

**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE  
CIVIL DIVISION**

**COMMONWEALTH OF DOMINICA**

Claim No. DOMHCV2022/0180

**BETWEEN:**

**L.N. a minor, by his Next Friends  
CRAIG NESTY and LISA DE FREITAS**

Claimant/ Respondent

-and-

**SYLVIA JNO. BAPTISTE**  
As Principal of the **ST. MARY'S ACADEMY**

Defendant/ Applicant

**Appearances:** Mr. Lennox Lawrence and Mrs. Kathy Buffong-Royer for the Defendant/ Applicant;  
Mr. Justin Simon, KC leading Mrs. Hazel Johnson for the Claimant/ Respondent.

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2022: December 19  
2023: March 10  
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**JUDGMENT**

Application to set aside and/or revoke order granting  
leave to apply for Judicial Review

[1] **JOSIAH-GRAHAM, J:** - This is an application for an order setting aside and/or revoking an order dated 24th October 2022 granting leave to the Applicant, L.N, by his next friend, Craig Nesty and Lisa de Freitas, to apply for Judicial Review.

[2] To assess the Respondent's application to set aside the grant of leave, a background is set out.

**BACKGROUND**

[3] L.N., a minor, represented by his next friends Craig Nesty and Lisa de Freitas, applied for leave to apply for Judicial Review on 30th September 2022. This application was against Sylvia Jno. Baptiste ("the Principal") in her capacity as Principal of the St. Mary's Academy ("the Academy") and six other Respondents being members of the Board of Management of the Academy ("the Board"). L.N. challenged their decision refusing his admission to the Academy for the academic year 2022/2023 following his results from the Grade Six National Assessment. L.N. alleges that the Academy's selection process was "unreasonable, irrational and unfair".

- [4] L.N., through his parents and next friends, wrote to the Principal querying her decision not to admit him into the Academy<sup>1</sup> and asking her to provide reasons for his rejection. The basis for the query was that he graduated from the Pioneer Preparatory School in July 2022 with honours, his older brother attends the Academy and is an honour student, he lives in the catchment area of the Academy and the Academy is the alma mater of his father, paternal and maternal uncles.
- [5] The Principal replied<sup>2</sup> to L.N.'s parents via letter dated 21st July 2022 and informed that L.N. was amongst a large number of students in the Roseau catchment area who selected the Academy as their first choice, that the selection process employed is "fair, reasonable and objective and we try as best as possible to ensure that the students we select for every given year are a reflection of the wider Dominican demography<sup>3</sup>". Although the Principal did not provide reasons why L.N.'s application was not successful as his parents requested, she indicated that consideration is given to a student's performance at the examination, the availability of space, whether their siblings or relatives previously attended the School, and that while the School is Catholic, it enrolls 25% of non-Catholics, and the reality is that the School "simply cannot accommodate everyone".
- [6] Being aggrieved, L.N. sought redress by appealing the decision communicated from the Principal to the Education Appeals Tribunal of the Ministry of Education ("the Tribunal"), the body established by legislation to review admission decisions by the Principal pursuant to regulation 23(2) of the Statutory Regulations Order 7 of 2011 of the Education Act, Chapter 28:01 ("the Regulations") which provides thus:
- 'R. 23(2) Subject to these Regulations, a person who is aggrieved **by the decision of a principal to refuse admission** to a child may, in writing to the Education Appeal Tribunal, appeal against that decision **and it shall be the duty of the Tribunal to dispose of the appeal within seven days of the date of the hearing**'. [emphasis added]
- [7] The Permanent Secretary in the Ministry of Education, Mrs. Chandler Hyacinth replied<sup>4</sup> to this correspondence indicating that the "Appeals Tribunal is not presently constituted but the Ministry is presently working on rectifying this issue". Because the Tribunal is not presently constituted, Mrs. Hyacinth recommended that L.N.'s parents complain to the Chief Education Officer as provided for in section 84 of the Regulations for his intervention "prior to further recourse"<sup>5</sup>.

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<sup>1</sup>"LD-3" to "LD-5" located in Certificate Identifying Exhibits to Affidavit in Support of Fixed Date Claim Form filed on 7<sup>th</sup> Nov. 2022

<sup>2</sup>"LD-6" located in Certificate Identifying Exhibits to Affidavit in Support of Fixed Date Claim Form filed on 7<sup>th</sup> Nov. 2022

<sup>3</sup>"LD-6", para 4

<sup>4</sup>"LD-8" LD-7' located in Certificate Identifying Exhibits to Affidavit in Support of Fixed Date Claim Form filed on 7<sup>th</sup> November 2022

<sup>5</sup>Regulation 84 provides thus:

