, where any person is arrested for any offence for which he or she is liable to be arrested under any customs enactment any court before which he or she is brought may proceed to deal with the case although the proceedings have not been instituted by order of the Comptroller or have not been commenced in the name of an officer.”

¹ Cap15.05 of the Revised Laws of Saint Lucia.

- [3] It is notable, that subsection (1) specifically confers upon the Comptroller of Customs the power to order the institution of criminal proceedings for an offence under any customs enactment, including **the Act**, and for such proceedings and prosecution thereof to be in the name of a customs officer. This power and the exercise of it is made expressly subject to the powers of the Director of Public Prosecutions (“DPP”) under section 73 of the **Constitution of Saint Lucia**² (“the **Constitution**”). I shall return to this aspect and the powers of the DPP under section 73 of **the Constitution**, including the power to take over and to continue or to discontinue criminal proceedings brought or commenced by some other public officer under any statutory power to do so.
- [4] The three charges were laid by three informations in the First District Court in the name of the second respondent. They each pertained to offences allegedly committed by Dr. Hilaire under section 102(3) of **the Act** in failing or refusing, without reasonable cause, to comply with the written requests made in September 2020 by the then Comptroller, Mr. Chiquot, to produce certain documents and information. Such documentation included, specifically, a copy of his commercial invoice from the supplier of a Land Rover motor vehicle (“the vehicle”) imported by him into Saint Lucia on 18th December 2015. It is to be noted that these three charges did not concern any offence relating to the making of a false declaration upon entry of the vehicle into Saint Lucia or to any other offence chargeable under **the Act** or any other customs enactment.
- [5] The written requests made after the then Comptroller, Mr. Chiquot, were apparently prompted by the receipt by him of a memorandum from the Director of Finance in or about November 2017. This memorandum raised certain concerns about a missing Government property or asset (a motor vehicle) and requested that an investigation be conducted by the Customs and Excise Department into the importation of the vehicle by Dr. Hilaire. The said request for information and

² Cap 1:01 of the Revised Laws of Saint Lucia.

documents also came after an investigation had been conducted by customs officers of the Customs and Excise Department over a 3-year period. It is also apparent from the affidavit evidence before the court below that during the said investigations, Dr. Hilaire was interviewed on several occasions by the Customs investigators, and at that time he was represented by his then lawyers, Fosters. These lawyers also sent written correspondence to the then Comptroller on behalf of their client, which correspondence is part of the documentary evidence before the court below as exhibits to the various affidavits on both sides in the said proceedings.

- [6] It is also apparent from the evidence below, that the decision to withdraw the charges against Dr. Hilaire was taken by the respondents after the Comptroller and the officers of the Customs and Excise Department had embarked upon and engaged in a 'mediation' process purportedly under the egis or with the sanction of the magistrate responsible for presiding over the trial of Dr. Hilaire on the said charges. This much can be gleaned or deduced from the order of the magistrate dated 2nd December 2021, made in the proceedings concerning the discontinuance of the prosecution of the said three criminal charges and from the affidavit evidence of both Comptroller Emmanuel and Mr. Chiquot. I shall return to the said order later in this judgment. However, and these facts are not in dispute, Dr. Hilaire had been represented at the mediation process by his then private legal practitioner, Mr. Mondesir, who later was appointed Attorney General of Saint Lucia. It is also apparent from the affidavit evidence of the first respondent, Comptroller Emmanuel, that he made the decision to discontinue the prosecution having reached a conclusion as to the lack of legal and factual sustainability of the said charges. The evidence also discloses that this decision to withdraw or discontinue the three criminal charges against Dr. Hilaire, was communicated to or put before the Magistrate's Court on 2nd December 2021.

The Application for Leave for Judicial Review

- [7] The appellant (the applicant in the court below) is the immediate former Prime Minister of Saint Lucia, and currently the Leader of the Opposition in the Parliament. He was also the Minister of Finance when the investigations into the importation by Dr. Hilaire of the vehicle were being conducted by the Customs and Excise Department and the criminal charges were subsequently brought against Dr. Hilaire.
- [8] On 5th April 2022 the appellant filed an application pursuant to the **Civil Procedure Rules 2000** Part 56.3 against the respondents for leave to commence judicial review proceedings for a declaration that the decision of the respondents to withdraw or otherwise discontinue the prosecution of Dr. Hilaire for the three offences under **the Act** “by failing to comply with the directive of the Comptroller of Customs to produce documents, contrary to section 102(3) of the Act” (“the Decision”), was ultra vires, and/or irrational, and/or unreasonable, and/or arbitrary, and/or made in bad faith, and/or perverse, and/or based on improper considerations or purposes, including but not limited to political considerations, and/or made in breach of the respondents’ statutory duties under section 102 of **the Act**, and/or was an abuse of power. The appellant also sought, inter alia, an order of certiorari quashing the Decision and an order directing the respondents to reinstate the prosecution of Dr. Hilaire for the said offences. The application sets out in some detail the factual background and the grounds, including legal grounds, upon which the appellant as applicant relies in seeking the said reliefs. The appellant also asserted in the notice of application that he had the requisite standing to bring the proposed claim for judicial review for the reasons stated, there are no alternative remedies available to him; and there had been no inordinate delay in filing his application.
- [9] The grounds on which these reliefs were sought by the appellant, are in brief:
- (i) section 109 of **the Act** did not authorise the respondents or any of them to withdraw or otherwise discontinue the criminal proceedings which they had instituted against Dr. Hilaire for offences under **the Act** or any customs enactment;

(ii) the DPP had taken over and/or continued the said criminal proceedings pursuant to his powers under section 73 of the **Constitution**, and as such, the power to withdraw or otherwise to discontinue those proceedings vested in the DPP (and not the respondents) who did not withdraw or discontinue the said proceedings and had not been consulted by the respondents in their decision to withdraw or otherwise discontinue the said proceedings;

(iii) in reaching the Decision, the respondents had failed to apply applicable policies for discontinuation of prosecutions, since the evidence gathered from the extensive investigations conducted by the former Comptroller, Mr. Chiquot was, “both admissible and cogent and was itself sufficient to provide a realistic prospect of conviction”;

(iv) in making the Decision, the first respondent (Comptroller Emmanuel) breached principles of natural justice, and took into account irrelevant considerations, “by improperly seeking out and obtaining legal advice from the Attorney General, Leslie Mondesir, who to the knowledge of the respondents was conflicted, having (prior to being appointed to the office of Attorney General) acted as legal counsel on behalf of Dr. Hilaire in connection with the said charges that had been laid against Dr. Hilaire for the said offences”;

(v) in arriving at the Decision, the respondents: (a) took irrelevant matters into account, including political considerations; (b) acted for improper motives or purposes; and/or (c) failed to take any proper or appropriate legal advice;

(vi) in light of the investigations and “the **legal advice** and **prosecutorial assistance** that was obtained from and rendered by the Director of Public Prosecutions in connection with the **charging and prosecution** of Dr. Hilaire for the said offence, the Decision was arbitrary, manifestly perverse, unreasonable, and irrational and/or amounted to an abuse of power” (emphasis added); and

(vii) the respondents were under a duty to give reasons for the Decision as fairness required that they should, but they failed or refused to provide any, or any adequate reasons for the Decision.

[10] In support of his application for leave, the appellant filed two affidavits from himself (the first on 5th April 2022 and the second (in reply) on 21st June 2022), and also the affidavit of Mr. Chiquot (filed also on 21st June 2022), with exhibits. One of the complaints made by the appellant to the correctness of the judge’s decision refusing leave, is his alleged failure to refer at all to the affidavit evidence of Mr. Chiquot. However, this is not correct, as paragraph [53] of the judgment shows. There the

judge refers to Mr. Chiquot's affidavit and summarises portions of it or some of the main allegations and factual matters therein. These include his letter dated 18th January 2021 to the DPP handing over the files to him "for onward prosecution". To round off the filings on both sides, the respondents filed on 10th June 2022 and relied on the affidavit of the first respondent (Comptroller Emmanuel), with exhibits.

[11] In his first affidavit, the appellant sets out the facts relied upon in some detail, supporting certain factual assertions with documentary exhibits (paras. 9-50). I do not consider it necessary for present purposes to regurgitate them here. As mentioned, there are several documents exhibited to the appellant's first affidavit. One such document is a letter dated 4th January 2022 from the appellant on the official stationery of the Leader of the Opposition. It is addressed to the first respondent, Comptroller Emmanuel, and sets out his concerns regarding the decision to withdraw the charges against Dr. Hilaire, a matter which the appellant considered to be of "great public interest and importance". The said letter concluded with certain questions, an answer to each of which was requested of Comptroller Emmanuel. These questions included whether it was a fact that Comptroller Emmanuel had made the decision to withdraw the charges without any prior consultation with the DPP "under whose office this prosecution was being **conducted** and under whose office and authority the prosecutor was acting". (emphasis added). Another question was whether it was not a fact that, "you consulted with the current Attorney General, Mr. Leslie Mondesir, prior to your withdrawal of the case, supposedly seeking his advice on the matter?" and, whether Comptroller Emmanuel had failed to consult with the Director of Finance and with the previous acting Comptroller of Customs.

[12] The first respondent, Mr. Emmanuel, is the Comptroller of Customs in Saint Lucia vested by statute with responsibility for administering **the Act**. Upon service on the respondents on 19th May 2022 of the application for leave to commence judicial review proceedings, Comptroller Emmanuel filed his affidavit in opposition thereto (with exhibits) in his capacity as acting Comptroller of Customs. In his affidavit in

reply and in opposition to the application, the Comptroller addresses (at paragraphs 6 – 48) the evidence in opposition to the application and in response to the factual and other assertions in the appellant's first affidavit.

- [13] What emerges from Comptroller Emmanuel's affidavit evidence, is that during the investigation period, Dr. Hilaire was represented by the law firm of Fosters (specifically Ms. Renee St. Rose), who wrote several letters on behalf of their client to the Customs and Excise Department. Several of these letters were exhibited to Comptroller Emmanuel's said affidavit. One document exhibited thereto is a memorandum dated 25th October 2021 from the acting Comptroller of Customs (Mr. Emmanuel) to the Hon. Attorney General, under cover of which was submitted a letter dated 18th October 2021 from Fosters to the acting Comptroller pertaining to the "seized Range Rover Sports HSE S14 motor vehicle." The penultimate paragraph of this memorandum to the Attorney General states:

"I have been notified by exit report from my predecessor, Mr. Peter Chiquot, that the matter is with the Attorney General's Chambers (Chambers) **and that discussions have ensued with Fosters, Chambers and the Customs Department with a view to a resolution.**" (emphasis added)

- [14] At paragraphs 26, 29 and 44 of his affidavit, Comptroller Emmanuel stated:

"26. I therefore formed the view that any continuation of the prosecution of Dr. Hilaire for a breach of section 102(3) of the Customs Act would not be justified. I understood section 102(3) of the Act to apply in cases where the Comptroller is not in possession of the information requested from an importer. In the circumstances, I formed the view that a prosecution of Dr. Hilaire for breach of section 102(3) would not be warranted or successful. Further, the Customs Act (Section 27) makes provisions for failure or inability of an importer, for want of any document or information, to make perfect entry of those goods, to making a signed declaration to that effect. There is no evidence that the former Comptroller of Customs, Mr. Chiquot, guided the importer concerning these provisions."

"29. As indicated at paragraph 26 of this affidavit I was of the view that since the Customs and Excise Department was in fact in possession of the information requested of Dr. Hilaire there was no point in continuing the prosecution against him. Therefore, after a brief conversation with the Second Respondent I informed Dr. Hilaire's attorneys that the charges would be withdrawn."

“44. I further reiterate that the charges were discontinued against Dr. Hilaire for no other reason than that I formed the view that there was no basis for the prosecution to continue. In this regard I repeat paragraph 26 hereof.”

