

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(Civil Division)

COMMONWEALTH OF DOMINICA

Claim No. DOMHCV 2021/0107

BETWEEN:

CARA SHILLINGFORD

Applicant

AND

[1] STEPHENSON HYACINTH

(In his capacity of chairman of the Integrity Commission)

[2] THOMAS HOLMES

(In his capacity as member of the Integrity Commission)

[3] INTEGRITY COMMISSION of the Commonwealth of Dominica

Respondents

Before: Hon. Mde. Justice M E Birnie Stephenson

Appearances:

Wayne Marsh of Cara Shillingford Chambers for the Applicant

Heather Felix Evans of Optimum Legal for the first and second respondent and Lisa de Freitas of de Freitas, de Freitas & Johnson for the third named respondent all led by Mr Reginald Armour SC

2022: November (Court of Appeal Decision) 25.

2023: June 12.

RULING ON APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW

- [1] **STEPHENSON J.:** The availability of judicial review against public bodies is an important legitimate safeguard. It is the principal means by which the courts are able to scrutinise the actions of public bodies to ensure that they act lawfully and fairly. Judicial review provides protection to citizens by making sure public bodies are subject to the rule of law.
- [2] Our courts have not permitted reviews solely on the basis of a material mistake of fact on the part of the person who made the decision. Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.
- [3] Judicial review is concerned with the decision-making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.
- [4] Before the court is an amended application for leave to file for Judicial review pursuant to CPR Part 56 and for an injunction brought by Cara Shillingford (the applicant) herself a member of the Integrity Commission against the Chairman and another member of the Integrity Commission and Integrity Commission of Dominica¹ (The respondents).² The third named respondent will be referred to as the Commission.
- [5] The impugned decision of the Commission was made at a meeting held on February 12th 2021 allowing the sitting Prime Minister who is a person in public life, to keep the gift valued at EC\$194,000.00 given to him by one Moosa Navsa.

¹ The Integrity Commission was created by Statute namely the Integrity in Public Office Act Chapter 23:04 and amended by the IPO Amendment Act by Act number 21 of 2015

² Amended Application with affidavit in support filed on the 19th May 2021

[6] The Commission was created by virtue of Section 4 of the IPO Section 4 provides as follows:

Establishment of Integrity Commission

- 4.(1) There is established an Integrity Commission consisting of—
- (a) a Chairman, who shall be an attorney-at-law of at least seven years standing at the Bar, a Chartered Accountant of at least seven years post qualification experience or a person who has held high administrative, managerial or executive office in the public, private or social sector, appointed by the President on the advice of the Prime Minister;
 - (b) one member appointed by the President on the advice of the Prime Minister;
 - (c) one member appointed by the President on the advice of the Leader of the Opposition.
- (2) The Prime Minister shall consult with the Leader of the Opposition before tendering any advice under subsection (1)(a).
- (3) Members appointed under subsection (1) shall be persons of high public standing and reputation for personal integrity

[7] The Integrity in Public Office Act (The IPO Act) was enacted for the purpose of receiving declarations on the financial affairs of persons holding specific positions in public life, for the purposes of establishing probity, integrity and accountability in public life and for related matters³. This is a sure indication as to the role and importance of the Commission in The Commonwealth of Dominica.

[8] It is important to understand that judicial review proceedings are not a reconsideration of the merits of the decision but a challenge to the lawfulness of the decision that was made. Judicial review is not to determine whether the decision was correct or not, but whether the decision makers exercised their powers and discretion honestly and properly. This leads to the conclusion that the essential nature of a judicial review, is not directed at correcting a decision on the merits but is aimed at the maintenance of legality. Judicial review is therefore only concerned with whether the impugned decision is lawful. Judicial review is ultimately concerned with process and regularity. This will be determined on the basis of the record and reasons.

[9] The first stage is to apply for "leave" to apply for Judicial Review. The test for obtaining leave to proceed is that you have an arguable case with a reasonable prospect of success and not subject to any discretionary bar. The purpose of the leave stage is that the Court will weed out cases where

³ IPO Act Chapter 23:04 of the Revised Laws of the Commonwealth of Dominica

it cannot see any arguable error of law. It is important at this stage the applicant has standing to make the application sought that is a genuine interest in bringing that case rather than being a mere busybody.

[10] In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Permanent Secretary of a Ministry interdicts a public servant on the direction of the Personnel Committee, when the powers to do so are vested by law in the Public Services Commission. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.

