

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2021/1033

BETWEEN

ST. VINCENT AND THE GRENADINES TEACHERS UNION

1stAPPLICANT

THE PUBLIC SERVICE UNION

2ndAPPLICANT

POLICE WELFARE ASSOCIATION

3rdAPPLICANT

SHANILE HOWE

4thAPPLICANT

NOVITA ROBERTS

5th APPLICANT

CAVET THOMAS

6th APPLICANT

ALFONZO LYTTLE

7th APPLICANT

BRENTON SMITH

8thAPPLICANT

SYLVORNE OLLIVER

9th APPLICANT

and

THE MINISTER OF HEALTH WELLNESS AND THE ENVIRONMENT

1stRESPONDENT

THE PUBLIC SERVICE COMMISSION

2nd RESPONDENT

THE COMMISSIONER OF POLICE

3rd RESPONDENT

ATTORNEY GENERAL OF SAINT VINCENT AND THE GRENADINES

4thRESPONDENT

Before:

The Hon. Mde. Justice Esco L. Henry

High Court Judge

Appearances:

Ms. Cara Shillingford, Mr. Jomo Thomas and Ms. Shirlan Barnwell for the applicants

Mr. Anthony Astaphan SC, Solicitor General Ms. Karen Duncan, Mrs. Cerepha Harper-Joseph and Mr.

Kesron Walters for the 1st, 3rd and 4th respondents

Mr. Grahame Bollers for the 2nd respondent

2022:Feb.11 & 18

Mar.10

DECISION**BACKGROUND**

[1] **Henry, J.:** This case arises out of legislative measures enacted and implemented by the Minister of Health, Wellness and the Environment in Saint Vincent and the Grenadines ('the Minister') in response to health challenges posed by the spread of the novel corona virus disease and the declaration of a pandemic by the World Health Organization ('WHO'). The Public Health Act¹ ('the Act') was amended to among other things, empower the Minister to declare that a public health emergency exists in Saint Vincent and the Grenadines if he receives a recommendation from the Chief Medical Officer ('CMO') that a public health emergency be declared for part or all of the State.

[2] The amendment to the Act provides further that the CMO's recommendation must be predicated on the CMO's belief that the public health emergency cannot be mitigated or remedied without the implementation of special health measures. Other amending provisions set out a list of such special measures which the Minister is authorized to activate on advice from the CMO. These provisions supplemented his rule-making powers conferred by section 147 of the Act by which he was charged with making rules for carrying out the purposes of the Act. On December 3rd, 2020, the Minister by **Statutory Rule and Order (SR&O) No. 38 of 2020** declared a public health emergency for the State of Saint Vincent and the Grenadines for the pandemic caused by COVID-

¹ Cap. 300 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

19 (Coronavirus Disease-2019).The **SR&O** was gazetted and came into force on 4th December 2020.

- [3] The Minister made a series of rules by **SR&O No. 28 of 2021** including mandating that certain listed classes of public officers be vaccinated against the Covid-19 disease which causes the corona virus illness – rule 5(1). Provision was made that any employee who failed without reasonable excuse to take the vaccine must not access his/her workplace, would be treated as being absent from duty without leave – rule 8(1).He also stipulated in rule 8(2) that Regulation 31 of the Public Service Regulations ('PS Regulations')applies to any officer who is absent from duty without leave under sub-rule (1). Regulation 31 of the PS Regulationsstates that a public officer who is away fromdutywithout leave for a continuous period of 10 days shall be deemed to have resigned his office unless the PSC declares otherwise ('the deeming provision').
- [4] In similar fashion, SR&O No. 32 of 2021was made on 12th November 2021 by which the Honourable Prime Minister purported to amend the Police Act by inserting a new section 73A. That new section provided that a police officer is deemed to be absent without leave under rule 8 of the Public Health (Public Bodies Special Measures) Rules and to have resigned his office in like fashion; unless declared otherwise by the Police Service Commission (in the case of an officer below the rank of Deputy Commissioner and above the rank of Corporal); and bythe COP (in the case of an officer below the rank of sergeant) – 'the Police Act deeming provision'.
- [5] Six individuals (Shanile Howe, Novita Roberts, Cavet Thomas, Alfonso Lyttle, Brenton Smith and Sylvorne Oliver – 'the individual applicants')and their respective worker'sunions and organization (St. Vincent and the Grenadines Teachers Union ('SVGTU'), the Public Service Union ('PSU') and the Police Welfare Association(collectively 'the applicants') have brought this application for leave. The individual applicants asserted that the Public Service Commission ('PSC') and the Commissioner of Police ('COP') respectively notified them by letter that they were deemed to have resigned from their jobs by virtue of the deeming provision and section 73A of the Police Act respectively. They seekleave to apply forjudicial review of the Minister's decision to make the rules establishing a 'mandatory' vaccination programme for certain classes of workers including them.

They contend that in breach of the principles of natural justice the terminations were effected without affording them an opportunity to be heard. They have applied for leave to seek judicial review of those impugned decisions by the PSC and COP to terminate their employment by letter.

[6] They also signaled their intention to seek constitutional reliefs that the impugned Rules are null and void, unlawful, unconstitutional; amount to inhuman and degrading treatment; and constitute an infringement to their right to deprivation of property without compensation under section 1 of the Constitution. They have joined the Honourable Attorney General as a respondent to the application.

[7] The application for leave is resisted. The Minister, PSC, COP and Honourable Attorney General (collectively 'the respondents') submitted that the applicants are not entitled to leave to apply for judicial review or constitutional relief. They argued that the SVGTU, PSU and the Police Welfare Association ('PSA') are unincorporated bodies that have no right to sue in their own names in respect of these matters, since no right to sue has been conferred on them by statute. They contended further that the Honourable Attorney General is not a proper party to the application. They argued that the applicants failed to disclose material facts and did not demonstrate that their claim has good prospects of success in fact or law. They submitted that the applicants' claim for constitutional relief should be struck out because they have not pleaded or raised a viable or proper constitutional case or basis for relief.

[8] The applicants insisted that this is a proper case in which to grant leave to apply for judicial review of the impugned decisions. They countered that the Honourable Attorney General is a proper party to their intended constitutional claim. They submitted that the SVGTU, PSU and the PWA are all capable of suing in their own names.

ISSUES

[9] The issues that arise for consideration are whether: -

1. The SVGTU, PSU and PWA have the *locus standi* to bring a suit in their own names in the case at bar?
2. Whether the Honourable Attorney General is a proper party to these proceedings?

3. Whether the applicants should be granted leave to apply for judicial review of the impugned decisions of the Minister of Health, Wellness and the Environment, the PSC and/or the COP?

ANALYSIS

Issue 1 – Do the SVGTU, PSU and PWA have the *locus standi* to bring a suit in their own names in the case at bar?

- [10] At the outset, it is important to state that while the applicants have signaled in this application for leave that they intend to apply for other administration orders based on allegations of constitutional breaches, the present application is expressed to be one for leave to apply for judicial review. It is not expressed to be an application or claim for an administration order under the Constitution of Saint Vincent and the Grenadines and has not been proceeded as such.
- [11] The respondents submitted that a trade union that is not a body corporate has no right at common law to sue in its name unless empowered to do so by statute. They argued that the SVGTU, the PSU, and the PWA did not bring this application in a representative capacity and have been granted no power by an Act of Parliament such as the **Trade Unions Act**² to bring an action in their own names.
- [12] They contrasted this to the position which obtains in the United Kingdom where express provision is granted by section 10 of the **Trade Union and Labour Relations (Consolidation) Act 1992** for a trade union to sue and be sued in its own name. In this regard, section 10(1)(b) states: -
- ‘(1) A trade union is not a body corporate but –
- (a) ...
- (b) it is capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract or tort or any other cause of action; and ...’

They argued that the **Trade Unions Act** confers no such right on a trade union to sue and be sued in its own name.

²Cap. 216 of the laws of Saint Vincent and the Grenadines, Revised Edition 2009.

[13] They relied on **Grenada Technical & Allied Workers Union v Kenny A Lalsingh Investments Company (Kalico) Limited**³ and **Antigua and Barbuda Public Service Association v Attorney General and Central Board of Health**⁴ to support this position. In the **Grenada Technical and Allied Workers Union case**, His Lordship Mr. Justice Michel referred to section 10 of the **Trade Union and Labour Relations (Consolidation) Act 1992** and opined: -

‘... no such provision exists in the Labour Relations Act, 1999 of Grenada, which legislates the status, rights and responsibilities of trade unions in Grenada.’⁵

[14] His Lordship examined the equivalent part of the Grenada legislation and observed: -

‘It does not ... give any right to a trade union in Grenada to sue or be sued in its own name. Instead it vests the property a trade union in the trustees of the union who alone can sue or be sued in respect of the union’s property and then goes on at section 12 of the Act to state the following:

“(1) The trustees of a registered organisation to any other officer of such organisation who may be authorized so to do by the rules may bring or defend any action, suit, prosecution or complaint in any court concerning the right or claim to property, real or personal, of the organisation, and may sue or be sued in their proper names without other description than the title of their office.’⁶

[15] He concluded: -

‘The question as to whether this section **authorizes the trustees or other officer of a trade union** in Grenada to sue or be sued on behalf of the union other than on an issue concerning property remains to be determined, but its determination does not bear on the outcome of this case and so need not now be addressed. However, the provisions contained in Part III of the Labour Relations Act, 1999 do not appear to liberate a trade

³Suit No. GDAHCV2008/0292

⁴Suit No. ANHHCV2021/0364

⁵At para. 10.

⁶At paragraph 12.

union in Grenada from its common law shackles of an inability to sue or be sued in its own name. If therefore a trade union in Grenada is not entitled in law to sue or be sued in its own name then **it cannot in its own name bring a representative action in the high Court on behalf of its members.**⁷ (Emphasis added)

[16] The respondents pointed out that likewise in the **Antigua and Barbuda Public Service Association case**, the learned judge noted in the settled order: -

‘... there is a fundamental difference between capacity and standing. Capacity to sue simply put is the right to come to court whereas standing is the right to obtain relief in court. This is determined as a preliminary matter as if the applicant fails to satisfy the court of its competence to sue, then this effectively will put an end to the matter’.