- [15] In response to the assertion that Comptroller Emmanuel had improperly consulted with the Attorney General, Hon. Leslie Mondesir prior to taking the decision to withdraw or discontinue the charges, Hon. Mondesir having previously acted for Dr. Hilaire during the mediation process, Comptroller Emmanuel made the following averment, which is a flat out denial of that allegation:

“33. I did not have any such discussions with the Honourable Attorney General and the AG’s Chambers prior to my discontinuation of the charges.”

“35. ... I am not aware that the present Attorney General represented Dr. Hilaire as alleged. In any event I never received counsel from the Honourable Attorney General concerning the withdrawal of the charges against Dr. Hilaire.”

- [16] Specifically with regard to the withdrawal of the charges before the First District Court, Comptroller Emmanuel avers:

“30. On 2nd December 2021 I **along with Mr. Chiquot** and the Second Respondent attended the First District Court and informed the Court that the charges against Dr. Hilaire were to be withdrawn.” (emphasis added)

- [17] The second respondent was at all material times a Customs Inspector in the Department of Customs and Excise and the Customs officer in whose name the charges were brought in the First District Court against Dr. Hilaire. No affidavit from the second respondent was filed in the proceedings below.

- [18] Mr. Chiquot is the former Comptroller of Customs and the person who authorised the bringing of criminal charges against Dr. Hilaire. His affidavit was filed in the proceedings in the court below on 21st June 2022. Mr. Chiquot attests therein to the truth and accuracy of the statements in the affidavit of the appellant attributed to him and to the allegations of fact of what he, Mr. Chiquot, had represented to the appellant. At paragraph 8, Mr. Chiquot avers (in part):

“8. After consultation with the Attorney General’s office and the office of the Director of Public Prosecutions (“DPP”), the two agencies responsible for

providing the legal guidance to the Customs and Excise Department, it was agreed that the matter should be submitted to the criminal courts and prosecuted under Section 102(3) of the Act. That course of action was deemed necessary, pursuant to Section 119(1) of the Act, because of the continued defiance and bullying in the responses from Foster's Chambers, on behalf of Dr. Hilaire, in relation to the lawful request for documentation and the refusal to return the vehicle to the Customs and Excise Department, as was directed by the Comptroller of Customs. An instruction was issued to the Second Respondent, as Chief Investigator, to file the three matters in the Magistrate's Court against Dr. Hilaire for his refusal to comply....."

[19] At paragraph 9, Mr. Chiquot states:

"9. After the criminal complaints were lodged, they were referred to the DPP's Office for criminal prosecution. On January 18, 2021, in preparation for the court hearing and prosecution of the three lodged cases, the files were officially forwarded by me to the office of the DPP **with a view to the prosecution thereof being taken over by the DPP**. The request was made by letter dated January 18, 2021, as a cover to the case files that were sent. A copy of that letter is exhibited hereto marked "**Exhibit PC 2**"." (emphasis added)

[20] With regard to whether the matter had gone to mediation, paragraph 10 (in part) of Mr. Chiquot's affidavit is instructive:

"10. **I attended a mediation summoned by the Magistrate's Court on June 28, 2021**. Also present at the mediation were the Second Respondent from the Customs Department and ASP Anantha Wilson, Police Prosecutor and Ms. Kelly Thompson, Crown Counsel, from the office of the DPP. Dr. Hilaire was represented by Mr. Leslie Mondesir and Mr. Thaddeus Antione at the mediation and they agreed to submit the documentation that had been requested by the Customs Department to move the matter forward. The mediation was adjourned to the following week, where Dr. Hilaire and his legal team did not show up for the mediation." (emphasis added)

[21] Mr. Chiquot also states in his affidavit that on 4th October 2021, Comptroller Emmanuel informed him that he needed the files relating to the matter against Dr. Hilaire, "to prepare for a meeting with the newly appointed Attorney General, Mr. Leslie Mondesir." However, he was never informed about the outcome of any meeting between Comptroller Emmanuel and the Attorney General on 7th October 2021, and he states at paragraph 12 that he "...did not enquire."

Comptroller Emmanuel in his affidavit evidence has denied ever meeting with the Attorney General concerning the Dr. Hilaire charges and their withdrawal.

[22] At paragraph 14, he confirms that it is doubtlessly correct that, “the Office of the DPP has customarily provided legal guidance and counsel at every stage of criminal matters filed by the Customs and Excise Department, both before and after filing...” These include, as he listed them, representation at court ordered mediation, and general conduct of prosecutions. This notwithstanding, he goes on to state at paragraph 15 that the, “prosecution of the [Dr. Hilaire] matters was **assumed** and taken over by the DPP after the matters were filed.” (emphasis added)

[23] At paragraph 24, Mr. Chiquot avers that the criminal matters were adjourned on 7 occasions over a 6-month period, and that at those hearings “the Crown Counsel and a prosecutor from the DPP’s Office were present and represented the Customs and Excise Department.” He also confirms that the matter went to mediation on 28th June 2021. However, at the mediation session on 1st December 2021, the DPP’s Office was, “inexplicably excluded from the session”, Comptroller Emmanuel and the second respondent attended the said session without any legal counsel, and it was his “understanding from [Comptroller] Emmanuel that Dr. Hilaire’s legal team advised him to withdraw the charges, and he acceded to that request.”

[24] At paragraph 28, Mr. Chiquot states:
“28. On the morning of December 2, 2021, I was summoned to the Office of the Comptroller where I was informed that he had withdrawn the charges against Dr. Hilaire. Upon enquiring for a reason, Mr. Emmanuel indicated that he had circulated copies of the files to three of his peers to see if they would come up with a different view to the view that I had. He indicated that they all agreed that there was no basis for the charges, so he decided to withdraw the matters.”

[25] The “three peers” were three Customs Officers. Mr. Chiquot considered them to be “untrained in the law”. He categorised Comptroller Emmanuel’s decision to withdraw the charges against Dr. Hilaire as “highly irregular”. At paragraph 31, Mr. Chiquot addresses what took place at the Magistrate’s Court. His account is that Comptroller

Emmanuel informed the Magistrate “that he had agreed to withdraw the charges”, and Mr. Leslie Theophilus, legal counsel for Dr. Hilaire requested that the matter be dismissed, to which course of action Comptroller Emmanuel agreed. Thereupon, the Magistrate “announced the dismissal and closed the case. However, I have since seen the record of the Magistrate’s order (Exhibit AC12) and it states that the matter was in fact withdrawn.”

[26] At paragraph 32, Mr. Chiquot gives evidence of his meeting with the DPP, to whose office he had immediately proceeded. He stated there was a verbal exchange between the DPP and Comptroller Emmanuel. He stated that “...The DPP was visibly annoyed and in clear and unequivocal terms expressed his disappointment about what had happened, referring to the withdrawal and the fact that he was not consulted and indicated that he did not agree with [Comptroller] Emmanuel’s decision to withdraw the matters.”. Then follows Mr. Chiquot’s best recollection of what verbatim the DPP said to Comptroller Emmanuel in his presence. In short, on Mr. Chiquot’s evidence, the DPP expressed (in raw language) his disappointment, and even anger, at the decision taken by Comptroller Emmanuel to withdraw the charges and discontinue the prosecution of Dr. Hilaire in the Magistrate’s Court.

[27] I pause to observe that according to Mr. Chiquot’s account of what the DPP had said, at no time did the DPP actually say that what Comptroller Emmanuel had done in agreeing to and withdraw the charges before the Magistrate’s Court against Dr. Hilaire, was an impermissible or unlawful usurpation of the powers of the DPP under section 73 of the **Constitution**. Likewise, there was no statement from the DPP in that meeting to the effect that he had formally (or implicitly) taken over and decided to continue the prosecution of the said charges or it did not lie within the powers and authority of the Comptroller Emmanuel to withdraw or discontinue the said prosecution.

[28] Mr. Chiquot in his affidavit disputed that Comptroller Emmanuel was not aware the Attorney General, as a private legal practitioner, had prior to his appointment to such

high office, represented Dr. Hilaire in relation to the said charges. According to paragraph 36, he considered that in saying that he had not been aware of this, Comptroller Emmanuel was being “misleading and disingenuous” since he, Mr. Chiquot, had discussed this fact with him on several occasions during his tenure as acting Comptroller and when Comptroller Emmanuel had requested the files from him in October 2021, and again when he had informed him that he was going to meet with Attorney General Mondesir.

[29] Finally, Mr. Chiquot attests in his affidavit to having issued a press statement on 21st January 2022 concerning the lack of response from the Attorney General’s Office to two letters sent by him, and other matters. He also made clear that he had provided the appellant with all the information that he possessed in relation to these matters. According to paragraphs 41 and 42, he remains adamant that the criminal proceedings which he had instituted against Dr. Hilaire “were properly founded”, and this remains so notwithstanding the fact that he had settled a lawsuit in defamation brought against him by Dr. Hilaire, at a mediation session held on 15th March 2022 on the basis of a written apology.

[30] Mr. Leslie Mondesir, now Hon. Leslie Mondesir, is the Attorney General of Saint Lucia, a constitutional office. The Attorney General has not given any evidence in this matter. The DPP has also not provided any evidence in this matter. Dr. Hilaire is currently a member of Parliament and a Minister in the Government of Saint Lucia. He too has not given evidence in this matter.

The Judgment below

[31] The learned judge considered that the “singular issue” which he was called upon to decide at the leave stages was “whether the decision of the Comptroller of Customs to discontinue the criminal prosecution against Dr. Hilaire should be examined by way of judicial review”. Having cautioned himself to refrain from “forming or expressing any opinion on the merits of the case”, the learned judge considered that he ought to adopt a principled approach to the question of whether the appellant as

applicant had met the threshold requirement for the grant of leave. Having correctly identified the test as being whether the appellant has an ‘arguable ground for judicial review which has a realistic prospect of success’, the judge also identified that this threshold test is a “low” one. In support of these principles of law he relied on the decision of the Privy Council in **Sharma v Brown-Antoine and others**.³

- [32] At paragraph [28] the learned judge posited:
“[28] The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to any discretionary bar such as delay or an alternative remedy.”
- [33] At paragraph 29, the judge opined that in respect of the term “arguability”, the concept is not to be judged by reference to the nature and gravity of the issue to be argued. On the contrary, the test is to be applied in a flexible way. The more serious the allegation or the more serious its consequences, if proven, the stronger must be the evidence before a court will conclude the allegations have been proven on a balance of probabilities. While it is correct to say that “arguability” is a concept which must be flexible in its application, respectfully, the judge’s reference to the standard of proof in civil matters is misplaced. The judge was concerned at the leave stage with whether the threshold test of arguability had been met by the appellant, and not with the hearing and determination of the substantive judicial review proceedings.
- [34] The learned judge also accepted as sound the principle that it is not that a case for leave must be “potentially arguable”. An applicant for leave cannot plead “potential arguability” to justify or to satisfy the requirement for leave to apply for judicial review upon a speculative basis, in the hope that position may be strengthened upon a full-blown inquiry after judicial review proceedings has been commenced. This principle is well-supported by high authority.⁴

³ [2006] UKPC 57.

⁴ See: Decision of the UK Supreme Court in **Matalulu and Another v DPP** [2003] 4 LRC 712 at 733.