- [8] L.N.'s parents then wrote to the acting Chief Education Officer, Dr. Jeffrey Blaize as per Regulation 84. The Education Officer mounted an investigation into the complaint and communicated his findings to L.N.'s parents in writing that he is "satisfied that a fair and unbiased procedure was employed in student selection so as not to disadvantage any particular student. As a selection process, simple random selection provides each member of the identified population an equal, none zero chance of being selected".
- [9] In addition, Dr. Blaize referred L.N.'s parents to their right to an appeal of the decision to the Tribunal as provided for in section 23(2) of the Regulations and urged that they consider "the second-choice school option for student placement as provided for in the placement option form supplied by the Ministry of Education".
- [10] Not surprisingly, L.N.'s parents were also dissatisfied with Dr. Blaize's conclusion and sought some avenue of redress. They brought this action for Judicial Review against the Principal, and the Board. Leave was granted *ex parte* on 24<sup>th</sup> October 2022.
- [11] In an affidavit in response which was not before the Court when the application for leave was granted, the Principal swore that L.N.'s application was misdirected and misconceived in that the decision to refuse the application for admission was in fact her decision as Principal of the Academy and was not taken by the Management Board. This affidavit was filed after the decision for leave was determined. The Principal also deposed in her affidavit the leave granted to apply for Judicial Review would be a detriment to the good administration of the School and also result in floodgates for future applications since the L.N. was not the only student who passed the Grade 6 National Assessment whose application had to be refused for want of space, or whose application has been refused in the past.<sup>6</sup>

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"84 (1) Where a teacher, principal, education officer, parent or adult student has reason to believe that a person other than the Chief Education Officer has acted in a manner contrary to the Act or these Regulations, the teacher, principal, education officer, parent or adult student may file a written complaint with the Chief Education Officer regarding the act.

(2) The complaint filed shall contain the reasons that caused the complainant to believe that the contravention complained of under sub-regulation (1) has occurred.

(3) Subject to sub-regulations (5) and (6), the Chief Education Officer shall, within two weeks from the date of receipt of the complaint and upon giving notice in writing to the -

(a) competent principal and the education officer; and

(b) person against whom the complaint is filed,

cause an investigation to be conducted of the alleged violation which is the subject of the complaint.

(4) The notice referred to in sub-regulation (3) shall contain the substance of the alleged violation and a request to the person referred to in paragraph (a) of that sub-regulation for a written response to the complaint.

(5) The Chief Education Officer shall not initiate an investigation under this regulation -

(a) where the complaint is not in writing;

(b) where the complaint is filed any time within thirty days immediately after the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation; and

(c) unless he is satisfied that the complainant has made the necessary efforts to have the matter which is the subject of the complaint resolved by the relevant school or Education Officer as the case may be".

<sup>6</sup> para 4(2) of Affidavit in Support filed 18th November 2022.

- [12] Following this affidavit response by the Principal, but after the grant of leave, L.N. commenced his claim for judicial review on 7<sup>th</sup> November 2022 against the Principal only.
- [13] On 18<sup>th</sup> November 2022, the Principal filed the instant application. The Principal makes the same contentions as contained in her letter in response dated 21<sup>st</sup> July 2022. She also asserted that the decision to refuse the application for admission was hers only and that the reason for the refusal of L.N.'s application was the unavailability of space and that L.N was so informed. She contended that her decision was lawful, as the Principal of the secondary school she can refuse admission because of the unavailability of space.
- [14] On 2<sup>nd</sup> December 2022, L.N. responded with an Affidavit in Opposition to the Application to set aside the leave order. L.N. repeated and relied on the contents of the affidavits in support of the application for leave to support his opposition to the Principal's application to set aside the leave granted for Judicial Review.
- [15] On 9<sup>th</sup> December 2022, the Principal filed an application to dismiss the substantive application. The applications to dismiss the substantive application and to set aside or revoke the grant of leave for Judicial Review was heard on the 19<sup>th</sup> December 2022.
- [16] I have refused the Principal's application to set aside the grant of leave. The reasons for this decision are set forth below.

### THE PRINCIPAL'S SUBMISSIONS

- [17] Learned Counsel for the Principal contended that the principal of the Academy, is not the proper party to this action on the ground that the principal of an assisted private school is not a public body or authority against whom Judicial Review can be sought or obtained and accordingly, the grant of leave ought to be revoked or set aside. Counsel submitted that it is a well settled principle of law that judicial review is a remedy against public bodies or authorities, such bodies being responsible for performance or undertakings compatible with the duty of a public body or authority<sup>7</sup>.
- [18] Counsel relied on the case of **Public Service Association v. Public Service Commission et al SLUHCVP2010/0013 [7]** where it is stated that "Judicial Review proceedings are proceedings in public law essentially to ensure that a public body complies with the law".<sup>8</sup>

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<sup>7</sup> Fire Service Association v. Public Service Commission et al SLUHCVP 2010/0013, at paragraph 11

<sup>8</sup> **Ann Hendricks Bass v. Director of Physical Planning et anor SKBHCVP 2016/ 004** was also cited. This case held "Judicial Review proceedings have been recognized by several judicial authorities as being public law proceedings ..." and at paragraph 11 which states "Judicial Review claims, generally speaking, have to do with litigation commenced by a party who is aggrieved by some act of a public body<sup>8</sup> or authority."