[17] They submitted that the learned judge observed that while the applicant was registered as an unincorporated entity, it was not a physical or natural person, did not possess legal personality and was therefore not recognized by law as being capable of having legal rights and duties unless so authorized by statute. The respondents noted that the learned judge held that the applicant in that case was not competent to engage in legal proceedings and therefore dismissed the application. They submitted that the SVGTU and PSU are trade unions and therefore subject to the referenced common law rule and that their application should meet the same fate for the same reasons.

[18] The respondents submitted that the PWA is a creature of statute having been constituted by sections 71 and 72 of the **Police Act**⁸. They submitted that it has been given a restricted status and authority under the **Police Act** exclusive of a right to sue in its name. They submitted further that its powers are circumscribed by section 71, and restricted to: -

‘... the purpose of enabling non-commissioned officers and constables of the Force to consider and bring to the notice of the Commissioner and the Governor-General all matters affecting their general welfare and efficiency.’

⁷At paragraphs 13 and 14.

⁸Cap. 391 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

[19] They reasoned that unless a trade union is given express statutory power to sue in its own name or in a representative capacity, it has no authority to do so. They submitted that the SVGTU, PSU and PWA have not sued in a representative capacity and therefore have no legal standing to pursue this application as framed in their own names or in a representative capacity.

[20] The applicants placed reliance on section 19 of the **Trade Union Act** of Saint Vincent and the Grenadines. They argued that the provision recognizes that a trade union's funds can be used to prosecute claims and by extension recognizes that it can be party in a claim. Section 19 of the trade Union Act states: -

'19. Use of funds of trade union

The funds of a registered trade union, may, subject to the rules thereof and to the provisions of this Act be expended only for the following objects—

- (a) the payment of salaries, ...;
- (b) the payment of costs and expenses ...;
- (c) the **prosecution or defence of any legal proceedings to which the trade union or** any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any rights of the trade union as such or any rights arising out of the relations of any member with his employer or with a person whom the member employs;'

[21] The applicants submitted further that the SVGTU, the PSU and the PWA have been adversely affected by the impugned decisions and therefore have *locus standi* to bring this application pursuant to Civil Procedure Rule ('CPR') 56.2. Rule 56.2 of the CPR provides: -

'Who may apply for judicial review

56.2 (1) An application for judicial review may be made by any **person, group or body** which has **sufficient interest** in the subject matter of the application.

(2) This includes –

- (a) any **person** who has been adversely affected by the decision which is the subject of the application;
- (b) **any body or group acting at the request of a person or persons** who would be entitled to apply under paragraph (a);

- (c) **any body or group** that **represents the views of its members who may have been adversely affected by the decision** which is the subject of the application;
- (d) **any body or group** that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application;
- (e) **any statutory body** where the subject matters falls within its statutory limit; or
- (f) **any other person or body** who has a right to be heard under the terms of any relevant enactment or Constitution.’(Emphasis added)

[22] They argued that the instant case can be distinguished from the Grenada case which was one in private law and did not involve public law. They argued that trade unions have been party to judicial review cases right up to the Court of Appeal, including in **Grenada Technical & Allied Workers Union (GTAWU) v Honourable Karl Hood (Minister of Labour)**⁹ and **Grenada Technical & Allied Workers Union and Public Worker’s Union v Public Service Commission, Attorney General of Grenada and Grenada Postal Corporation**¹⁰. They contended that the Court of Appeal never held that the trade union did not have *locus standi* to proceed with the cases. The respondents countered quite correctly that that was not a live issue before the court in either case. Accordingly, the court was not required to and did not address that issue.

[23] The learning on *locus standi* in judicial review proceedings as outlined in **Halsbury’s Laws of England**¹¹ is that the intended claimants must demonstrate that they have a sufficient interest or standing in the matter to which the application relates, in order to bring proceedings for judicial review. The learned authors observed that at the permission stage it is only in obvious cases that the court may decide that the claimant lacks sufficient interest. They added that a person who has a genuine interest in seeking a remedy will not generally be refused permission on grounds of lack of standing even if the particular ground of challenge relied upon is not one in which he has a personal interest.

⁹GDAHCV2010/370

¹⁰ Grenada Civil Appeal No. 11 of 2003

¹¹Halsbury’s Laws of England Vol. 61A (2018), para. 57.

[24] They noted that in most cases, the question of standing is determined on the substantive application for judicial review and not at the threshold stage as a preliminary issue independent of a full consideration of the merits of the complaint. They remarked that the expression 'sufficient interest' is not defined, but in practice is a broad, flexible concept encompassing a mixed question of fact and law having regard to the context and what best serves the purposes of judicial review in that context. They added: -

'It is now clear that the court should not adopt an unduly restrictive approach and ... may have regard to broader concerns, including the merits of the challenge, the importance of enforcing the law, the importance of the issue raised, the presence or absence of any other person with sufficient interest, the nature of the unlawful conduct alleged and the role of the claimant in relation to the issues under consideration.'¹¹

[25] The learned authors added: -

'In recent years, the rules on standing in judicial review claims have been considerably relaxed. Individuals have been recognised as having standing not only where their rights or interests are affected but in a broad range of situations where in some way they are affected by a decision. ... The courts have increasingly recognised that a wide range of pressure groups have standing to bring challenges in matters which concern their areas of interest or expertise.'¹¹

[26] It is trite law that only a natural or legal person has legal standing to initiate proceedings in court, in his personal capacity (i.e. on his/its own behalf). The SVG TU, PSU and PWA do not contend that they possess such personality. I find that they do not. However, CPR 56.2 expressly authorizes entities other than legal or natural persons to lodge applications for judicial review, if they have a sufficient interest in the subject matter under consideration.

[27] It is important to note that the several classes of persons and bodies who are eligible to initiate such action must: -

a) have been adversely affected by the impugned decision¹²;

¹²CPR 56.2(a)

- b) be taking such action on behalf of and at the request of person or persons who have been so affected¹³;
- c) represent the views of its members who may have been adversely affected by the impugned decision¹⁴;
- d) be able to show that the matter is of public interest and that it possesses expertise in the subject matter of the application¹⁵;
- e) a statutory body that has legislative responsibility for the subject matter¹⁶; or
- f) have the right to be heard under some law or the Constitution¹⁷. (Emphasis added)

[28] The 8th applicant Mr. Brenton Smith supplied affidavit testimony in support of the application for leave. He averred that he was authorized by the other applicants to make the affidavit on their behalves. As to the SVGTU, the PSU and the PWA he stated that they are duly registered organisations representing public servants employed in the public service and have sufficient interest in the subject matter of the application.

[29] He made no assertions that the SVGTU, the PSU or the PWA have been adversely affected by the impugned decisions; that they have taken this action on behalf of their members and at their request; that they represent the views of their members who have been adversely affected by those decisions; that the matter is one of public interest and that they have relevant expertise in the subject matter; or that they have the right to be heard under any law or the Constitution. Their submissions did not advance any of those positions. Taking into consideration that there is no such evidence before the court and that the SVGTU, the PSU and the PWA have made no legal submissions on which this court can find that they satisfy the requirements of CPR 56.2(2) (a) – (d)

¹³ CPR 56.2(b)

¹⁴ CPR 56.2(c)

¹⁵ CPR 56.2(d)

¹⁶ CPR 56.2(e)

¹⁷ CPR 56.2(f)

and (f), I find that they have not demonstrated that they have a sufficient interest in these proceedings, pursuant to those provisions.

[30] It appears that the SVG TU and the PSU were formed and registered in accordance with the provisions of the **Trade Union Act**. They do not thereby become statutory bodies. I make no finding that they are. They are therefore not captured by CPR 56.2(2)(e). Accordingly, they cannot rely on that provision to bestow *locus standi* on them for purposes of initiating judicial review proceedings.

[31] The PWA is statutory creature, having been constituted under section 71 of the **Police Act** and therefore it can be considered a statutory body. The question arises as to whether it fits within the other criteria of CPR 56.2(2)(e). The parties made no pointed submissions on that issue. By section 71 and 72 of the **Police Act**, the PWA's full remit is to bring to the attention of the Governor-General and the COP 'all matters affecting (the) general welfare and efficiency' of its members. Its members are non-commissioned officers and constables.

[32] It is important to note that while the PWA is concerned with liaising directly with the COP and Governor-General on matters of its members' general welfare, this seems to contemplate that the relationship between the PWA and the COP and Governor-General is one of liaison or conduit but not as broker or negotiator. Be that as it may, no evidence has been presented to this court to signal that the PWA's joinder to this application is for the benefit of any particular group of persons or named individual in relation to any such issues of general welfare or efficiency. For these reasons, there is no factual basis on which to make a finding that the PWA has a sufficient interest in the subject matter of these proceedings. Mr. Smith's bare averment that it does is inadequate in this regard.

[33] Moreover, no evidence has been presented to indicate what if any approaches have been made to the COP or Governor-General in relation to any such concerns and the outcome of same. The authorities establish that leave to apply for judicial review may be granted on condition that there is no alternative remedy. The language of section 71 of the **Police Act** suggests that in the case of the PWA there is a procedure for issues relating to its members' general welfare or efficiency to be first

brought to the attention of the COP or the Governor-General. It is not clear if such steps were taken and what if any responses were received.

- [34] In light of the foregoing, I am satisfied that the SVG TU, PSU and the PWA have not demonstrated that they have a sufficient interest in the subject matter of these proceedings to confer the necessary standing on them to initiate and prosecute this application or a subsequent claim for judicial review in their own individual names as opposed to doing so in a representative capacity. They did not file this application in a representative capacity. They are therefore struck out as parties to this application.

Issue 2 – Is the Honourable Attorney General a proper party to these proceedings?