- [35] The learned judge also correctly identified from the authorities as an established principle that judicial review of a decision to prosecute or not to prosecute, although available in principle, is a highly exceptional remedy. In this respect, these phrases have been used by various courts: “rare in the extreme”, “sparingly exercised”, “very hesitant”, “very rare indeed”, and “very rarely”. The learned judge was also cognisant of the jurisprudence that decisions to prosecute are “particularly ill-suited for judicial review”, whereas decisions not to prosecute are more susceptible to being successfully challenged.
- [36] The learned judge correctly identified that the offences with which Dr. Hilaire had been charged did not concern strictly the commission of any offence relating to the collection of custom duties but related specifically to offences under section 102(3) of **the Act**. He noted that in addition to the prosecutorial powers conferred upon the Comptroller pursuant to section 119 of **the Act**, the Comptroller also had the power under section 125(1)(a) to compound any offence, which power is also expressly granted subject to the powers of the DPP under section 73 of the **Constitution**.⁵
- [37] The judge considered that the appellant’s principal case was that the exercise by the Comptroller of a power to discontinue or to withdraw the criminal proceedings against Dr. Hilaire was unlawful. This argument was two-fold. The first was that the DPP had taken over the prosecution of Dr. Hilaire in the exercise of his powers under section 73(2) of the **Constitution** and, accordingly, the Comptroller had no power under **the Act** or otherwise to independently discontinue to said prosecution and withdraw the charges. Secondly, even if the DPP had not taken over the proceedings, the Comptroller’s power to discontinue them whether pursuant to section 119 of section 125, was subject to the powers of the DPP under section 73 of the **Constitution**. In the judge’s view these two main planks of the appellant’s case for leave, boiled down to “the Comptroller’s power to discontinue the proceedings was subject to the powers of the DPP and that having not first

⁵ “(1) Subject to the powers of the Director of Public Prosecutions under section 73 of the Constitution the Comptroller may, as he or she thinks fit—
(a) compound any offence; ...”

consulted with, sought the advice of the DPP and ultimately obtain the approval of the DPP, the Comptroller's decision to discontinue the proceedings was unlawful." As I understand it, the case for the appellant before this Court was put on a somewhat different and more expansive footing.

[38] As to the case for the respondents, the judge surmised that they contended that the Comptroller was authorised to discontinue or withdraw the prosecution by virtue of the proviso to section 73(4) of the **Constitution**, and in any event, there was no evidence that the DPP had taken over and continued the prosecution of Dr. Hilaire for offences under section 102(3) of **the Act**.

[39] Indeed that learned judge accepted the argument, based on the proviso, and found that while the Comptroller's prosecutorial discretion was, like that of the DPP, not absolute, but is subject to judicial review and scrutiny by the courts in certain limited circumstances, the instant matter did not fall within any of the categories or circumstances such as to amount to an arguable case for the grant of leave. This is what the judge concluded at paragraph 45:

"[45] Therefore, on the basis of the proviso to section 73(4) of the Constitution, the Comptroller of Customs, being a prosecuting authority or exercising a prosecutorial discretion had the power to withdraw criminal proceedings with the leave of the court....However, the court declines to find at the invitation of the applicant that the facts presented fall into any of those categories or that the circumstances that existed amounted to an arguable case for the grant of leave."

[40] As to the question of whether the DPP had taken over and continued the prosecution of Dr. Hilaire, the judge having recognised that it was a fact sensitive issue, and that had the DPP done so it would be more arguable that the Comptroller would have acted unlawfully. He went on to consider the evidence before him from the appellant, including the evidence of Dr. Chiquot, the former acting Comptroller and his letter to the DPP dated 18th January 2021. He also considered the affidavit evidence of the second respondent, Comptroller Emmanuel, that the DPP had not been joined in the proceedings, and the evidence of what was described as the "routine practice" of lawyers from the DPP's Chambers appearing in court and conducting, on behalf

of the Customs and Excise Department, the prosecution of persons for offences under any customs enactment. On this important and central issue, the learned judge concluded:

“As it stands there simply has not been any evidence presented to the court to substantiate that the prosecution had been taken over by [the] DPP.’ As to the evidence of a ‘routine practice’, the judge mused: ‘This appeared to be a routinely common practice which did not seem to equate [to] the exercise of the DPP’s powers under section 73 of the Constitution.”

[41] Interestingly, counsel for the appellant argued before this Court that the DPP’s powers were limited to those set out in section 73, and there was no power therein which would permit the DPP to assign members of his staff and resources to conduct prosecutions on behalf of other government departments, authorities or functionaries empowered by statute to initiate and to carry on prosecutions for criminal offences within their area of remit. Accordingly, counsel argues, any such “routine practice” would itself be ultra vires to powers granted to the DPP under section 73, unless such power and authority was expressly conferred upon the DPP by statute. I shall return to this later but suffice it to be said that I find this submission extravagant, and I do not agree with its premise or conclusion.

[42] As to the appellant’s ground that the Comptroller’s decision to discontinue or withdraw the prosecution of Dr. Hilaire was his independent decision, it having been the subject of political influence, the learned judge, having reviewed the evidence, concluded on this issue:

“[65] In respect of both limbs upon which the applicant relied as amounting to an arguable case, the court has formed the view that the facts presented do not support an arguable case for the grant of leave to bring a claim for judicial review.”

[43] Regarding the appellant’s argument that the issues raised in the application for leave were of great public concern (perhaps a reference to the newspaper articles) and for that reason the court ought to grant leave so they may be investigated as matters of public importance, and, additionally, there was conflicting evidence which required testing on the merits in judicial review proceedings, such as to be properly

arguable, the learned judge disagreed. The judge, for the reasons expressed at paragraph 71 the judge, on the basis of the pronouncements of principle by the UK Supreme Court in **Matalulu and another v DPP**,⁶ concluded that although the allegations being made were serious ones, the evidence adduced at the leave stage made them merely “potentially arguable”, and therefore they did not meet the threshold test of arguability.

The Appeal

- [44] As mentioned above, the appellant relies on nine grounds of appeal. The 9th ground challenges the order for costs made by the judge against the appellant. The appellant contended that this order was made contrary to the general rule that in judicial review proceedings costs are not normally awarded against an unsuccessful applicant, and the learned judge gave no reasons why he was deviating from the general rule. The respondents, quite correctly, do not demur. The costs order made by the learned judge was clearly wrong and must be set aside. This effectively disposes of ground 9 of the appeal.
- [45] As to the other eight grounds, the appellant in his written submissions argued grounds 2, 3, 4, 5, and 6 together under the heading “DPP taking over the prosecution of the case”. This is in clear recognition that that issue is central to the determination of this appeal. Put briefly, if this Court considers that the learned judge erred when he concluded that there was no evidence before him that the DPP had taken over and continued the prosecution of the charges against Dr. Hilaire and there was sufficient evidence that this issue was at least arguable with a reasonable prospect of success, it is accepted by both sides that the Comptroller in such circumstances, did not have or could not exercise the power to discontinue or withdraw the said criminal proceedings, and the appeal ought to be allowed and the order of the judge refusing leave set aside and leave granted by this Court. Next the appellant argued ground 7 and 8 (dealing with the allegations of political interference) together. And finally, the appellant argued ground 1 which is a general

⁶ [2003] 4 LRC 712.

ground that the learned judge erred when he decided that the appellant had failed to meet the threshold test of an arguable case warranting the granting of leave.

[46] The respondents' approach in their written submissions' mirrors, in the main, that of the appellant. The respondents considered first the legal issues, including the threshold test and principles for the granting of leave as enunciated in the various authorities, and the approach to be taken specifically to an application leave to commence judicial review proceedings of a prosecutorial decision. Next, the respondents address the interpretation and import of the relevant statutory and constitutional provisions, before going on to address, *seriatim*, the issues or allegations of whether the DPP had taken over the prosecution, political interference, unreasonableness of the Comptroller's decision to withdraw the proceedings, and whether the judge erred in assessing the facts and in resolving questions of fact at the leave stage.

[47] In dealing with the grounds of appeal, I will adopt an approach similar to that utilised by the parties, in particular, the pairing of grounds adopted by counsel for the appellant. Accordingly, I will consider ground 2 to 6 (inclusive) first, followed by grounds 7 and 9, and more briefly, ground 1. Before doing so, however, I must briefly set out the relevant principles of law, including the threshold test. I say briefly, because, essentially, the threshold test for granting leave and most, if not all, of the relevant principles are not in dispute, subject to one exception of some importance. That is, learned counsel Mr. Astaphan SC for the respondents, urged the Court to not adopt too "low" a threshold test in determining whether the learned judge got it correct when he dismissed the appellant's leave application, in that the subject matter of the application concerned judicial review of a prosecutorial decision; more specifically, the decision to discontinue or to withdraw a prosecution lawfully commenced. In considering the threshold test and applicable principles I will also briefly address the relevant constitutional and statutory provisions relied on by the parties both before the learned judge and in this appeal. These provisions will be

dealt with in more detail when analysing and reaching conclusions on grounds 2 to 6 inclusive.

The Threshold Test for granting Leave and Applicable Principles

- [48] At the time of the hearing of the application on 5th August 2022, the applicable rules of court were those set out under Part 56 of the **Civil Procedure Rules 2000** (“**CPR 2000**”). Under r. 56.3 a person wishing to apply for judicial review was obligated, as a first but essential step in the process, to apply for leave. If granted, leave will be conditional on the applicant filing a claim for judicial review within 14 days of the order granting leave. The leave stage is considered to be a “filtering” stage, whereby the court can weed out bad, hopeless or unmeritorious applications for judicial review. This was considered a necessary means by which the court can ensure that only applications of some merit such as to be arguable with a realistic prospect of success, are permitted to go forward and thereby ensure that the court’s time and resources are properly deployed, and the justice system does not become clogged-up with baseless applications and challenges.
- [49] However, this two-stage process has been reduced to one step with the coming into force on 31st July 2023 of the **Civil Procedure Rules (Revised Edition) 2023** (the “**2023 CPR**”). By the **2023 CPR** and the revised Part 56, it is no longer a necessary requirement for an applicant for judicial review to first apply for and obtain leave of the court. By this substantive change, an applicant for judicial review or for any other administrative order can proceed directly to filing a fixed date claim form for this remedy (new r. 56.3). The instant matter, were it to be viewed through the lens of the **2003 CPR**, were it to have been commenced after the 2023 CPR came into force, no leave to commence judicial review proceedings would have been required of the appellant, and he would have been permitted to proceed to formally commence judicial review proceedings against the respondents and have that claim tried and determined on its merits by a judge of the High Court of Justice. But alas, timing is everything, and we are where we are. This appeal, therefore, falls to be determined by this Court applying the principles applicable to a review by an

appellate court of the interlocutory decision of a judge of the court below, his application of the threshold test for granting leave, and upon an assessment of the correctness of the learned judge's decision refusing leave applying the relevant principles as set out in the authoritative decisions of the Privy Council, this Court, the UK Supreme Court and other persuasive decisions.

[50] The test for granting leave to commence judicial review proceedings is so well-established as to be considered trite. The relevant case law and principles have been reviewed and reformulated in a number of authoritative decisions over the last 10 years by the Privy Council, the UK Supreme Court, this Court and, importantly also, by the Supreme Court of Fiji. These authoritative and highly persuasive decisions are: **Matalulu and another v DPP**⁷ a decision of the Supreme Court of Fiji; **Mohit v Director of Public Prosecutions of Mauritius**⁸ a decision of the Privy Council; **Sharma v Brown-Antione and others**⁹ also a decision of the Privy Council; **Sonya Young v Vynette Frederick**¹⁰ a decision of this Court; **Commissioner of Police and another v Steadroy C. O. Benjamin**¹¹ another decision of the Privy Council; and **Attorney General of Trinidad and Tobago v Ayers Caesar (Trinidad and Tobago)**.¹²

[51] These authorities were relied on or cited by counsel of both sides in support of their clients' case on appeal, and indeed before the court below. The threshold test and applicable principles have been thoroughly reviewed, distilled, and formulated in these authorities. I can do no better than to adopt them wholesale. It is fair to say that there is no substantive dispute between counsel for the parties in this appeal on the test and applicable principles, subject to one exception. This exception is, while Mr. Patterson KC, learned counsel for the appellants, contends that the threshold test for granting leave is a low one (as set out in the authorities), on the

⁷ [2003] 4 LRC 712.