Heavy reliance was also placed on sections 23(2), 84, 160 and Part X on Appeals (sections 148 to 156) of the Education Act, Chapter 28:01.

- [19] Counsel also submitted that L.N.'s complaint to the Chief Education Officer and his subsequent investigation and report regarding his findings invoked the jurisdiction of the Ministry of Education as the body responsible for the selection process at schools and accordingly, the application for judicial review is brought against the wrong party.
- [20] Counsel further contended that L.N.'s parents were referred by the Chief Education Officer of their right to an appeal of his decision to the same Appeals Tribunal as provided for in section 23(2) of the Regulations. Counsel therefore submitted that L.N. should appeal the decision of the Chief Education Officer to the Tribunal, that being an available remedy, following the steps already taken by L.N. This Tribunal, however, is not constituted. Counsel's response to this fact is that as the Minister of Education has not yet responded to the application for an appeal neither has there been a refusal to carry out the appeal and as such the remedy remains available to them. Moreover, Counsel also contends that should the Minister refuse to constitute the Tribunal, only then would an appropriate remedy be to instead seek an order of mandamus compelling the minister to constitute the Tribunal.
- [21] Counsel did not address L.N.'s concerns about the Academy's selection process.

### **L.N.'S SUBMISSIONS**

- [22] L.N.'s Learned King's Counsel urged the Court to find that the decision of the Principal to refuse L.N.'s admission to the Academy was taken in the exercise of a function of governmental nature, a public function, and is therefore subject to the judicial review. Counsel urged the Court not to revoke the leave granted for judicial review. Counsel contended that the clear intent of the Education Act is to make the principal of a private assisted school accountable for decisions taken in respect of the admission of students and accordingly, the Principal having made the decision, is subject to judicial review.
- [23] Further, in light of the non-functioning of the Education Appeals Tribunal, there was no expeditious manner to determine the challenge to the grievance as required by Regulation 23(2). Counsel submitted that Regulation 23(3) contemplates that an appeal against the decision of a principal to refuse admission is to be dealt with expeditiously and requires that the appeal is disposed of by the Education Appeals Tribunal within seven days of the date of hearing, thereby underscoring the importance of treating with an appeal against a decision to refuse admission of a student as made by the principal.

- [24] That the Tribunal has to date not been constituted, this failure, Counsel argues, clearly rules out the only appeals procedure provided by the Education Act and accordingly constitutes an exceptional circumstance which permits the Court to intervene by way of Judicial Review<sup>9</sup>. Counsel asserted that there is no alternative remedy as the Tribunal is not constituted. He bolstered this point based on the communication of the Permanent Secretary informing L.N.'s parents that the Ministry is "presently working on rectifying this issue". Counsel relied on the authorities of **Commonwealth Trust Limited v Financial Services Commission** BVIHCV2008/0051 [28] and **Elroy Peter v Comptroller of Customs** DOMHCV2015/0288.
- [25] Additionally, Learned Counsel observed further that the Principal in her affidavits provided varying and inconsistent explanations of the process/procedure of admission of new students and what matters are considered in making this determination and that the various explanations make the procedure that was conducted irrational and arbitrary. In the affidavit evidence, the Respondent deposed that there are applicants' resident outside of the catchment area who were admitted to the Academy in priority to L.N. The Principal did not respond to this claim but stated that the selection "is a reflection of the wider Dominican demography". Counsel submits that this is evidence of the random selection process employed by the Principal, which establishes that the Principal acted ultra vires the Education Act and in excess of her authority.
- [26] With respect to the argument that L.N. ought to compel the Minister to constitute the Education Appeals Tribunal, Counsel argued that constituting the Tribunal does not address the decision taken by the Principal and does not permit the real issue to be determined. Further, that in any event, the existence of alternative statutory remedies constitutes a discretionary bar and not an absolute bar to judicial review<sup>10</sup>. A Court is required to examine the suitability of the alternative remedies available to the applicants seeking judicial review<sup>11</sup>.