- [35] The respondents submitted that the joinder of the Honourable Attorney General as a party to the application for leave is wrong. They argued that an Attorney General is not a proper party to such proceedings if he is not the person or authority who made the impugned decision. They contended that the applicants have not accused the Honourable Attorney General of making any decision in the case at bar that may be the subject of this application for leave. They cited the cases of **Richard Frederick and another v Comptroller of Custom and another**¹⁸ and **National Bank of Anguilla (Private Banking and Trust) Limited (in administration) et al v Chief Minister of Anguilla et al**.¹⁹
- [36] The applicants countered that this matter is partly a constitutional claim alleging breach of sections 77 and 78 of the Constitution (interference with property rights); and partly an application for leave to seek judicial review. They submitted that while the Honourable Attorney General made no decision which is being challenged by way of judicial review, the holder of the office of Attorney General would have to be added as a party in respect of the constitutional aspect of the claim. They cited the decision in **Quorum Island (BVI) Limited and Virgin Islands Environmental Council et al**²⁰. They submitted that the Honourable Attorney General therefore had to be a defendant to the constitutional claim.

¹⁸SLUHC VAP2008/037

¹⁹AXAHC VAP2020/0001, at paras. 65 and 66.

²⁰BVIHC VAP2009/0021, at the headnotes and para. 28

[37] To resolve this issue, the court's must direct its attention to the nature of the application before it. As set out in the Notice of Application, this is an application for leave to apply for judicial review of impugned decisions by the 1st, 2nd and 3rd named respondents. In the case of the first respondent the impugned decision is the making of regulations 5(1), 8(1) and 8(2) by SRO 28 of 2021. The complaint against the 2nd and 3rd respondents is that terminated the employment of the 4th, 5th, 6th, 7th, 8th and 9th defendants. The Honourable Attorney General is not accused of making any decision for which leave to seek judicial review is being sought.

[38] The **Richard Frederick case**, the **Quorum Island case** and the **National Bank of Anguilla case** all reiterated the well-established principle that in judicial review proceedings (also known as prerogative or crown side proceedings) the Honourable Attorney General is not a proper party unless he made a decision which is being challenged. The applicants and the respondents are agreed that the Honourable Attorney General made no such decision in the instant case. I find that he did not.

[39] The rationale supplied by the applicants (in their submissions) for the joinder of the Honourable Attorney General as a named respondent to the present application for leave is that it is the applicants' intention to bring a constitutional claim for breach of sections 77 and 78 of the constitution and interference with their property rights. Those intentions are foreshadowed in paragraph 8 of the Notice of Application, not as a discrete claim, but seemingly in a visionary or futuristic manner.

[40] The applicants have pointed to no authority which supports joinder of the Attorney General as a named party to an application for leave to file a judicial review claim, simply because they intend to incorporate constitutional claims at a later date on the filing of a fixed date claim form pursuant to CPR 56.7. Joinder of the Attorney General at the leave stage does not convert the proceedings to a joint constitutional and crown side proceedings. That is achieved if leave is granted and a judicial review claim is subsequently filed; or even if leave is denied the applicants proceed with a fixed date claim for an administrative order. It is at that stage that it would be appropriate to join the Honourable Attorney General if the factual allegations support such joinder.

[41] The rules make clear that if an applicant intends to seek judicial review of any decision, leave must be granted to do so²¹. If leave is refused, that ends the attempt to proceed with a judicial review claim, unless an appellate court orders otherwise. A litigant seeking any administration order other than judicial review is not required to apply for leave but must instead file a fixed date claim form²². The application presently before the court is not for an administration order but rather for leave to apply for judicial review.

[42] The decisions in the **Richard Frederick case**, the **Quorum Island case** and the **National Bank of Anguilla case** are authoritative and binding on this court. The principle enunciated in them regarding joinder of the Attorney General in crown side proceedings must be applied in the case at bar. It is that the Attorney General is not a proper party in such proceedings unless he has made a decision which is being challenged. There is no allegation that the Honourable Attorney General made an impugned decision. It is not appropriate for him to be joined as a party to this application for leave to apply for judicial review. Accordingly, he must be struck out as a respondent in respect of this application for leave.

Issue 3 – Should the applicants be granted leave to apply for judicial review of the impugned decisions of the Minister of Health, Wellness and the Environment, the PSC and/or the COP?

Test for leave

[43] The celebrated case of **Satnarine Sharma v Antoine-Browne**²³ outlines the test to be applied in determining whether leave for judicial review should be granted. Lord Bingham articulated it in the following terms: -

‘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

²¹ CPR 56.3.

²² CPR 56.7.

²³[2006] UKPC 57.

success and not subject to a discretionary bar such as delay or an alternative remedy: see *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628 and *Fordham, Judicial Review Handbook 4th ed* (2004), p 426.²⁴

The parties accepted that this is the appropriate test.

[44] The respondents added that the nature of this application invites greater scrutiny from the court than in normal judicial review cases. They cited a decision emanating from the Supreme Court of Fiji – **Matalulu and Another v DPP**²⁵. They commended the following portion of the judgment as outlining the correct approach to be adopted by the court in considering the present application for leave: -

'The judge granting leave to issue judicial review proceedings has a discretion once a sufficient interest is shown by the applicant. That discretion must be informed by the evident purpose of Ord 53. It is not an occasion for a trial of issues in the proposed proceedings. That having been said, the judge considering the grant of leave is entitled to have regard to a variety of factors relevant to the purpose of the rule. These include:

1. Whether the proposed application is frivolous or vexatious or an abuse of the process of the court.
2. Whether the application discloses arguable grounds for review based upon facts supported by affidavit.
3. Whether the application would serve any useful purpose, eg whether the question has become moot.
4. Whether there is an obvious alternative remedy such as administrative review or appeal on the merits which has not been exhausted by the applicant.
5. Whether a restrictive approach to the grant of leave is warranted because the decision is one which is amenable to only limited judicial review.

The question whether there are arguable grounds for review is not to be determined by the resolution of contestable issues of law. But where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are manifestly untenable, then leave should not be granted. The submission was made on behalf of the appellants that leave to issue judicial review proceedings should be granted wherever a 'potentially arguable case' is disclosed. We do not understand the full significance of the term

²⁴At pp. 5-6.

²⁵[2003] 4 LRC 712

'potentially arguable'. It cannot be used 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.'²⁶

- [45] The respondents submitted that in line with the court's position in the **Matalulu case**, the context of an application for leave is important. They submitted further that the context of the issues in this application concern a pandemic, and measures recommended by the CMO to combat the consequences of the pandemic that were enacted into law and supplemented by the Minister with measures for compliance. They submitted further the context includes the nature of the qualified rights guaranteed under the Constitution. They reasoned that this case presents a very different context from the usual applications for judicial review.
- [46] They argued that the learning in **Matalulu** is applicable to the case at bar because the pandemic and responses to the public health issues including the requirement for vaccines and mandates, concern judgments by the CMO. They submitted that this may include taking advice from local medical personnel and Doctors, the World Health Organization (WHO), Pan American Health Organization (PAHO), and/or the Caribbean Public Health Agency's Caribbean Regulatory System (CARPHA CRS).
- [47] It is important that the court makes the observation that while the impugned rules in some instances expressly state that they are made by the Minister on advice of the CMO, no evidence has been presented by any of the parties as to what advice from the CMO, if any, guided the Minister in making the regulations. In like fashion, no evidence has been offered to reflect that the impugned rules were informed by WHO, PAHO or CARPHA CRS. Those statements by the respondents are therefore disregarded.
- [48] The respondents contended that the special context of this application will require not only strict scrutiny, but some judicial deference to the medical judgment of the CMO. They submitted that this application concerns public policy and public health and therefore a restrictive approach should be taken by the High Court and it should subject this application to close scrutiny in relation to pleading and evidence as intimated in **Matalulu**. That a case concerned an application for leave to

²⁶ Per Von Doussa JJ at page 733 (b) to (g).

review a decision by the Director of Public Prosecution (DPP) to enter a nolle prosequi on a private prosecution for an alleged criminal offence.

[49] In delivering that decision Don Moussa J. stated: -

'There are cases in which a **restrictive approach to the grant of leave may be warranted because of the limited grounds upon which review is available in such cases and public policy considerations which should constrain the incidence of such review.** This is particularly applicable to decisions made by prosecuting authorities in the administration of the Criminal justice system. The decision to prosecute or not prosecute a particular case is likely to be affected by a wide variety of considerations. **Other decisions of a governmental character may fall into the same category where they involve questions of policy, the allocation of resources and the determination of priorities for government action including the delivery of services.** That is not to say that such decisions are immune from review where they are made unlawfully or in excess of power. It does say that an application for leave to seek judicial review of such decisions may require close scrutiny by a judge before leave is given.'²⁷ (emphasis supplied)

[50] The respondents argued that a restrictive approach is entirely warranted in the instant case, because the decision and measures being challenged were recommended to the Minister by the CMO, as they are required to restrict or remedy the pandemic that was in existence in Saint Vincent and the Grenadines. They contended that the context would require significant deference to the judgment of the CMO and would require compelling evidence that the measures had no relation to the medical evidence or were so out of line with science or medical opinion. No evidence was led of such recommendation or of the objective behind such recommendations if made. In fact, the recitals to and provisions of the impugned rules 5(1), 8(1) and (2) do not assert that they were made on advice from the CMO.

²⁷Per Von Doussa JJ at page 733 (g) to (i).

[51] The applicants countered that the Court in the **Matalulu case** gave three examples of situations which require strict scrutiny of an application for leave to seek judicial review. They submitted that the case at bar is different, that the issues in this case deal with human rights and do not fit into any such categories.