⁸ [2006] UKPC 20.

⁹ [2006] UKPC 57.

¹⁰ Civil Appeal No. 22 of 2011 (oral decision delivered 31st May 2012, unreported).

¹¹ [2014] UKPC 8.

¹² [2019] UKPC 44.

other hand Mr. Astaphan SC, learned counsel for the respondents, while accepting that generally the test is a low one, contends that where the matter being challenged is the exercise of the prosecutorial discretion, including the discretion to withdraw or discontinue a prosecution, the test, as supported by the relevant authorities, is not low, but such challenges are exceptional and are rarely granted by the courts.

[52] The case law indicates that while the threshold test for leave to bring a claim for judicial review is whether the applicant has an arguable case with a realistic prospect of success which is not subject to a discretionary bar, and that test is a low test, it is a flexible one. Accordingly, a “modified threshold test” may be applied where warranted. This would permit the court to apply a higher hurdle in certain circumstances taking account of certain factors. These include 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 dealing with leave.¹³ One situation where it is settled that a heightened threshold test ought to be adopted and applied is where the challenge is to the exercise of discretionary prosecutorial power.

[53] The relevant case law and principles were comprehensively reviewed and distilled in the two main opinions of their Lordships in the Privy Council in **Sharma**. This was a case on appeal from the Court of Appeal of Trinidad and Tobago. It concerned the granting of leave by a judge of the High Court to the applicant, then the Chief Justice of the said Republic, to seek judicial review of an alleged decision taken by the Deputy Director of Public Prosecutions (to whom the DPP had delegated full prosecutorial authority and power in that matter) to prosecute the sitting Chief Justice on a charge of attempting to pervert the course of justice. The central question on appeal to the Board was whether the decision to prosecute, in the context of the powers of the DPP under a written Constitution, could be subject to

¹³ See: R (on the application of Federation of Technological Industries) v Customs and Excise Commissioners [2004] EWHC 254 (Admin) at para. 8; and Mass Energy Ltd v Birmingham City Council [1994] Env LR 298, at 307-308, 310, 311 and 318 CA.

judicial review, or whether the criminal process ought to be allowed to take its course.

[54] The first opinion was delivered by Lord Bingham of Cornhill and Lord Walker of Gestingthorpe. It was the conclusion of the Lords of the first opinion, that a decision to prosecute was in principle susceptible to judicial review on the ground of interference with the prosecutor's independent judgment, although the courts would be reluctant to grant what was in fact a highly exceptional remedy, and in their opinion, there was no complaint which could not be fairly resolved within the criminal process. On the other hand, Baroness Hale, Lord Carswell and Lord Mance, in delivering the second opinion, concluded that judicial review of a decision to prosecute was an exceptional remedy of last resort, and the issue relating to the decision to prosecute should properly be raised in the course of criminal proceedings either as an application to stay the proceedings on the ground of abuse of process, or at the substantive trial.

[55] In the first opinion, Lord Bingham and Lord Walker, reviewed the governing principles as distilled from the relevant authorities and formulated the threshold test for leave in these terms:

“(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy..... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.”

[56] On the central question in the appeal of whether a decision to prosecute is susceptible to judicial review, their Lordship of the first opinion answered it in the affirmative:

“It is well-established that a decision to prosecute is **ordinarily** susceptible to judicial review and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognized ground for review; *Matalulu*, ...at p. 735, 736, and *Mohit v Director of Public Prosecutions of Mauritius* ... at paras. [17]

and [20]. It is also well established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme'; 'sparingly exercised'; 'very hesitant'; 'very rare indeed'; and "very rare". (emphasis added)

- [57] In further elucidation of the exceptional nature of this remedy, their Lordships of the first opinion cited approvingly this passage from the opinion of Lord Steyn in **R v Director of Public Prosecutions, ex parte Kebilene and others**:¹⁴

"My lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review." (emphasis added)

- [58] Their Lordships on the first opinion went on to draw some distinction from the case law in terms of the approach to and likelihood of an application for leave being successful or not, between leave to challenge a decision **to** prosecute and leave to challenge a decision **not** to prosecute (emphasis added). In case of the former, the conclusion reached was that there was no English case where leave to challenge a decision to prosecute has been granted. Whereas cases where leave is being sought to challenge the decision not to prosecute have had some success.

- [59] An example of the latter category of cases (decision not to prosecute) is **Mohit**, a decision of the Privy Council. There the question under consideration was whether a decision by the DPP of Mauritius to discontinue a private prosecution in the exercise of his powers under the relevant sections of the Mauritius Constitution, is in principle susceptible to judicial review. Lord Bingham, who delivered the opinion of the Board with which all other members agreed, first observed that the Supreme Court of Mauritius had chosen not to adopt or follow the decision of the Supreme Court of Fiji in **Matalulu**. Lord Bingham opined at paragraph 21:

"..... It cannot, in the Mauritian context, be accepted that the extreme possibility of removal [of the DPP] under s. 93 of the Constitution provides an adequate safeguard against unlawfulness, impropriety or irrationality. **There is here nothing to displace the ordinary assumption that a**

¹⁴ [2000] 2 AC 326 at 371.

public officer exercising statutory functions is amenable to judicial review on grounds such as those listed in Matalulu. The Board would respectfully endorse the cited passage from the Supreme Court of Fiji's judgment in that case as an accurate and helpful summary of the law as applicable in Mauritius." (emphasis added)

[60] In drawing the above-mentioned distinction in approach (between decisions to prosecute and not to prosecute), the Board in **Sharma** rationalised that where leave is being sought of the decision not to prosecute, "the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal", and judicial review afford the only possible remedy citing, in particular, **Matalulu** at p.736. Reference was also made to the opinion of Powell J in **Wayte v United States**¹⁵ where, by contrast, Justice Powell characterised the decision to prosecute as, "particularly ill-suited to judicial review". Their Lordships of the first opinion summarised, helpfully, five reasons or rationales, distilled from the case law, for the court's extreme reluctance to disturb decisions by prosecutorial authorities to prosecute by way of judicial review proceedings. As these five reasons concern circumstances where the challenge by judicial review is to the decision to prosecute, and this instant matter concerns the decision not to prosecute or to discontinue and existing prosecution, I do not consider it necessary to repeat them here. Suffice it to be said that each of these five reasons are well-formulated and well-founded rationales for this principle. They are drawn from the authoritative decisions in **Matalulu**; **Mohit**; **Ex parte Kebilene**; **R v Horseferry Road Magistrates' Court, ex parte Bennett**;¹⁶ **Attorney-General's Reference (No. 1 of 1990)**;¹⁷ **Director of Public Prosecutions v Humphrys**;¹⁸ and other cases.

[61] At paragraph 24 of **Sharma**, their Lordships of the first opinion, having underscored that both **Matalulu** and **Mohit** were cases dealing with the decision not to prosecute (as in the instant matter), opined:

¹⁵ 470 US 598 (1985) at 607.

¹⁶ [1994] 1 AC 42.

¹⁷ [1990] Lexis Citation 2026.

¹⁸ [1977] AC 1.

“[24] The effect of the decisions by the Supreme Court of Fiji [in *Matalulu*] and the Board [in *Mohit*] was to establish that such decisions are **in principle** susceptible to review and that the available grounds are somewhat wider than the Fiji Court of Appeal had suggested. But the judgments of the Supreme Court and the Board accepted, implicitly if not expressly, the **extreme difficulty** of obtaining such relief, and neither threw any doubt on the authority, in England and elsewhere, emphasizing the **reluctance** of the courts to grant it.” (emphasis added)

[62] This brings me to the early decision of the Supreme Court of Fiji in **Matalulu**, the salient principles enunciated therein having been accepted and adopted wholesale by the Privy Council, the UK Supreme Court, and by this Court. As mentioned, **Matalulu** was a case where private prosecutions were commenced for offences under the Penal Code. Those prosecutions were subsequently taken over by the DPP of Fiji who terminated them by entering a nolle prosequi. Leave for judicial review of the DPP’s decision was applied for and granted by a judge at first instance. An appeal against that decision was successful on the basis, in part, that judicial review of the DPP’s decision to enter a nolle prosequi was available only on rare occasions of “flagrant impropriety”.

[63] On application to the Supreme Court of Fiji, special leave to appeal was granted. The Supreme Court held:

“Judicial review of the exercise of prosecutorial discretion was to be exercised sparingly. In such cases, it was sufficient to apply established principles of judicial review. These had proper regard to the great width of the DPP’s discretion and the polycentric character of official decision-making in such matters, including policy and public interest considerations which were not susceptible of judicial review because it was within neither the constitutional function nor the practical competence of the courts to assess their merits. That approach subsumed concerns about the separation of powers. A mistaken view of the law upon which a proposed prosecution was based would not constitute a ground for judicial review in connection with the institution of a prosecution. The appropriate forum for determining the correctness of the prosecutor’s view was the court in which the prosecution commenced. Where the DPP decided to **discontinue a prosecution** on the basis of a mistaken view of the law then, by definition, **there was no court proceedings within which that view could be tested, and it might be that a stronger case for review could be made.** Decisions to initiate or **not to initiate or to discontinue** prosecutions might

be based on judgments about the prospects of success on questions of law and fact. The DPP was empowered to make such judgments even though they might be wrong on the law or mistaken on the facts.” (emphasis added)

[64] At page 733 in the judgment of the Fiji Supreme Court in **Matalulu** (Von Doussa, Keith and French JJ), their Lordships opined that in considering whether to grant leave for judicial review generally, the judge has a discretion which must be exercised upon or being informed by the purpose of the order or rule of court by which leave to commence judicial review proceeding can be applied for and granted. In the instant matter, the applicable rules of **CPR 2000** are rules 56.3 and 56.4. The Fiji Supreme Court mused that it is not an occasion for a trial of issues, a matter which the learned judge in the instant matter reminded himself of on a number of instances. The Supreme Court also helpfully provided an inexhaustive list of five factors which a judge considering an application for leave is entitled or ought to have regard to. One such factor is whether the application discloses arguable grounds for review based upon facts supported by affidavit.

[65] The Fiji Supreme Court also opined that, “the question whether there are arguable grounds for review is not to be determined by the resolution of contested issues of law”. However, “where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are **manifestly untenable**, then leave should not be granted.” (emphasis added) With regard to an assertion that a ground or grounds are “potentially arguable”, their Lordships concluded that such grounds “cannot justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen.”

[66] The Fiji Supreme Court also considered a category of cases where a “restrictive approach” to the grant of leave may be warranted. This was either on the basis of the limited grounds that might be available or on public policy considerations constraining the incidence of such review. They opined:

“This is **particularly applicable** to decisions made by prosecuting authorities in the administration of the criminal justice system. The decision to prosecute or not prosecute a particular case is **likely to be affected by**

a wide variety of considerations. Other decisions of a governmental character may fall into the same category where they involve questions of policy, the allocation of resources and the determination of priorities for governmental action including the delivery of services. That is not to say that such decisions are immune from review where they are made **unlawfully or in excess of power.** It does say that an application for leave to seek judicial review of such decisions may require **close scrutiny** by a judge before leave is given.” (emphasis added)

[67] As to specific instances in which the prosecutorial power of the DPP may be susceptible to judicial review, their Lordships in **Matalulu** opined:

“It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. In excess of the DPP’s constitutional or statutory grants of power – such as an attempt to institute proceedings in a court established by a disciplinary law.
2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.
3. In bad faith, for example, dishonesty. An example would arise if prosecution were commenced or discontinued in consideration of the payment of a bribe.
4. In abuse of the process of the court in which it [the prosecution] was instituted, although the proper forum for review of that action would ordinarily be the court involved.
5. Where the DPP has fettered his or her discretion by a rigid policy – eg one that precludes prosecution of a specified class of offences.”