## JUDICIAL REVIEW

- [27] The application for an order to set aside leave granted in judicial review proceedings must establish that leave should not have been granted: **Sumayyah Mohammed v Morrine and Another** (1995) 49 WIR 371 at 386b. **Gordon v DPP** [2002] 2 WIR 369 and **Sharma v Browne Antione** [2006] UKPC 57 establish that leave should be set aside "where clearly unmeritorious applications have slipped through the net." An application can be considered clearly unmeritorious if properly considered and the applicant does not and did not meet the requirements for the grant of leave.

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<sup>9</sup> *Commonwealth Trust Limited v Financial Services Commission* BVIHCV2008/0051 [28] and *Elroy Peter v Comptroller of Customs* DOMHCV2015/0288.

<sup>10</sup> Civil Procedure Rules 2000, r.56.3(2)

<sup>11</sup> *Supra*, *Elroy Peter v Comptroller of Customs* [33]; *Leech v Deputy Governor of Parkhurst Prison* [1988] 1 AER 485

- [28] In **Sookhan v The Children's Authority of Trinidad and Tobago** (Trinidad and Tobago [2021] UKPC 29 [2]) the court stated that "the threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review that has a realistic prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy". (See also **Sharma v Browne-Antoine** [2006] UKPC 57; [2007] 1 WLR 780 [14]).
- [29] In the Eastern Caribbean Supreme Court it is clearly stated in **Sylvester v Mitchell** GDAHCV2014/0172 [4] that, "A Court will refuse leave to a claim for judicial review unless it is 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 relief" (see also **Sharma v Browne-Antoine**<sup>12</sup>). This test explained by Kangaloo JA in **Ish Galbaransingh and Steve Ferguson v the AG**<sup>13</sup>, as not to be applied in any dogmatic manner but that it must be applied contextually against the nature of the decision maker, the decision and the circumstances of the case. Indeed, in **Sharma** Lord Bingham and Lord Walker explained that the test of "arguability" is not to 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." (See also **Anne Hendricks Bass v Director of Physical Planning and Development Advisory Committee**, SKBHCV2016/0004).
- [30] This case presented to the court is unique in that L.N. having been granted leave to apply for Judicial Review against the Principal and six members of the Board of the Academy, subsequently only commenced his claim against the Principal, in circumstances where she is a contracted employee of the Academy and where a right of appeal of her decision lies with the Tribunal which is not constituted.

## THE ISSUES

- [31] The issues for determination whether L.N.'s application is clearly unmeritorious are:
1. Whether there is an arguable case having a reasonable prospect of success which deserves further investigation;
  2. Whether there is an alternative remedy which ought to have been pursued before seeking judicial review; and
  3. Whether the decision of the Principal is amenable to Judicial Review.

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<sup>12</sup> [2006] UKPC 57

<sup>13</sup> Unreported decision CA Civil 207 of 201

## DISCUSSION AND ANALYSIS

### The arguability of the case

- [32] The evidence filed establishes that L.N. has an arguable case with a reasonable prospect of success which deserved further investigation in my view.
- [33] First, the claim now before the Court is against a single party, the Principal. From the evidence deposed by the initial Respondents, the Academy is managed by a Management Committee on behalf of the Ministry of Education as distinct from the Board of Governors established by the Catholic body.
- [34] In the instant case, leave was granted to the applicant ex-parte against seven respondents, being the Principal and the Academy's School Board of Management. At the time, the evidence and materials presented for the application demonstrated arguability. Since then, however, the members of the School Management Committee have been withdrawn from this application and it's only the principal against whom this action is brought. The applicant's application for leave for judicial review challenging the decision of the Principal refusing to admit L.N. did not go against section 22 - 23 of the Education Act, Chapter 28:01 as it was in fact an administrative decision and there was an element of public law in the decision. The challenge in [this] circumstances is that where the Principal's decision being subject to review by an aggrieved parent or student by the Tribunal, such Tribunal is not presently constituted. The Regulations require that in admitting students to the Academy, priority is to be given to applicant's resident in the school catchment area designated for the Academy by the Education Act and that the principal is to have regard to the availability of space for students qualifying from the Grade 6 National Assessment examinations for admission to a secondary school. Regulations 22 and 23 also make provision for compulsory attendance including limitations on admission and admission of students<sup>14</sup>. [emphasis mine]

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<sup>14</sup> 22. (1) The Grade Six National Assessment Examination, or such other equivalent examination as the Minister may approve, shall be the qualifying examination for admission to a secondary school.

(2) The principal of a secondary school shall only admit the number of students determined by space and standards for classroom as specified by the Chief Education Officer.

(3) Principals shall not make arrangements between or among themselves for automatic entry of students into the system of public education.