[52] The decision in **Matalulu** reiterated the applicable test for grant of leave to apply for judicial review. Further, the learned justices pointed out that the substantive law governing the powers of the DPP in Fiji and their amenability to judicial review were set out partly in the Constitution, partly in the Criminal Procedure Code, partly in Ord. 53 and partly in case law. They referred to the decisions in **Maxwell v R [1996] 1 LRC 299** and **Kostuch v A-G of Alberta (1995) 128 DLR (4th) 440**. In the former, it was held that certain decisions involved in the prosecution process are of their nature insusceptible to judicial review. In the latter, the court held that the 'test for prosecutorial discretion remains of flagrant impropriety and it is not unreasonableness.'²⁸

[53] After considering a number of other decisions including cases from the United Kingdom, Canada, the United States, Barbados and Guyana, the Fijian Supreme court expressed the view that there is now little or no support for the proposition that prosecutorial decisions by a DPP 'are completely beyond the reach of judicial review albeit the occasions on which it may successfully be invoked are likely to be rare because the width of the power and the mix of factors that may legitimately be taken into account in its exercise.'

[54] The court approvingly referred to sentiments expressed on this concept Powell J in the case of

Wayte v United States (1985) 470 US 598 at 607 – 608. He explained: -

'This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a

²⁸ Page 728 (b) to (e) per Don Moussa J.

prosecution delays the criminal proceeding, threatens the chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.'²⁹

[55] The principles that emerge from the **Matalulu case** regarding 'greater scrutiny' is that a limited number of instances necessitate that the court exercises greater care when considering an application for judicial review. One clear example is those cases which seek to challenge the exercise by a DPP of his prosecutorial decision-making powers. The Supreme Court of Fiji recognized that certain limits on the courts' judicial review powers are inherently built into determination of those matters for a number of reasons including the imperative of maintaining the separation of powers construct. The case at bar involves no such decision. The court remarked also those other considerations in like cases, are of a policy nature and in respect of allocation of resources. The court was careful to note however that in all of those cases, judicial review is available if the impugned decision is made unlawfully or in excess of authority, notwithstanding the need for greater scrutiny.

[56] The respondents invite this court to place the impugned decisions in this case within the category of cases which require stricter scrutiny. They argue that this is the appropriate approach because the subject matter involves a pandemic and measures designed to combat its effect that were introduced based on the medical evidence, medical opinion and science. The difficulty with this proposition is that neither party presented any such medical evidence, opinion or science to the court. The respondents supplied no evidence about the advice which guided the making of the impugned regulations.

[57] While the court must take judicial notice of the reality of the WHO declaration of a global pandemic occasioned by the COVID-19 virus, it cannot take judicial notice of any recommendation made to the Minister by the CMO or any other person. It appears that the challenged decisions were driven by a policy of the Ministry of Health, Wellness and the Environment. However, without evidence,

²⁹Quoted at page 735 (c) to (e) of the Matalulu case.

this court cannot speculate about the scientific, medical, financial or other policy considerations which drove the making of the impugned decisions. There is little to no evidential basis on which this court can conclude that the policy considerations which informed the challenged decisions place this case within a category of the type described by the court in **Matalulu**. That would be entirely speculative and I refrain from making such a finding. In the premises, the application will be considered inline with all of the referenced established principles including those emanating from **Sharma v Antoine-Browne**.

[58] The High Court is empowered to review decisions made by public authorities to assess whether the decision-maker exceeded the statutory authority vested in him or her; abused his or her powers; acted in breach of natural justice principles; acted illegally or made a decision which no reasonable person could have made. The Court is not concerned in those instances with the merits of the impugned decision but rather with the process utilized in arriving at the decision.

[59] The grounds on which judicial review is usually pursued are illegality, procedural impropriety, proportionality and irrationality also known as 'Wednesbury unreasonableness'. These three grounds encompass several subsets such as failure by a public body to take account of relevant considerations or taking into account irrelevant matters when making a decision; and denial of an opportunity to be heard to a person who will be affected by the decision. 'Irrationality' refers to a decision that 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.³⁰ The applicants' complaints about the impugned decisions invoke some of those grounds.

Impugned decisions of the Minister

[60] The applicants describe themselves in the Notice of Application by reference to their occupation and employment. I shall borrow the descriptors used by them. It should be noted however, that this is not intended to signify this court has made a finding as to their respective stated occupation and employment. It is being done simply for convenience.

³⁰Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9

[61] The 4th and 5th applicants Shanile Howe and Novita Roberts are primary school teachers employed with the Ministry of Education. The 6th applicant Cavet Thomas is customs officer employed with the Customs and Excise Department. The 7th applicant is Alfonzo Lyttle who is an Assistant Supervisor employed in the Customs and Excise Department. The 8th applicant Brenton Smith is a Station Sergeant of the Royal St. Vincent and the Grenadines Police Force. The 9th applicant is Sylvorne Olliver, a Corporal of Police of the Royal St. Vincent and the Grenadines Police Force. Unless stated otherwise or the context suggests otherwise, all future references to the applicants is to these named individuals.

[62] The applicants expressly challenge the making by the Minister of rules 5(1), 8(1) and 8(2) of **SR&O No. 28 of 2021 cited as the Public Health (Public Bodies Special Measures) Rules, 2021**, whereby : -

(a) Rule 5(1) establishes a mandatory Covid-19 vaccination program for the 4th, 5th, 6th, 7th, 8th and 9th applicants and other employees in the Schedule.

(b) Rule 8(1) and (2) provide that failure/refusal of those applicants to take the Covid-19 vaccination, prohibits them from attending their place of work, despite their willingness to continue working, results in them being treated as being absent from duty without leave and as having abandoned their employment within the meaning of Regulation 31 of the Public Service Commission Regulations.

[63] The applicants indicate that if leave is granted to apply for judicial review of the Minister's decision to make those Rules, they intend to seek (a) a declaration that Regulations 5(1), 8(1), and (2) are unlawful on account of being *ultra vires*, disproportionate, unreasonable and irrational; and (b) an order quashing the Minister's decision to make those rules. They assert that they have made a plethora of complaints with the respondents without effect and that no alternative form of relief is available to them. They have supplied no evidence of the complaints made to the respondents.

[64] The applicants set out several grounds for their application. They pleaded that the Minister made rules 5(1), 8(1) and 8(2) in purported exercise of powers under section 43B of the **Public Health Act**; that rule 5(1) mandates every employee specified in the Schedule to be vaccinated against the coronavirus-disease 2019 and that they fall within the Schedule. They pleaded further that rule

8(1) provides that an unvaccinated employee must not enter the workplace and is to be treated as being absent from duty without leave.

- [65] They noted that rule 8(2) states that regulation 31 of the PSC Regulations applies to a public office who is absent from duty without being on leave. They contended that the practical and legal effect of such application of Regulation 31, is that a person who refuses or otherwise fails to take the Covid-19 vaccine would be deemed to have abandoned his job after 10 consecutive days of being debarred from attending his workplace. They added that they have all been debarred from attending their workplaces for a period in excess of 10 days and that respectively the PSC and CPO terminated their employment without providing them an opportunity to be heard.
- [66] The applicants pleaded further that the application of regulation 31 of the PSC Regulations has the further effect of depriving them of their accrued pension and benefits arising from decades of service pursuant to section 6 of the Pension Act³¹. They claimed that to date they and over 150 other public officers have been deemed to have abandoned their jobs.
- [67] They pleaded further that section 43B (2) of the **Public Health Act** on its face, grants the Minister power to implement special measures to mitigate or remedy the health emergency declared under section 43B(1), the clear purpose of which is to ensure public safety during the period of the Covid-19 pandemic. They pleaded that section 43B envisages that the measures are to be of temporary duration and remain in effect until it is declared that a public health emergency has ended pursuant to section 43B(3).
- [68] The applicants contended further that rule 8(1) and (2) are outside of the statutory mandate in that they touch and concern the consequence of the employment contract where a relevant employee refuses or otherwise fails to take the vaccine. They argued that the Minister's decision was irrational and Wednesbury unreasonable, as no reasonable decision-maker would force such a large number of public employees to take the vaccine in circumstances where (i) the efficacy of authorized vaccines has significantly declined; (2) where the long-term adverse effect of the vaccines are unknown and possibly dire; and where (3) the known adverse side effects of the vaccines are serious.

³¹ Cap. 272 of the Laws of Saint Vincent and the Grenadines.

- [69] The applicants pleaded that there is no rational connection between the temporary public health measures under the impugned rules and the legal consequence of deeming an employee who refuses to take the vaccine as having abandoned his or her job and been permanently terminated at the instance of the employee. They added that the impugned sub-rules 8(1) and (2) are disproportionate, as less intrusive measures could have been taken to achieve the intended purpose of the rules.
- [70] Mr. Brenton Smith was the only person to provide affidavit testimony in support of the application. He averred that he was authorized to make the affidavit on behalf of all the applicants. He asserted that they are all employed in the public service and have sufficient interest in the subject application. He outlined that the **Public Health Act** was amended by **Act No. 6 of 2020** and assented to by the Governor-General on 9th April 2020. He noted that sections 43A to 43F were inserted as new sections and made provision for public health emergencies. He pointed out that section 43B provides for the declaration of a public health emergency by the Minister.
- [71] He averred that on 4th December 2020, the Minister by **SR&O 38 of 2020**, made pursuant to section 43B of the **Public Health Act**, declared a public health emergency for the pandemic caused by COVID-19 (Coronavirus Disease-2019). He averred further that on 3rd August 2021, an amendment was made to section 43B of the Act by replacing 'voluntary' with 'an'. He explained that the Minister on 19th October 2021 made **SR&O No. 28 of 2021** pursuant to sections 43B and 147 of the Act.
- [72] Mr. Smith asserted that 'section (sic) 5 of SR&O 2021 No. 28' creates a requirement that specified categories of public servants including teachers, health care employees, police officers and public officers within the Customs and Excise Department must be vaccinated against the coronavirus disease 2019. He added that section 8 (presumably rule 8) provides for the punishment to be applied to public employees who chose not to be vaccinated with a Covid-19 vaccine. He asserted that between December 6th and 13th 2021 the PSC and COP issued letters to the applicants terminating their employment within the public service. He exhibited copies of the letters issued to the 4th, 5th, 6th, 7th, 8th and 9th applicants.
- [73] In all but one instance (that of Sylvorne Olliver) the letters were issued by the PSC or Police Service Commission and signed by the CPO Arlene Regisford-Sam. The letter addressed to Ms. Olliver

was dated December 6th, 2021, and signed Colin O. John, Commissioner of Police. The letters addressed to Ms. Howe and Ms. Roberts were dated 13th December 2021. The letters to Ms. Thomas, Mr. Lyttle and Mr. Smith were dated 8th December 2021.