[68] The list above was not intended to be exhaustive. However, as stated at page 736, “contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice.”

[69] The instant matter concerns the vires and lawfulness of the decision of Comptroller Emmanuel to discontinue or to withdraw the prosecution of the charges brought by acting Comptroller Chiquot against Dr. Hilaire. This was not a decision taken or made by the DPP of Saint Lucia, as is the case in most of the case relied on. It is a purported exercise of prosecutorial discretion to discontinue a prosecution made by a public officer imbued by statute with prosecutorial decision-making powers pursuant to section 119 of **the Act**. These same principles which apply to the exercise of prosecutorial discretion by the DPP apply also to the exercise of prosecutorial discretion by independent prosecutors.¹⁹ Accordingly, independent prosecutorial decision-makers (like a DPP) have a significant margin of discretion, particularly where the issue involves disputed evidence of primary fact or an assessment of the public interest.

[70] **Matalulu** and **Mohit** are both cases concerning the decision not to prosecute or to discontinue an existing prosecution. **Sharma** on the other hand, concerned a decision to prosecute, albeit one which it was contended had not actually been made by the Deputy DPP. In **Matalulu**, the central issue was whether special leave to appeal to the Supreme Court should be granted. However, the salient principles from the decision of the Fiji Supreme Court were subsequently adopted as correct by the UK Supreme Court and the Privy Council. In **Mohit**, the Privy Council allowed the appeal against the decision of the Supreme Court of Mauritius dismissing the appellant's application for leave to apply for judicial review of the decision of the DPP to take over and discontinue his private prosecution on the erroneous basis that it was an abuse of process and that the decision by the DPP was unreviewable. The order refusing leave was set aside and the appellant's application remitted to be considered afresh by the Supreme Court in light of the Board's judgment and any evidence there may then be. Such evidence to include any reasons which the DPP may choose to give for his decision; albeit the decision whether to give reasons

¹⁹ See: *R v (on the application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60 at [30]-[31].

at all was one entirely within the judgment of the DPP, as there is “in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content.”

[71] Next is the decision of the Privy Council in the fairly recent case of **Attorney General of Trinidad and Tobago v Ayers-Caesar (Trinidad and Tobago)**. This appeal does not concern judicial review of the prosecutorial powers of the DPP or any other functionary or authority. As such it is, in some respects, not directly on point with the instant matter. However, the opinion of the Board delivered by Lord Sales on the test and standard of proof when applying for leave to issue judicial review proceedings, is both instructive and confirmatory of the principles exposed in prior decisions of the Board as generally applicable to such applications. At paragraph 20, Lord Sales confirms that the test for the grant of leave for judicial review is the “usual” one. The threshold for the grant of leave is low, and the court is concerned with whether an applicant has an arguable ground for judicial review which has a realistic prospect of success.

[72] At paragraph 19, the Law Lord opines on the question of “public interest” in the legal issues raised by the application:

“[19] In the Board’s view, the majority of the Court of Appeal were right to find that it would be in the public interest for the issues regarding the extent of the President’s powers and what role he or she ought properly to play in a case such as this to be authoritatively decided by the courts after a substantive hearing on the merits.”

[73] Finally, in relation to the governing legal principles, the decision of the Privy Council in **Commissioner of Police v Benjamin**, is also instructive. This case concerned an application by Mr. Benjamin for leave to review the decision of the Commissioner of Police to lay criminal complaints against him for certain offences under the Forgery Act of Antigua and Barbuda. The charges were brought by an officer in the Police Force who did so notwithstanding the oral and written instructions of the DPP to hold off and to not lay any charges against Mr. Benjamin. The application for leave was refused, the first instance judge concluding that the DPP did not have the

power to prevent the police from laying the complaints, and that the allegation of political interference vitiating the decision of the Commissioner to prosecute could be raised before the Magistrate's Court on an application within the extant criminal proceedings. On appeal to this Court, the appeal was allowed, the orders of the judge set aside, and the summons issued against Mr. Benjamin quashed. On appeal by the Commissioner to the Privy Council, the Board advised that the appeal be allowed, and the orders of the Court of Appeal set aside, the effect of which was the reinstatement of the order of the High Court dismissing the application for leave.

- [74] At paragraph 16 of the unanimous opinion of the Board, Lord Wilson states, "The common law has conferred a power to institute criminal proceedings on every citizen and, when at first they instituted such proceedings, the police exercised that general power..... But the power of the police to institute criminal proceedings has been buttressed by statute." Paragraph 21 is also particularly instructive:

"[21] The provisions of the Constitution are central to the issue raised in this appeal. Counsel for Mr. Benjamin contends that, either expressly or implicitly, they confer power on the Director [DPP] to prevent the police from instituting criminal proceedings. It is agreed that, if this contention is correct, the duty of the police to institute such proceedings in the circumstances specified in section 23 of the Police Act and their power to do so at common law and under section 26(2)(a) of the Magistrate's Code of Procedure Act are qualified accordingly: for section 2 of the Constitution provides that it is the supreme law and that, if any other law is inconsistent with it, it shall prevail and the other law shall, to the extent of the inconsistency, be void."

- [75] I pause here to make a few pertinent observations flowing from the above quoted passage in the context of the instant matter. The first is that the **Constitution of Saint Lucia** contains a similarly worded supremacy clause to that of Antigua and Barbuda. Accordingly, there can be no doubt that the **Constitution** is the supreme law of Saint Lucia. The effect of this in the instant matter is that the powers of the DPP under section 73 of the **Constitution** must take precedence over and are supreme to the provisions of any other law or statute to the extent that any such provision is inconsistent with the provisions of section 73. Secondly, the decision in **Benjamin** is authority for a right held by every citizen of the State of Saint Lucia to bring a private prosecution against another person for the alleged commission of a

criminal offence. This common law right, even to the extent that it is buttressed by statute in Saint Lucia, is however subject to the constitutional powers of the DPP in section 73(2) to take over any prosecution brought by a citizen, and to either continue or discontinue it.

- [76] The third aspect of this concerns the right or power of the DPP to discontinue or to withdraw private criminal prosecutions and prosecutions brought by other public officers or authorities pursuant to a statute. In my considered opinion, this raised two questions. The first question is that where a private citizen has exercised their common law (or statutory right) to prefer charges and to prosecute another person for a criminal offence, does that private citizen also have a concomitant power or right to withdraw and to discontinued the private prosecution initiated by them, assuming it has not, in the intervening period, been taken over by the DPP pursuant to his powers under section 73(2) of the **Constitution**? Put differently, is the power of discontinuance also one which arises at common law in a case where the criminal prosecution is a private one and, if it does, how and in what manner is it to be exercised by the private citizen? The second question which it raises is the application to private prosecutions at common law of the proviso to section 73(4) of the **Constitution**. In my view this aspect is clear. The proviso applies with equal force and effect to all circumstances where any person other than the DPP has lawfully instituted the criminal proceedings and would include both criminal proceedings brought by a private citizen in exercise of their common law right to do so and proceeding brought by a public officer or authority pursuant to a power to do so under a statute. In either circumstance, nothing in section 73 concerning the powers granted to the DPP shall prevent the withdrawal of those proceedings at the instance of the private citizen, or public officer or authority, with the leave of the court, unless the prosecution of those proceedings has been taken over and continued by the DPP under section 73(2) of the **Constitution**.

Relevant provisions of the Customs Management Act and the Constitution

- [77] The charges brought by Comptroller Chiquot against Dr. Hilaire were for offences under section 102(3) of the **Customs Management Act**. The three charges or informations were for an alleged failure by Dr. Hilaire to furnish the Comptroller with certain documents and information, specifically the invoice provided to him by his supplier of the vehicle imported into Saint Lucia. Section 102 provides (in material part) as follows:

“102(1) Importers ...shall keep all commercial documentation relating to importation ... for a period of 5 years from the date of importation ... and any person concerned in the importation shall –

(a) Furnish to any officer in such form and manner as he or she may require, any information relating to the goods;

(b)

(c) produce and permit the officer to inspect, take extracts from, make copies or remove for a reasonable period any invoice, ... or ...documents relating to the goods;

(d)

(2) The Comptroller may require evidence to be produced to his or her satisfaction in support of information provided by virtue of subsection (1) In respect of any goods imported

(3) Any person who without reasonable cause, fails to comply with any requirement imposed on him or her under subsection (1) or (2) commits an offence and is liable on conviction to a fine of \$5,000.”

- [78] The Comptroller’s power to institute criminal proceedings against an importer of goods for an offence under any customs enactment, including an offence under section 102(3) of the **Customs Management Act**, lies in section 119 of the said **Act**, which provides (in material part) as follows:

“119. INSTITUTION OF PROCEEDINGS

(1) Subject to the provisions of subsection (3), and to the powers of the Director of Public Prosecutions under section 73 of the Constitution, proceedings for an offence under any customs enactment,, shall not be commenced except –

(a) by order of the Comptroller of Customs in writing; and

(b) in the name of an officer [Customs Officer].

(2)

(3) Despite anything in the foregoing provisions of this section, where any person is arrested for any offence for which he or she is

liable to be arrested under any customs enactment any court before which he or she is brought may proceed to deal with the case although the proceedings have not been instituted by order of the Comptroller or have not been commenced in the name of an officer.”

[79] The provisions of section 119 and the powers granted therein for the institution, by order of the Comptroller and in the name of a Customs Officer, of criminal proceedings against any person for an offence under any customs enactment, are important to the issues raised in this appeal by the appellant under grounds 2 to 6. Firstly, section 119 clearly grants the power to the Comptroller to prefer criminal charges in the Magistrate’s Court against a person for an offence or offences under any customs enactment. This prosecutorial power is to be exercised by order of the Comptroller (presumably in writing) and the charges brought in the name of a Customs Officer. This power is not the same as the common law right granted to every citizen to bring a private prosecution. It is of the class of statutory prosecutorial powers granted expressly to a public officer or public authority. In the instant matter, there is no issue raised as to the validity and vires of the exercise of this power by the then acting Comptroller Chiquot when the informations were laid against Dr. Hilaire in 2021.

[80] Secondly, the prosecutorial power granted to the Comptroller pursuant to section 119, is made expressly subject to the powers of the DPP under section 73 of the **Constitution**. Thirdly, there is no express power granted by section 119 for the Comptroller to discontinue or withdraw a criminal prosecution commenced by him or her (or a predecessor in office) under section 119. Thus, the question arises as to whether the power to discontinue a prosecution is implicit or, put differently, is to be implied under section 119. The appellant argues that no such power was granted, and none can be implied, under section 119. Accordingly, Comptroller Emmanuel did not have the power to withdraw or discontinue the prosecution of Dr. Hilaire, and his decision to do so was *ultra vires* and unlawful. On the other hand, counsel for the respondents argued that such power albeit not expressly granted by section 119 was impliedly granted to the Comptroller as a matter of principle and proper

construction of section 119, and by virtue of section 17(3) of the **Interpretation Act**.²⁰

- [81] In seeking to counter this argument, counsel for the appellant submitted that section 17(3) of the **Interpretation Act** does not apply so as to imply a power of discontinuance and, in any event, this raises an arguable issue for determination in judicial review proceedings. Counsel points to provisions in other enactments where the power of discontinuance or withdrawal was expressly granted. These include section 73 (2)(c) of the **Constitution** which expressly confers on the DPP the power to “discontinue” criminal proceedings at any stage before judgment is delivered; and to section 8(1) of the **Special Prosecutor Act**²¹ of the laws of Saint Lucia which states:

“8. (1) Subject to the powers of the Director of Public Prosecutions under section 73 of the Constitution of Saint Lucia ..., the Special Prosecutor [an Attorney-at-Law appointed under s. 4] may perform any function in relation to the institution, carrying on and withdrawal or a prosecution for an offence against the laws of Saint Lucia and may prosecute a matter in his or her own name.”