(4) Subject to the directions of the Minister, a principal shall in considering applications for admission of children to a public or assisted secondary school, as far as is practicable, give priority to children of persons resident in the school catchment area set out in the Third Schedule.

(5) The principal of a primary school shall not admit a child to the school unless the principal –  
(a) verifies the age of the child by reference to the birth certificate of the child bearing the name of the child; and  
(b) is satisfied on the evidence of the immunization records referred to in regulation 21(1)(g) that the child is immunized against Diphtheria, Pertussis, Tetanus, Polio, Measles, Mumps, and Rubella.

23. (1) Subject to these Regulations, a person is entitled to be admitted as a student of a school, if the person is a –  
(a) child of a citizen of Dominica;  
(b) national of a Member State of the Community;  
(c) child of a foreign or Commonwealth Diplomat or Consular Officer serving in Dominica;



[35] From a reading of Regulations 22 and 23, the following can be concluded:

- (i) a passing grade at the Grade 6 National Assessment qualifies a student for entry into secondary school;
- (ii) a **principal** may only admit the number of students (new entrants) as instructed by the Chief Education Officer;
- (iii) a principal must, as far as practicable, give priority to children of persons who reside in the school catchment area;
- (iv) to be entitled to admission into a secondary school, a student must be a child of a citizen of Dominica, or resident in Dominica (applicable ones);
- (v) **anyone who is aggrieved by a principal's decision to refuse admission to a child**, may write an appeal to the Education Appeal Tribunal against the decision. The Tribunal's duty is to dispose of the appeal within seven (7) days of the date of the hearing. (emphasis added)

[36] In my view the evidence disclosed at the leave stage, passes the threshold for arguability for the grant of leave in an application for leave for judicial review application. Taking into account that an aggrieved person has a right to seek the court's supervisory powers over decision-makers and ought not to be shut out summarily, this applicant's leave application concerning claims that his rights to an appeal of the principal's decision making as being arbitrary or irrational had been infringed is not scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court .

### The availability of alternative remedies

[37] The Education Act makes provision for an Education Appeals Tribunal, for inter alia persons aggrieved by decisions of a principal. This Tribunal, provided for at sections 148-156 of the Act<sup>15</sup>, has a duty to hear and determine appeals. The Tribunal is empowered (by sections 149-150) to:

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- (e) child of a person, resident in Dominica who is employed by a regional or international organization or institution which transfers staff from one country to another;
  - (f) a child who is resident in Dominica.

(2) *Subject to these Regulations, a person who is aggrieved by the decision of a principal to refuse admission to a child may, in writing to the Education Appeal Tribunal, appeal against the decision and it shall be the duty of the Tribunal to dispose of the appeal within seven days of the date of the hearing.*

<sup>15</sup> Sections 148-156, of the Education Act, Chapter 28:01 provides thus:

148. (1) *For the purposes of determining appeals under this Act, the Minister shall appoint an Education Appeal Tribunal.*
- (2) *The Minister shall appoint to the Education Appeal Tribunal –*
- (a) *a chairperson, who appears to be suitably qualified by having held high office in the judicial or legal field;*
  - (b) *a maximum of five other persons; and*
  - (c) *a secretary who shall be a public officer.*
- (3) *The Chairperson and the members of the Education Appeal Tribunal shall be appointed for the term and in the manner specified by the Minister.*

- (i) hear appeals referred to it,
- (ii) may call upon experts or consultants if necessary, and
- (iii) appoint a mediator to attempt to settle the matter under appeal.

[38] The procedure for considering appeals by the Tribunal is as follows (section 151):

- (i) it may make any investigation it considers necessary,
- (ii) it may set the time, place, and date for a hearing of the appeal and notify the parties to the appeal,
- (iii) it must give the parties an opportunity to make representations either orally in writing, or both, before deciding,
- (iv) the parties are to pay their own costs unless the Tribunal directs otherwise,
- (v) appeals are to be heard in camera in any place or community, except if the Tribunal decides otherwise.