- [74] Except in the case of Mr. Smith's, the letters signed by Arlene Regisford Sam were identical apart from the addressee's particulars and the salutation. They stated: -

'I have to inform you that the Public Service Commission has noted that you, without reasonable excuse, failed to comply with Rule 5 of the Public Health (Public Bodies Special Measures) Rules 2021.

As a result of your failure to comply with Rule 5, you have been absent from duty without leave since November 22nd, 2021, pursuant to Rule 8 of the Rules.

Accordingly, on behalf of the Public Service Commission, I have to inform you that you are deemed to have resigned your office with effect from December 7th, 2021, and have ceased to be an officer, in accordance with the Regulation 31 of the Public Service Commission Regulations, Chapter 10 of the Laws of Saint Vincent and the Grenadines.

On behalf of the Government of Saint Vincent and the Grenadines, I would like to thank you for the service you have rendered during your period of employment, and also, to wish you success in the future.'

- [75] The letter addressed to Mr. Smith used identical language, save that 'Public Service Commission' was replaced with 'Police Service Commission'; and 'Section 73A of the Police Act Chapter 391 of the Laws of Saint Vincent and the Grenadines' was substituted for 'Regulation 31 of the Public Service Commission Regulations, Chapter 10 of the Laws of Saint Vincent and the Grenadines'.

- [76] Regulation 31 of the Public Service Regulations states:

'31. Abandonment of office

An officer who is absent from duty without leave for a continuous period of ten working days, unless declared otherwise by the Commission, shall be deemed to have resigned his office, and thereupon the office becomes vacant and the officer ceases to be an officer.' (Emphasis added)

[77] It is important to note that while reference is made to 'Section 73A of the Police Act', the amending provision was by subsidiary legislation which is stated to be subject to a resolution of the House of Assembly. The court was not presented with any such resolution. In any event, none of the applicants took issue with the provision referred to as section 73A of the **Police Act**. It is outlined in the Schedule to **SR&O 32 of 2021** and states: -

'73A. (1) This section applies to a member of the Force or Auxiliary Police who is to be treated as being absent from duty without leave under rule 8 of the Public Health (Public Bodies Special Measures) Rules 2021.

(2) Notwithstanding anything in sections 17, 20 and 62, a member of the Force or Auxiliary Police who is absent from duty without leave for ten consecutive days is deemed to have resigned his office unless declared otherwise by-

(a) ...

(b) The Police Service Commission, in the case of an officer below the rank of Deputy Commissioner of Police but above the rank of sergeant;

(c) The Commissioner, in the case of an officer of or below the rank of sergeant;

(3) Where a member of the Force or Auxiliary Police is deemed to have resigned his office under sub-section (2), the office becomes vacant and the member ceases to be a member of the Force or Auxiliary Police.' (Emphasis added)

[78] The relevant provisions of the **Act** are sections 43A to 43F and 147. The Minister is authorized by section 147 to make rules generally for carrying out the purposes of the Act. As stated by Mr. Smith, sections 43A to 43F were enacted on April 9th, 2020, and introduced new provisions, which cover public health emergencies. Section 43A defines 'public health emergency' as 'an extraordinary event which is determined to constitute a public health risk in Saint Vincent and the Grenadines and which potentially requires a coordinated response in Saint Vincent and the Grenadines.'

- [79] Section 43B makes provision for the Minister to declare that a public health emergency exists in the State of Saint Vincent and the Grenadines, if the CMO believes that such an emergency exists and that it cannot be mitigated or remedied without implementation of special health measures, and recommends that the Minister declares a public health emergency for part or all of the State. By sub-section (2) of section 43B, the Minister is empowered to implement special measures on the CMO's advice, to mitigate or remedy such public health emergency.
- [80] The **Public Health Amendment Act No. 6 of 2020**, assented to by the Governor-General on 9th April 2020 provided by section 43B(2)(a) that special measures may include 'establishing a voluntary immunization' for Saint Vincent and the Grenadines or any part of the State. By amending **Act No. 15 of 2021**, the words 'a voluntary' were replaced with 'an'. The applicants contend that this amendment instituted a mandatory vaccination program for the classes of persons listed in the Schedule.
- [81] Other special measures provided for by the amendments on 9th April 2020, include the creation by the Minister of a 'list of individuals or classes of individuals to be given priority for active and passive immunizing agents, drugs, medical supplies or equipment'³², and on the CMO's advice institution of limitations on access such as 'prohibiting or limiting access to certain areas of the country or evacuating persons from an area of Saint Vincent and the Grenadines.'³³
- [82] By **SR&O No. 38 of 2020** which was gazetted on 4th December 2020, the Minister declared a public health emergency for the State of Saint Vincent and the Grenadines 'for the pandemic caused by COVID-19 (Coronavirus Disease 2019)'. The recitals signified that the CMO believed that a public health emergency existed in Saint Vincent and the Grenadines, that it could not be mitigated or remedied without the implementation of special health measures and that she had recommended to the Minister that a public health emergency be declared for the entire State of Saint Vincent and the Grenadines.

³²Section 43B(2) (b)

³³Section 43B(2) (d)

[83] By **SR&O 28 of 2021** made and gazetted on 19th October 2021, the Minister made rules including the impugned rules 5(1), 8(1) and 8(2). There is nothing on the face of the **SR&O** stating that those rules were made on the advice or recommendation of the CMO. There is no evidence to such effect.

[84] Rules 5(1), 8(1) and (2) state respectively: -

‘5 (1) Subject to rule 7, every employee specified in the Schedule must be vaccinated against the coronavirus disease 2019.

8 (1) An employee who without reasonable excuse fails to comply with rule 4 or 5 must not enter the workplace and is to be treated as being absent from duty without leave.

(2) Regulation 31 of the Public Service Commission Regulations applies to a public officer who is absent from duty without leave under sub-rule (1).’

[85] The **SR&O** defines ‘employee’ as an employee of a public body; ‘public body’ as ‘the government, and a department, institution or undertaking of the government; a local authority; and an authority, a board, commission, committee or other enterprise, whether permanent or temporary, paid or unpaid, which is owned or controlled by the Government;’.

[86] Among the categories of employees listed in the Schedule are teachers appointed to public educational institutions, assisted private schools or public schools; members of the Royal Saint Vincent and the Grenadines Police Force and public officers within the Customs and Excise Department. Based on the assertions made by Mr. Smith in his supporting affidavit, the applicants in this case all fell into one of those categories, on the date that the **SR&O** was made. This is confirmed in the letters sent to them by the CPO and the COP respectively.

Rule 5(1)

[87] The applicants argued that there is a plenitude of expert evidence in the public domain that

establishes that the Covid-19 vaccination does not prevent, control, contain and suppress the risk of the spread of the coronavirus-disease 2019 in public bodies and therefore does not create a safe workplace; and that vaccinated people are equally likely to infect and to be infected as are unvaccinated persons. They reasoned that allowing unhindered access to vaccinated employees

while excluding the unvaccinated is therefore irrational in so far as it does not cater to and allow for a safe workplace. They submitted that this being so the mandate that all workers be vaccinated is irrational.

[88] They argued that emergency use authorization of the COVID-19 vaccines is different from full authorization. They submitted that it is a dangerous, unreasonable and unjustifiable interference with constitutional freedoms. They contended that their application is for leave to apply for judicial review of this particular rule mandating use of vaccine by certain public servants, teachers etc. They submitted that on these bases, an arguable ground of illegality and irrationality exists with respect to the Minister's decision to make regulation 5(1).

[89] The applicants argued that the Minister's decision to make regulation 5(1) is irrational because no reasonable decision maker would force such a large number of public employees to take a vaccine where the efficacy has declined substantially, where the long-term effects are unknown and potentially severe and where certain adverse side effects are serious. They have thereby attacked rule 5(1) on the grounds of irrationality and proportionality. Although the applicants signaled an intention to challenge the legality of rule 5(1) if leave is granted³⁴, they took no issue expressly in their application with the *vires* or legality of that rule. They included no grounds under which that rule was being challenged as being *ultra vires*. The court cannot therefore entertain any submissions from them attacking the legality of rule 5(1).

[90] The respondents submitted that an application for leave requires a sufficiency of material facts and evidence, and a sound basis in law, in order to show good prospects of success. They added that such evidence must be objectively viable and not premised on conjecture, hearsay or material of one kind or another floating in the public domain.' They contended that since the context is public health, medical or science-based evidence is required to assist the Court about the threat of Covid 19 and/or the vaccines. They reasoned that this is essential, otherwise the Court will be left with mere conjecture when it seeks to consider the allegations of unreasonableness, irrationality or disproportionality.

³⁴Paragraph 6(a) of the Notice of Application filed on 20th December 2021.

[91] They added that the applicants failed to supply evidence in support of their contention that there are alternative measures to combat the coronavirus disease. They argued further that in the absence of cogent material facts and evidence, regardless of his or her training and experience, the judge will not be able to consider, far less conclude that the allegations of irrationality or disproportionality have any prospects of success at a trial. They cited in support the cases of **Global Education Providers Inc. v The Hon. Peter Saint Jean et al**³⁵ and **Bondalyn Jacobs et al v Prime Minister of Antigua and Barbuda, Central Board of Health**³⁶.

[92] The respondents' submission that there must be sufficiency of evidence to meet the threshold of arguability in an application for judicial review is in keeping with the cited legal authorities, and CPR 56.3(4) which stipulates that a short statement of all the facts relied on must be provided.

[93] In **Sharma v Browne-Antoine**³⁷ Lord Bingham of Cornhill and Lord Walker of Gestinghope expounded on the guiding principles including how a court determines arguability. It is instructive to capture those pronouncements at this juncture as they will inform the court's determination of issues of whether the applicants have presented an arguable case with a realistic prospect of success.