- [82] With respect, this line of argument by the appellant is unsustainable and without merit. In my view, it does not give rise to an arguable legal issue such that leave to commence judicial review proceedings ought to have been granted. In my judgment, such a power is to be implied under section 119 of **the Act** as a power which is a reasonably necessary compendium to the power to institute criminal proceedings vested in the Comptroller or as reasonably incidental to such power, subject to the powers of the DPP under section 73 of the **Constitution**. The provisions of section 17(3) are clear and, properly construed, applies to the prosecutorial power granted to the Comptroller under section 119 of **the Act**. Section 17(3) provides:

“17. Statutory powers and duties generally

(3) Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do the act or thing or are incidental to the doing thereof.”

²⁰ Cap. 1.06 of the Revised Laws of Saint Lucia.

²¹ Act No. 19 of 2022 of the Laws of Saint Lucia.

[83] The fact that section 73(2)(c) of the **Constitution** expressly confers upon the DPP the power to discontinue criminal proceedings instituted by himself or herself or any other person or authority, does not derogate from the conclusion reached above that such power can and ought as a matter of principle to be implied under section 119 of the **Customs Management Act**. Subsection (2) of section 73 of the **Constitution** is dealing not just with the powers of the DPP to institute criminal proceedings against any person before any court of law, but also to take over and either continue or discontinue criminal prosecutions brought before any court by any person (including a private citizen or public officer under some enactment) or authority. Clearly, in such circumstances, and for good and obvious reasons, Parliament considered it necessary to expressly state that the DPP is to be empowered to not only take over, but to discontinue prosecutions whether brought by him or by another person or authority.

[84] Likewise, Parliament in providing by statute for the appointment of Special Prosecutors, that is persons who once appointed under section 4 would become a “public officer” empowered, in parallel with the DPP, to institute criminal prosecutions in his/her own name and to prosecute those offences in a court of law, to also be imbued with the power, like the DPP, to withdraw a prosecution instituted by him/her as Special Prosecutor. Moreover, section 8(5) provides:

“(5) The Special Prosecutor is deemed to have the powers of the Director of Public Prosecutions under an enactment, except for the powers exclusively given to the Director of Public Prosecutions under the Constitution of Saint Lucia, Cap. 1.01.”

[85] I am also of the opinion that the Comptroller, in exercising the implied power to withdraw or discontinue criminal prosecutions instituted by him or her under and pursuant to section 119, the proviso to section 73(4) of the **Constitution** is of significance. It states:

“Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.”

[86] The appellant submits that the proviso above cannot be used to imbue the Comptroller with the power of discontinuance or withdrawal, absent an express power to do so in section 119, as the proviso is not an enabling provision for the granting of such power to the Comptroller or any other public officer or authority who has not been expressly granted that power by the particular enabling prosecutorial legislation. The respondent argues that the power of the Comptroller to discontinue or withdraw prosecutions instituted by him or her is implicit in the power to institute such prosecutions under section 119 but concedes that such power has to be exercised in the manner provided for by the proviso to section 73(4) of the **Constitution**.

[87] In my considered view, the respondents have the better of the argument on this issue. I have already concluded that the Comptroller has the power under section 119 to withdraw or discontinue a criminal prosecution instituted by the Comptroller thereunder, subject to the power of the DPP under section 73 of **the Constitution** to take over and discontinue any such prosecution, this power being implied or reasonably incidental to the power to commence prosecutions granted to the Comptroller.

[88] I also accept that in exercising the power to discontinue, the Comptroller is also required to obtain the leave or sanction of the court as stipulated by the proviso to section 73(4) of **the Constitution**. This latter provision being in **the Constitution**, the supreme law of the land of Saint Lucia, takes precedence and must be observed and complied with by the Comptroller.

[89] What then is the procedure to be followed by the Comptroller when discontinuing or withdrawing a criminal prosecution instituted under section 119 of **the Act**? The Comptroller (and those public officers or authorities in a similar position) while empowered, by implication, to decide to discontinue or to withdraw a prosecution instituted by him or her as Comptroller, is required, in order to effectively bring the

prosecution to an end, to obtain the leave or sanction of the court to withdraw or discontinue the said prosecution. In this way, the court formally brings the prosecution of the person charged to an end, they are thereby discharged, and the court may make certain other consequential orders as appropriate in the particular circumstances of the matter. It follows that in the instant matter, while Comptroller Emmanuel had the power under section 119 (by implication or as being reasonably incidental), to withdraw or discontinue the prosecution of the charges against Dr. Hilaire, he had to do so formally before the magistrate.

[90] The appellant argued before this Court, for the first time, that even if Comptroller Emmanuel has a power of discontinuance (as an implied or reasonably incidental power under section 119), which the appellant disputes, he did not exercise that power in the manner stipulated by or in compliance with the proviso to section 73(4) of the **Constitution**. (“the proviso point”) This submission is predicated on the fact that the magistrate’s order dated 2nd December 2021 does not specifically evince that the magistrate granted leave or that he made an order for withdrawal of the prosecution of Dr. Hilaire. Rather the order simply acknowledges the fact that the Comptroller had withdrawn the prosecution of the defendant, Dr. Hilaire after mediation, while going on to make other ancillary orders.

[91] Moreover, the appellant’s principal argument was that, in any event, in the instant matter, the DPP having taken over and continued the prosecution of Dr. Hilaire, Comptroller Emmanuel no longer had the power of discontinuance and could not lawfully exercise that discretionary power. In addition, counsel for the appellant submitted that in Saint Lucia there is no authority granted to a magistrate to order the parties to criminal proceedings to submit to mediation. The respondents argued that the appellant sought leave to challenge the decision by Comptroller Emmanuel to discontinue the prosecution of Dr. Hilaire. They did not seek to challenge by way of judicial review the decision of the magistrate or any of the steps taken by Comptroller Emmanuel after he took the decision to exercise his power of discontinuance. The respondents also argued that Comptroller Emmanuel did have

the power of discontinuance or withdrawal, and he exercised it lawfully, properly and effectively in compliance with the proviso to section 73(4) of the Constitution. This much they submit has been sufficiently made clear by the orders of the magistrate on 2nd December 2021 which each recorded the withdrawal of the said prosecution after a mediation process which involved, among others, the respondents and Dr. Hilaire and his legal counsel. Furthermore, the magistrate, having effectively sanctioned the withdrawal of the charges and the discontinuance of the prosecution of Dr. Hilaire, went on to make certain consequential orders flowing therefrom. As to the existence of a statutory basis for mediation in criminal matters in Saint Lucia, counsel for the respondents referred the Court to rule 7.2(d) (a citation error – the correct subparagraph being either (b) or (e) of both) of the **Criminal Procedure Rules** of Saint Lucia.²²

[92] It must be pointed out that neither the proviso point, nor the mediation point were canvassed by the appellant before the learned judge, nor were any of these issues grounds upon which the leave application was premised. I am satisfied that the mediation point does not itself carry much weight in determining the correctness and legality of the Comptroller's decision to withdraw or to discontinue the prosecution of charges brought under section 119 of the **Customs Management Act** against Dr. Hilaire. I say it is of little weight because whether the magistrate had the power under rule 7.2 of the **Criminal Procedure Rules** to order mediation in a criminal matter, is not relevant to the question of whether the decision by the Comptroller to discontinue the prosecution was lawful or reasonable, such as to be susceptible to judicial review. This latter issue turns on whether the Comptroller had a power of discontinuance under section 119 of the **Customs Management Act** and, in turn, if he has such power, whether he could no longer exercise it, as arguably the prosecution had been taken over by the DPP in exercise of his powers under section 73(2) of the **Constitution**. Any legal question as to whether the magistrate had the power to order mediation in a criminal matter is of no relevance to the determination of the said main issue. In any event, I note that as it is the evidence of Comptroller

²² Statutory Instrument No. 22.

Emmanuel that he decided to withdraw or discontinue the said charges against and the prosecution of Dr. Hilaire, because he had reached the conclusion himself, having first consulted with three senior officers in the Customs and Excise Department, that the charges laid could not be made out.

- [93] Turning next to the proviso point. As the documentary evidence discloses, there were three identical orders evidencing the withdrawing of the three criminal charges against Dr. Hilaire. These are exhibit “AC-12” to the first affidavit of the appellant. The orders state: *“On the 2nd day of December 2021 the matter against the Defendant was withdrawn after Mediation.”* The orders go on to state (in material part):

“The Comptroller of Customs is to release one used Land Rover Discovery by 3.12.21 and delivered on or before December 10th 2021.”

“The said adjudication was consequent on Withdrawal.”

- [94] The orders do not formally record the granting of leave to discontinue or to withdraw the prosecution of any of the three charges. No transcript or other written or electronic record of the proceedings on 2nd December 2021 before the magistrate was produced by either side in evidence before the learned judge, and none has been sought to be produced before this Court. The only evidence before the judge below was a copy of each of the said three orders, and the affidavit evidence of Mr. Chiquot for the appellant and of the first respondent, Comptroller Emmanuel. Accordingly, the only cogent evidence of the actual withdrawal proceedings (or discontinuance) of the said prosecution is the orders of the magistrate dated 2nd December 2021.

- [95] In my considered view, the proviso point is not open to the appellant to make at this stage of the proceedings, having not challenged the decision of the magistrate as evinced by the orders made 2nd December 2021. The decision, the subject of the application by the appellant for leave, is the decision by Comptroller Emmanuel to discontinue the prosecution of Dr. Hilaire under section 102(3) of the **Customs Management Act** and no other. During oral argument, the Court raised with counsel

for the appellant whether it was not the case that it was the decision by the magistrate which effectively brought the criminal proceedings to an end. Counsel confirmed it was the decision of the Comptroller to discontinue the prosecution which is the subject of the intended challenge by way of judicial review, and not the decision of the magistrate on 2nd December 2021. However, counsel for the appellant argued that if the decision by the Comptroller was arguably unlawful, ultra vires or without jurisdiction, then it would follow that the orders made on 2nd December 2021 by the magistrate following from or as a consequence of that decision would itself be null and void and of no effect.

[96] Having found that the Comptroller has the power of discontinuance under section 119 of **the Act**, it follows that he had the power to decide to discontinue the prosecution of Dr. Hilaire unless, as argued by the appellant, the DPP had, prior thereto, taken over and continued the said prosecution. This latter issue will be addressed in the next section. However, the simple fact is that the Comptroller did go before the Magistrate's Court, notified the Magistrate of his decision to withdraw or to discontinue the prosecution of the charges laid against Dr. Hilaire and the Magistrate proceeded to note such withdrawal and to make an order consequential thereon. In my view, absent a finding that it was arguable that the DPP had taken over and continued the prosecution thereby taking it out of the hands and jurisdiction of the Comptroller under section 119 of **the Act**, there can be no basis upon which a challenge the decision of the Comptroller to discontinue the prosecution is arguable with a realistic prospect of success.

[97] The third substantive matter which arises in relation to section 119 of the **Customs Management Act**, is in relation to subsection (3) (set out above at paragraph 78). It is my considered opinion that subsection (3) relates to circumstances where a person who was liable to be arrested for an offence under any customs enactment, has been arrested for that offence, and has been charged and taken before a court by the police whether in exercise of their power to institute criminal prosecutions (at common law or by statute) or by or at the instance of the DPP. This would include

offence under section 102. Subsection (3) recognises that, for example, the DPP or the police can, without an order from or the sanction of the Comptroller of Customs, institute criminal charges and proceedings for an offence under a customs enactment for which the person charged would be liable to be arrested under **the Act**. This relates to circumstances where the procedure and authority under section 119 to institute criminal charges and prosecutions by the Comptroller, is not engaged. In those circumstances, the criminal charge and the prosecution of them by either the DPP (under his/her section 73(2)(a) constitutional powers), or by the police pursuant to their powers either at common law or by applicable statute, would be lawful. In the case of the DPP, the prosecution would be under his/her control and cannot be withdrawn or discontinued by the Comptroller of Customs.