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- (4) *The Minister may solicit and consider nomination for the membership of the Education Appeal Tribunal from groups interested in education in Dominica.*
  - (5) *The chairperson and the members of the Education Appeal Tribunal shall swear an oath of non-disclosure in the form prescribed by the Minister for information gained during an appeal in accordance with this Part.*
  - 149. (1) *An appeal referred to the Education Appeal Tribunal shall be heard by the chairperson and two or more members chosen by the chairperson.*
  - (2) *Subject to section 148(2)(a), where possible, the qualifications of the members of the Education Appeal Tribunal shall be appropriate to the matter under consideration by the Tribunal.*
  - (3) *The chairperson may call upon such experts or consultants as are considered advisable to report to the Education Appeal Tribunal.*
  - 150. *Prior to the consideration of an appeal by the Education Appeal Tribunal, the chairperson may appoint a mediator to attempt to settle the matter under appeal.*
  - 151. (1) *In considering the matter being appealed, the Education Appeal Tribunal may make any investigation it considers necessary.*
  - (2) *The Education Appeal Tribunal shall set the time, place, and date for a hearing of the appeal and shall notify the parties to the appeal of the time, place, and date of the hearing.*
  - (3) *A decision shall not be made by the Education Appeal Tribunal without giving the parties to the appeal an opportunity to make representations either orally or in writing or both.*
  - (4) *Parties to the appeal shall pay their own costs unless otherwise directed by the Tribunal.*
  - (5) *Except if the Education Appeal Tribunal decides otherwise, appeals shall be held in camera and may be heard in any place or community.*
  - 152. *The Education Appeal Tribunal, in deciding a matter being appealed, may make an order doing one or more of the following:*
    - (a) *confirming or varying the decision that is under appeal;*
    - (b) *identifying a student as a student with special needs;*
    - (c) *determining that an individual education plan be prepared for a student;*
    - (d) *directing the Chief Education Officer to implement an individual education plan in a particular environment including, but not limited to, a regular class;*
    - (e) *directing the Chief Education Officer to enroll a student in a school named by the Education Appeal Tribunal;*
    - (f) *directing a determination to be made in accordance with section 83; [s. 83 deals with special needs appeals]*
    - (g) *defining the contents of a student record when the appeal under consideration is pursuant to section 22; and*
    - (h) *reinstating to school a student who has been expelled or placed on an indefinite suspension.*
  - 153. *In the determination of an appeal, the Education Appeal Tribunal shall consider –*
    - (a) *the educational interests of the student who is the subject of the appeal;*
    - (b) *the impact of a decision on the total school or class population; and*
    - (c) *any other factor that appears to be relevant to the matter in dispute.*
  - 154. *The decision of the Education Appeal Tribunal shall be final and binding upon the parties to the appeal.*
  - 155. (1) *A copy of an order made by the Education Appeal Tribunal shall be filed with the Registrar of the High Court.*
  - (2) *On the filing of a copy of an order with the Registrar of the High Court, the order has the same force and effect as if the order were an order of that Court.*
  - 156. *A copy of the decision of the Education Appeal Tribunal shall be sent to the Minister and the parties to the appeal.*

[39] There are several orders which the Education Appeals Tribunal may make after determining an appeal (section 152). It may do one or more of the following:

- (i) confirm or vary the decision under appeal,
- (ii) identify a student or students with special needs,
- (iii) determine that an individual education plan be prepared for a student,
- (iv) direct the Chief Education Officer to implement an individual education plan in a particular environment including, but not limited to, a regular class,
- (v) direct the Chief Education Officer to enroll a student in a school named by the Education Appeal Tribunal,
- (vi) direct a determination to be made in accordance with section 83 (this section deals with special needs students),
- (vii) define the contents of a school record when the appeal under consideration is pursuant to section 22 (this section deals with student records),
- (ix) reinstate to school a student who has been expelled or placed on an indefinite suspension.

[40] In determining an appeal, the Education Tribunal shall consider the following (section 153):

- (i) the educational interests of the student who is the subject of the appeal,
- (ii) the impact of a decision on the total school or class population, and
- (iii) any other factor that appears to be relevant to the matter in dispute.

[41] The Education Appeals Tribunal's decision is final and binding upon the parties, according to section 154. The Tribunal is to file a copy of its order with the Registrar of the High Court, and it shall have the same force and effect as if the order were an order of the Court, per section 155. Additionally, a copy of the Tribunal's decision is to be sent to the Minister and the parties to the Appeal, per section 156.

[42] The Tribunal is not duly constituted as contemplated in the Act. Regulation 23 (2) contemplates that an appeal against the decision of a principal to refuse admission is to be dealt with by the Appeals Tribunal and also to be dealt with expeditiously and requires that the appeal is disposed of within seven days of the hearing, thereby underscoring the importance of a functioning appellate procedure.

[43] The affidavit evidence shows the permanent secretary informing L.N. following their request for an appeal, that the Tribunal was not constituted and recommended a different level of inquiry required to be carried out by the Chief Education Officer.

[44] Section 84 of the Regulations makes provision for complaints and investigations by the Chief Education Officer. It states:

84. (1) Where a teacher, principal, education officer, parent or adult student has reason to believe that a person other than the Chief Education Officer has acted in a manner contrary to the Act or these Regulations, the teacher, principal, education officer, parent, or adult student may file a written complaint with the Chief Education Officer regarding the act.

...