[94] The Law Lords opined: -

'But arguability cannot be judged without reference **to the nature and gravity of the issue to be argued**. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:

"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies

³⁵DOMHCVAP2012/0009

³⁶ANUHCV2021/0394

³⁷[2007] 1 WLR page 515F-G

not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities”.

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”: *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733.’ (emphasis supplied)

[95] The applicants’ complaint that the Minister could have employed less restrictive measures than a mandatory vaccine regime under rule 5 (1) to address the health and medical challenges posed by the pandemic, is not supported by the affidavit testimony. Mr. Smith’s affidavit contained no suggestions or ideas about the less stringent measures that the applicants implied and argued could have been deployed instead of rule 5(1). The Court is not permitted to embark on a search for such material. It has to be presented by the applicants. Their contention that it would have necessitated them seeking an order to adduce expert testimony does not absolve them from the evidential demands of judicial review proceedings referred to earlier.

[96] The applicants’ failure to supply evidence of those alternative measures fatally undermines this aspect of their application. Without the factual underpinnings to support their assertions, there is simply no arguable ground advanced by them which provides a realistic prospect of success in relation to their irrationality and proportionality attack on rule 5 (1). Their application for leave to seek judicial review of rule 5 (1) of SR&O 28 of 2021 is therefore dismissed.

Rule 8 (1) and (2)

[97] In respect of rule 8 (1) and (2), the applicants argue that the Minister has exceeded the powers conferred on him by section 43B(2) of the Act to implement special measures to mitigate or remedy the public health emergency. They argued that the Minister was not authorized by the Act or otherwise by Parliament to make rules which touch and concern the employment contract between the employee and employer. They submitted that he misapprehended his powers and acted illegally in making rule 8(1) and (2).

[98] In this regard, they submitted that Rule 8(1) and (2) prescribe sanctions for failure to comply with the vaccination regime stipulated under rule 5. They contended that rule 8(2) goes far beyond the scope of powers given to the Minister by the **Act** and purports to amend Regulation 31 of the PSC Regulations. They submitted that power to appoint persons to and remove them from the public service, and discipline them is conferred exclusively on the PSC by sections 77 and 78 of the Constitution³⁸ which provide *inter alia* that the PSC is not to be subject to the direction or control of any other person or authority³⁹. This is so. They reasoned that Regulation 31 of the PS Regulations makes no reference to an officer being deemed to have abandoned his office who showed up for and made himself available for work on the online portal. They argued that the PSC must make its own regulations dealing with the removal of public officers from office and not act on regulations made by the Minister to such effect.

[99] The applicants submitted that the Minister purported to amend the PS Regulations and issue directions to the PSC as to who they should deem to have abandoned or resigned from their post. They submitted further that the impugned rules also directed the PSC to terminate those officers. They argued submitted that it is unconstitutional and illegal for the Minister to purport to remove public officers from office. They argued further that the PSC followed the Minister's direction in rule 8 and did not give them an opportunity to be heard.

[100] The applicants contended that the PS Regulations **39 and 40** govern discipline within the public service. They submitted that rule 8 (1) and (2) of the seeks to serve as the judge, jury and executioner in one stroke of the Minister's pen in relation to whether an officer has resigned his office for being in breach of sub-rules 8(1) and (2). They argued that by his pen the Minister eroded the applicant's entitlement to be heard. They submitted that the rules of natural justice require that if an employer is going to take action against an employee, he must be given an opportunity to be heard. They submitted that this entitlement was erased by the Minister when he purported to make those regulations – 8(1) and (2).

³⁸Cap. 10 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

³⁹Section 77(11)

[101] The applicants submitted that the decision to treat public officers to whom **SRO No. 38 of 2021** applies as having abandoned their jobs for failure to take the vaccine has the effect of depriving those who have given pensionable service, of their pension rights. They cited **Elvis Daniel v. Public Service Commission et al**⁴⁰ in which the Court of Appeal found that 'Pension benefits would be amenable to protection as property rights under section 6 of the Constitution unless the deprivation of benefits arises from a lack of qualification or entitlement to it.'⁴¹And that 'once the appellants are entitled to pension benefits, in the absence of some lawful basis for its deprivation, in respect of which none has been advanced in this case, the appellants are entitled, not only to a declaration that their property right guaranteed by section 6 of the Constitution has been breached, but an assessment of damages for that breach, as a mere declaration would not be adequate given the nature of the breach.'⁴²

[102] The applicants contended that the issue is whether sub-rules 8(1) and 8(2) if held lawful would provide a basis for depriving public officers of pension benefits which would otherwise be protected under section 6 of the Constitution, and whether this outcome is proportionate to the objective of mitigating or remedying public health. They submitted that while the objective of remedying or mitigating the public health emergency posed by the Covid-19 pandemic is a legitimate and important one, there is no rational connection between it and interfering with the pension rights of public officers by permanently dismissing them from their employment for failing to take the Covid-19 vaccine.

[103] They argued that the public health objective of keeping the workplace safe by excluding unvaccinated persons can be achieved in less intrusive ways with less or no interference with the property rights of public officers. They suggested that this could be done by exploring alternative modes of work for public officers such as working online which would require no interruption in employment; requiring unvaccinated persons to take regular testing; prohibiting the attendance of unvaccinated

⁴⁰SVGHC VAP2016/0007

⁴¹ At para. 55

⁴² At para. 57

workers at their workplace but without interfering with the employment relationship and with their remuneration; prohibiting the attendance of unvaccinated workers at their workplace but putting them on half pay; prohibiting the attendance of unvaccinated workers at their work place but having time spent out of work as part of entitlement to annual vacation leave.

[104] They submitted that other less intrusive measures could be treating the failure to take the Covid-19 vaccine and the consequent absence from work as amounting to voluntary retirement; treating the failure to take the Covid-19 vaccine and the consequent absence from work as grounds for compulsory retirement; treating the failure to take the Covid-19 vaccine and the consequent absence from work as grounds for retirement in the public interest. They insisted that the course chosen by the Minister is excessive and does not strike a fair balance between the public health emergency objective and the rights of public officers.

[105] In response, the respondents argued that the main purpose of the vaccine mandates for the frontline workers in the public service was explained in a release published by the Office of the Prime Minister on the 30th July, 2021. They argued further that the release outlined the objectives of the **Public Health (Amendment) Bill, 2021** including the intention to require certain categories of frontline employees in the public sector to take the vaccine in relation to work in certain jobs. They submitted that the High Court can take judicial notice of this letter as it is an official publication by the Government. No legal authority for that proposition was advanced. It is not within the category of documents of which a court is required to take judicial notice⁴³. It is therefore disregarded.

[106] The respondents submitted that rule 4 of the **Special Measures SRO** required testing for other categories of officers. They pointed out that it provided clear exemptions under rule 7, on medical and religious grounds for the requirement to be vaccinated.

[107] They submitted that while section 1 of the Constitution of Saint Vincent and the Grenadines provides that every person in the State is entitled to the fundamental rights and freedoms, 'that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the

⁴³Evidence Act, Cap. 220 of the Laws of Saint Vincent and the Grenadines, sections 40-44 and 45

following, namely— (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions...’those rights are not absolute but are subject to and limited expressly by the rights and freedoms of others and the public interest. They argued that consequently, sections 7, 9, 10, 11, 12 and 13 of Chapter I of the Constitution, which protect the fundamental rights including the right to freedom of expression, movement, conscience, and protection from discrimination etc., are all made expressly subject to laws reasonably required in the interests of public health.

[108] The respondents argued that therefore, there ought to be no question that in Saint Vincent and the Grenadines (i) there are no absolute rights, (ii) the enjoyment of the said rights and freedoms of the applicants are subject to the rights and freedoms of others, the public interest including public health, and that (iii) the collective rights of the public interest, and interest of public health, and not private rights, are paramount. They contended that this ought to be so especially the case in the face of a pandemic. They referred to **St Luce v The Attorney General of Antigua and Barbuda**⁴⁴.

[109] The respondents contended that the applicants’ assertion is that the regulations are *ultra vires* because they touch and concern their contracts of employment, and therefore fall outside the statutory mandate. In other words, they interpreted the applicants’ complaint to be that their contracts of employment are immunized from the application of the **Act**, and measures and regulations made under them. The respondents contended that this submission is contrary to law and wholly untenable for two reasons.

[110] Firstly, they submitted that the Act and Regulations confer very broad advisory powers on the CMO and rule-making powers on the Minister in relation to management of a public health emergency. Secondly, they contended that as a matter of law the nature of applicants’ employment as public officers is one of status governed to a significant extent, if not totally, by Acts of Parliament, regulations, and General Orders made by the Executive or Legislative Branch of the Government.

⁴⁴(1975) 22 WIR 536 at page 540 (g) to 541 (a)]

[111] The respondents submitted further that there is no question that sub-sections 43B (1) and (2) of the **Act** confer very broad powers on the CMO to advise the Minister on measures which he or she (CMO) believes are necessary to control and combat dangerous and infectious diseases including Covid-19. They contended that similarly, section 147 of the **Act** vests broad powers on the Minister for carrying out the purposes of the Act. They argued that this includes power to give legal effect to the advice of the CMO, and measures to ensure compliance with the Regulations. They cited **section 25 of the Interpretation and General Provisions Act**⁴⁵ which outline some of the principal parameters governing the making of subsidiary legislation.

[112] They argued that the public health special measures which are the subject of this application were passed in the interest of public health and neither the enabling Act nor the Regulations or amendments to the Act restricted the CMO's authority to give advice on those matters. They contended that she is thereby authorized to advise on special measures in any part of Saint Vincent and the Grenadines. They argued that there is nothing in the law that suggests or supports an argument that contracts of public officer are immune from application of the Act from the measures and rules made under them. They submitted that authority of CMO and Minister are broad and like any other law, citizens to whom the law applies regardless of status are required to comply with them. They submitted further that the legislation did not require the CMO to consult anyone to implement measures that she thinks are required in the interest of public health and that no allegations were made that she failed to consult.