Grounds 2, 3, 4 5 and 6 – Whether the DPP took over the Prosecution of the case

[98] Grounds 2- 6 all, on similar but not identical bases, challenge the finding by the learned judge that there was no evidence that the DPP had taken over and continued the criminal proceedings instituted by the acting Comptroller Chiquot against Dr. Hilaire.

[99] I have in the last section dealt with and drawn certain conclusions as to the threshold test and applicable principles from the leading authorities, particularly with regard to where the challenge by way of judicial review is to the exercise of prosecutorial discretion not to prosecute or to discontinue an existing prosecution. I have also dealt at some length with the legal issues raised by the appellant in submitting that the Comptroller had no power or authority under section 119 or otherwise to discontinue or withdraw prosecution of the criminal charges brought against Dr. Hilaire. I found that he does have such a power, which is to be implied as necessary or as reasonably incidental to the prosecutorial power granted under section 119. That leaves, substantively, the important issue upon which most of this appeal turns. This is whether, even if such a power can be implied or is a reasonably incidental to the prosecutorial power granted under section 119, there was sufficient

evidence before the learned judge to satisfy the threshold test of arguability with a realistic prospect of success, that the DPP had, prior to the Comptroller's decision to discontinue, taken over and continued the said prosecution in exercise of his power to do so under section 73(2)(b) of the **Constitution**. Related to this pivotal issue, were the criticisms levelled by the appellant of the learned judge's approach to and assessment of the evidence before him at the leave stage; and whether, notwithstanding his self-caution not to make conclusive findings at the leave stage, he erred by doing just that.

- [100] The appellant's case was that in the instant matter there was sufficient evidence before the learned judge to make it arguable with a realistic prospect of success, that the DPP had, in exercise of the powers granted pursuant to section 73 of the **Constitution**, taken over and continued the prosecution of Dr. Hilaire on the said criminal charges under **the Act**. Accordingly, the appellant as applicant had satisfied the threshold test for the grant of leave, and the learned judge had erred in not so concluding. It is also the case for the appellant that, in such circumstances, the prosecution having been taken over by the DPP, any powers which the Comptroller may have had to withdraw or discontinue criminal prosecution for offences under **the Act** or any customs enactment, could no longer lawfully be exercised; and the only public office holder with such power and who could so exercise it, was the DPP. Accordingly, the decision made by Comptroller Emmanuel and what he purported to do before the magistrate on 2nd December 2021, to withdraw or discontinue the prosecution of Dr. Hilaire for offences under section 102(3) of **the Act**, was ultra vires, unlawful, a nullity, and of no legal effect. Furthermore, the said decision amounted to an improper and unreasonable exercise of the power of discontinuance of this criminal prosecution, in circumstances where the evidence supportive of the offences charged was strong, and the Comptroller had failed to consult with the DPP or any law officer at the DPP's Chambers, and to receive advice from him or them, before purporting to discontinue the prosecution.

[101] In attempting to make good these grounds of appeal, the appellant relied in particular on the affidavit evidence of the appellant, the affidavit evidence of Mr. Chiquot and his letter to the DPP dated 18th January 2021 (“Exhibit PC 2”). It is the appellant’s submission that this evidence was sufficient to raise an arguable case with some realistic prospect of success, and the learned judge erred in not so concluding and in refusing to grant leave. These evidential matters were addressed briefly at paragraph 27 above.

[102] Exhibit PC2 is a letter from Mr. Chiquot, the then acting Comptroller, to the DPP dated 18th January 2021. Heavy reliance was placed on what it says by Mr. Patterson KC, learned counsel for the appellant. The letter has as a caption: “Submission of Case File Re – Dr. Ernest Hilaire”. In the said letter, Comptroller Chiquot confirms that the three case files were “attached”, and he identified each of them by reference to their respective file numbers and the applicable charges. The letter then concludes thus: “the matters were lodged with the Magistrate’s Court on October 16th, 2020, **and are being forwarded for information and onward prosecution.**” (emphasis added)

[103] I note that there is nothing in the said letter confirmatory either of a request by Mr. Chiquot as Comptroller for the DPP to “takeover and continue” the said three criminal matters, pursuant to his powers under section 73(2) of the Constitution, nor is there any reference to a prior decision by the DPP to do so. Instead, the request made of the DPP by Comptroller Chiquot was for “information and onward prosecution”. Furthermore, Mr. Chiquot at paragraph 9 of his affidavit quoted above, merely states that the files were forwarded to the DPP under cover of the said latter “**with a view to the prosecution thereof being taken over by the DPP**”. (emphasis added) Again, this is not evidence of or confirmatory of the fact that the DPP had, in exercise of his section 73(2) constitutional powers, decided to and in fact did take over and continued the prosecution of the three criminal charges before the Magistrate’s Court against Dr. Hilaire. There is certainly no evidence that the DPP subsequent to this letter did so or that he continued the said prosecutions in

his name, albeit the DPP was not compelled to do so and could have taken them over and continued the prosecution against Dr. Hilaire of the said charges in the name of the second respondent. Furthermore, the appellant's application for leave speaks to "legal advice" and "prosecutorial assistance" of the DPP, not to a taking over of the prosecution pursuant to his powers under section 73(2) of the **Constitution**. However, one of the grounds of the application is that the DPP had taken over and continued the prosecution of these charges. Furthermore, Mr. Chiquot averred at paragraph 13 of his affidavit, "Contrary to Mr. Emmanuel's assertion at paragraph 20 of his affidavit, I can say, unequivocally, that the DPP **took over the conduct and prosecution** of the criminal matters. It is false for Mr. Emmanuel to assert, as he did, that the DPP's office merely "assisted with the prosecution". (emphasis added)

- [104] The respondents argue that for the DPP to have taken over the prosecution of these matters, he must have exercised that constitutional power by some formal publicly visible step in the said proceedings. In support of this submission reliance was placed on this passage from the decision of the Privy Council in **Benjamin** at paragraph 27. There Lord Wilson opined:

"27. '.... The director [of Public Prosecutions] exercises his power to discontinue by taking a **formal, publicly visible, step in the proceedings** which can (with whatever degree of difficulty: *Leonie Marshall v Director of Public Prosecutions* [2007] UKPC 4) be challenged by judicial review. An instruction by the Director to the police not to institute proceedings would also in theory be susceptible to judicial review but would often **lack the public visibility** which would alert potential applicants to the possibility of challenge.'" (emphasis added)

- [105] I can discern no sound reason or logic why the decision by the DPP to exercise any of his powers under section 73(2) of the **Constitution** ought not to be exercised by some formal and publicly visible step in the proceedings to which they relate. In my judgment, and for the reasons or rationale summarised by Lord Wilson *supra*, this

principle is no less sound in its application to the exercise by the DPP of his constitutional power to take over and to continue a criminal prosecution instituted by another public office or authority including the Comptroller of Customs under section 119. While section 73 does not speak to the way in which a decision by the DPP to take over and to continue a matter (or to discontinue a criminal prosecution) is to be exercised and conveyed, the Privy Council has made it clear that decisions by the DPP to prosecute or not to prosecute or to discontinue a prosecution, must be done in a publicly visible way. For this primary reason alone, it is therefore imperative to the exercise by the DPP of such power, for him or her to do so by some publicly visible step in the proceeding which conveys his decision and exercise of that power clearly to the court, to the person charged, and to the public. This is the only way by which decisions of this kind and exercise of such a constitutional power would have the necessary public visibility to alert or make potential applicants aware of the possibility of a challenge by way of judicial review.

- [106] The only evidence proffered by the appellant as to public acts of the DPP in relation to the prosecution of Dr. Hilaire, is the fact that lawyers from the DPP's Office appeared some seven times before the Magistrate's Court on behalf of the complainant, the second respondent. It is in reliance on these facts that counsel for the appellant posits that the requirement for publicly visible steps is said to have been satisfied in the instant matter. However, there is no evidence that the DPP formally responded to Mr. Chiquot's letter forwarding the files for "information and onward prosecution". It is axiomatic that the Comptroller does not have the power to make the decision for the DPP under section 73(2)(b) of the **Constitution** to take over and continue a matter. Pursuant to section 73(6) of the **Constitution**, only the DPP can make that decision and, in exercising that power, he or she shall not be subject to the direction or control of any other person or authority. There is no evidence that the DPP responded to the letter of 18th January 2021 stating that he would or has formally taken over and will continue the prosecution of Dr. Hilaire for offences under section 102 of the **Customs Management Act**. Likewise, no evidence was produced in the court below from the DPP to the effect that he had

ever taken over the prosecution of these matters. Moreover, there has been no affidavit or other evidence from the DPP in these proceedings to the effect that having taken over the prosecution of these matters, it was not open thereafter to Comptroller Emmanuel to unilaterally discontinue or withdraw the prosecution of them, as he purported to do.

- [107] This state of the evidence is, in my opinion, not improved by the affidavit evidence from Mr. Chiquot that the DPP did take over and continue the prosecution of the charges against Dr. Hilaire. His saying so does not take the matter any further. It is not for him to say or to conclude that the DPP had in fact taken over the prosecutions, absent any cogent evidence from the DPP or in the court proceedings before the magistrate that he or she had taken some publicly visible step in the proceedings demonstrative of the fact that he had done so. Absent that kind of evidence, what Mr. Chiquot says about it is, with respect, of little moment and is not cogent evidence of the DPP having taken over the prosecution of Dr. Hilaire in exercise of his powers under section 73(2)(b) of the **Constitution**.
- [108] The appearances in the proceedings on seven occasions by counsel from the DPP's Office, is not necessarily indicative of the DPP having taken over and continued the prosecution of Dr. Hilaire. These appearances were also entirely explicable on the basis of what was said in evidence of Mr. Emmanuel (and buttressed to some extent by the evidence of Mr. Chiquot) to be the existing practice, whereby the DPP's Office assists with advice and the actual prosecution in court of charges instituted by the Comptroller for offences under a customs enactment. I conclude, therefore, that the learned judge did not err, nor did he apply too high a standard of proof, in concluding that there was no evidence before him that the DPP had taken over the prosecution of the charges laid by the then Comptroller against Dr. Hilaire. It was for the appellant as the applicant for leave to put before the court below cogent evidence so as to give rise to this issue being arguable with a realistic prospect of success. This, in my assessment, the appellant failed to do. He has not raised a *prima facie* case which is arguable and which warrants further exploration of a full hearing.

[109] In my judgment, the learned judge was correct in his analysis of the evidence touching on this issue and in finding that there was no cogent evidence that the DPP had taken over and continued the prosecution of Dr. Hilaire. This is so notwithstanding the colourful language used by the DPP in a meeting with Mr. Chiquot and Mr. Emmanuel after the decision to withdraw the prosecution of Dr. Hilaire had been conveyed to the magistrate. Accordingly, the power to discontinue and to withdraw the said prosecutions continued to lie with the Comptroller of Customs, to be exercised under section 119 of **the Act**. For these reasons, grounds 2, 3, 4, 5 and 6 of the appeal fail.

Grounds 7 and 8 – Political Interference

[110] In my view, this is not a point of merit in the appeal. The learned judge dealt with this issue at paragraphs 57 to 65 of his judgment. At paragraph 65 he concluded:

“[65] In respect of both limbs upon which the applicant relied as amounting to an arguable case, the court has formed the view that the facts presented do not support an arguable case for the grant of leave to bring a claim for judicial review.”

[111] The relevant principle in relation to this ground of challenge was formulated in **Matalulu** and adopted by the Privy Council in **Sharma** and **Mohit** as applicable to the prosecutorial discretion granted to the DPP under the applicable Constitution. However, there can be no doubt that this principle, like the others set out in **Matalulu**, apply with equal force to the exercise of prosecutorial discretion by other public officers and authorities where they purport to exercise such a power granted to them by statute. The principle is:

“When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion – if the DPP were to act upon a political instruction the decision could be amenable to review.”

[112] The appellant also cites an extract from the decision of the House of Lords in **Kebilene**. Set out below is only a part of that passage, sufficient to underscore the relevant principle of law:

“So long as an offence is on the statute book, it will ordinarily be presumed that it is to be made good by action against offenders; and this is so notwithstanding the Director’s wide discretion whether or not to prosecute in any individual case. Accordingly, justification of a decision not to bring any prosecution at all under a particular provision would have to rest on some factor or consideration in consequence of which it could properly be thought reasonable in the public interest that the provision should not be enforced; and the public interest grounds which the court would require to be shown would have to be capable of displacing the ordinary presumption.”

[113] The appellant submitted that consequent upon the prosecution of Dr. Hilaire coming after a 3 year investigation by officers of the Customs and Excise Department during which extensive materials were gathered, and with advice and guidance from the DPP’s Office and the Office of the Attorney General, leading to the charges being preferred, to justify the discontinuing of those proceedings, the first respondent needed to show “some factor or consideration in consequence of which it could properly be thought reasonable in the public interest that the prosecution should be discontinued.” It is also submitted that since the Comptroller does not possess the same broad powers or discretion as the DPP to discontinue, if any at all, the standard or degree of proof and burden of establishing those factors or consideration would be greater than that placed on the DPP.

[114] The appellant also submitted that the Comptroller had failed to discharge that burden and standard in that he has not been also to point to anything new that had transpired or to any new information, evidence or materials upon which he based his decision to discontinue the prosecution. The only reason advanced by the Comptroller is that he had consulted with three of the customs officers in his department and decided that, “for no other reason than I formed the view that there was no basis for the prosecution to continue.”

[115] In fact, this is not a full accounting of the evidence and reasons given by Comptroller Emmanuel at paragraphs 26, 29, and 44. In short, his decision to discontinue the prosecution was based on a view of the law and facts which he took at that stage. Where one Comptroller has made the decision to prosecute, another Comptroller subsequently appointed, with the same powers and discretion, is entitled, as a matter of principle, to review that decision and where reasonable to come to a different conclusion as to the evidential and legal strength of the case already brought by the prior Comptroller. However, as was opined by the Supreme Court of Fiji in **Matalulu** at page 736 where the decision is to discontinue a prosecution based on a mistaken view of the law, there is no court proceedings in which that view can be tested, and there may be a stronger for review that can be made.

[116] The appellant submitted that the only material change of circumstances occurring since the commencement of the prosecution of Dr. Hilaire under section 119 of **the Act**, were:

- “(a) as a result of the General Election, the Saint Lucia Labour Party gained control of the Government;
- (b) Dr. Hilaire was elected as a member of Parliament and appointed to the Cabinet as a Minister;
- (c) Comptroller Emmanuel was appointed to act as Comptroller of Customs; and
- (d) Mr. Leslie Mondesir, who was Dr. Hilaire’s legal counsel during the mediation process, was appointed as Attorney General.”

[117] In support of this ground of challenge to the decision to discontinue the prosecution of Dr. Hilaire, the appellant relied on two matters in his evidence. These were: (i) the Comptroller had improperly consulted with the Attorney General in October 2021 prior to deciding to withdraw or discontinue the prosecution of Dr. Hilaire; and (ii) the Attorney General was conflicted in that he had previously acted as legal counsel for Dr. Hilaire in the mediation process. In considering this issue, the learned judge cited certain extracts from the affidavit evidence of the appellant at paragraphs 62 and 63 of his judgment. The tenor of this evidence was the appellant’s belief that Dr. Hilaire, who had won a seat in the House of Assembly and was appointed a Minister of the Government had “improperly exerted his considerable influence, in

that capacity, on the respondents in order to coerce them into making the Decision [to discontinue prosecution]”; and Dr. Hilaire was appointed to the office of Deputy Prime Minister of Saint Lucia “the month after the criminal proceedings against him was dropped.” Accordingly, the Decision must be viewed in this context.

[118] The appellant contended that Comptroller Emmanuel consulted with Attorney General Mondesir in coming to his decision to discontinue the prosecution. In fact, there was no cogent evidence before the judge below that Comptroller Emmanuel had consulted with the Attorney General about the prosecution of Dr. Hilaire or concerning his decision to discontinue that prosecution. The only evidence proffered is that of Mr. Chiquot at paragraphs 46 and 47 of his affidavit. I do not consider it necessary to set them out here. Suffice it to be said that paragraph 46 consists merely of opinion and speculative assertions, which are of no evidential value. As to paragraph 47, Mr. Chiquot gives evidence regarding his conversation with Comptroller Emmanuel in October 2021, during which he had cautioned Comptroller Emmanuel not to consult with the Attorney General as to do so “will only compromise his integrity, but also that of the Customs Department.” Importantly, according to paragraph 12, Mr. Chiquot’s evidence is also that he did not know what happened thereafter and neither did he inquire of Comptroller Emmanuel.

[119] This evidence is most unsatisfactory to say the least, even for the relatively low bar at the leave stage. Accordingly, the assertion that Comptroller Emmanuel in fact consulted with the Attorney General about the prosecution prior to making the decision to discontinue them, amounts to mere speculation at this stage of the proceedings. Furthermore, the assertion in the affidavit of Mr. Chiquot that Comptroller Emmanuel improperly consulted with Attorney General Mondesir is flatly denied by Comptroller Emmanuel, and no cogent rebuttal evidence has been proffered in reply.

[120] In my considered judgment, the appellant’s evidence in support of this ground of challenge is not sufficiently cogent as to provide a sound enough basis, for a

conclusion of arguability of the allegation of political interference and conflict of interest, as contended by the appellant at paragraph 54 of his written submissions.

[121] In my judgment, the allegation of political interference or influence on Comptroller Emmanuel's decision to discontinue the prosecution is nothing more, and may be considerably less, than being "potentially arguable". I am therefore in agreement with the learned judge when he concluded:

"[70] The allegations made by the applicant are indeed very serious allegations, however, it cannot be said that at the leave stage the facts upon which these allegations are based can meet the threshold of an arguable case warranting the grant of leave.

[71] An applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen."

[122] Moreover, the evidence adduced by Mr. Chiquot does not even begin to amount to evidence or compelling proof of political interference, corruption, fraud, dishonesty or bad faith on the part of Comptroller Emmanuel. Counsel for the appellant argued that these principles, set out in **Matalulu**, apply only to where the decision-maker is the DPP and not to other public officers such as the Comptroller of Customs. As stated above, I do not agree with this proposition.

[123] The appellant argued that the question whether Comptroller Emmanuel's decision to discontinue the prosecution was the product of or tainted by political interference, is clearly a question of fact which was in dispute and that the evidence of Dr. Hilaire and Attorney General Mondesir is relevant and compellable. Accordingly, at the hearing of the substantive claim for judicial review, the State would have to put all its cards on the table, including producing the relevant documentary evidence. Further, it is submitted by the appellant, that the learned judge effectively wrongly decided this crucial disputed question of fact when he ruled at the leave stage that the appellant had not presented an arguable ground for judicial review. More correctly, the judge's finding on this issue was that the facts presented by the appellant, "do not support an arguable case for the grant of leave to bring a claim for judicial review."

[124] With respect, this submission lacks merit. The learned judge clearly applied the threshold test to the evidence presented on this issue and, in my view, correctly concluded, that it did not meet the test of arguability. The fact that evidence is disputed is not sufficient to make an arguable issue such that it has a realistic prospect of success. The starting point has to be the kind and quality of the evidence adduced to support a finding of arguability and looking at the evidence on the application from both sides to determine whether the threshold test has been met. I have no doubt that the evidence presented did not satisfy the threshold test for the grant of leave, and the learned judge was correct to so conclude. Accordingly, grounds 7 and 8 of the appeal also fail.

Ground 1 – Whether the Judge erred in deciding that the Application failed to meet the Threshold of an Arguable Case

[125] This is a short ground. The appellant's case in support of this ground is summarised at paragraphs 64 to 66 of his written submissions. The appellant lists some eight questions and issues of fact and law (at para. 64) which it is submitted arise in the application for leave and are in addition to the several important disputed questions of law and fact (arising from the other grounds of appeal). It is submitted that there can be no serious dispute that these assertions or questions of law and fact warrant review in a substantive claim for judicial review.

[126] All of the additional questions or issues relied on by the appellant, have been dealt with above in considering and disposing of grounds 2 to 8 of the appeal. The only issue which has been found to have satisfied the threshold test of arguability has been the question of whether Comptroller Emmanuel correctly followed the procedure and dictates of the proviso to section 73(4) of the Constitution when he sought to withdraw or discontinue the prosecution of Dr, Hilaire on 2nd December 2021 before the Magistrate's Court. It is only in that limited respect that it can be said that the learned judge erred in not granting leave to the appellant to bring a claim for judicial review.

Disposition

- [127] For the reasons set out above, I would dismiss the appeal against the judgment and order of the learned judge dated 18th August 2023 dismissing the appellant's application for judicial review, except that I would allow the appeal against the order for costs. Ground 9 having been uncontested, the order for costs made by the learned judge on 18th August 2023 at paragraph [73] of his written judgment is set aside and there is no order as to costs.

Costs in the Appeal

- [128] In the appeal the appellant has lost on all grounds, except ground 9 challenging the costs order in the court below. Accordingly, the respondents have been mainly successful. The general rule set out in rule 56.13(6) of **CPR 2000** is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. This Court has consistently applied the general rule to the determination of costs in an unsuccessful appeal by an applicant for an administrative order (see, for example: **The Attorney General v Martinus Francois**;²³ **Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States**;²⁴ **Judicial and Legal Services Commission v Horace Fraser et al**;²⁵ **George Rick James v Hon. Gaston Browne et al**;²⁶ **Global Education Providers Inc. v The Honourable Petter Saint Jean et al**;²⁷ **Cerise Jacobs v Minister of Tourism et al**).²⁸
- [129] I am of the view that the appellant did not act unreasonably in bringing the application for leave to commence a judicial review claim or in bringing an appeal from the lower court's refusal of leave. Accordingly, and for these reasons, I would

²³ Civil Appeal No. 37 of 2003 (delivered 29th March 2004, unreported).

²⁴ Civil Appeal No. 9 of 2006 (delivered 1st March 2007, unreported).

²⁵ Civil Appeal No. 24 of 2005 (delivered 28th November 2005, unreported).

²⁶ ANUHCVP2016/0015 (delivered 13th October 2020, unreported).

²⁷ DOMHCVP2012/0009 (delivered 4th May 2018, unreported).

²⁸ ANUHCVP2019/0011 (delivered 24th May 2022, unreported).

apply the general rule, set aside the costs order made in the court below, and substitute an order of no costs in the proceedings below.

[130] Accordingly, with the exception of the appellant's ninth ground of appeal against the order for costs made by the learned judge on 18th August 2023 at paragraph [73] of his written judgment, I would order that the appeal is dismissed, with no order as to costs.

I concur.

Vicki-Ann Ellis
Justice of Appeal

I concur.

Eddy Ventose
Justice of Appeal

By the Court

Chief Registrar