[11] A person may not bring an application for judicial review unless they have “sufficient interest” in the matter to which the claim relates. Any issue as to standing will usually be determined when considering the application for permission to apply for judicial review. What counts as sufficient interest depends on the circumstances of the particular claim.

[12] Persons who are directly and adversely affected by the decision under challenge will seldom (if ever) be refused relief for lack of standing. In some cases claimants may be considered to have sufficient standing if the claim is brought in the public interest. Re: **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd**⁴

[13] In her substantive application for judicial review the applicant is seeking a number of declarations regarding a decision taken by the Commission taken on the 12th February 2021 allowing a person

⁴ [1982] A.C. 617

in public life to keep a gift ("the questioned gift") allegedly made to him. The applicant seeks to urge the court that the impugned decisions of the Commission were ultra vires, unlawful illegal, **Wednesbury unreasonable** null and void.

[14] It is further alleged that the Commission took irrelevant factors into account in making its decision and further that the majority of the members of the Commission including the first and second named respondents abdicated their duty to conduct a proper and sufficient inquiry into the circumstance that the questioned gift was given before coming to their decision.

[15] The applicant also seeks further, declarations that the Commission made an error of law and thus acted unlawfully and ultra vires when it directed that the questioned gift could be retained by the public figure as a reward for his official acts in public office. That the impugned decision was in breach of the IPO Act.

[16] The applicant is seeking leave to ask this court to quash the impugned decision and to direct the Commission to direct the public figure to deliver the questioned gift to the Financial Secretary and for an order directing the Financial Secretary to deal with the questioned gift as a gift to the State.

[17] The applicant in her application gave a brief statement of the facts upon which she seeks to ground her application and further stated that the application was made without delay and that she is a person directly and personally affected by the impugned decision since it makes a mockery of the IPO Act and it is her duty as a Commissioner to ensure that the Act is applied. Further that there is no other form of address available to her in the circumstances of the case.

[18] The application for leave was supported by two affidavits sworn to the applicant and filed on the 11th May 2021 and the 19th May 2021 with exhibits.

[19] The amended application for leave was served on the respondents and a hearing on the application was convened and directions were given by the court regarding the application for leave. Submissions with authorities were filed by both sides and the Respondents clearly oppose the application.

[20] This is the court's ruling.

[21] In **Sharma v Brown-Antoine**⁵ the Privy Council has stated that the correct test to be applied by courts in considering whether or not to grant leave to apply for judicial review was as follows:

“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 application. . . . It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen”.

[22] The well-established and accepted grounds upon which administrative action is subject to judicial review are as follows:

- i. The first ground is 'illegality'. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The courts are concerned to ensure that the decision-maker has acted within the confines of his power.
- ii. The second ground is 'irrationality', namely *Wednesbury* unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
- iii. The third ground is 'procedural impropriety'. The type of procedure that will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made. Even where facts are 'jurisdictional', the court's investigation of them is of a supervisory character and not by way of appeal.⁶

[23] In **Chief Constable of the North Wales Police v Evans**⁷ Lord Hailsham of St. Marylebone L.C. said that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court.

⁵ *Sharma v Brown-Antoine and Others* (2006) 69 WIR 379

⁶ Re: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410, [1984] 3 All ER 935 at 950, HL, per LORD DIPLOCK.

⁷ [1982] 1 WLR 1155 at page 1161a

[24] Like the *locus classicus* of our region regarding applications for leave to file for Judicial Review referred to as **The Sharma Case**⁸, this case, in the words of Lord Bingham is one of “acute sensitivity and moment”.

[25] This court happily embraces and adopts the approach taken by the Privy Council in the **Sharma case** where it was stated

*“Pursuant to its duty as just defined, we will give a brief and colourless summary of the facts, sufficient only to explain how the present unhappy situation has arisen. A number of matters are in dispute, and on these no finding of fact can be made”*⁹.

[26] The court has reviewed the quite lengthy submissions filed by both counsel for the respondents in this matter. Reference will be made to those submissions which were considered necessary to explain the court’s conclusions.

[27] As it regards submissions made on both sides of the case it is to be noted that failure to make specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account.

Delay:

[28] The first point taken by the respondents in opposition to the application for leave submitted is that the leave ought to be refused on the ground of unreasonable delay as well as being detrimental to good administration. This point was based on the fact that the impugned decision was taken on the 11 February 2021 and the application for leave was made on the 11th May 2021.

[29] The applicant contended that her application is a timely one and is not subject to the bar of delay. This court previously ruled on part of this application and ruled that the failure by the applicant to file her affidavit explaining the reason why her application was being made just short of the three-month limit amounted to a lack of full and frank disclosure on her part. This order was appealed and the appeal allowed with the direction *inter alia* that the affidavit ought to be considered. It is to be noted that this court did not rule on the issue of the delay.

⁸ Supra

⁹ *ibid*

[30] The primary test for applications for judicial review is that the application ought to be made promptly. An application if made within three months is considered as timely. This court notes that there are decisions which have been made from time to time in the court where applications even though they have been made within the three-month period have been considered to not prompt and leave was denied.

[31] *In Maharaj -v- National Energy Corporation of Trinidad and Tobago*¹⁰ the question of delay was considered, and it was held that when considering whether an application for leave to apply for judicial review had been sufficiently prompt, the presence or absence of prejudice or detriment was likely to be the predominant consideration. The Privy Council, in allowing the appellant's appeal from Trinidad and Tobago, ruled that the judge had been required to have regard to prejudice and detriment before reaching a conclusion on whether to set aside leave to apply for judicial review, and, accordingly, he had exercised his discretion in setting aside leave on an erroneous basis.

[32] The Privy Council in its ruling held that a range of factors ought to be considered such as the merits of the application, the nature of flaws in the decision-making process, whether fundamental rights were implicated and whether any public policy considerations to the extent that they might be relevant was applicable.

[33] In the case at bar, taking into consideration all the circumstances of the case more particularly having regard to the prejudice and likely detriment which can be caused by the decision to refuse on the grounds of delay and the fact that the applicant has provided an excuse for the delay in that she has averred that she was suffering from a life threatening illness which caused her to be out of the state of Dominica hence her delay in commencing the proceedings at bar. Further upon consideration of the merits of the claim and overall public interest in the proceedings this court will exercise its discretion and allow the application for leave to proceed. It is to be noted that this court was never minded to go with the respondents' point on the delay.

Does the applicant have the standing and sufficient interest to bring an application for judicial review against the commission?

[34] It is the applicant's contention that the decisions of the Integrity Commission are made in private, and members of the public would not know the decisions and in these circumstances as a

¹⁰ 2019 ALL E R (D) 02 Feb

commissioner that it was her duty to ensure that the provisions of the IPO act are respected and enforced and in the circumstances that she has sufficient interest and standing to bring the application at bar. This court understands the applicant to be saying that the commission's actions need to be challenged and because the commissions proceedings are in private no one or no member of the public will be privy to the considerations, procedure adopted and decision and as such the impugned decision would not be challenged when it should.

[35] Counsel cited and relied on the cases of **R v Monopolies and Mergers Commission ex Argyll Group plc**¹¹ and **Gladys Gafoor -v- The Integrity Commission**¹² in support of her point in this regard. It is to be noted that this court is of the respectful view that the **Gladys Gafoor** case as cited by applicant is to be distinguished from the case at bar as in that case the applicant did have a personal interest in the decision of the commission which was to excuse her as a commissioner from considerations in a specific manner after duly considering the request of the person under consideration which is factually different from the case at bar.

[36] In **R v Monopolies and Mergers Commission ex Argyll Group plc**, the test regarding sufficient interest was considered by Sir James Donaldson MR who adopted the approach as set out in **Reg - v- Inland Revenue Commissioners, Ex parte National Federation of Self Employed ad Small Business Ltd** as to who may be considered as having locus standi to bring matters of judicial review. The test as has been considered by the courts of the Eastern Caribbean Supreme Court has been applied and stated that the test for standing was "whether the applicant can show a strong enough case on the merits judged in relation to his own concern with it." The Courts of the Eastern Caribbean Supreme Court have decided that the issue of standing in respect of an application for judicial review should be considered after a determination of the substantive issues raised by the applicant.

[37] The interest required by law is not a subjective one; the court is not concerned with the intensity of the applicant's feelings of indignation at the alleged illegal action, but the court is really primarily concerned with objectively defined interest. Strong feelings will not suffice on their own although any interest may be accompanied by sentimental considerations. Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with a clear and clean objective.

¹¹ [1986] 1 W L R 763

¹² CV 2012-00873 High Court of Trinidad & Tobago

[38] In particular, a citizen's concern with the legality of governmental action is not regarded as an interest that is worth protecting in and of itself. The complainant (applicant) must be able to point to something beyond mere concern with legality: either a right or to a factual interest. Judicial review applications should be more restrictive to persons with direct and sufficient interest and should not be turned into class actions or *actio popularis* which allow any person to bring an action to defend someone else's interest under sections of the Constitution.

[39] The 'unqualified' litigants or persons without direct and sufficient interest (meddlers) are more likely to bring flimsy or weak or half-baked actions/cases and these are likely to create bad or poor precedents. It may be a bar for other genuine persons with sufficient interest from challenging the actions or decisions affecting them directly. The courts should be satisfied that a party has sufficient interest and ensure that the courts are presented with concrete disputes, rather than abstract or hypothetical cases.

[40] Mrs Shillingford Marsh has brought the application for leave to file Judicial Review of a decision made by the respondents as outlined above.

[41] In **Spencer -v- The Attorney General of Antigua**¹³ The approach taken by the court was consider the merits of the case before considering whether the applicant had the necessary *locus standi* to bring the application as occurred in **Re: Blake**¹⁴ where the court considered the merits of the application before the court. The application was found to be unmeritorious. The court therefore found it unnecessary to consider whether the applicant had locus standi in the matter before the court.

[42] This approach was approved, adopted, and applied by the Court of Appeal in Antigua Case of **Spencer -v- The Attorney General of Antigua and Barbuda**. Reference can also be made to this approach which was adopted by Denning MR in **Blackman -v- AG**¹⁵. In **Martinus Francois**¹⁶ it was held *inter alia* that

“This approach that was recommended in Spencer accords with good law and reason. An applicant for a declaration can have no locus standi in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and

¹³ (1999) LRC 1

¹⁴ (1994) 47 WOR 174

¹⁵ [1971] 1 WLR 1037

¹⁶ [2004] ECSCJ

the facts in order to determine whether there is sufficient nexus between an applicant and the subject matter of the claim to give him or her locus standi. application".¹⁷

[43] In **R v Monopolies and Mergers Commission, ex parte Argyll Group Ltd** ¹⁸

"The first stage test which is applied on the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddlesome busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance."

[44] This court graciously agrees with the decisions that the question of the applicant's locus standi is to be considered if and when the substantive matter is being considered. Therefore any citizen who is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any one of the citizens in this country; the door of the court will not be ajar for him. But, if he or she belongs to an organisation which has special interest in the subject-matter or if he has some concern deeper than that of a busy body, he cannot be locked out at the gates of the temple of justice.

[45] It is the duty of the courts to protect the scarce state resources and the over-burdened court system by ensuring that litigants who appear in court in matters of judicial review have a direct or sufficient interest to come to court. Precious resources would be wasted on the adjudication and defence of claims if mere busybodies could challenge every minor or alleged minor infraction by the state or public officials. Without the necessary sufficient interest threshold for standing as the floodgates will open, inundating the courts with vexatious litigation and unnecessary court disputes.

The Application for leave:

[46] It is the applicant's contention that she has an arguable case with a reasonable prospect of success. It is the applicant's contention that the Respondent's decision was illegal in that, it was contrary to section 35(1) whereby it is unlawful for a person in public life to accept a gift from any person as a reward.

¹⁷ See Eddy Ventose 'Commonwealth Caribbean Administrative Law' at page 39 referring to Benjamin -v- Attorney General of Antigua (*at para 146*)

¹⁸ 1986 1 WLR 763

[47] It was submitted that when the court examines the facts of the case in detail it will find that there was contravention of section 35(4) of the Act. The gift was not a trivial one and was given as a reward to the Prime Minister for his performance in his official functions in that capacity and in allowing the Prime Minister to retain this gift upon the declaration to the commission it is contended the commission acted illegally and in those circumstances their decision is susceptible to judicial review.

[48] The applicant further submitted that where a public body considers irrelevant considerations while disregarding relevant considerations when it arrived at its decision that the decision can be reviewed. Counsel on behalf of the applicant cited and relied on the statement of Thomas J in the **Richards -v- Constituency Boundaries Commission Case**.¹⁹

[49] The applicant also contends that the commission failed to consider and exercise its sweeping powers under section 11 of the Act to can compel the attendance of witnesses to be examined under oath and the circumstances of the gift and in doing so the Commission abdicated its duties to make the impugned decision solely on what she considered to be the questionable information before it.

[50] The applicant contends also, that the decision taken by the Commission was Wednesbury unreasonable that it was outrageous in its defiance of logic and acceptable moral any sensible person who directed their mind to it. The applicant's contention is also, that it was unreasonable for the Commission to permit a person in public life (PIP) to retain a gift of substantial value given by someone claiming to be a stranger and which the gift was expressly given because of how the recipient's performed his official duties.

[51] The applicant contends that in choosing not to investigate and independently verify the information presented to them the Commission made the decision to allow the recipient to keep the gift. Further that it was also unreasonable on the part of the Commission so to do.

[52] The applicant contends that the commission in arriving at the impugned decision failed to act with probity, integrity and accountability and in so doing failed to give due consideration to the purpose for which it is constituted.

¹⁹ SKBHCV2009/0159

Breach of international obligations

[53] It was also contended by the applicant the commission was in breach of its international obligations in that the commission failed to give effect to Article 5 of the United Nations Convention Against Corruption and that the impugned decision flies in the face of the provisions and in fact amounts to the sanctioning of corruption.

The Respondent's submissions

[54] A raft of issues and points have been raised by counsel for the respondents which in the court's view is not necessary to discuss in order to resolve or to decide the main issue in the case at bar, that is whether or not leave should be granted to the applicant to file judicial review proceedings.

[55] Senior Counsel Reginald T A Armour on behalf of the respondents submitted that judicial review is about a process. This is well established if not trite law.

[56] The respondents submit that the application for leave fails to disclose any arguable ground for judicial review which has a realistic prospect of success.

[57] It was further contended on behalf of the respondents that the inquiry submitted by the commission was:

- a. Sufficient;
- b. Did not take irrelevant matters into consideration and account; and
- c. Arrived at a permissible decision within its statutory discretion;

and in the circumstances of the case there is no basis for the court to intervene.

[58] It was submitted that the court ought to first consider and examine the structure of the Integrity Commission. This court understands this submission to be that based upon the appointment of the members of the commission and the fact that the impugned decision in the case at bar was made by a majority of two commissioners with one commissioner being the applicant dissenting, that there is no case at bar which has been presented that has a realistic prospect of success.

[59] The respondents contend that the decision taken by the commission was taken after, in their view a sufficient inquiry was conducted. The respondents further contend that upon a purposeful construction of the IPO Act the commissioners were duly appointed and the impugned decision was a majority decision of 2 to 1 and was at all material times a valid one. This is in the face of the fact

that the Act makes provision for a quorum of 2 persons in the event that there is a vacancy or a third person has not been properly appointed. In the case at bar all three commissioners were duly and properly appointed.

[60] The respondents also contend that pursuant to section 13 of the Act the members of the commission are not subject to the control or directions of any person or authority.

Sufficient Interest

[61] It was submitted on behalf of the respondents that the applicant does not have sufficient interest as is required by part 56.2 of the Civil Procedure Rules 2000 (CPR 2000). That in these circumstances leave ought to be refused as there is no prima facie entitlement on the part of the applicant to the relief sought.

[62] The respondents cited and relied on **John Mussington and another -v- Development Control Authority and others**²⁰. Counsel pointed the court to the statements made by Webster JA when he reviewed the law as to what is “sufficient interest” and the need for the court to find that an applicant has sufficient interest in the subject matter of the application. Counsel stressed the words of Lord Wilberforce in **Inland Revenue Commissioners -v- National Federation of Self-Employed and Small Business Ltd**²¹ when he said

*“There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all or no sufficient interest to support the application then it would be correct at the threshold stage to refuse him leave to apply. ...”*²²

[63] Webster JA found in that case that CPR 2000 part 56.2 contained the same requirements for sufficient interest in the subject matter as in the UK. Webster JA said

“The same considerations relating to standing apply in the Eastern Caribbean”. The learned judge went on to say that “the court should review all the material at the leave stage. It is a simple matter and it is clear that the applicant does not even have a prima facie case that he has sufficient interest in the subject matter of the application; permission should not be granted for the matter to proceed to trial. The court should not be burdened with trial brought by person who do not have a sufficient interest in the subject matter of the application. However, ... if the evidence of standing is not definitive either way the matter should go forward and be determined at trial” (Emphasis added)

²⁰ ANUHCVP2020/0005

²¹ [1982] AC 617

²² Ibid at page 630 (at paragraph 16 of the Mussington Judgment supra)

[64] The respondents also submitted that the applicant in the case at bar falls within the clear parameters defined in the authorities which would justify refusal of leave because:

- a. The applicant has no interest in the outcome of the proceedings;
- b. The applicant has no interest in the reliefs being sought;

[65] Counsel on behalf of the respondents submitted that in the case at bar, the applicant's real complaint is that she was out voted on the issue of the gift in the commission's decision. That her real complaint is that her dissent was not accepted.

[66] The respondents further submission is that “ *This is subjective and self-serving interest which cannot on the true construction of the IPO Act and the operational mandate of the commission qualify to meet the thresh hold of sufficient interest*”²³.

[67] The respondents further submit that the applicant has not shown herself to have a prima facie interest in the matter at bar. This court understands the respondents to be saying that in the case at bar, the court ought not to permit the applicant to proceed on the ground that she has no interest.

[68] The respondents submit that the applicant has sought to ground her interest in the proper functioning of the Commission. That her interest was discharged by her participation in the meeting and the secretary recording her dissent. The respondents further submit that the application cannot be permitted to continue her interest as the commission has duly made its decision.

[69] Senior Counsel Armour further submitted that the applicant ought not to be allowed to arrogate unto herself the role of “Public Champion” and a supervisory role over the majority of the commission.

No Arguable Case

[70] Counsel cited and relied on the often quoted and well known case of **Sir James Fitz Allen Mitchell - v- Ephraim Georges** and the statement of Rawlins JA. in that an applicant must show that there is an arguable case. It was submitted that the court must look at the overall case and identify the grounds upon which the claimant's case would be arguable.

²³ See paragraph 22 of the respondents' submissions

[71] Counsel submitted that in the case at bar the court must have regard to the statutory limits imposed on the Commission by the Act. Counsel further submitted that the Commission arrived at its decision pursuant to section 35(4) of the IPO Act.

[72] Counsel noted that the applicant's submissions as it relates to sections 35 and 11 and that there is no inquiry mounted pursuant to section 11(1) IPO Act and in so doing failed to take her concerns as one of the commissioners into account. It was emphasised by counsel for the respondent that the role of the court is not to usurp the functions of the decision maker.

[73] Counsel cited and relied on the statement made by this court in the **Zarina Matthew Case**²⁴ that "Judicial Review is a review of the manner in which the decision was taken and not whether the decision was wrong or right". Counsel also cited **Secretary of State for Education & Science -v- Tameside Metropolitan Borough Council**²⁵ where it was said

*"It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, per Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"*²⁶

[74] Counsel submitted that a true construction of the IPO Act does not prescribe the method by which an inquiry ought to be conducted by the commission. It was submitted that it is for the commission to regulate its own proceedings and decide what and what not to take in account as a relevant consideration.

[75] Counsel for the respondent also submitted that it is for the commissions to decide that which is relevant and the weight to give the considerations in its affairs. **Re: Creednz -v- Governor General**²⁷ as approved by Cooke J in **Re: Findlay**²⁸ and **Tesco Stores Ltd -v- Secretary of State for the Environment and others**²⁹

²⁴ DOMHCV10`9/0154

²⁵ [1977] AC 1014

²⁶ Ibid at page 1065

²⁷ [1981] 1 NZ LR 172 at 183

²⁸ [1985] AC 318 @ 333 to 334 per Lord Scarman

²⁹ [1995] 1 WLR 759 @ 780

[76] It is the respondents' case that there was no compelling requirement for the commission to utilise its powers under section 11 of the IPO Act³⁰ and that the decision which was arrived at was on which they were entitled to arrive at.

[77] It was submitted by the respondents that based on the evidence adduced by the applicant, the commission did not fail to take relevant considerations into account neither did they take into account irrelevant considerations, the applicant's evidence is that the Commission did not take that which the applicant considered to be relevant for consideration in determining the issue before it. Counsel submitted that this does not amount to an issue of relevance or irrelevance but rather weight which is a matter for the decision maker in its discretion.

[78] The respondents' submission further, is on a consideration of the material before it, the commission the facts which was taken into account in coming to the impugned decision taken on the 12th February 2021 was recorded in the Inquiry Report, that the decision is well within the range of reasonable responses available to the Commission and is not Wednesbury unreasonable.

[79] Counsel on behalf of the respondents also submitted that the allegations of mala fides or bad faith on the part of the Commission which were made and which can be implied in the applicant's case through her submissions and pleadings that the onus is on her to not only particularise the allegations of bad faith but to prove them. **Re: FazKaz Auto Supplies Limited et al -v- The Attorney General**³¹.

[80] The closing salvo of the respondents is that as a dissenting minority member of the Commission nowhere in the affidavits as filed by the applicant does she show any evidence which approached the threshold required of her in law for leave to file for judicial review to be granted as established

³⁰ 11. (1) The Commission shall have the powers, rights and privileges of the Supreme Court at a trial, in respect of -
(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;
(b) compelling the production of documents; and
(c) the issue of a commission or request to witnesses abroad.
(2) Section 17 of the Commissions of Inquiry Act shall apply *mutatis mutandis* for the purposes of subsection (1).
(3) The forms of summons for the attendance of witnesses or other persons or the production of documents shall be in Form 1 as set out in the Third Schedule.

³¹ SLUCVAP2018/0040

by **Sharma -v- Browne-Antoine** that is that she has an arguable case with a realistic prospect of success. Counsel submitted that the application should be dismissed with costs.

Court's considerations

[81] It is incumbent on a court to exercise caution before attributing improper motives to litigants before it. Courts exist to resolve legal and factual disputes and to determine *inter alia* the rights of citizens. Every citizen and or resident in the Commonwealth of Dominica has a right to approach the court for an order or relief for any perceived wrongdoing.

[82] It is necessary in this court's view to understand what the function and the role of the Integrity Commission is. As pointed out by the applicant its objective is stated in the preamble of the act as follows:

*"An act to provide for the establishment of an integrity commission for the purpose of receiving declarations on the financial affairs of persons holding specific positions in public life, for the purpose of establishing probity, integrity and accountability in public life and for related matters."*³²

[83] The test for leave to file for judicial review has been accepted and stated by all the parties in the case at bar as that which is law and laid down in the well known and oft quoted locus classicus **Sharma -v- Browne - Antoine**³³. The words of Lord Bingham are worth repeating. He said that.

*"... the ordinary 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' and that '[i]t is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'".*³⁴

[84] This court understands this to mean that if the prospects of success are highly unrealistic then leave ought not to be granted. It is noted that at this stage it is trite law that the court ought not to delve deeply into the arguments of the parties before it but should make a cursory perusal of the evidence before the court and make the decision as to whether the application is sufficiently meritorious to justify leave. The grant of leave is discretionary, and the court should exercise such discretion judiciously.

³² Pre Amble to Chapter 23:04

³³ Op cit

³⁴ (2006) 69 WIR 379 (PC) at paragraph 14

[85] Senior Counsel Armour on behalf of the respondents submitted to the court that there is no real complaint being made against the commission and that what the applicant's grievance is, is that the commission did not consider what she considered to be the relevant considerations which does not amount to an issue of relevant or irrelevant considerations being considered by the commission. This court is in the court's view amounts to factual criticisms of the factual findings of the commission and does not raise any point of law.

[86] Of further consideration is that the applicant is a duly appointed member of the Commission, and she seeks to challenge a duly made decision of the commission which in this court's view amounts to her challenging her own decision. This can be fleshed out at a full hearing of the matter.

[87] It was also submitted that it is a matter or weight given to the considerations before it by the commission in its discretion. It is noted that the decision taken was agreed to by two of the three duly appointed commissioners with the applicant's vote being against the decision taken and also it being the minority vote.

[88] Section 35 of the IPO Act addresses the issue of persons in public life accepting a gift as a reward for any official act done by the person in public life and states that it is unlawful for there to be any such acceptance subject to the provisions of section 35(2) and at subsection (3) that the recipient of a gift is required to make a report to the commission.

[89] Subsection (4) empowers the commission to make an inquiry and if it is found that the gift was given to the recipient personally and was not trivial; *"but was not intended to be a motive or reward for doing or abstaining from doing anything in the course of the performance of his official functions or causing any other person from doing or forbearing to do anything the commission shall all the person in public life to retain the gift"*

[90] Subsection (5) provides

"Where the Commission finds through an inquiry that the gift was given to the person in public life as a State gift or was given to the person in public life personally but that gift—

(a) was not trivial; or

(b) was intended to be a motive reward for doing or abstaining from doing anything in the course of the performance of his official functions or causing any other person from doing or forbearing to do anything, the Commission shall direct the person in public life in writing to deliver the gift to the Financial Secretary ..."

[91] In the case at bar, the applicant is seeking to have the court direct that the court makes the decision which is to be made by the commission as provided by section 35(5). It is in this court's respectful view that this would not be in keeping with the statute. Upon review of the statute, it is clear that the legislature has empowered the commission to make this decision after going through their process of inquiry. It is further noted that the commission is empowered to make its own rules of procedure. (See section 58)

[92] Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court delve into the averments made by the applicant to test the process utilised by the Commission in coming to the decision.

[93] It is to be noted that the Commission has its purpose and procedure as is provided by law. Section 58 of the IPO Act gives the Commission the power to make its own rules which further supports that the commission is an autonomous body.

[94] The Commission is free to make its own and determine its own procedure and make its own findings of fact. The court in considering judicial review is concerned with the process and not whether the decision was right or wrong and once the commission acted within the parameters of the IPO Act its decision would be unassailable, regardless to if this court or anyone agrees or disagrees with their decision.

[95] The Commission's function in the case at bar was to determine the nature of the gift and whether in the circumstances of the case the recipient could keep the gift received or hand it over to the Financial Secretary and based on the evidence before it the commissioners were entitled to make their determination and the commission was under no obligation to agree with the applicant's view or opinion.

[96] Upon consideration of Section 4(5) of the IPO Act the Commission is required to conduct an inquiry into the gifts received by persons who hold high Public Office that is PIPs. It is the applicant's contention that the process embarked on by the Commission was flawed. This court does not plan to delve into or make an inquiry into the process. Suffice it to say that upon a cursory review of the applicant's averments in support of her application for leave to file judicial review coupled with the purpose for the establishment of the Commission as stated in the IPO Act Preamble (supra) and

section 4(5) of the Act this court has come to the considered view that the process adopted by the Commission should be reviewed and in the circumstances of the case Judicial Review is the more appropriate form for that process to be examined and reviewed.

[97] This court as a review court does not have the power or authority to make findings of fact in view of the fact that judicial review is not concerned with the correctness of the decision or whether or not it agrees with the impugned decision. However, the High Court can review the process adopted and taken by the Commission in arriving at its decision. Finally, this court cannot tell the commission what weight to give to any fact, circumstance, consideration, or inference to be drawn from any fact or circumstances.

[98] In order for the applicant to possibly succeed in her application she would have had to show the court that there was a high degree of perversity and unreasonableness in the decision-making process. Respectfully without opining on the soundness of the Commission's decision on the face of it did the Commission do what it was required to do and in the circumstances of this case the applicant has been able to establish on the balance of probabilities that she can possibly succeed in her claim.

[99] Excessive interference by the judiciary in the functions of the Legislature and Executive is not proper. The machinery of government would not work if it were not allowed some free play in its joints. The requirement of standing provides the judiciary with a means to protect its independence and maintain its legitimacy. On occasion, judges ought to use the rules of standing in order to give effect to the notion of justiciability-that is, the idea that it is not appropriate for certain matters to be adjudicated by a court of law. On this point alone, upon an in-depth consideration of the applicant's case the court could decline to exercise its judicial review jurisdiction in the event that the applicant is unable to show the requisite direct or sufficient interest.

[100] This court notes further that the IPO Act at section 51 clothes the commissioners with immunity from suit in that it provides that members of the commission shall not be liable to any action or suit in respect of anything done in good faith in the performance of their functions as a member of the commission. In the case at bar the applicant has sought to bring action against the two commissions who voted in favour of the recipient keeping the gift and the commission, which includes herself, which is and cannot be legally allowed.

[101] Each of them has its own field of operation with different characteristics and exclusivity and meant by the Constitution to exercise its powers independently. The doctrine of separation of powers demands and ought to require that unless there is the clearest of cases calling for intervention for the purposes of determining constitutionality and legality of action or the protection of the liberty of the individual which is presently denied or imminently threatened, the Courts must refrain from entering arenas not assigned to them either by the Constitution or laws of Dominica.

[102] It cannot be overemphasized that it is necessary in a democracy that courts refrain from entering into areas of disputes best suited for resolution by other Government agents. The courts should only intervene when those agents have exceeded their powers or acted unjustly causing injury thereby. This is not the case at bar.

[103] It is this court's finding that the application at bar cannot succeed against the Commissioners personally.

[104] Because the application for leave to file judicial review is granted this court is of the view that as it regards the injunction sought that the registration of the vehicle should be suspended pending and that the vehicle not be used until the hearing, outcome and determination of the Judicial Review.

[105] This court wishes to thank counsel on both sides for their very helpful submissions and this court also wishes to note that having appealed the interlocutory decision in the matter this court thought it prudent to await the hearing and disposition of that appeal and possible directions.

[106] This court understands that the applicant's interlocutory appeal was allowed and the Justice of Appeal who delivered the opinion and the decision of the court stated that handing down of this ruling should be more or less expedited which, barring the intervention of ill health on the part of this judge this court has complied with the Justice of Appeal's dicta.

[107] The Court's order is as follows:

- a. The claim against the first and second named defendants is hereby struck out as they are immune from legal suit pursuant to the provisions of the IPO Act;
- b. Leave is therefore granted to the applicant to file a claim for Judicial Review against the Integrity Commission within 14 days of the handing down of this decision.

- c. The registration of the gifted vehicle is duly suspended, and the use of the gifted vehicle is prohibited until the hearing and outcome of the Judicial Review Application and orders made therein.
- d. There shall be no order as to costs.
- e. The applicant shall have carriage of this order.

M E Birnie Stephenson
High Court Judge

By The Court

[Seal]

Registrar