[113] The respondents submitted that in **Attorney General of Antigua and Barbuda and Another v Goodwin and Others**⁴⁶ the Court of Appeal considered the presumption of constitutionality. They quote Justice of Appeal A. Mathew on this issue as saying: -

'Hence the presumption is always in favour of the constitutionality of a statute; not against it; and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete and unmistakable.'⁴⁷

⁴⁵Cap. 14 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009

⁴⁶ (1999) 60 W.I.R. 249

⁴⁷ At page 255

- [114] The respondents reasoned that there ought therefore to be no serious dispute that the **Public Health (Public Bodies Special Measures) Rules, 2021, No. 28 of 2021** ('Special Measures SR&O') were issued on the advice of the CMO pursuant to section 43B of the **Act** and published by the Minister in accordance with his discretion under section 147 of the **Act** with rule 8 providing for consequences for non-compliance. They submitted that therefore, the **Act** as amended and the Special Measures SRO, are entitled to the presumption of constitutionality.
- [115] The respondents submitted that alternatively, if the presumption of constitutionality does not apply to the **Public Health (Public Bodies Special Measures) Rules, 2021**, they will rely on the presumption of regularity. They submitted further that the applicants were required under the common law, and rule 56 of the CPR, to act with frankness in their application for leave to apply for judicial review. They contended that the applicants were required to disclose the fullness of their case, i.e. all of the facts relied on by them, including the obligation to disclose any consideration which they knew that the respondents have given to the matter in question in response to a complaint made by or on behalf of the applicants. They relied on rules 56.3(3)(g) and 56.3(4) of the CPR on this score.
- [116] They also cited **Cleveland Emmanuel v. Commissioner of Police et al**⁴⁸, where on the issue of non-disclosure in an application for leave to file judicial review proceedings the Court said: -
- 'In **Cable & Wireless v Telecommunications Regulatory Commission** [BVIHCV2012/0179 at para. 18] Justice Ellis spoke of the duty of candour and of full and frank disclosure in applications for leave to file judicial review. Counsel for the respondents argued that although the case dealt with an ex parte application, the principle of full and frank disclosure is still relevant. Rule 56.3(f) of the **Civil Procedure Rules** requires an applicant to give "details of any considerations which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant." The applicant by failing to disclose the consideration given by the

⁴⁸SLUHCV2017/0713

COP to his complaint in relation the transfer, he has failed to comply with the rules. This is certainly a factor to be considered and could be fatal to an application.⁴⁹

- [117] The respondents submitted that in this case the applicants have failed to disclose among other things, whether there is any information by way of Covid-19 dashboards or other information which show whether any person or persons have been infected, hospitalized and died from Covid-19 in Saint Vincent and the Grenadines since 2020; the several Regulations which were published in the Gazette prior the Special Measures SRO, which did not include vaccines or mandates; and the explanations given by the Office of the Prime Minister for the Special Measures; whether or not the vaccines were approved by the Minister acting on the advice of the Chief Medical Officer, and/ or approved or authorized by regional or international agencies like WHO, PAHO or CARPHA; any medical or other evidence to establish or which contradicts the allegations made against the vaccines by the applicants.
- [118] They argued that the applicants have also not provided evidence about whether any person or persons vaccinated in Saint Vincent and the Grenadines or the OECS, if any, became seriously ill, hospitalized or died as a direct result of taking the vaccine only; the fact that the **Special Measure SRO** was by law to remain in place until revoked, and therefore was not, and is not, of a “temporary” nature; that the special measures provided for medical and religious exemptions; whether the applicants applied for, or were granted or refused, an exemption on medical or religious grounds. The respondents submitted that this failure to disclose these material facts are sufficiently grave to warrant the dismissal of the application for judicial review.
- [119] The respondents submitted that while section 73 of the Constitution protects certain offices within the public service from the unilateral variation of emoluments and terms of service, none of the applicants fall within those classes of public officers, and cannot invoke that protection. They argued that the applicants’ conditions of service as public officers in the State of Saint Vincent and the Grenadines may therefore be unilaterally varied by law including subsidiary legislation that

⁴⁹Para. 41 of the Cleveland Emmanuel case

include mandates and consequences for non-compliance such as those prescribed by the Special Measures SR&O.

[120] They argued that the Parliament of Saint Vincent and the Grenadines decided on 6th October 2021 to codify the common law by providing that a public officer's condition of service is varied in relation to the mandate directing certain classes to take the vaccine. They cited in support **Ophelia King v The Attorney General of Barbados**⁵⁰, and the judgment arising from appeal to the Privy Council⁵¹, **Thomas v Attorney General**⁵², **Roshan Lal v Union of India**⁵³ and **Sonia Williams et al v The Attorney General of the Commonwealth of Dominica**⁵⁴. The respondents pointed out correctly that (as reflected in ground (p) of their application) the applicants are not alleging that the special measures constituted a breach of the employment contract.

[121] On the allegation of 'termination of employment', the respondents submitted that the applicants' allegation is without merit. They argued that there was and is no termination. They contended that the laws of Saint Vincent and the Grenadines by Regulation 31 of the PS Regulations clearly recognize the fact that a public officer may abandon his post, and that the abandonment of a post or office is not a termination. They argued that there is therefore no law which prohibits the Executive or Legislative branch from adding to or varying the circumstances which may lead to an abandonment of a post or office, and the consequences of such an abandonment. They submitted that in **Thomas v Attorney General**⁵² the Privy Council held that it is for the Parliament or Executive to determine the terms of service of public officers.

[122] As to the applicants' claim to a right to be heard, the respondents argued that there is no right to be heard because the **Special Measures SRO** made the circumstances and consequence of

⁵⁰(1992) 44 WIR 53 at pg 74

⁵¹[1994] WLR 1560 at pg 1563 B to G

⁵²[1982] AC 113 at pg 128(c) to (d)

⁵³[1967] AIR SC 1889 at pg 1984

⁵⁴Civil Appeal No. 29 of 2004

abandonment clear. They submitted that the intent to abandon, fact of abandonment, and consequences of abandonment were matters well known to the applicants. They contended that further or alternatively, that properly construed, regulation 31 of the **Public Service Regulations** required the applicants to initiate a notice or request to the PSC to be absent from work and before the expiration of the ten (10) days.

[123] As regards the issues of pension and right to property, the respondents submitted that section 6 of the **Pension Act**⁵⁵ sets out the circumstances in which a pension may be earned. They argued that abandonment is not such a circumstance. The respondents submitted that the applicants nevertheless allege that the **Special Measures SRO** has caused them to lose their right to pensions and rely on the right to protection under section 1 of the Constitution. The respondents contended that the **Special Measures SRO** does no such thing. They argued that the applicants had a choice to take the vaccines or seek an exemption. They contended that the applicants have done neither, because they voluntarily refused to do so.

[124] The respondents submitted that the applicants therefore face two hurdles: -
(i) they do not fit within the circumstances prescribed by section 6 of the **Pensions Act**; and
(ii) they are in any event not protected by the provisions of section 73 of **the Constitution**.

[125] The respondents contended that the applicants' reliance on **Elvis Daniel v The Public Service Commission** does not assist them because this case is distinguishable on all fronts, and more specifically on the ground that in the **Elvis Daniel case** the Government had promised to reinstate officers (without loss of status or benefits) who had obtained leave to conduct an election and lost their bid at the polls. The respondents submitted that this is not the case in this application or claim for constitutional relief.

[126] The respondents submitted that the court considered regulation 31 of the PS Regulations in the

⁵⁵Cap. 272 of the Laws of Saint Vincent and the Grenadines

case of **Felix Da Silva v The Attorney General and Kenneth John**⁵⁶. They submitted further that the judgment in that case is authority for the proposition that regulation 31 by operation of law deems a public officer to have resigned his post in certain circumstances. They argued that the Regulation imposes on a public officer who finds himself in those circumstances an obligation to indicate to the PSC that he or she does not wish to be considered to have abandoned his/her post. They argued that it is after receiving such indication from a public officer that the PSC is required to consider and make a determination in relation to such representation.

[127] They submitted that once the Regulation 31 of the PS Regulations is activated by absence of a public officer from duty for 10 days, it is not for the PSC to conduct an inquiry or hearing and give the public officer an opportunity to be heard. Rather, they contended that the inquiry must be initiated by the public officer seeking intervention from the PSC by notice in writing. They argued that according to the interpretation of Regulation 31 in the Da Silva case, the applicants had an obligation to go to the PSC. They argued that there is no evidence from the individual applicants or their trade unions that they contacted the PSC as did the officer in the **Da Silva** case.

[128] As a point of departure, the court accepts that enjoyment of the fundamental rights and freedoms enshrined in the Constitution are not absolute but are subject to the rights and freedoms of others and the public interest including public health. The court further acknowledges that there is a presumption of constitutionality of the impugned rules and recognizes that it is a rebuttable presumption. The applicants have advanced legal arguments about the *vires* and by extension the constitutionality of sub-rules 8(1) and (2) of the **Special Measures SR&O**, which engage a consideration of whether the Minister ventured into another public authority's - the PSC's - rule-making arena by purporting to make rules a function that the Constitution has reserved exclusively for the PSC.

[129] The issues in this case paint a sharp contrast between the indisputable obligation of the Minister of Health to introduce measures to protect and safeguard public health, and remedy and mitigate any public health emergency on the one hand; and on the other hand, certain grievances which affected

⁵⁶Suit No. No. 356 of 1981 at pg. 12 -13

persons (in this case the applicants) may perceive have emanated from the implementation of such measures. The court's role in this case is not to substitute its decision for that of the public bodies charged with certain statutory functions, but rather to examine the applicants' complaints and decide whether they make for an arguable case with realistic prospects of success at a trial.