- (6) The procedure set out in the Public Service Commission Regulations for the conduct of an investigation respecting misconduct by public officers shall apply *mutatis mutandis* in the case of an investigation under these Regulations.

[45] According to Regulation 84 the procedure for filing and dealing with complaints is as follows:

- (i) the aggrieved party; whether it is a teacher, principal, education officer, parent, or adult student, may file a written complaint to the Chief Education Officer regarding the act;
- (ii) the aggrieved party should include reasons with the written complaint to the Chief Education Officer;
- (iii) having received the written complaint with reasons, the Chief Education Officer should investigate the complaint/alleged violation within 2 weeks of receiving the complaint.
- (iv) As part of the investigation into the complaint, the Chief Education Officer must give written notice, with the details of the complaint, to the principal, education officer and person against whom the complaint is filed.
- (v) The Education officer can make a determination of misconduct following the procedure set out in the Public Service Commission Regulations.

[46] Significantly, from the scheme of the legislation, this decision of the Chief Education Officer is also subject to an appeal to the Tribunal. Following the advice of the permanent secretary L.N. filed a complaint with the Education Officer who made a decision. This Court has not heard submissions on whether the Education Officer is empowered to vary the decision of a principal, or whether his powers under section 84 are to make a finding that there has been misconduct. If he is not so empowered, then any review by the Chief Education Officer will not be a suitable alternative remedy. In any event, the investigation having been concluded, L.N. was not able to access the next level of review that was required by the Education Act, an appeal to the Tribunal. In fact, up to the day of the hearing of this application, the Tribunal had not been constituted, ruling out the only appeal procedure provided by the Education Act for any alternative remedy available to L.N.

[47] Counsel for the Principal submits that L.N. ought to have filed proceedings seeking an order of mandamus asking the Court to order the Minister of Education to perform her duty of establishing the Education Appeals Tribunal. This submission as it relates to the availability of alternative remedies is ill-founded as L.N. has not sought leave against the Minister of Education. Further, the decision not to commence tangential proceedings to compel a decision in an alternate process in my view when weighted against other factors, particularly delay does not lend to this approach being preferred.

[48] At the time of the hearing of this application, according to the permanent secretary in the Ministry of Education, establishment of the Tribunal required an act of parliament, the said parliament prorogued due to national elections and as such there was no body or authority that appears to be able to carry on this function at a time when a student's right is alleged to have been deprived and for which they're entitled to seek immediate relief. In my view L.N.'s parents availed themselves of the purported alternative remedy of a complaint to the Chief Education Officer, and the dispute was determined, though he still remains dissatisfied. Here L.N. was again informed (by the Chief Education Officer) of a right to an appeal to the Education Appeals Tribunal, which has still not been constituted.

[49] The failure to constitute a functioning Tribunal was properly considered to be an exceptional circumstance warranting the grant of leave, given that the school term had already commenced and that permitted the court's attention for immediate inquiry into the claim brought against the Principal and the Board of Management<sup>16</sup>. It remains an exceptional circumstance as to date the Tribunal has not been constituted.

### **The amenability of the Principal's decision to judicial review**

[50] To settle whether the Principal is a proper party, I must determine whether the decisions of the Principal in respect of the admission of students is amenable to judicial review. Judicial review applications may be brought against either bodies or persons. The learned authors of **Atkins** have stated that "[t]he subject matter of the majority of judicial reviews is a decision made by some person or body". In **Leech v Deputy Governor of Parkhurst Prison [1988] 1 AER 485 at 496** it was stated that:

The principle is now as well established as any principle can be in the developing field of public law that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised in accordance with the rules of natural justice, the court has jurisdiction to review the exercise of that power.

[51] In **R (Beer) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056 at [16]** Lord Justice Dyson stated:

It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law.

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<sup>16</sup> See **Commonwealth Trust Limited v Financial Services Commission BVIHCV2008/0051 [28]**

- [52] In **R (Lewisham London Borough Council) v Assessment and Qualifications Alliance (AQA), and Pearson Education Ltd (Edexcel)** [2013] EWHC 211 (Admin) at [139], which was a judicial review claim brought against parties which included a private examination board, the Court stated:

...the decisions under challenge plainly have a “public element, flavour or character” to them, to use the language of Dyson LJ in *R (Beer) v Hampshire Farmers Market Ltd.* [2004] 1 WLR 233, para.16. The determination of GCSE grades, taken by students across the country, is a matter of very significant public importance potentially affecting the life chances of those who are candidates for the examination. This is a classic case of contracting out a public function.

- [53] In the present case the source of the Principal's power in respect of student admissions are established by statute (section 136 of the Education Act) and by Regulations 22 and 23. Further, the decision made by the Principal under challenge has a plain “public element, flavor or character”. The determination of who is admitted into schools is of significant public importance to students and parents in Dominica especially where the Education Act recognises that all students have a right to education (s.14). I have been mindful that section 15(2) of the Education Act provides that for the purposes of providing an educational programme to students, the Chief Education Officer shall enroll students in a public school, or direct students to attend an educational programme offered by another school where it is reasonable to do so.
- [54] Ordinarily, applications for leave for judicial review of the decision of a principal in respect of admission would not likely be granted, as the statutory right of an appeal to the Tribunal would exist. Accordingly, while a principal engages in the selection of the students for admission, decisions regarding those admissions can be challenged by an aggrieved parent to the Tribunal, which appears to be a public authority or body. That body, once constituted, has the power to confirm or vary the principal's decision (s.152) and that decision, once rendered is final and binding (s.154). As a public body the decision of the Tribunal could still be subject to judicial review if it was *inter alia ultra vires*. What makes this case exceptional is that the right of an appeal cannot be said to exist in circumstances where the Tribunal has not been and still remains to be constituted and where it can be readily implied by the conduct of the Minister having not so far seen attended to its constitution, that she has refused to constitute it. The Tribunal has to date not been constituted.
- [55] There is a public interest in having the admission decisions of principals reviewed by the Tribunal since there is sufficient statutory underpinning to the exercise of discretion of principals making decisions. That admission decisions are reviewable by the Tribunal,

recognises the exercise of a "public function" based on its statutory underpinnings, or of the important "public element" of these decisions.

- [56] The Education Act contemplates a functioning tribunal as an important safeguard for the rights of students and parents aggrieved by decision of the Principals of public schools. For this Tribunal not to be functioning 24/7 especially in circumstances of admissions and other kinds of challenges students may have in the course of their school life is wrong. The Tribunal's turnaround cycle is seven days which speaks to the urgency and seriousness with which Parliament intended these complaints to be addressed. For students to come to the court to seek a remedy because of the non-constitution of the Tribunal, a basic and important safeguard for students in the course of their educational life is a matter the Minister ought to move with speed to remedy. The Minister should also put in place procedures to ensure its continuity from one administration to the next. In the absence of the Tribunal, the body with which the review of the Principal's decision resides, and no sense as to its date for constitution, this in my view invites the jurisdiction of the Court to review the Principal's decision.
- [57] Accordingly, the continued absence of a functioning Tribunal established by the legislature for redress in the circumstances of this claim, judicial review of the principal's decision which is to be reviewed by a Tribunal that remains non-functioning, provides the court the legal power and capacity to exercise its supervisory jurisdiction to review acts of the administrative body that is alleged to exceed its powers.
- [58] Concerning the suggestion that there would be floodgates of principals' decisions should the application to revoke the grant of leave not be granted, I do not agree. In relation to the authority of the Principal to admit students, I cannot see how the legislation would set in place a machinery for reviewing the decisions of Principals and then seek to render the very process useless by not establishing the Tribunal. In short, the Constitution's framers would not have created an extensive impartial review process<sup>17</sup> and then allow the Tribunal to be by itself useless by not seeking to ensure it is functional. Where the legislation provides machinery for review that is not in place, the Courts are called upon to ameliorate the situation through its supervisory authority and jurisdiction to review the decisions of bodies or individual with such public function powers.
- [59] In closing I wish to state that I find it difficult to comprehend that such an important safeguard of the Education Act to have a body established to review actions of its officers is not in place. With the reconvening of Parliament, it is appropriate for the Minister of Education to establish the Tribunal as expeditiously as possible. It is imperative that the Minister cure this gap in the

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<sup>17</sup> See Part X at Sections 148 to 156, Education Act, Chapter 28:01

administration of the Education Act. It is an important safeguard regarding the rights of students to education in the Commonwealth of Dominica.

**Disposition**

[60] In all the circumstances, for the reasons set out above, the application to set aside the grant of leave is refused.

**Costs:**

[61] This is an interlocutory application in administrative proceedings. It would in my view be desirable to determine the issue of costs at this stage. For this reason, the costs of this application shall be the costs in the cause.

**Order:**

[62] It is hereby ordered that:

1. The application filed on 18<sup>th</sup> November 2022 to set aside leave to apply for judicial review is dismissed;
2. The costs of this application be the costs in the cause.

[63] I wish to thank Counsel for their submissions made in this matter. On the issues for resolution, having examined the submissions with care and taking account of all the arguments made by each party in coming to my conclusions, the omission of specific mention on any point of submission does not mean that it has been ignored or there has been a failure to take it into account.

**Jacqueline Josiah-Graham**  
**High Court Judge**

**By the Court,**

**Registrar**