- [130] I agree with the respondents that the Act and **Special Measures SR&O** confer very broad advisory powers on the CMO and extensive rule-making powers on the Minister. The respondents' submissions that the applicants' employment is one of status governed by the common law, Acts of Parliament, regulations and General Orders made by the executive and legislative arms of government are unimpeachable. Likewise, the respondents' argument that the applicants are public officers whose terms and conditions of service are not protected from unilateral variation under section 73 of the Constitution is beyond dispute.
- [131] Unlike the respondents, I do not interpret the applicants' case to be that the regulations are *ultra vires* solely because they relate to their contracts of employment and fall outside of the statutory mandate in the sense that they are immunized from application of the measures introduced by sub-rules 8(1) and (2). As I understand it, the applicants object to the Minister whose ministerial portfolio covers matters of health, wellness and the environment, from making rules for an area that falls outside of that portfolio without the express imprimatur of or delegation by the public body constitutionally charged with that area.
- [132] The respondents do not dispute that the PSC has exclusive remit for rule-making in respect of all public service employment matters, as reflected in the PS regulations. There is no evidence before this court that the PSC has authorized the Minister by instrument of delegation or otherwise, responsibility to making rules in respect of the employment of the classes of public officers within which the applicants fall. To the extent that the applicants contend that sub-rules 8(1) and (2) purport to enlarge the effect of Regulation 31 of the PS Regulations contrary to the PSC's exclusive constitutionally bestowed rule-making authority it raises an important issue of excess of power by the Minister which is not fit to be resolved at this application for leave stage.

- [133] That issue arises by virtue of the existence of sub-rules 8(1) and (2) coupled with the exhibited letters and Mr. Smith's testimony that those rules were interpreted by the PSC as reason for deeming the applicants as having resigned their respective posts under Regulation 31. It is more expansive than the limited and restrictive interpretation that it is purely a question of whether the applicants are objecting to unilateral variation of their contracts of employment.
- [134] Essentially, their grouse is that the variation was purportedly made by the Minister when he either without or in excess of his authority, allegedly stood in the shoes of the PSC and amended Regulation 31 of the PS Regulations. The applicants submitted that in addition, this effectively amounted to a termination by the PSC and COP at the instance of the Minister pursuant to sub-rule 8(1) and (2) and cannot be deemed to be a resignation by operation of law under Regulation 31 of the PS Regulations.
- [135] Their insistence on the right to be heard in such circumstances emanates from what they referred to as a termination. The court's construction of PS Regulation 31 in the **Da Silva case** is useful in a straight case of a public officer's absence from work for 10 days, without more. However, the reality that (a) sub-rules 8(1) and (2) were not made by the PSC but by the Minister, and (b) that those sub-rules direct that Regulation 31 of the PS Regulations are activated in the circumstances described in those sub-rules introduce additional factors and in my considered opinion provide the basis for further judicial scrutiny on related implications and consequences.
- [136] To my mind, the scenario before the court invites consideration of whether the Minister exceeded his rule-making authority, and if he did so, whether the impugned sub-rules resulted in the termination of the applicants' employment without the opportunity to be heard; and in any such case whether such termination if made out, was proportionate and/or affected the applicants' pension rights and right to property.
- [137] Moreover, it is not appropriate to resolve at this stage the question of whether the presumption of constitutionality is rebuttable in this case. The foregoing analysis of the applicants' and respondents' respective positions demonstrate forcefully that there are a number of live arguable

issues that affords the applicants reasonable prospect of success at trial. They cannot be resolved by a factual or legal finding at this stage or by concluding summarily that the broad powers conferred on the CMO and the Minister are not judicially reviewable.

[138] On this issue of failure to disclose, the several matters identified by the respondents which they accuse the applicants of failing to disclose for the most part are matters about which there is no evidence that the applicants have access to such materials. I remind myself that failure to disclose does not automatically result in refusal of leave to seek judicial review. I consider the issues in this application to be significant and to a large extent to arise from the exercise of rule-making authority. In those circumstances, the court must in my opinion be concerned with examining a complaint based on merit even if disclosure is not as fulsome as it could be. This is particularly so if the subject matter involves questions of considerable public interest as this case appears to be.

[139] I make no finding that the applicants have access to all of the materials described by the respondents as information that should have been disclosed. I hasten to add however that it would have been useful for the applicants to have indicated whether they applied for either the medical or religious exemption and the outcome of such application. To my mind, absence of those details is not crucial to a determination of whether the applicants have presented an arguable case with reasonable prospects of success in respect of their challenge to regulation 8(1) and (2).

[140] The competing legal submissions regarding the challenge to sub-rules 8(1) and (2) of the **Special Measures SR&O** when examined in the light of the factual assertions made by Mr. Smith highlight several issues of significance and depth which demonstrate that the applicants have set out an arguable case with a realistic prospect of success. For the foregoing reasons, their application to apply for leave to seek judicial review of the Minister's enactment of those two sub-rules is granted on the grounds of illegality, excess of authority, breach of natural justice rules and proportionality as pleaded.

Impugned decisions of the PSC and COP

[141] The applicants describe the issuance of letters by the PSC and COP as acts whereby they were respectively terminated from their employment. The word termination was not used in any of those

letters. Instead, the authors signified that failure by the addressees to comply with rule 5 of the Public Health (Public Bodies Special Measures) Rules 2021 equated to being absent from duty without leave since November 22nd 2021 pursuant to rule 8 of the rules. The PSC, the Police Service Commission and the COP communicated to the applicants respectively to that effect and the described circumstances were interpreted as resignation of the addressees from their jobs with effect from December 7th 2021. The PSC and COP declared that in the circumstances that the applicants were deemed to have ceased to be officers in accordance with Regulation 31 of the PS Regulations and section 73A of the Police Act respectively.

[142] The letter issued by the COP to Ms. Sylvorne Olliver states: -

‘Please be advised that you, without reasonable excuse, failed to comply with Rule 5 of the Public Health (Public Bodies Special Measures) Rules 2021 (“Rules”).

As a result of your failure to comply with Rule 5, you have been absent from duty without leave since November 22, 2021 to December 03, 2021, pursuant to Rule 8 of the Rules.

Section 73A of the Police Act Chapter 391 provides that a member of the Royal St. Vincent and the Grenadines Police Force (RSVGPF) who is absent from duty without leave for ten (10) consecutive days is deemed to have resigned his/her office.

In this regard, you are informed that you have resigned your office and have ceased to be a member of the Royal St. Vincent and the Grenadines Police Force. You are to ensure that your kit and accoutrements are properly accounted for and handed in to the storekeeper.

Please be advised that that your personal file will be processed. This is to ensure that you receive any benefits to which you may be entitled under the Police Act.

I wish to thank you for the service you have rendered to the State during your period of employment. Also, I wish you every success in your future endeavours.’

[143] The applicants submitted that it is settled law of ancient vintage that the failure of a public authority to provide a person adversely affected by a decision with an opportunity to be heard is ground for

setting aside the decision. They referred to the 1615 judgment in **Bagg's Case**, in which Bagg was removed from his position by the Mayor for misconduct without having been afforded a hearing. The applicants also relied on **R v. Cambridge University (Dr. Bentley Case)** which was referred to in the **Bagg case**. They quoted Fortescue J as stating:

'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.'

[144] The applicants argued that the principle that a person is not to be dismissed or subjected to an adverse decision without being given a hearing has been pronounced and confirmed over and over by the Privy Council in cases from the Caribbean⁵⁷ and by the Eastern Caribbean Court of Appeal⁵⁸.

[145] The respondents submitted that the applicants provided no evidence of termination of their employment. They submitted further that the letters exhibited to Mr. Smith's affidavit are not letters of termination but rather were letters advising them of the operation of law, their abandonment and deemed resignation. I have already discussed their further submissions including reliance on the **Da Silva case** and will not repeat them.

[146] My earlier rulings regarding the arguability of the alleged breach of natural justice principles, legality and proportionality are just as applicable in relation to the applicants' contentions that the PSC's and COP's letters amounted to unlawful termination of the respective applicants. Without making a finding that the applicants' employment was terminated by the PSC and COP, I consider that it is just to grant the applicants' leave to apply for judicial review of the PSC's and COP's decisions 'to terminate the applicants' employment'. I re-affirm my determination that in respect of those letters, the applicants have set out a good arguable case against the PSC and COP that the referenced 'terminations' in breach of the principle of natural justice as alleged.

⁵⁷ PC Appeal No. 51 of 1960

⁵⁸ Philbert Bertrand v. Secretary, PSC, Commonwealth of Dominica Civil Appeal No. 10 of 1999 9 [2006] UKPC 57]

COSTS

[147]As to costs, the judge is empowered to make such order as he or she considers just⁵⁹. I therefore make no order as to costs. The applicants and respondents have all attained a measure of success in this round of the proceedings. I am of the considered opinion that they were evenly matched and that for this reason, they should each bear their own costs.

ORDER

[148] It is accordingly ordered and declared:

1. The St. Vincent and the Grenadines Teachers Union, the Public Service Union, the Police Welfare Association are not competent to bring a suit in their own names in these proceedings.
2. The St. Vincent and the Grenadines Teachers Union, the Public Service Union, the Police Welfare Association and the Attorney General of Saint Vincent and the Grenadines are struck out as parties to this part of the proceedings, specifically the application for leave to seek judicial review.
3. The applicants' claim for leave to apply for judicial review of the Minister's decision to make rule 5(1) of SR&O No. 28 of 2021 is refused.
4. The applicants' claim for leave to apply for judicial review of the Minister's decision to make rule 8(1) and (2) of SR&O No. 28 of 2021 is granted, limited to the illegality, procedural impropriety and proportionality grounds in sub-paragraphs 7(g), (h), (i), (n) and (p) of the Notice of Application and related grounds.
5. The applicants' claim for leave to apply for judicial review of the PSC's and COP's decisions to 'terminate the respective applicant's employment' is granted.
6. The applicants shall file and serve their claim for judicial review within 14 days of today's date.
7. The first hearing of the application for judicial review is to be scheduled to a date in April or May 2022 convenient to the parties to be fixed by the Registrar in consultation with the parties.

⁵⁹CPR 56.13(4).

8. Each party shall bear his, her or its own costs.

[149] I am grateful to counsel for their comprehensive submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar