THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT KITTS AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2013

In the matter of Section 49 and 50 of the Constitution of St. Christopher and Nevis

And in the matter of an application for leave to apply for judicial review of the decision of the Constituency Boundaries Commission contained in its report dated the 5th or 6th September, 2013

And in the matter of an Application for Declaratory, injunctive and Other Relief by the Hon Shawn Richards, the Hon Timothy Harris, the Hon Eugene Hamilton and the Hon Mark Brantley, pursuant to Section 96 of the Constitution of St. Christopher and Nevis

Claim No. SKBHCV2013/0241

BETWEEN:

[1] HON. SHAWN K. RICHARDS
[2] HON. TIMOTHY HARRIS
[3] HON. EUGENE A. HAMILTON
[4] HON. MARK BRANTLEY

Applicants

AND

[1] THE CONSTITUENCY BOUNDARIES COMMISSION
[2] HIS EXCELLENCY THE GOVERNOR GENERAL
[3] THE PRIME MINISTER OF ST. CHRISTOPHER AND NEVIS
[4] THE ATTORNEY GENERAL OF ST CHRISTOPHER AND NEVIS

Respondents

Appearances:

Mr. Mendez S.C. with Mr. Michael Quamina, instructed by Mr. MacClure Taylor and Ms. Talibah Byron for the Claimants

Mr. Forde Q.C. with Ms. Nargis Hardyal, and Ms. Simone Bullen-Thompson Solicitor General for the 1st and the 4th Respondents

Mr. Braham Q.C. with Ms. Violet Williams and Ms. Nisharma Rattan-Mack for the 2nd Respondent

Mr. Anthony Astaphan S.C. with Dr Henry Browne Q.C. and Mr. Sylvester Anthony instructed by Ms. Angelina Sookoo for the 3rd Respondent.

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2013: September, 9th, 20th, 28th,
November 25th

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*Judicial Review – Report of Constituency Boundaries Commission – Allegations of Wednesbury Unreasonableness – Irrelevant Considerations – Failure to consider Relevant matters – Improper Purposes – Bias – Failure to Consult – Approach of the Court at the Permission stage – Arguable Case with Reasonable Prospect of Success – Leave Granted in Exceptional Cases for Compelling Reasons, and where Public Interest Aroused.*

*Pre-Action ex parte Application for Interim Order – Whether Serious Issues to be Tried - Jurisdiction to Grant Interim Order - Constitutional Ouster Provision - Whether CPR Part 17 applies to Judicial Review Proceedings – Grant of Interim Order against Governor-General – Whether Governor-General Proper Party - Discharge of Interim Order – Relevant Interest to Commence Proceedings.*

*Interlocutory Order – Principles governing the grant of Order in Public Law Matters – American Cyanamid Principles Applied with appropriate Flexibility – Damages not relevant consideration – Balance of Justice – Preservation of the Court's jurisdiction.*

A Report published by the Constituency Boundaries Commission (the 'Commission') on the 5th September 2013 which was placed on the parliamentary order paper to be debated in the National Assembly on the 9th September 2013, and which has made recommendations to change the boundaries of certain constituencies in St. Kitts, has triggered concern in the minds of a number of elected members of the Assembly in opposition to the Government (the applicants in this case). It is their belief that these recommended changes to the boundaries of those constituencies, are designed to, and will have the effect of causing the loss of the electoral support base of some members of parliament in opposition to the Government, and have no other purpose but to see the affected members being unable to win their seat in the upcoming general elections. They view these recommendations as having been arrived at in complete disregard of the relevant constitutional directives of Schedule 2 of the Constitution of St. Kitts and Nevis which is expected to guide the work of the Commission. The applicants also ground their stance in their belief that the Commission is not only headed by a Chairman who is affected by an appearance of bias, but also took irrelevant matters into consideration, namely a Preliminary Census Report 2011 which has been publicly noted as being still in the verification process and is likely to undergo minor changes but which changes may have significant impact on the ground for election purposes.

In haste and before filing a substantive claim, the applicants laid un-filed papers before the Court on the evening of Friday the 6th September 2013 and on Monday the 9th September 2013 they sought urgently certain ex parte relief. Minutes before the Assembly was due to commence debates that morning they were granted an interim ex parte conservatory order against His Excellency the Governor-General. This interim order restrained the Governor-General from making a proclamation under sections 50(6) of the Constitution of St Kitts and Nevis which was expected to make final the recommended boundary changes, which the Court considered at that time would have effectively limited the Court's ability to intervene, and in the circumstances of this case, leave no remedy for the applicants. The applicants were ordered to commence their substantive claim within 48 hours and to serve all documents including the order of Court, on the respondents who comprised the Boundaries Commission, the Governor General, the Prime Minister and the Attorney General.

The applicants filed an application for leave to apply for judicial review supported by an affidavit of Mr. Shawn K. Richards, the 1st applicant within the 48 hours time limit. By the next day, the respondents had filed an application supported by various affidavits to discharge the interim order. Each side also filed a number of other affidavits in support of their respective application.

On the Application for a discharge the respondents raised a number of preliminary and substantive points. A number of these points went to the court's jurisdiction not only to grant and continue the interim order but also the court's power to allow this matter to proceed by way of judicial review, and to grant any interim order under that process. The respondents also contended that there were no serious issues to be tried, nor any arguable case disclosed on the affidavits.

Held, granting leave to apply for judicial review on (i) breach of the duty to consult, (ii) bias, (iii) considering irrelevant matters and failure to consider relevant matters, and granting an interim order against the Attorney General in his capacity as representative of His Excellency the Governor-General:

*1.* An application for leave to apply for judicial review marks the point of commencing proceedings under Part 56 of the Rules. Where an applicant intends to commence judicial review proceedings, he may in an appropriate case, before filing his application for leave to apply for judicial review, or on filing such an application for leave, apply under Part 17 for an ex parte order. There is nothing in the Part 56 which states that the provisions of Part 17 of the Rules do not apply to judicial review proceedings; in fact CPR 2000 by Part 2.2(1) expressly defines 'civil proceedings' to include 'judicial review' proceedings. Accordingly the Court has the discretion to grant interim relief pursuant to Part 17 in judicial review proceedings even before leave had been granted to apply for judicial review, and in the circumstances of this case even before the application for leave had been made. *(see page 50)*

*Dicta of Rawlins CJ in Quorum Island (BVI) Ltd. v Virgin Island Environmental Council and Another Civil Appeal No. 21 of 2009 BVI (unreported) at paragraph 29 applied.*

*Considered: MD (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ. 194 (28 February 2012); R (On the Application of Muhammad) v Secretary of State for the Home Department 2013 WL 5338116 Queen's Bench Division (Administrative Court); N v Newham LBC 2013 WL 3994856 Queen's Bench Division (Administrative Court); R. (on the application of S) v Secretary of State for the Home Department 2013 WL 5730242 Queen's Bench Division (Administrative Court*

*CPR 56.4; Part 17; section 26 of the Eastern Caribbean Supreme Court Act (St Christopher and Nevis Chapter 3:11*

2. Where service of Court process is required to be effected on persons standing in the shoes of the 2nd to the 4th respondents in this matter, service would be proper if it were effected on the appropriate Permanent Secretary or other officer authorized to receive service on behalf of each of them. It is quite inappropriate for His Excellency the Governor General, the Hon. Prime Minister and even the Hon. Attorney General to be served court documents personally. It would be startling and could, in certain circumstances, lead to alarming consequences if service of the court's process would be required to be effected personally on each of these respondents. The evidence on service in this case demonstrated that the applicants had sought, within the 48 hours to serve all the documents on the respective secretaries and agents of the respondents. In some of those instances when service of the documents was not effected within the time required, it was because, these officers and or agents had refused to accept service. In any event, in this case, the respondents were not prejudiced by any irregularity in service, as within hours after the 48 hours period they had all filed and served an application to set aside the interim order, a clear statement that they were seized with the contents of the documents. *(see page 37)*

*Considered: Richard Frederick and Lucas Frederick v The Comptroller of Customs and The Attorney General HCVAP 2008/0038; Bertha Compton qua Administrative of the Succession of the late Macrina Blaize v Dr Christiana Nathaniel and Others Civil Appeal No. 12 of 2004 St. Lucia.*

*Considered: CPR 56.9; Part 5; CPR 2.2;*

3. As a general rule, an ex parte interim order may be granted for a period of not more than 28 days. In this case, the interim ex parte order granted on the 9th September 2013, was made to last until further order of the Court. There being no specific termination date on the order was not fatal to the validity of the order as the matter became *inter partes* four days after it was made, at which time it was directed that the order would continue until further order. There was then a full *inter partes* hearing on the 28th September 2013, at which time the Court reconfirmed that the order was to continue until further order of the Court, i.e. until the decision is delivered. At this stage the order became an *inter partes order.* There was accordingly no breach of CPR 17.4 to warrant a discharge of the order on this basis. *(see page 32)*

*Part 17.4 explained. Considered: eChina Cash Inc v eChina Cash BVI and Others Claim No. BVIHCV 2008/0330*

4. As a matter of principle, where an applicant has moved the Court for ex parte interim relief pursuant to Part 17 of CPR 2000 and has stated on the papers that a particular claim will be commenced as the substantive action, there may be cases when the applicant may be entitled to commence his substantial claim by an equally viable claim. In such a case, interim relief which may have been granted, may not be set aside on the basis that the applicant has failed to file 'that specific claim' which he had promised, where the Court would have nonetheless granted the order had that application for interim relief been grounded in that other equally viable claim as being the substantive claim. In any event in this case, even though the papers had stated that an originating motion was the underlying claim, on the oral arguments, the applicants had stated that it was intended to file an application for judicial review as the substantive matter. *(see page 41)*

*Considered: Gamatronic (UK) Ltd v Hamilton 2013 WL 5826189 Queen's Bench Division*

5. The decision that the applicants are seeking permission to challenge is contained in the 'Report' of the Commission that was published on the 5th September 2013. Statements made by Counsel for the applicants that, the applicants were preparing for this matter since June of this year, were called in aid by the respondents to support a contention that the applicants delayed in moving the court. This delay is fatal to the grant or the continuation of any order, the respondents say. The Court does not agree. The statements of the applicants must be put in their proper context. The court can take judicial notice of the fact that not so long ago, there was also a challenge to a report of the Commission. Having regard to that history, it might have been obvious that the new Report of the Commission was going to be subject to considerable public scrutiny and that political parties would be on the ready months before the report is published to launch a challenge should they find the need to do so. This is what the Court understands from Counsel statement that 'the applicants were preparing for this matter since June 2013'. No one could have expected the applicants to have launched a challenge to the Report months before the report was actually published. Such a challenge would have been premature. The Court considers that the applicants acted with due haste in relation to the general complaints being made against the Report. *(see page 45)*

*Considered: Sonya Young v Yvette Frederick HCVAP 2011/022*

*6.* As a general rule, judicial review will not be allowed where there is an adequate alternative remedy available to the party seeking such a remedy. In this case the respondents contended that there was an adequate alternative remedy available to the Applicants in the forum of the affirmative resolution procedure of National Assembly, in that as members of the Assembly, they were entitled to attend and debate the draft proclamation and then vote on whether it should be approved by the Assembly. They failed and or refused to attend the Assembly to debate and vote on the draft proclamation and as such, the respondents say, they failed to pray in aid that alternative remedy which had been open and available to them. The Court disagrees that this remedy would have been an adequate alternative remedy. For the alternative remedy to be adequate, it must be shown to be real and effective. Where the Applicants were contending that the Governing Party were taking steps to fast track the draft proclamation through the Assembly, it might be unrealistic, if they were right, to expect the Assembly to disapprove the draft proclamation where the Governing Party has the majority. In any event, and what is significant in the Court's determination of this issue, is that there are no express requirements in the Constitution which requires that the Assembly consider whether the Report of the Commission had complied with Schedule 2 of the Constitution. The Assembly, even in the face of serious non-compliance on the part of the Commission, could still approve the draft proclamation. There is no obvious and effective remedy here. *(see page 47)*

*Applied: R. (on the application of Sinn Fein) v Secretary of State for Northern Ireland 2007 WL 2864 Divisional Court*

*Considered: The Honourable Satnarine Sharma v Carla Brown-Antoine [2006] UKPC 57; Sir James Fitz Allen Mitchell v Ephraim Georges and Another HCVAP 2007/0023 St Vincent and The Grenadines (unreported); R v Chief Constable of Merseyside Police, ex p Calveley [1986] QB 424; R. (on the application of Singh) v Cardiff City Council [2012] EWHC 1852 (Admin); R. (on the application of C) v Financial Services Authority [2012] A.C.D. 97 Queen's Bench Division (Administrative Court); Ex Parte Waldron [1985] 3 WLR 1090; In the Application of Anthony Leach HCA No 1002 of 2004 (TT); In the Application of Saga Trading Ltd. HCA No. 1347 of 1993 (TT); Sir James Fitz Allen Mitchell v Ephraim Georges and Another HCVAP 2007/0023 St Vincent and The Grenadines (unreported)*

7. As a matter of approach, the courts have appeared generally inclined to leave the determination of whether an applicant has *locus standi* to bring an application for judicial review, until it is determined whether the underlying application has merit. Nonetheless, in an appropriate case, it is permissible to actually determine this issue as a preliminary matter as it goes to the court's jurisdiction. In this case, the Applicants are voters and members of the National Assembly, who are claiming that the Boundaries Commission has acted in contravention of the mandatory requirements of Schedule 2 of the Constitution. They further contend that the recommendations which are made by the Commission and contained in their Report of the 5th September 2013 is designed to, and will likely have the effect of unlawfully affecting the outcome of the next general elections. The Courts has concluded that it has jurisdiction to review the decision of the Boundaries Commission. In those circumstances, it is difficult to see who would be possessed of relevant interest to challenge the decisions of the Commission, if not these Applicants. The Court finds that these applicants do have the requisite *locus standi* to commence and continue these proceedings. *(see page 53)*

*Dicta of Lord Diplock in Inland Revenue Commissioner [1982] A.C. 617 at page 644 approved; Dicta of Lord Mustill at paragraph 33 in Randolph B Russell and John G. Thompson v The Attorney General of St Vincent and the Grenadines and the Supervisor of Elections UKPC No. 4 of 1996 approved.*

*Considered: The Attorney General v Martinus Francois Civil Appeal No. 37 of 2003, St. Lucia.*

*Considered: Section 96 of the Constitution; Part 56 of CPR 2000*

8. Section 116 of the Constitution ousts the jurisdiction of the Court to enquire in any function which by the Constitution, the Governor General is required to make, whether in his own deliberate judgment, or in accordance with the advice or recommendation, or after consultation with any party. This section however, is not in question in this case, as what is being challenged is not any function or decision of the Governor-General. What is being challenged in this case is a decision of the Constituency Boundaries Commission. Further Section 116 of the Constitution only prevents the Court from making an order against the Governor when he is performing functions under the Constitution. Where an order is being properly sought against the Governor General, it would not be appropriate to join His Excellency as a party in any matter, but instead as a matter of constitutional practice, the Attorney General should be named as his representative and the order can be then made against him. In this case, the order against the Governor General is an order effectively preventing him from acting on the Report of the Commission. *(see page 71)*

*Considered: The Prime Minister and Juno Samuel v Sir Gerald Watt Q.C. Civil Appeal No. 5 of 2012 and Hochoy v Nuge and Others (1964) 7 WIR 174; Hon. Shawn K. Richards v The Constituencies Boundaries Commission SKBHCV 2009/0159 St Kitts and Nevis unreported;.*

*Distinguishing: Re Blake1994) 47 W.I.R. 174*

9. Section 50(7) of the Constitution is a specific and limited ouster provision. Its effect is that once the Governor General has acted under section 50(6) and made a final proclamation, the Court can only enquire into the very limited questions as to whether the proclamation has given effect to Rule 1 of Schedule 2 of the Constitution, namely whether a final proclamation has declared that there is to be less than three constituencies in Nevis, and or that the number of constituencies in the Federation have been increased beyond eleven, and it is declared that less than one third of that number is to be in Nevis. A reading of Section 50(7) together with section 96 of the Constitution makes it clear that every other aspect of Section 50 is amenable to the Court's supervisory jurisdiction. Accordingly the Court has a power to review the functions of the Constituency Boundaries Commission. *(see page 64)*

*Considered: Constitution Boundaries Commission and Another v Baron 58 WIR 153; Russell (Randolph) and Another v Attorney General of St Vincent and the Grenadines and Another 51 WIR 110.*

*Section 50(7) of the Constitution explained.*

10. An act or decision that has been declared void may have the effect of invalidating everything that follows and which is founded in that act or decision, thus invalidating the actions of subsequent actors. In deciding whether the actions of the second and third actors following a void act, is itself void as being a nullity, it is important to determine whether the second and third actors have power to act notwithstanding the invalidity of the first act. One approach that may assist in this determination is whether there is a separate avenue to challenge the first act as against the second and third acts. If there is, it will show that the legislature has given the second and third actors the power to act notwithstanding the invalidity of the first act. In this case, by virtue of the wide language of

section 96 of the Constitution, it is clear that the Report of the Commission, the draft proclamation and the resolution of the Assembly are all equally open to the same mode of challenge under the Court's power to ensure that they have acted within the confines of their legislative mandate. There is no separate avenue to challenge (or appeal) the Commission's Report as against the acts of the Prime Minister and the Assembly. Further the entrenched provisions of Schedule 2 of the Constitution must be construed in a generous and purposive manner to 'reflect the deeper inspiration of the basic concept on which those provisions were founded. The underlying purpose of Schedule 2 is to ensure that there are free and fair elections in St Kitts and Nevis, thus these rules cannot be seen as mere rules to be disregarded. Further, the fact that the ouster contained in section 50(7) of the Constitution is not as broad as insulating the National Assembly meant that the Constitution itself has allowed the Court the power of review at any stage before the final proclamation is made under Section 50(6). Accordingly, in the circumstances of this case, if the decision of the Commission is declared void and a nullity, the Court is entitled to intervene even where the Prime Minister has laid a draft proclamation before the National Assembly that has itself approved that draft proclamation in exercise its parliamentary functions. *(see page 66)*

*Considered: F Hoffman-La Roche v Secretary of State for Trade and Industry [1975] AC 295 at page 365 and Boddington v British Transport Police [1999] 2 AC 143; Steadroy C.O. Benjamin v The Commissioner of Police and the Attorney General Civil Appeal No. 23 of 2009; Lord Wilberforce in Minister of Home Affairs and Another v Collins MacDonald Fisher and Another [1980] A.C. 319 at 328; Frederick Alexander James v Commonwealth of Australia and the State of New South Wales and Others [1936] UKPC 52; Republic v Independent Electoral and Boundaries Commission and another Ex Parte Councillor Elliot Lidubwi Kihusa & 5 Others [2012] eKRR; Bahamas District of the Methodist Church v Symonette [2000] UKPC 31; Rediffusion (Hong Kong) Ltd. v Attorney General of Hong Kong [1970] AC 1136; Discussion in H. W. R. Wade and C. F. Forsyth, 'Administrative Law' 10th edn. Oxford University Press 2009, at page 250.*

11. On an application for leave to apply for judicial review, the usual test was whether there was an arguable ground for judicial review having a realistic prospect of success and not subject to any discretionary bar such as delay or an alternative remedy. In an exceptional case the Court may grant leave even where there is not a reasonable prospect of success, but where there is some compelling reason, and public concern has been aroused. Such an exercise of discretion must not be taken as a blank check for any applicant to proceed with any and all grounds raised even those which are completely hopeless and frivolous; there should be at some reason, possibly based on some perception of the evidence which one side has adopted which might usefully be usefully distilled at the public hearing. *(see page 88)*

*Applied: Sharma v Carla Browne-Antoine Privy Council Appeal No. 75 of 2006 (T&T); R (Gentle) v Prime Minister [2006] EWCA Civ. 1078; R (on the application of Gentle) v Prime Minister [2008] 1 AC 1356.*

*Considered Re Jessica Hamill [2008] NIQB 44; Michelle Andrews v The Director of Public Prosecutions and Others Civil Appeal No. 3 of 2008 SVG*

12. The Commission was required to act reasonably and to take relevant matters into consideration. This included the matters set out in Schedule 2 to the Constitution. Having regard to the complaints being made against the Commission, it was necessary in considering whether there were serious issues to be tried or arguable grounds with a reasonable prospect of success, to take the applicants case at its highest and not attempt to resolve disputes on the affidavit. *(see page 107)*

*Considered: R v Boundary Commission ex Parte Foot and Others [1983] 1 Q.B. 600*

13. On an allegation that the Commission had taken an irrelevant matter into consideration, namely the Preliminary Census Data Report of 2011 when that report was still incomplete and subject to changes which may have a significant impact on the ground, the Court was entitled to consider whether there was a triable issue, or an arguable case that the Commission had acted unreasonably. In this case, from the affidavits of the applicants, the Commission had been aware that the Census Report was not completed. They had sought specific advice on how they should treat with it. They got advice from the Attorney General that it would not be appropriate to use having regard to the possible consequences of marginal shifts following the verification process. With this in mind they called the Ministry responsible for the Report and other technical persons and discussed these shifts. This was what a reasonable Commission was required to do; not simply disregard the preliminary report out of hand, as it was still relevant. As a reasonable Commission they were expected to approach their decision making process from different angles, and determine what matters would be considered relevant. In looking at this report, the evidence shows that they were fully aware that it was possible there could be marginal shifts in the data, and they were being told over and over again what effect those shifts could have on the ground. It was for them to determine what weight to give to this report, because if they had failed to consider it, that too might have been open to a challenge. There is not sufficient evidence before this Court to show that there is a triable issue or an arguable case that in considering this report they acted as an unreasonable Commission. Notwithstanding, this conclusion, the Court considers that this Report appears to be what has triggered these entire proceedings. For this reason and for the fact that it is the one main aspect of this case that has raised considerable public attention, and appears to have aroused public concern, the Court considers that this is a compelling reason to grant the applicants leave to proceed with this ground in their application for judicial review.*(see page 75, page 112)*

*Considered: R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd. [1987] 2 All ER 1025; R v Boundary Commision ex Parte Foot and Others [1983] 1 Q.B. 600; (R (on the Application of Beresford) v Sunderland City Council [2001] 4 All ER 565*

14. Where a duty to consult exists, or in an appropriate case where a statutory body has embarked on a process of consultation, there is a duty imposed on that body to conduct that process fairly and properly. In this case there is no constitutional or statutory duty imposed on the Commission to consult with anyone during their deliberations. Having regard to the fact that this Commission is a body which does not determine rights or obligations, and it is body which simply makes recommendations on boundary changes

which have to be vetted by the Assembly so that ultimately the decision to makes changes is a decision of the Assembly, there is no common law duty imposed on the Commission to consult with any person or body. Having regard to the circumstances of this case, however, it is arguable that, having regard to the fact that the Commission had embarked on a process of consultations, there was a legitimate expectation that they would conduct that process fairly and properly. Further, it was arguable that once the Commission had embarked on that consultation process, conspicuous unfairness might result if the Commission failed to conduct that process fairly and properly. *(see page 93)*

*Dicta of Lord Woolf in R v North and East Devon Authority, ex parte Coughlan [2001] 1 QB 213 at paragraph 108 approved.*

*Considered: Harrow Community Support Ltd. v The Secretary of State for Defence [2012] EWHC 1921 (Admin); Hon. Shawn K. Richards v The Constituencies Boundaries Commission SKBHCV 2009/0159 St Kitts and Nevis unreported; Minister of Local Government v South Sydney Council (No 2) [2002] NSWCA 317; Cooper v Wandsworth Board of Works (1863) 14 CBNS 180; Ridge v Baldwin [1963] 1 WLR 935; Wiseman v Bourneman [1969] 3 All ER 275; In the Application of Rai Ramrattan HCA No 1304 of 2003 (TT); In the Application of Ajodha Persaud HCA No 323 of 2003 (TT); In the Application of Carl Hanoman HCSCJ No 23M of 1999 (GY); Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346; R v North and East Devon H.A. Ex parte Coughlan [2000] 2 W.L.R. 622; Council for Civil Service Unions v Minister for the Civil Service [1985] A.C. 374; R v Inland Revenue Commissioners, Ex p Preston [1985] A.C. 835; R v Inland Revenue Commissioners Ex parte Unilever Plc. [1996] S.T.C.; Lennox Linton v The AG Claim No. ANUHCV2007/0354;*

15. One of the issues raised on the Complaint was that the Chairman of the Commission was affected by bias, and as such the decisions of the Commission was thereby affected. In approaching this issue the Court considered that it was significant to note the Chairman was appointed in accordance with a strict constitutional process. Further, this Commission is largely a political body in which all members with the exception of the Chairman are required to be members of the Assembly. Evidence that the Chairman was an executive member of the ruling Party, was engaged on commercial contracts with the Government etc did not present an arguable case that he was clothed with actual bias. However, having regard to the test of the fair minded and informed observer, there is an arguable case that there might be a perception of bias. The fact that the regular members of the Commission is required to be comprised of members of the Assembly makes it arguably more important that the Chairman should be selected from a group of politically neutral persons, or at the very least, arguably not be a person who is an executive member of the ruling party and who may arguably from a factual standpoint, be a political activist. Leave will be allowed to proceed on this ground. *(see page 82, Page 104)*

*Applied: Porter v Magill [2002] 1 All ER 465; Helow v Secretary of State for the Home Department [2008] 1 WLR 2416*

*Considered: Resolution Chemicals Ltd v H Lundbeck A/S 2013 WL 5338207 Chancery Division (Patents Court); Davidson v Scottish Ministers [2004] UKHL 34; JSC TBA Bank v Ablyazov [2012] EWCA Civ. 1551; R v Bow Street Magistrates Ex parte Pinochet Ugarte (No.*

*2) [2000] 1 AC 119 (HL); Dr. Vaughan Lewis v Attorney General & Monica Joseph; Vance Amory v Thomas Sharpe Civ. App. No. 13 of 2009 SKN; Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail [2011] EWCA Civ 1617; Re Alternative A5 Alliance's Application for Judicial Review 2013 WL 617770 Queen's Bench Division (Northern Ireland); Vance Amory v Thomas Sharpe Civ. App. No. 13 of 2009 SKN; Hon. Shawn K. Richards v The Boundary Commission SKBHCV 2009/0159 SKN; R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168; Meerabux v AG of Belize [2005] 2 A.C. 513; R (Island Farm Development Ltd.) v Bridgend County Borough Council [2006] EWHC 2189 (Admin); R(Loudon) v Bury School Organisation Committee [2002] EWHC 2749 (Admin); In R (Island Farm Development Ltd.) v Bridgend County Borough Council [2006] EWHC 2189 (Admin).*

16. Allegations that a statutory or constitutional body such as the Commission has acted for improper purposes are grave and they must not be treated as a synonym for an honest but mistaken reliance on a factor that is in law irrelevant or even on evidence that might show a perception of bias. In this case the applicants argue that having regard to the effect which the decision of the Commission is likely to have, an inference can be drawn that the Commission acted for the improper purpose of disadvantaging members of the Assembly opposed to the Prime Minister. There is no arguable case of actual bias. Equally the evidence does not disclose an arguable case of improper purposes. It is therefore not proper to allow the applicants to proceed with this ground for judicial review when they seek to ground it in an inference to be drawn from evidence that might equally be open to other inferences. *(see page 110)*

*Dicta of Webster J.A. (Ag.) in Attorney General v Kenny D. Anthony, Civil Appeal No. 31 of 2009 (St. Lucia) at paragraphs 67 to 68 approved*

17. On an application for an interim order in judicial review proceedings, the Court is guided by the private law principles contained in the case of American Cynamid Co. v Ethicon Ltd. applied with appropriate flexibility. In certain cases, as in this case, the question of the adequacy of damages will not be relevant in determining the matter. In such cases the main issue is the balance of convenience or the balance of justice. The Court must assess whether the balance of convenience or justice favours the grant of the interim order and choose the course which in all the circumstances appears to offer the best prospect that an eventual injustice can be avoided or minimized. As part of the process, the Court will also consider the public interest. In considering the balance of justice in this case, one way to approach the matter is to ask whether the refusal to grant the order might have the effect of rendering the entire process pointless. In this case, the Court agrees that if the Governor General were to make the final proclamation under Section 50(6) of the Constitution, it could have the effect of depriving the Court of Jurisdiction in the circumstances of this case, to review the decision of the Commission. There being no jurisdictional bars, and the Court having found that there being serious issues or an arguable case on a number of grounds, there was reason not to discharge the interim order granted. However, the court will replace that order with the following order:

    *"An Order directed to the Hon. Attorney General in his capacity as Representative of the Governor General, restraining the Governor General, whether by himself, his servants and or his agents or persons subject to his control, authority or direction or howsoever*

*otherwise from making any proclamation in terms of any draft submitted under section 50 of the Constitution, until the hearing and determination of this action or until further order of this Honourable Court. (see page 115)*

*Applied: American Cyanamid Co v Ethicon Limited [1975] AC 396; Secretary of State for Transport, ex parte Factortame (No 2) [1991] 1 All ER 70; The Belize Alliance of Conservation Non-Government Organisations v The Department of the Environment and Another UKPC Appeal No. 47 of 2003*

*Considered: Bacongo v Department of the Environment of Belize (Practice Note) [2003] UKPC 63 [2003] 1WLR 2839 at 2849; National Commercial Bank v Olint Corporation Corporation Ltd. [2009] UKPC 16 at [16] to [18]; In R. (on the application of KO) v Lambeth LBC 2013 WL 4411403 Queen's Bench Division (Administrative Court)*

JUDGMENT

A. INTRODUCTION

[1] RAMDHANI J (Ag.) On the 9th September 2013, before filing a substantive claim, the applicants, complaining about a Report of the Constituency Boundaries Commission (the 'Commission'), sought urgently certain ex parte relief, and were granted an ex parte conservatory order ('the interim order') against the 2nd named respondent restraining him from performing functions under sections 50(6) of the Constitution of St Kitts and Nevis. The applicants were ordered to file and serve their substantive claim within 48 hours, and it was directed that the matter be adjourned to the 20th September 2013. On the 11th September 2013 the applicants filed an Application for Leave to apply for judicial review. An affidavit sworn to by the applicant, the Hon. Shawn K. Richards was filed on even date in support of the application

[2] On the 20th September 2013, the respondents appeared, having filed an application on the 13th September 2013 supported by a number of affidavits, to discharge the interim order, and pressed the Court to set it aside. A number of arguments were raised, but having regard to the issues being raised, the Court gave directions to all parties to file written submissions on the issue of the discharge.

[3] An application was also made by the applicants on the 20th September 2013 to effectively deem their 'Amended Notice of Application' for leave filed at 9:12 a.m. on that same day as properly filed. There being no objection to this application, leave was granted to treat the amended Notice of Application as properly filed. Again, the court directed that all parties file and exchange submissions no later than the 26th September 2013 on the Amended Application for Leave to Apply for Judicial Review

[4] The application to discharge and the application for leave were adjourned to the 27th September 2013 to be heard in open court. (By this date there were a number of other supporting affidavits on either side.)

THE PARTIES

[5] The applicants who filed the Application for interim relief and for leave to apply for judicial review are distinguished members of society and are all members of the National Assembly. The first named applicant, Mr. Shawn K. Richards of Crab Hill, Sandy Point, St. Kitts is the current parliamentary representative of Constituency number 5. The second named applicant, Mr. Timothy Harris, of Tabernacle, St. Kitts, is the parliamentary representative of Constituency number 7. The third named applicant, Mr. Eugene Hamilton of Cunningham Heights, Cayon, St. Kitts, is the parliamentary representative of Constituency number 8. The fourth named applicant, Mr. Mark Brantley of Montpelier, Nevis is the parliamentary representative of Constituency number 9 in the island of Nevis.

[6] The first named respondent is Constituency Boundaries Commission that is created pursuant to section 49 of the constitution of St. Kitts and Nevis. This Commission comprises of Mr. Peter Jenkins the Chairman, Mr. Asim Martin, Ms. Marcella Liburd, Mr. Vance Armory and Mr. Vincent Byron. The second named respondent is His Excellency the Governor-General whose office is established by section 21 of the Constitution, and who holds office during her Majesty's pleasure and is her representative in St Kitts and Nevis. The third named respondent is the Honourable Prime Minister, Dr Denzil Douglas. The fourth named respondent is His Excellency The Attorney General.

[7] Though the respondents are ‘applicants’ in their own ‘Application’ to discharge, whenever the term ‘applicants’ is used in this judgment it will refer to the applicants commencing these proceedings, and the term ‘respondents’ will be used in all instances to mean the respondents to those proceedings.

THE CONSITUTIONAL BACKDROP OF THIS CASE

[8] The primary challenge according to the applicants relates to a decision of the Constituency Boundaries Commission. According to the respondents, however, this case involves more than the recommendations that are contained in the Report of the Commission. This case they say, also relate to the process which follows when the Commission has presented the Governor-General with their Report, and whether these applicants can seek to challenge the acts of the Governor-General by way of judicial review and to seek the grant of interim relief against him. In this regard it is useful to set out the Constitutional provisions that relate to the role of the Commission and the process leading up to the making of a proclamation under section 50(6) of the Constitution.

*A. The Role of the Constituency Boundaries Commission*

[9] The islands of St Kitts and Nevis became independent in 1983 and since 1984 was divided into eleven voting districts or constituencies; eight of which make up the island of St. Kitts and three of which make up Nevis. Each of these constituencies is to return by the voting population of each, a single representative who represents the will of the constituents of his or her district in the National Assembly. These elected representatives and the Senators who are appointed in accordance with the Constitution together with Her Majesty represented by His Excellency the Governor-General, make up parliament in St Kitts and Nevis. There are usually three Senators appointed by the Governor General, two in accordance with the advice of the Prime Minister and one in accordance with the advice of the Leader of the Opposition. The numbers of Senators can be increased to four when the Attorney-General is a Senator, as is presently the case. The Prime Minister is appointed by

the Governor General from amongst those of the elected Representative who seem most likely to command the support of the majority of the Representatives.

[10] The drafters of the Constitution in recognizing the fundamental nature of boundary changes or any possible need to create new constituencies, provided for a Constituency Boundaries Commission (the 'Commission'). This Commission, established pursuant to section 49 of the Constitution, is that constitutional body which is tasked with ensuring the credibility of one of the main planks of democratic elections. As Satrohan Singh J.A. stated in the case of Constituency Boundaries Commission and The Attorney General v Urban Baron:[1]

> *"The constitutional importance of a Boundaries Commission cannot be overstated. It plays a pivotal role in ensuring free and fair elections. The right to vote as contemplated by the Constitution is a right to vote in a constituency without gerrymandering, Gerrymandering, or any other unfair attempt to alter the boundaries of any constituency contrary to the provisions of the Constitution, violates the very fabric of our parliamentary system of democracy."*

[11] By section 50 of the Constitution, this Commission is mandated to 'review the number of boundaries of the constituencies into which St. Christopher and Nevis is divided and submit to the Governor-General reports either –

> *a. Showing the constituencies into which it recommends that St. Kitts and Nevis should be divided in order to give effect to the rules set out in Schedule 2; or*
>
> *b. Stating that, in its opinion, no alteration is required to the existing number or boundaries of constituencies in order to give effect to those rules.*

[12] Schedule 2 to the Constitution sets out the two rules that the Commission must have regard to in performing their function. These rules appear under the heading: *"Rules for Delimitation of Constituencies".* The rules state:

> *"1. There shall not be less than eight constituencies in the island of Saint Christopher and not less than three constituencies in Nevis and if the number of constituencies is increased beyond eleven, not less than one third of their number shall be in the island of Nevis."*

[1] 58 WIR 153

*2. All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this rule to such extent as it considers expedient to take account of the following factors, that is to say –*

*(a) the requirement of rule 1 and the differences in density of populations in the respective islands of Saint Christopher and Nevis;*
*(b)the need to ensure adequate representation of sparsely populated rural areas;*
*(c) the means of communication;*
*(d) geographical features; and*
*(e) existing administrative boundaries."*

[13] It can be presumed that when the boundaries were divided in 1984, it was believed that their geographical boundaries would ensure that the voters in any constituency would be fairly and effectively represented in parliament. It would have also been obvious to the framers of the Constitution that with the passage of time and shifts in population brought on by growth, migration and death, that there would be a need to review these boundaries at periodic intervals. If this were not done then the entire electoral system could go out of balance, and the voters in one constituency could very well have an unfair influence in the decision making process which affects their lives simply because their constituency is now comprised of a disproportionate number of persons.

[14] These guidelines seek to ensure that there is effective representation in parliament. The right to vote is fundamental, and each vote must count with relative equal weight as every other vote. As was noted in Re Prov. Electoral Boundaries (Sask.), [2] a leading Canadian case on boundary changes: "Relative parity of voting power is a prime condition of effective representation. Deviations from absolute voter parity, however, may be justified on the grounds of practical impossibility or the provision of more effective representation."[3] In St. Kitts and Nevis factors such as *'the need to ensure adequate representation of sparsely populated rural areas, the means of communication, geographical features and existing administrative boundaries'* may need to be taken into account to ensure that our legislative assembly effectively represent the electorate. 'Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced."

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[2] [1991] 2 S.C.R. 158
[3] *re Prov. Electoral Boundaries (Sask.)* (n. 2)

[15] A feature of the St Kitts and Nevis Constituency Boundaries Commission that distinguishes it from Boundaries Commissions in a number of other Caribbean jurisdictions is that the ordinary membership of this Commission is to comprise of politicians. It is useful to set out Section 49 of the Constitution in full. It provides:

> *"(1) There shall be for Saint Christopher and Nevis a Constituency Boundaries Commission (hereinafter referred to in this section as the Commission) which shall consist of –*
>
> *(a) a chairman appointed by the Governor-General, acting in accordance with the advice of the Prime Minister given after the Governor-General has consulted the Leader of the Opposition and such other persons as the Governor-General, acting in his own deliberate judgment has seen fit to consult;*
>
> *(b) two members of the National Assembly appointed by the Governor General, acting in accordance with the advice of the Prime Minister;*
>
> *(c) two members of the Assembly appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition;*
>
> *Provided that the chairman shall not be a member of the Assembly or of the Nevis Island Assembly.*
>
> *(2) A member of the Commission shall vacate his office –*
>
> *(a) at the next dissolution of Parliament after his appointment;*
>
> *(b) in the case of the chairman, if any circumstances arise that, if he were not a member of the Commission , would cause him to be disqualified for appointment as such;*
>
> *(c) in the case of a member other than the chairman, if he ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament; or*
>
> *(d) if the Governor-General acting in accordance with the advice of the Prime Minister given after the Governor-General has consulted the leader of the Opposition in the case of the chairman, in accordance with the advice of the Prime Minister in the case of a member appointed under subsection (1)(b) or in accordance with the advice of the Leader of the Opposition in the case of a member appointed under subsection (1)(c), so directs.*
>
> *(3) The Commission may regulate its own procedure and, with the consent of the Prime Minister, may confer powers and impose duties on any public officer or on any authority of the Government for the purpose of the discharge of its functions.*
>
> *(4)The Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.*
>
> *Provided that any decision of the Commission shall require the concurrence of a majority of all its members."*

[16] This section makes it clear that apart from the chairman, all of the members of the Commission must be Representatives in the National Assembly. And in fact any such regular member will cease to be a member of the Commission if he ceases to be a member of the Assembly other than it arising from the dissolution of Parliament. The Governor General is bound to follow the advice of the Prime Minister in relation to not only the chairman but also two other members of the five-man Commission.

[17] This is in stark contrast to a number of other jurisdictions in the region. In Dominica, apart from the chairman who is the Speaker of the House, the other four members cannot be selected from members of the House or from the public service.[4] In Trinidad and Tobago, the Commission shall comprise of not less than three and no more than five members including a chairman.[5] The chairman and other members are to be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. A person in Trinidad an Tobago shall not be qualified to hold office as a member of the Commission who is a Minister, a parliamentary secretary, a member of the House of Representatives, a Senator, a temporary member of the Senate, or a public officer. In St. Vincent and the Grenadines, the Commission is comprised of three members including a chairman who is appointed by the Governor General acting in his own deliberate judgment.[6] The St Vincent and the Grenadines Constitution disqualifies not only a present member of parliament, but also anyone who, within the last five years preceding his proposed appointment has been a member of the House or nominated by a political party to run for office. He is also disqualified if during the preceding five years he has been the holder of an office in any political party or otherwise supported any candidate for election.

[18] It would seem that the drafters of the Constitution in St. Kitts and Nevis have insisted that only sitting members of the Assembly, that is active politicians, are qualified to be appointed regular members of the Commission. The only disqualification for the chairman is that he is not to be a member of the National Assembly. It is significant to note that the provisions of section 49 and 50 of the Constitution are entrenched at the highest level, so

[4] See Section 56 of the Dominica Constitution Order 1978 (S.I. 1978 No. 1027 (UK)
[5] See Section 71 of the Constitution of Trinidad and Tobago.
[6] See Section 32 of the Constitution of St Vincent and the Grenadines.

that any bill to amend these provisions shall not be submitted to the Governor-General for his assent unless it is passed by at least two thirds of the members of the Assembly on the final reading and:

> (a) *there has been an interval of not less than ninety days between the introduction of the bill in the National Assembly and the beginning of the proceedings in the Assembly on the second reading of the bill; and*
>
> (b) *after it has been passed by the Assembly the bill has been approved by referendum by not less than two thirds if all the votes validly cast on that referendum in the island of Saint Christopher and two thirds of all the votes validly cast on that referendum in the island of Nevis."*[7]

[19] That this Commission in St Kitts and Nevis is so much a political creature has grounded some of the arguments in this case. Learned Senior Counsel Mr. Astaphan, for the Prime Minister has suggested that in analyzing the nature and functions of the Commission its political composition should be given due regard. This is an issue that the Court will return to when considering whether there is an arguable case that the Commission may have acted unreasonably.

*B. The Process that follows a Report of the Commission making Recommendations to Change Boundaries.*

[20] Section 50(3) to 50(6) of the Constitution detail the steps that should follow when the Commission has submitted a Report to the Governor-General under section 50(1) recommending changes to boundaries. These subsections provide:

> *"(3) As soon as may after the Commission has submitted a report under subsection (1)(a), the Prime Minister shall lay before the National Assembly for its approval the draft of a proclamation by the Governor-General for giving effect, whether with or without modification, to the recommendation contained in the report, and that draft proclamation may make provisions for any matters that appear to the Prime Minister to be incidental to or consequential upon other provisions of the draft.*
>
> *(4) Where any draft proclamation laid before the National Assembly gives effect to any recommendations of the Commission with modifications, the Prime Minister shall lay before the Assembly together with the draft a statement of the reasons for the modifications.*

[7] Section 38 of the Constitution of St. Kitts and Nevis

*(5) If the motion for the approval of any draft proclamation laid before the National Assembly under subsection (3) is rejected by the Assembly, or is withdrawn by leave of the Assembly, the Prime Minister shall amend the draft and lay the amended draft before the Assembly.*

*(6) If the draft proclamation laid before the National Assembly under subsection (3) or (5) is approved by a resolution of the Assembly, the Prime Minister shall submit it to the Governor General who shall make a proclamation in terms of the draft; and that proclamation shall come into force upon the next dissolution of Parliament after it is made."*

[21] From these provisions, there is a sequence of events which is expected to follow, namely:

1. The Governor General is expected to make a draft proclamation to give effect to the recommendations contained in the Commission's report whether with or without modifications contained in the report.[8]
2. The Prime Minister is required thereafter to lay that draft proclamation as made by the Governor General before the Assembly and the draft proclamation shall make provisions for any matters which appear to the Prime Minister to be incidental to or consequential upon the other provisions of the draft.[9] Where the draft proclamation, which is laid before the National Assembly gives effect to any recommendations of the Commission with modifications, the Prime Minister shall lay before the National Assembly together with the draft a statement of the reasons for such modifications.[10]
3. The Assembly is then required to debate the draft proclamation and either approve or reject it. It could also be withdrawn by leave of the Assembly. Where it is not approved or withdrawn, the Prime Minister is required to amend the draft and lay this amended draft for approval.[11]
4. When the Assembly approves the draft proclamation, the Prime Minister shall submit it to the Governor General who shall make a proclamation in terms of the draft.

[8] Section 50(3)
[9] Section 50(3)
[10] Section 50(4)
[11] Section 50(5)

[22] Once the Governor-General makes a final proclamation in terms of the draft, section 50(7) of the Constitution allows only a limited challenge to the validity of this proclamation. This subsection, which will be addressed in more detail later in this judgment, provides:

> *"The question of validity of any proclamation by the Governor-General purporting to be made under subsection (6) and reciting that a draft thereto has been approved by resolution of the National Assembly shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in schedule 2."*

[23] Whilst there has been no final proclamation made by the Governor-General, the Court's power in intervening in those preceding steps has been the subject to serious and substantial dispute in these proceedings. The arguments will be addressed in due course.

## THE EX PARTE APPLICATION FOR INTERIM RELIEF

[24] On the evening of Friday the 6th September 2013, before filing a substantive claim, the applicants lodged with the Registrar of the Supreme Court an *ex parte* Application supported by an unsworn affidavit seeking an interim order. Through the Registrar the Court advised the applicants that the matter would be heard at 8:00 a.m. on Monday the 9th September 2013. The hearing on that Monday was done in chambers on un-filed documents. In their Notice of Application the applicants sought the following relief:

1. *An Abridgement of Time;*
2. *An order restraining the respondents by themselves, their servants, and/or agents or persons subject to their control, authority or direction or howsoever otherwise from submitting to the Governor-General, or making use of, any report purportedly pursuant to section 50(1)(1) until the hearing of this action or until further order of this Honourable Court.*
3. *Such further or other relief as may be just;*
4. *Costs.*

[25] The applicants' main complaint was against the Constituencies Boundaries Commission - that the Commission in performing its functions under section 50(1) of the Constitution, namely to 'review the number of boundaries of the constituencies into which St. Christopher and Nevis is divided and submit to the Governor-General reports', had arrived at their report without due regard of the matters set out in Rule 2 of Schedule 2 of the Constitution. In their application, the applicants certified that the matter was of extreme urgency since Parliament was likely to swiftly act on a draft proclamation of the Governor-General arising from the Report of the Commission. This was likely, they say, having regard to the majority of the ruling Party in the Assembly, to lead to a resolution under section 50(5) of the Constitution, and this would then lead to a proclamation by the Governor-General under section 50(6) which the applicants would be barred from challenging.

[26] In their grounds in support of their Application, the applicants stated *inter alia* that the Commission has relied on a document termed Preliminary Census data 2011 to carry out its work in reviewing the number and boundaries of the Constituencies in St. Kitts and Nevis. Further, that the Census Exercise is still being conducted and that the process of verification has to be completed and that computer checks and edits have to be begun, and that both processes can lead to changes in the data, even if marginal. They stated that the Commission had even ignored a legal opinion from the Attorney General advising that it was not recommended that they use the data from the incomplete census.

[27] They stated that they *"the Commission has invited Political Parties registered in St. Kitts and Nevis to submit recommendations as to how they would want changes if any to be made to the number and boundaries in St. Kitts and Nevis. The Parties invited to make representations are the St. Kitts Nevis Labour Party (SKNLP); the People Action Movement (PAM); the Nevis Reformation Party (NRP) and the National Integrity Party (NIP). The Hon. Timothy Harris and the Hon. Sam Condor were each written individually and invited to make recommendations.* And further, *'that the Commission has now made decisions as to how the boundaries are to be redrawn. A Report has now been produced*

*which (has been/is to be) submitted to the Governor-General for a draft proclamation to be prepared and to be laid in the Parliament by the Prime Minister."*

[28] The applicants stated that this *"Report proposes to redraw the boundaries of the Constituencies which the applicants represent. St. Christopher 5, by dismembering the parish of St Ann, and splitting the hometown of Sandy Point in 2 and the support base of the 1st Applicant/proposed claimant, and appending it (sic) half of it with the villages of Newton Ground and St. Pauls, that have been traditionally the Labour stronghold of the Leader of the St. Kitts Nevis Labour Party. St. Christopher 7 constituency by subtracting 1,535 voters and adding 2053 voters. St. Christopher 8 by removing a portion of the parish of St. Mary that contains the stronghold of Cayon. Nevis 9 by removing the Church Ground area of St. John.'*

[29] It was apprehended by the applicants that *"the proposed changes would drastically affect their chances at being returned as the Representative of Constituency #5 under the guise of reviewing the boundaries in order to hand the SKNLP a victory at the next General Election."*

[30] An affidavit of the 1st Claimant dated and sworn to on the 9th September 2013 supported the application, essentially deposing to, and developing the very matters contained in the grounds in support of the application.

[31] This application raised matters of considerable national importance. Here were questions relating to the changes of boundaries having the possible effect of unlawfully interfering with the outcome of the next General Elections. The complaints are really allegations of 'gerrymandering'.

[32] On the initial *ex parte* hearing on the 9th September 2013, the Court first considered whether sufficient urgency was made to ground the court exercise of discretion under Part 17 of CPR 2000. Whilst the 'Certificate of Urgency' is required to demonstrate that the applicant for relief has addressed his mind to the question of urgency and is so satisfied, it

is a matter ultimately for the court to determine whether the matter is so urgent so as to justify allowing the applicant to seek interim relief before the substantive claim. Whilst these arguments would be developed in more detail, the Court's initial reaction was that if these applicants did in fact have serious issues to be tried, there was a real need to proceed *ex parte* lest the Governor General make the proclamation under section 50(6) of the Constitution, which in the circumstances of this case would bar the claimants from any effective relief.

[33] The Court then considered whether there was a serious issue to be tried on the evidence before the court. These arguments would be developed in detail, but again the court felt, having regard to the affidavit evidence, that there were serious issues to be tried in relation to the Commission's compliance with Rule 2 of Schedule 2 of the Constitution, and the court considered that at that stage, this hurdle had been crossed.

[34] On the question of whether damages would be an adequate remedy, the court felt on that initial hearing, that if the applicants were right, no damages could compensate them for the harm they could suffer as a result of the wrong they were complaining of. On the other hand, the court considered that a temporary order would not be likely to cause the respondents any real and significant damage. The balance of justice at this stage lay in favour of the grant of the order. The court however, felt that parliament should not be restrained at this stage, and that there was no real need to prevent parliament debating the draft proclamation arising from the Report. For this reason, the Court considered a variation of the order being sought was appropriate and granted a conservatory order against the Governor General in the following terms:

1. *A conservatory order is granted in the following terms:*
    - i. *His Excellency the Governor General shall not act or rely on a Report of the Constituencies Boundaries Commission dated the 5th or 6th September 2013 whether directly or indirectly;*
    - ii. *And His Excellency the Governor-General shall not make a proclamation under section 50(6) of the Constitution of St. Kitts and Nevis;*
    - iii. *This conservatory order shall continue until further order of this Court;*

2. *All documents including the Notice of Application for ex parte injunction and affidavit in support together with its exhibits are to be served on all the respondents together with this order;*
3. *The respondents shall have the right to make an application to set aside this order; seventy-two hours notice of such application shall be given to the other side;*
4. *The applicants are to file and serve their substantive claim within 48 hours;*
5. *The matter is adjourned until the 20th of September, 2013.*

[35] By the time the matter had been returned to court on the 20th September 2013, the applicants had filed a 'Notice of Application for Leave to apply for Judicial Review' together with supporting affidavits. The respondents had also filed an application dated the 13th September 2013 seeking to discharge the interim order. Arguments began on the 20th September 2013 on the application to discharge but this was adjourned on the court's motion and the parties were directed to file and exchange written submissions on their respective applications. At that hearing, the applicants also sought and obtained permission to amend their application for leave to apply for judicial review.

THE AMENDED NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

[36] The applicants' substantive claim is an application for judicial review. This Application will be treated in more detail later in this judgment. For now it is sufficient to state that by their Notice of Application dated the 11th September 2013 and amended with permission on the 20th September 2013, they have applied to the court for an order granting leave to apply for judicial review against the decision of the Constituencies Boundaries Commission contained in its report dated the 5th September 2013. They seek a number of reliefs including an order of certiorari to quash the decision of the Constituency Boundaries Commission contained in that report, and to prohibit the Commission from submitting it to the Governor General or from making use of the report in any way whatsoever.

[37] They also seek an interim order in the event that permission is granted to proceed, which effectively is an order seeking to avoid a final proclamation being made by the Governor General under section 50(6) of the St. Kitts and Nevis Constitution.

[38] In this Application for leave to apply for judicial review of the decision of the Commission, they state that they also intend, once leave is obtained, to combine with the application for judicial review, an Originating Motion pursuant to section 96 of the Constitution and the general law claiming Constitutional relief and Orders with respect to the content of the said report.

[39] As is noted, their substantial complaint is against the Commission's Report of the 5th September 2013. Their attack on the report is founded on four main grounds that are set out later in this judgment.

[40] As a matter of sequence, the Court will first consider the Application to discharge the Interim Order.

## B. THE APPLICATION TO DISCHARGE THE CONSERVATORY ORDER

[41] All of the respondents filed a Notice of Application dated the 13th September 2013 and amended on the 24th September 2013 to discharge the interim order and for damages and costs incidental to the Application. In this application, they raise a number of preliminary and substantive arguments to discharge. The main grounds of this application are as follows:

*(1) The conservatory Order expired or ceased to exist on or after September 2013 as no application or further order was made extending same beyond its return date of September 20, 2013.*

*(2) There was fatal non-compliance with the conservatory order and in particular clause 2 and 4 thereof. No Originating Motion was filed or served as represented by the Claimants and ordered by the Learned Judge.*

*(3) At the time the draft proclamation was approved by the National Assembly and forwarded to the Governor General on September 9, 2013 for the making of the proclamation, the conservatory order had not been served on either the Hon. Prime Minister or His Excellency the Governor General.*

*(4) The Application for Injunctive Relief and intended claim are misconceived. They are premised on the recommendations by the Boundaries Commission.*

*However the recommendations were approved by the National Assembly in accordance with the Constitution.*

*(5) The conservatory order was sought and obtained after undue delay on the part of the Claimants and contrary to the principle of public interest which demand that injunctions against inter alia the Government and general elections ought to be heard inter partes.*

*(6) The claimants refused and or neglected to make use of the alternative remedy available to them by their refusal to participate and vote against the draft proclamation laid before the Assembly by the Prime Minister. Having failed to participate and vote against the draft proclamation laid before the Assembly by the Prime Minister, the claimants ought not to be assisted by the High Court in any way at all.*

*(7) The joinder of His Excellency the Governor General is improper. It is also improper to join the Governor General as a party to these proceedings. There was therefore no proper basis for the conservatory order against the Governor General.*

*(8) The Constitution and in particular sections 49, 50 and 116 and/or the separation of powers doctrine prohibit the Court from granting injunctions or conservatory orders against the Governor General in the exercise of his constitutional and parliamentary duty required under section 50(6).*

*(9) The process for the recommendations and alteration of boundaries in St. Kitts and Nevis is expressly or inherently a political and parliamentary process, and therefore the High Court ought not to intervene unless it is pleaded and shown that the National Assembly had violated Rule 1 of Schedule 2 of the Constitution.*

*(10) Under the provisions of the Constitution, the privileges of the Assembly and separation of powers, interim relief is not or ought not to be available once the draft proclamation is laid before the Assembly.*

*(11) The conduct of the claimants was and is such that they ought not to be allowed to complain or seek interim relief at this late stage.*

*(12) These amendments are necessary to do justice and to bring all relevant issues to the attention of the High Court.*

*(13) There is no veritable claim that the Second Respondent has contravened or is contravening any right granted to the Claimant under section 49 or 50 of the Constitution … or any other provision of the Constitution.*

*(14) Section 50 of the Constitution contemplates that the …Boundaries Commission would from time to time review the number and boundaries of the Constituencies into which Saint Christopher and Nevis is divided.*

*(15) There is no evidence that any representation by any relevant authority has been made to the First Claimant or any other claimant that the boundaries which now exist in the constituencies in St. Christopher and Nevis would remain unchanged.*

*(16) There is no provision in the Constitution which grants to the First Claimant or any other claimant a right to represent a particular Constituency in the next General Election.*

*(17) There is no provision in the Constitution which precludes the Commission as established under Section 49 of the Constitution from considering the alleged Preliminary Census Data or any other relevant information in its review of the number and boundaries of the constituencies in which St Christopher and Nevis is divided.*

*(18) Neither the First Claimant or any other claimant has alleged or had established any loss or relevant interest relative to any alleged breach of the Constitution or any other alleged wrong.*

*(19) The effect of the Order is to preclude the Second Respondent from carrying out the function which he is mandated to do by virtue of Section 50(6) of the Constitution.*

*(20) The effect of the Order would hinder good Government and is inconsistent with Section 37 of the Constitution.*

[42] By their Application for Discharge the respondents are raising a number of preliminary and substantive objections. Many of these actually go to the court's jurisdiction not only to have granted the interim order, but also challenge whether the applicants are entitled to proceed with this matter at all, or at the very least, whether judicial review as a remedy is permissible in the circumstances of this case. The Court proposes to pose these 'objections' as questions to be answered by this judgment. The 'questions' for determination are as follows:

THE PRELIMINARY QUESTIONS

1) Whether, there being no return date on the interim order, and there being no application to continue it on the 20th September 2013, the order ceased or expired on the 20th September 2013?

2) Whether the applicants have failed to comply with certain terms of the Interim order, namely (i) service of the order and documents within 48 hours' and (ii) failure to file an 'Originating Motion' as was set out in the application for the interim order?

3) Whether there has been such 'delay' in making the application for Interim Relief, so much so that no relief should have been granted in the first place?

4) Whether the applicants had an adequate alternative remedy available to them in the forum of the affirmative resolution process of the National Assembly where they had a right to debate and vote on the draft proclamation?

5) Whether there is jurisdiction to grant an interim order in Judicial Review Proceedings before leave is granted to apply for Judicial Review.

THE SUBSTANTIVE QUESTIONS

1) Whether the applicants have demonstrated that they are possessed of sufficient and relevant interest to commence these proceedings against the respondents?

2) Whether an interim conservatory order could be made against the Governor-General restraining him from making a proclamation under section 50(6) of the Constitution?

3) Whether there were serious issues to be tried grounding the grant of the interim order?

4) If there are serious issues to be tried, was the question of damages applicable to this case, and if not, did the balance of justice favour the continuation of the order?

THE HEARING ON THE 27 SEPTEMBER 2013 – PRELIMINARY MATTERS

[43] On the 27th September 2013, there was disagreement between the parties, as to which application should be heard first. Mr. Mendes Q.C for the applicants submitted that the Notice of Application for leave should be heard first, as that might put some order on the proceedings, since if the court considered that leave should be granted, it might then be relevant to consider whether an interim order should be granted; those points of the discharge would then be relevant. It was his position that even if there were any real grounds to discharge the conservatory order, the court had the power to grant a completely new interim order at this stage. Mr. Astaphan S.C. for the respondents did not agree that the Application for leave should be heard first, as he pointed out that it was only proper that the court hear applications in the order that they are filed. When it was pointed out to him that the application for leave was filed before the application for discharge, Learned Senior Counsel without missing a beat, reminded the court that the hearing on the discharge was simply continuing from the 20th September 2013.

[44] The court was concerned that time should be managed effectively and that there should be no repetition of the points being raised. There was no sense in hearing these applications separately. Having regard to the fact that the arguments for the discharge had commenced on the 20th September, 2013, it was directed that the respondents would continue their submissions on the discharge, and in so doing they would also treat with the underlying issue as to whether there was arguable case on the claimants case, in a sense to address one of the main issues raised on the Application for Leave. The applicants would answer the points being raised whilst at the same time respond to those points relating to the discharge. The respondents would have a right of reply. The court noted that if there were any new issues being raised by the respondents in their reply on the application for leave then the applicants would be allowed to respond to those particular issues.

A. THE PRELIMINARY QUESTIONS

PRELIMINARY QUESTION # 1

*NO EXISTING ORDER - Whether there being no return date on the interim order, and there being no written application to continue it on the 20th September 2013, the order ceased or expired on the 20th September 2013?*

[45] The respondents' first preliminary onslaught in favour of discharge is that having regard to the terms of the interim order and rule 17.4 of the Civil Procedure Rules 2000 (CPR), the interim order expired on the 20th September 2013. They developed this arguments by relying on CPR 17.4(4) which provides:

> *"The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permit a longer period) if it is satisfied that –*
>
> *(a) in case of urgency no notice is possible; or*
>
> *(b) that to give notice would defeat the purpose of the application.*

[46] For the respondents, it is contended that in view of CPR 17.4, there is no basis for the granting of an interim order at large or without a returnable date. It must have a returnable date. The interim order of the court must therefore be construed in accordance with CPR 2000. They submit that Clause 5 of the order that states: *'The matter is adjourned until the 20th September, 2013',* cannot be interpreted and construed as the clause of the order prescribing the returnable date.

[47] The say that 'the 20th of September 2013 has come and gone. There was no application to extend the supervisory order. The inevitable legal consequence is that the conservatory order expired on the 20th September 2013.'

[48] The applicants resist this argument. They point to the Order which specifically states that it is to 'continue until further order of this Court', and they say that in their amended application for leave, interim relief is claimed to continue the order, as an alternative to

restraining the Prime Minister from submitting the proclamation to the Governor-General. They submit that there is no substance in this point.

## Analysis and Findings

[49] The interim order in this matter was made on the 9th September 2013, and the matter was adjourned for further consideration to the 20th September 2013. The order did not contain a date on which it was to terminate; it simply stated that it was to continue until further order of the court. There was also no application *per se* to continue the order. Were these matters fatal to the order continuing beyond the 20th September 2013?

[50] It is important to set out CPR 17.4(5),(6) and (7), which provide as follow:

*(5) On granting an Order paragraph (4) the court must –*

*(a) fix a date for further consideration of the application; and*
*(b) fix a date (which may be later than the date under paragraph (a)) on which the injunction will terminate unless a further order is made on the further consideration of the application.*

*(6) When an order is made under paragraph (4), the applicant must, not less than 7 days before the date fixed for further consideration of the application, serve the respondent personally with -*

*(a) the application for an interim order;*
*(b) the evidence on affidavit in support of the application; and*
*(c) any interim order made without notice; and*
*(d) notice of the date and time on which the court will further consider the application*

*(7) An application to extend an interim order under this rule must be made on notice to the respondent unless the court orders otherwise.*

[51] The provisions of CPR Part 17 are to be complied with on the grant of an ex parte order. Whether omission to comply with certain aspects of this rule will however have fatal consequences will depend on the circumstances of a given case.[12] The details provided by CPR 2000 in these provisions reveal what they intend to achieve, namely that no ex parte interim order must be made to last for an extended period without there being a timely and

[12] Palm Island Resorts Ltd v Arts Friends Ltd. Civ. App. No. 5 of 2002 SVG

expeditious *inter partes* hearing. There should be an application with notice to continue the order, but whether there is one or not, it is crucial that there be a full *inter partes* consideration of the ex parte order before it goes beyond 28 days.

[52] It is noted that on the 20th September 2013, the respondents appeared having filed an application to discharge the interim order. This was an *inter partes* hearing four days after the grant of the *ex parte* interim order, when the court commenced hearing arguments from the respondents on their discharge application. These arguments were not completed on that day, and written submissions were ordered, and the matter was adjourned on the motion of the court to the 27th September 2013. Before adjourning the matter however, the Court, noted that it was not going to discharge the order until fully considering the matter, and reconfirmed that the order was to continue until further of the court. Different considerations may have arisen if this matter had not been made *inter partes* and further consideration not been given to whether the order should be continued or discharged. In any event, CPR 17.4 requires that an ex parte order should not last for more than 28 days. This being the case, when the matter was heard *inter partes* on the 27th September 2013, the applicants applied *inter alia,* by way of their Application for leave to apply for Judicial Review, for a continuation of the interim order. The Court on that date expressly continued the order to last until further order – until a decision is delivered on the arguments. For all of these reasons, the Court considers that there has not been any significant non-compliance with CPR 17.4 to warrant a discharge of the order on that basis.[13]

PRELIMINARY QUESTION # 2

*Whether the applicants have failed to comply with certain terms of the Interim order, namely (i) service of the order and documents within 48 hours' and (ii) failure to file an Originating Motion as was set out in the application for the interim order?*

[53] Under this aspect of the respondents' case for discharge for non-compliance, they put their case on two limbs. First, they say that the documents ordered to be served within 48 hours by the interim order were not in fact served within that time. Second, they say that in any

[13] See also eChina Cash Inc v eChina Cash BVI and Others Claim No. BVIHCV 2008/0330

event that what should have been served is not a claim for judicial review but an originating motion for constitutional relief. This has not been done even to date.

*A. Service within 48 hours*

[54] The respondents' argument here was raised not on their written application to discharge, but in their submissions, and rightly they say that it is for the Applicant to prove service. Subsequent to the point being raised on the 20th September 2013, the applicants filed a number of affidavits to prove service.

[55] *Evidence of Service on the 1st Respondent, the Constituency Boundaries Commission* – This comes from the affidavit of Process Server, Mr. Levar Flanders sworn to on the 20th September 2013. He identifies copies of the Notice of Application for ex parte injunction, the affidavit of Mr. Shawn K. Richards in support of the Interim Injunction with the certificate of exhibits and exhibits, the Interim Order, a Notice of Application for Leave to apply for Judicial Review, a supporting affidavit sworn to by Mr. Shawn K Richards and Certificate of Exhibits and exhibits, as documents he was required to serve on the 1st Respondent. He states that 4:05 p.m. on the 11th September 2013 he visited the office of Mr. Peter Jenkins, Chairman of the Commission at Cayon Street, Basseterre, St. Kitts and asked a secretary to speak with Mr. Jenkins. He was told that Mr. Jenkins was with a client. He stated that the secretary agreed to, and did accept service for Mr. Jenkins.

[56] *Evidence of Service on the 2nd Respondent, His Excellency the Governor General* – This comes from the affidavit of Mr. Levar Flanders sworn to on the 20th September 2013. He identifies the Notice of Application for ex parte injunction, the affidavit of Mr. Shawn K. Richards in support of the Interim Injunction with the certificate of exhibits and exhibits and the order. He states that on the 9th September 2013 at about 11:45 a.m. he visited Government House, Springfield, Basseterre, St. Kitts to serve these documents. He states that he left the documents with the 2nd Respondent's secretary at the Governor General's Official Residence and Office. He states that he saw Mrs. Huggins place a stamp of the

Governor General's office and then sign her name on the copies that he had. She endorsed the date and time on the copies.

[57] There is then a second affidavit of Mr. Levar Flanders sworn to on the 20th September 2013. He identifies the Notice of Application for Leave to apply for Judicial Review and supporting documents. He states that on the 11th September 2013 at about 3:55 p.m. he visited Government House, Springfield, Basseterre, St. Kitts and attempted to enter the compound to personally serve the said documents. He states that the Sentry on duty told him that he should return on the following day. He states that being advised by Counsel for the applicants that he was required to comply with an order of the Court and serve the documents that very day, he attempted to give the documents to the guard, who then told him that he would not take any documents from him. He states that he then left the documents with the guard by placing them within his sight at the gate at Government House.

[58] *Evidence of Service on the 3rd Respondent, the Hon. Prime Minister* – This comes from the affidavit of Mr. Levar Flanders sworn to on the 20th September 2013. He identifies the Notice of Application for ex parte injunction, the affidavit of Mr. Shawn K. Richards in support of the Interim Injunction with the certificate of exhibits and exhibits and the order. He states that on the 9th September 2013 at about 11:55 a.m. at Government Headquarters he personally served Ms. Beverley Knight the Personal Secretary to the Prime Minister. He stated that he did see her endorse her name, date and time on copies of the documents.

[59] Then there is the affidavit of Mr. Kevin Seaton sworn to on the 20th September 2013. He deposes that on the11th September 2013 at about 3:55 p.m. for the purpose of serving the Notice of Application for Leave to apply for Judicial Review and supporting documents, he visited the Office of the Prime Minster and met with the Personal Secretary of the Prime Minister, Ms. Beverly Knight. He states that she informed him that she was instructed not to accept any service of documents, and that if he left them there she would throw them out. He states that on the following day he served a copy of the documents at Masses

House, the Headquarters of the St Kitts and Nevis Labour Party in Basseterre, St Kitts. He states that the documents were accepted by a secretary at the front desk for the Prime Minister. He states he has served documents on the Prime Minister this way before.

[60] *Evidence of Service on the 4th Respondent, the Hon. Attorney General* – This comes from the affidavit of Mr. Levar Flanders sworn to on the 20th September 2013. He states he served the documents required to be served by the interim order, namely Notice of Application for ex parte injunction, the affidavit of Mr. Shawn K. Richards in support of the Interim Injunction with the certificate of exhibits and exhibits and the order, on the 9th September 2013 at about 12:05 p.m. on the Attorney General by leaving them at the Office of the Attorney with the secretary to the Attorney General. He states that he saw her sign her name and endorse the date and time on the copies.

[61] Then there is an affidavit from Mr. Kevin Seaton sworn to on the 23rd September 2013. He states that on the 11th September 2013 at about 3:45 p.m. he personally served on the Office of the Attorney General, copies of the Notice of Application for Leave to Apply for Judicial Review and supporting affidavit and exhibits by leaving them with his Secretary at the Office of the Attorney General. He saw her sign her name on a copy endorsing it with the date and time.

[62] The applicants' position on the issue of service is that they attempted to effect personal service on all of the respondents within the time prescribed by the Interim Order. And that in all instances they left the relevant documents either with secretaries or an agent (the guard at the Governor-General's Residence) of the respondents. These affidavits were not contradicted, except by a bald statement contained in an affidavit sworn to by Ms Arleen Martin on the 23rd September 2013 in which she deposes at paragraph 6 that: *"I am advised by Counsel Angelina Gracey Sookoo and verily believe to be true that the Claimants failed to serve the above mentioned documents in compliance with the Order of the Court dated 9th September 2013."* There not being specific contradictions on the affidavits of the process servers, I will take this assertion to be Ms. Sookoo's legal position

on service, and not a statement that the process servers are to be disbelieved on their factual assertions.

[63] The question then for the court is whether there was non-compliance with the Order, and whether such non-compliance was fatal so that the Order must be immediately discharged as the respondents would have it.

*B. A Requirement to file and Serve an Originating Motion*

[64] The third named respondent has also argued that the Order should be discharged as the applicants has failed to file their substantive claim within 48 hours – their substantive claim being an 'Originating Motion' as pleaded in their ex parte application, and not an application for leave to apply for Judicial Review. Reference is made in particular to ground 4 of the *ex parte* application in which the applicants stated:

> *"The applicants intend to have issued from this Court an Originating Motion pursuant to section 96 of the Constitution and the general law and makes this application pursuant to Part 17 of CPR 2000."*

[65] The third named respondent submits that the court ordered that the applicants 'are to file and serve their substantive claim within 48 hours', it was clear they say, that the court took into account that the applicants had 'promised' to file an Originating Motion, and that there was no other basis for the grant of the order. The failure to file the 'Originating Motion', they say is a fatal non-compliance with the terms of the interim order.

## Analysis and Findings

### Service Simpliciter

[66] What rules govern 'service' in proceedings of this type? This rather simple point has led this Court on a journey. This began with CPR 56.9 that expressly provides that a claim form relating to an application for relief under a relevant Constitution must be served on the Attorney General. It also speaks to service on the other 'defendants'. But it is quickly noted that the rules do not specify how service on either the Attorney General or on any of the defendant ('office holders') is to be effected. Does it mean that the process server must

seek out either the Attorney General or the 'office holder' personally, or could service on an agent of either suffice? The Court considered that the 'note' to CPR 56.9 would provide the answer, as it made direct reference to Part 5 of CPR 2000, relating to service. But Part 5, while dictating that service is to be effected by way of personal service when it comes to individuals, and providing rules to treat with service on 'legal practitioners', different types of 'companies' and 'firms or partnerships', do not specifically treat with service of government officers, Ministers or Heads of State (the Governor-General). But again there is another 'note' that directed the Court to CPR 59.2 as treating with service on the 'Crown'. It is also noted that CPR 6.9 provides that where documents are to be served in connection with any proceedings of which notice has to be given to the Attorney General it should be effected in accordance with CPR 59.2.

[67] But CPR 59.2 did not provide the answer. It states that 'service of any document including a claim form on the Crown must be effected in accordance with the relevant Act.' This means in St. Kitts and Nevis, the Crown Proceedings Act Chapter 5.06 of the 2009 Revised Edition of the laws. There is no doubt that the object of that Act is to 'provide for the institution and maintenance of actions by and against the Crown in respect of liabilities arising in contract, tort or like actions committed by its servants or officers."[14] And it has been made clear that the Crown Proceedings Act, though relating to 'civil proceedings' against the Crown, do not relate to judicial review proceedings. As it has been noted, 'CPR 2000 recognizes public law proceedings as a peculiar specie of civil proceedings which fall outside the ambit of the ordinary type of civil proceedings contemplated by the Crown Proceedings Act and provides a regime of rules in Part 56 which are applicable only to proceedings of this kind.' From this it would seem that section 14 of the Crown Proceedings Act dealing with service of documents do not apply. The provisions contained in CPR 2000 would be applicable.[15]

[68] So one comes full circle to CPR 56.9 which, as noted earlier expressly provides that a claim form relating to an application for relief under a relevant Constitution must be served

[14] Richard Frederick and Lucas Frederick v The Comptroller of Customs and The Attorney General HCVAP 2008/0038
[15] Richard Frederick (n. 14)

on the Attorney General. It does not speak to his secretary or his clerk or other agent. The undisputed evidence in this case from the process servers was that the secretary to the Attorney General accepted service. This rings in consonance with the words of former Chief Justice Rawlins when he said in analyzing rules[16] which stated that service on an Attorney General would be effected by serving a member of staff or agent of the Attorney General were rules which 'make sound practical reason' as the Attorney General is an office holder and it would be impractical having regards to his duties to have to wait to personally serve him.[17] What is also significant is that the Attorney General is the legal representative of the State, the designated Attorney at Law. No one has ever expected that when service is to be effected on any Attorney at law representing any party, that such service must be done on the lawyer personally. It has always been sufficient for such service to be effected on his secretary or other agents designated for that purpose.

[69] For my part, I do not find that the rules referred to, bar service on the secretary or other officer authorized to accept service on behalf of the Attorney General. Such a practice has existed for a long time. I think it sensible and there is no reason why service in such matters on the Attorney General cannot be effected on his secretary or his authorized agent.

[70] With regard to other persons named in a judicial review application, there appear to be no provisions in our present rules which govern service on office holders such as Ministers or the Head of State. There is therefore a lacuna in these present rules.[18] This being the case, Order 50 of the old rules of the Supreme Court 1970 becomes applicable by virtue of section 91 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act Chapter 3:11, a provision which saves former rules of court which are not inconsistent with any present rules or legislation. Order 50 rule 10 states:

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[16] Rules of Court of St. Lucia and Belize.

[17] Bertha Compton qua Administrative of the Succession of the late Macrina Blaize v Dr Christiana Nathaniel and Others Civil Appeal No. 12 of 2004 St Lucia

[18] It is noted that Part 5 sends the reader onwards to Part 59.2 which states that Part 5 does not apply to civil proceedings against the Crown, and that service on the 'Crown' in such proceedings should be effected in accordance with the relevant Crown Proceedings Act.

*"(1) Where for the purpose of or in connection with any proceedings in the Supreme Court, not being civil proceedings by or against the Crown within the meaning of Part II of the Crown Proceedings Ordinance, any document which is required by any Act or these Rules to be served on a Minister of the government department which is an authorized department for the purpose of that Act, or on such a department or on the Attorney General, the document shall be served on the Attorney General or on the permanent Secretary of that department."*

*(2) In this rule 'Crown Proceedings Ordinance has the meaning assigned to it in Order 54 Rule 1"*[19]

[71] In the case of the Prime Minister, these rules require that service on him be effected on his permanent secretary. This is his authorized agent. If in practice the Permanent Secretary has herself authorized someone to receive service, then that too, once proven to the satisfaction of the court would be sufficient. The same approach should be taken of service on the Governor General – this would be effected if it is done on the secretary or other person authorized to receive service. In future however, I would recommend that when service would be required in rare cases to be effected on the Governor General, it should be effected on the Attorney General as his representative. In the case of statutory and constitutional bodies, service would be effected if it also done on the chairman or person authorized to receive service on behalf of that body; if such a body maintains an office I would think that service on the secretary of that body would be proper. It would be ridiculous to suggest that the process server would have to wait until he could find any of the 2nd to the 4th respondents personally in this case to effect service. Quite apart from being impractical and inappropriate, it could lead to alarming security consequences to have process servers personally seek to hand documents to any of the 2nd to the 4th respondents.

[72] In this case, the applicants attempted to serve all of the respondents within the terms of the Interim Order. In the case of the Commission, service was on the secretary of Mr. Jenkins who indicated that she was authorized to accept it on his behalf. In the case of the Attorney General his secretary accepted both sets of documents and signed to receive same. In the case of the Prime Minister, his secretary accepted the first set of documents

[19] Formerly Chapter 22 under the previous edition of the St. Kitts and Nevis Laws.

and refused to accept the second set. Those were served out of time at Masses House for the Prime Minister. In the case of the Governor General, it is noted that his secretary accepted the first set of documents including the interim order, but that at 3:55 p.m. the next day, the process server was refused entry to the Governor-General residence, and he left them in sight of the guard.

[73] In addition to all the above, or even quite apart from all the above, and what decides the point in my view, is that all of the respondents filed an Application dated the 13th September 2013 to discharge the interim order. I found it surprising that having filed this application, and incidentally not raising the point of service in that application, that the respondents should have really taken this point in their written and oral arguments[20]. Even if service was not strictly effected in accordance with the interim order, I find that this did not result in any prejudice to the respondents, and in those circumstances this Court will not discharge the Interim Order on that basis.

## Originating Motion

[74] The Application for leave to apply for Judicial Review begins the substantive claim for the applicants. In approaching this issue therefore, an important question is whether a claim for judicial review is equally viable in the circumstances of this case, to have grounded the application for *ex parte* relief. It would be impractical, and contrary to the overriding objective, if a court were to discharge an ex parte injunction in the case where an applicant fails to file the specific substantive claim which it may have 'promised' on the papers for leave, but instead filed an equally viable claim.[21] While an applicant would be required to

[20] Written submission filed by the Attorney General's Chambers on the 23 September 2013, to discharge the injunction.

[21] See in a somewhat different context, an interesting discussion in Gamatronic (UK) Ltd v Hamilton 2013 WL 5826189 Queen's Bench Division at para 55 where consideration was given to whether the claimants be allowed to re-plead such of their claims as they are advised to pursue, or should the proceedings be dismissed, leaving the claimants to bring new proceedings? The Court considered that 'there was no point in requiring the claimants to issue new proceedings to bring claims which, if properly pleaded, could properly be brought in this action. On the (limited) information before me on these applications Gamtronic UK appear to have a sufficient factual basis to formulate proper claims against the defendants. I consider that justice and the overriding objective are best served by giving them the opportunity to serve a new statement of case. Even if their claims cannot be fully particularised, the new pleading would have to be distinctly clearer and more focused than those in the claimants' original pleading."

point to the cause of action in seeking interim relief, some allowances, having regard to the urgent circumstances existing, may be made for the possibility of continued perfection in the pleadings. What the Court will consider when the claim eventually filed is different from the one promised, is whether, if the court had been initially faced with that other claim, the court would have granted or refused the interim order. There is no reason why the Court in this case, would not have granted the order for interim relief if the papers had disclosed that the substantive claim was a claim under Part 56.

[75] Quite apart from the above, it is important to note that the Order that was actually entered is headed up as a matter for 'judicial review'. This was an Order approved by the Court. As was noted by the Court at the hearing on the discharge, the matter of judicial review proceedings was in fact raised at the ex parte hearing even though the papers before the court did not disclose this.

[76] What is being complained of in this case is the decision of the Commission that is contained in their Report of the 5th September 2013. The applicants are contending the Commission acted in contravention of the constitutional parameters of schedule 2 of the Constitution in making these recommendations. For reasons that will be set out shortly, the Commission in performing its role is subject to the Court supervisory jurisdiction. Judicial review is an available and equally viable remedy open to the applicants.

[77] For all these reasons, the Court do not see the failure to file an originating motion as a good reason to discharge the interim order.

PRELIMINARY QUESTION # 3

*Whether there has been such 'delay' in making the application for Interim Relief, so much so, that no relief should have been granted in the first place?*

[78] The respondents have argued that the applicants themselves have on the 20th September 2013, through Counsel, disclosed that the applicants have been preparing for this case since June 2013. The respondents also contend that, having regard to the fact that two

members of the Commission were appointed by the Leader of the Opposition, there is a clear inference that they would have kept him informed of the work of the Commission. As confirmation of this view, they point to the fact that 1st named applicant in his affidavit actually 'relied almost exclusively' on what he was told by the member on the Commission from his political party who was appointed by the Leader of the Opposition.

[79] They go on to develop this argument by saying that the 'Commission wrote to the applicants inviting their comments. They responded and some exchange of correspondence occurred. The [applicants] therefore knew or ought to have known what was transpiring with the Commission. They would also have known have known or been informed at least by Mr. Byron that the Commission's Report was signed by one of the members appointed by the Leader of the Opposition.

[80] Further, they say, the applicants 'knew or ought to have known that since on or about the 2nd September 2013, the National Assembly was scheduled to meet. They did not attend. Instead, the [applicants] waited until the eleventh hour to spring a without notice application for interim remedies under the false pretence of extreme urgency.'

[81] This is a matter, they say, of great public interest; not only have the Head of State been made a party to this matter, but this is also a matter which touch and concern a general election, and so 'it is clearly in the public interest to order such an application to be served so that all affected parties may be heard on the merits' before granting permission to proceed.

[82] The respondents (Prime Minister) argue that in light of the indications given by Counsel that the applicants had been working on this matter since June 2013, and having regard to the nature of this matter, this meant there has been considerable 'delay' in the making of this application and so the Interim Order should not have been granted in the first place.

[83] The applicants in response contends that it is disingenuous to suggest that they could have launched these proceedings months ago, even before the Commission had executed

its report. They say that ‘it is trite law that the High Court exercises its judicial review jurisdiction in relation to decisions made by public authorities. They argue that they seek to judicially review a decision of the Commission, not a decision of the Governor-General, and that ‘launching proceedings against a decision not yet made would have been with met an objection of prematurity, the rationale being that until the public authority makes its decision, it can be persuaded to change its mind and the court’s jurisdiction might be invoked in vain. As such the applicants could have only commenced these proceedings after the Commission had made its report.

[84] They point to the fact that they found out the report was made on Thursday the 5th September 2013, and by the next day they had discovered that there was a likelihood that the report would be laid before the National Assembly on Monday the 9th September 2013. By the evening on Friday the 6th September 2013, they had lodged with the Registrar of the Supreme Court an un-filed ex parte application supported by an Affidavit of the 1st Applicant. The court noted the urgency – that the Assembly might approve a draft resolution under section 50 and that before the morning was out the likelihood was that the Governor General would issue a proclamation under section 50(6) of the Constitution, thereby ousting any valid challenge in the circumstances of this case – and set the matter for hearing at 8:00 a.m. on the morning of the 9th September 2013. The applicants, in view of all this, state that they acted with alacrity and dispatch; that there was no delay on their part.

Analysis and Findings

[85] These applicants were seeking ex parte relief under Part 17, and it was necessary for them to show that there was sufficient urgency grounding their application, or that it was in the interest of justice to grant the order. From the respondents’ standpoint, the applicants deliberately delayed making the application, so that the court should not have exercised the discretion to grant the order and now should discharge the order.

[86] The court accepts that this is a matter about the 'Report' of the Commission. Statements made by Counsel for the applicants that the applicants were preparing for this matter since June of this year must be put in their proper context. The court can take judicial notice of the fact that not so long ago, there was also a challenge to a report of the Commission. Having regard to that history, it might have been obvious that the new Report of the Commission was going to be subject to considerable public scrutiny and that political parties would be on the ready months before the report is published to launch a challenge should they find the need to do so. This is what the Court understands from Counsel saying that 'the applicants were preparing for this matter since June 2013'. No one could have expected the applicants would have launched a challenge to the Report months before the report was actually published. Such a challenge would have been premature.

[87] The Court had to approach this in a practical manner. The evidence of the respondent's evidence on affidavit showed that the Prime Minister moved with great alacrity in laying the draft proclamation before the Assembly. The Report was submitted to the Governor-General on the 6th September 2013. The Order Paper was circulated on the 6th September 2013, with an indication that an unidentified report would be discussed. The applicants' position was that the inference from all this was that the draft proclamation giving effect to the report would be prepared over the weekend (if it had not already been prepared in advance) and laid before the Assembly on the 9th September 2013. They stated that they had no notice of all of this; this was being done without any notice to the members of the Assembly of the terms of the draft proclamation or the Report itself.

[88] The Court considers that there was reason to ground the belief of the applicants that there seemed to have been haste in presenting the report and perhaps the draft proclamation to the Assembly, and so it was for this reason the Court heard the application at 8:00 a.m. on the 9th September 2013 a mere hour before the Assembly was due to commence business for the day. The Court is guided by the words of the Learned Chief Justice Dame Janice Perriera in Sonya Young v Yvette Frederick,[22] a case actually relied on by the respondents, when she said:

[22] Civil Appeal No. 22 of 2011

> *"In matter of great public interest, for example where it is proposed to make a head of government a party to civil proceedings, or where matters touch and concern a general election, it is clearly in the public interest to order that such an application be served so that all affected parties may be heard on the merits of such an application before granting the permission to proceed. Furthermore, it is trite principle that ex parte applications are generally sought only in circumstances of real urgency, for example, in circumstances where there is a danger of 'tipping off', or a risk of dissipation of assets, or where the very matter in respect of which relief is sought may be destroyed. None of these are applicable here."*

[89] None of the matters that could go to urgency were present in the *Sonya Young's* case. However, they were very much present in the case at hand. The applicants were saying that there was considerable haste being employed in getting the report and the draft proclamation through the Assembly. It was very possible that if the matter was heard *inter partes* at 8:00 a.m. on the 9th September 2013, but before an order could be made, the Assembly could have made their resolution approving the draft proclamation and thereafter the Governor General could have acted under section 50(6) to issue his proclamation. It is with this in mind that the Court proceeded to hear the matter *ex parte* at 8:00 a.m. on the 9th September 2013.

[90] As it turned out, the Assembly did in fact consider and approve the draft proclamation on the 9th September 2013. By the end of business on the 9th September 2013, there was a resolution of the Assembly approving the draft proclamation, which now awaits the act of the Governor General to approve it. This demonstrated that the urgency was indeed real.

PRELIMINARY QUESTION # 4

*Whether the applicants had an adequate alternative Remedy available to them in the forum of the affirmative resolution process of National Assembly where they had a right to debate the draft proclamation?*

[91] The Third Respondent submitted to the court that there is a real and effective remedy in the National Assembly. They could have chosen to attend and debate the draft proclamation, but 'they decided not to attend. There ought to be no question that this failure to invoke this alternative remedy is fatal to the claim and by extension the conservatory order'.

[92] The applicants' answer to this was short and simple. They say that the debate of the National Assembly is not an alternative to a challenge to the legality of the Commission's report. They say that the Assembly is not empowered to set aside the Report on any ground. It must take the report as written. It is only on application for judicial review that the report can be set aside.

## Analysis and Findings

[93] Judicial Review is a discretionary remedy and the Court will usually refuse to grant leave to proceed where there is an adequate alternative remedy open to the Applicant.[23] For a remedy to be considered an adequate alternative remedy it must be 'convenient, beneficial and effectual as the claim for judicial review'.[24]

[94] The Court considers that it is open to the Assembly to reject a draft proclamation, as the constitutional provisions do not prescribe that they must approve. However, the Court accepts that the real question for the Court is whether the disapproval by the Assembly can be equated with an adequate alternative remedy. Here is a case where the applicants are complaining that the Report is being fast tracked through the motions and having regard to the political composition of the Commission, they say that it would hardly make any sense to expect that the Assembly would carefully scrutinize the Report for failure to comply.[25]

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[23] The Honourable Satnarine Sharma v Carla Brown-Antoine [2006] UKPC 57; Sir James Fitz Allen Mitchell v Ephraim Georges and Another HCVAP 2007/0023 St Vincent and The Grenadines (unreported); R v Chief Constable of Merseyside Police, ex p Calveley [1986] QB 424; R. (on the application of Singh) v Cardiff City Council [2012] EWHC 1852 (Admin)

[24] R. (on the application of C) v Financial Services Authority [2012] A.C.D. 97 Queen's Bench Division (Administrative Court); see also Ex Parte Waldron [1985] 3 WLR 1090 at page 1108 where Glidewell LJ stated that the question was 'whether the alternative remedy would resolve the question fully and directly…" quoted with approval in two cases discussed by Rajendra Ramlogan in his text, 'Judicial Review in the Commonwealth Caribbean, Routledge Cavenidish 2007, at pages 202 and 204, namely: In the Application of Anthony Leach HCA No 1002 of 2004 (TT) per Judith Jones J, and In the Application of Saga Trading Ltd. HCA No Cv 1347 of 1993 (TT) per Archie J.

[25] Somewhat akin to the argument being made by the Applicant in Sir James Fitz Allen Mitchell v Ephraim Georges and Another HCVAP 2007/0023 St Vincent and The Grenadines (unreported), where the Court held inter alia that "The fact that the appellant did not first make an application to the commissioner to disqualify himself from conducting the inquiry in relation to the appellant before applying for judicial review does present an alternative remedy to an application for judicial review. In any event there is no practical advantage in asking the appellant to

[95] It is useful at this stage to make reference to R. (on the application of Sinn Fein) v Secretary of State for Northern Ireland,[26] a decision of the Divisional Court in the UK, in which Sinn Féin, one of the major political parties in Northern Ireland, sought permission to proceed with an application for judicial review. The claim related to the reports of the Independent Monitoring Commissions and certain decisions taken by the Secretary of State in reliance on those reports. The complaints by Sinn Féin was that it was unlawful and that it continued to be unlawful for the Secretary of State to rely on the reports because they were vitiated by a number of factors including bias of the members. One of the objections to permission being granted was that there was adequate alternative remedy in the parliamentary process; Sinn Féin should have taken up its seats in Parliament as a means of challenging the decisions, as those decisions required an affirmative resolution of Parliament. Sinn Féin did not, and it was contended on behalf of the respondents that the court should refuse permission. The court stated:[27]

> "*Mr Larkin also contended that the issues raised in the litigation are primarily political issues, for which political remedies have at all times been available. In particular, by section 95A of the Northern Ireland Act 1998, directions of the Secretary of State under section 51B of the Act have to be laid before Parliament and approved by resolution of each House. The Parliamentary process is therefore available as a means of challenging such directions. Sinn Féin, not having taken up its seats in the House of Commons, has chosen not to avail itself of this avenue of redress. In the circumstances the court should refuse relief on the basis that there exists an alternative remedy. Further, had these issues been raised in Parliament as they could have been, the grant of relief by the court would have risked trespassing on the Parliamentary process; and the court should exercise similar restraint even though Sinn Féin chose not to raise the issues in Parliament."*
>
> *"In our judgment those submissions are misconceived. It is for the court to determine the lawfulness of a decision taken by the Secretary of State in the exercise of his statutory powers. By determining that issue the court does not trespass in any way upon the functions of Parliament. Further, when Parliament considers a direction made by the Secretary of State, its focus is on policy and on the merits of the direction, not on issues of legality and due process of the kind with which the court is concerned. The existence of an affirmative resolution*

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return to the commission for this purpose particularly because he is challenging the very jurisdiction of the commission to continue to hear the inquiry as against him."

[26] 2007 WL 2864 Divisional Court

[27] Per Lord Justice Richards at paragraphs 70 and 71.

*procedure cannot therefore be regarded as an adequate alternative remedy."*

[96] I consider the approach in that case instructive. There is no requirement that the Assembly in this case must comply with Schedule 2 of the Constitution or more importantly, insist that any report that is presented before them must comply with those constitutional guidelines. The Assembly does not sit as an appeal body over the work of the Commission. Its focus is on matters of policy and merits of the draft proclamation, and can very well, even in the face of patent errors on the part of the Commission, proceed to approve a draft proclamation arising from the Report. And it is for these reasons that the Court finds that the debates of the Assembly or the existence of an affirmative resolution procedure do not present an adequate alternative remedy to a complaint that the Commission has acted contrary to their mandate under the Constitution. There being no adequate alternative remedy the Court declines to discharge the Interim Order on this basis.

PRELIMINARY QUESTION # 5

*Whether there is jurisdiction to grant an Interim Order in Judicial Review Proceedings before Leave is granted to apply for Judicial Review.*

[97] Learned Queen's Counsel Mr. Braham raised an interesting reason why he states that the interim order should be discharged. Mr. Braham submits that in judicial review matters, the Court has no jurisdiction to grant interim relief before leave to apply for judicial review is granted. He develops this arguments by pointing to CPR 56.4 which he argues only allows the Court to grant interim relief on the application for leave. There must be an application for leave before the Court, and it must be granted before the Court can grant interim relief. He contends that Part 56 stands by itself and that Part 17 does not apply to allow the court to grant interim relief before the substantive claim is filed; Part 17 he submits simply does not apply to judicial review proceedings.

[98] The applicants resist this and submit that the Court acted properly in applying Part 17 to grant interim relief before a substantive claim was filed under Part 56. There is no reason

they say, why Part 56 is to be read to the exclusion of other rules of CPR 2000. No one cited any authority in support of his respective contentions.

## Analysis and Findings

[99] It is appropriate to set out in full CPR 56.4 which reads:

> 56.4 Judicial review – hearing of application for leave.
>
> (1) An application for leave to make a claim for judicial review must be considered forthwith by a judge of the High Court.
>
> (2) The judge may give leave without hearing the applicant.
>
> (3) However, if
>
> (a) it appears that a hearing is desirable in the interests of justice;
> (b) the application includes a claim for immediate interim relief; or
> (c) the judge is minded to refuse the application;
>
> the judge must direct that a hearing in open court be fixed.
>
> (4) The judge may direct that notice of the hearing be given to the respondent or the Attorney General of the relevant Member State or Territory.
>
> (5) Where the application relates to any judgment, order, conviction or other proceedings which are subject to appeal, the judge may adjourn consideration of the application to a date after the appeal has been determined.
>
> (6) The judge may allow the application to be amended.
>
> (7) The judge may grant leave on such conditions or terms as he or she considers just.
>
> (8) Where the application is for an order (or writ) of prohibition or certiorari the judge must direct whether or not the grant of leave operates as a stay of the proceedings.
>
> (9) The judge may grant such interim relief as appears just.
>
> (10) On granting leave the judge must direct when the first hearing or, in case of urgency, the full hearing of the claim for judicial review should take place.
>
> (11) Leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.

[100] First, it is noted that CPR 56.4(7) speaks to the power of the Court to grant leave, but in a separate sub-rule, that is CPR 56.4(9), the Court is given a power to grant interim relief without it being conditioned on whether leave is granted or not. Second, having regard to CPR 2000 in its entirely, Mr. Braham arguments that the power to grant interim relief can only be exercised if there is an application for leave before the Court, as the entire sub-rule indicates, cannot stand. There is nothing in CPR 56.4 or the entire Part 56 for that matter which expressly excludes the operation of Part 17. I draw support for this firstly from the fact that the rules themselves say that they 'apply to all civil proceedings in the Eastern Caribbean Supreme Court in any Member States or Territories',[28] and that 'civil proceedings' include judicial review proceedings.[29] I also draw support from the case of **Quorum Island (BVI) Ltd. v Virgin Island Environmental Council and Another** in which Chief Justice Rawlins stated:[30]

> *"Finally, I note, in passing, the assertion by Mr. Farara that, except for Parts 25 to 27, no other provision of CPR 2000 is applicable to Part 56 of CPR 2000. These are the case management rules. I am not aware of any authority for this assertion. It is possibly premised on rule 56.11(1) of CPR 2000, which specifically provides that Parts 25 to 27 apply for the purpose of directions on a first hearing of a Part 56 claim. However, I see nothing in CPR 2000 that exempts the application of other Parts of CPR 2000 from consideration in Part 56 claims.*

[101] I also note **MD (Afghanistan) v Secretary of State for the Home Department**,[31] where Lord Justice Stanley Burnton, in the context of the UK CPR, considering what were the powers of the Court of Appeal in a case where there was an appeal from the refusal to grant leave and the refusal to grant interim relief, stated:

> "We consider it important to maintain the distinction between a refusal of interim relief and a refusal of permission to apply for judicial review. Interim relief may be refused although the Court has not decided to refuse permission to apply for judicial review, as where no sufficient case of urgency is made out. Conversely, it may be appropriate to grant interim relief even though no decision has been made to grant permission to apply for judicial review.

[28] Rule 2.2(1)
[29] Rule 2.2(2)
[30] Civil Appeal No. 21 of 2009 BVI at paragraph 29
[31] [2012] EWCA Civ 194 (28 February 2012)

[102] There is also the court's powers to grant interim relief generally found in section 26 of the Eastern Caribbean Supreme Court Act (St Christopher and Nevis) Chapter 3.11, which states *inter alia* that:

> *(1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge thinks just.*

[103] Having regard to the foregoing, I find that Part 17 applies to proceedings to be commenced under Part 56 of CPR 2000.

See also the following cases from the United Kingdom's Queens Bench Division, in which interim relief was either granted or considered before permission to apply for judicial review was granted, namely: *R (On the Application of Muhammad) v Secretary of State for the Home Department* 2013 WL 5338116 Queen's Bench Division (Administrative Court); *N v Newham LBC* 2013 WL 3994856 Queen's Bench Division (Administrative Court); *R. (on the application of S) v Secretary of State for the Home Department* 2013 WL 5730242 Queen's Bench Division (Administrative Court).

B. SUBSTANTIVE GROUNDS FOR THE DISCHARGE OF THE ORDER

SUBSTANTIVE QUESTION # 1

*Whether the applicants have demonstrated that they are possessed of sufficient and relevant interest to commence these proceedings against the respondents?*

[104] The respondents have argued that the applicants did not have the relevant *standing* to bring this application. They ground this argument on section 96 of the Constitution which provides as follows:

> *(1) Subject to sections 23(3), 37(10)(b), 50(7) and 116(2), any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.*

*(2) The High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened and to make a declaration accordingly."*

[105] They go on to contend that: "it is a prerequisite for a claim under section 96 of the Constitution that the person must establish the particular section of the Constitution which 'has been or is being contravened'. Section 96 does not refer to the likelihood of future breaches unlike section 18 of the Constitution which contemplates the likelihood of such future breaches. Moreover section 96 contemplates that the only person who can bring an action is the person who can allege the contravention relates to him."

[106] They argue further: "It is further submitted that in order for the claimants to establish *locus* they must show a sustainable allegation that a provision in the Constitution has been or is being contravened and that such contravention has affected their rights."

[107] The applicants have not really 'locked horns' on this argument launched by the respondents; their answer to this point has been rather simple. It is their contention that they have a meritorious claim in seeking to challenge a decision of the Constituencies Boundaries Commission. This decision, they say is reviewable.

## Analysis and Finding

[108] In recent years, the courts have been inclined to defer deciding this threshold issue until there is consideration of the substantive issues in the particular case. A useful analysis of some of the case law was undertaken by Rawlins J.A. (Ag.) as he then was, in **The Attorney General v Martinus Francois**:[32]

> *"**Re Blake** (1994) 47 WIR 174 In this case, this Court canvassed the merits of an application that challenged the appointment of a Prime Minister after inconclusive general elections. It found that the application was unmeritorious. The Court therefore decided that it was unnecessary to consider whether the applicant had locus standi, either by way of sufficient interest or relevant interest, in the subject matter of the application. In **Spencer v The Attorney General of Antigua and***

[32] Civil Appeal No. 37 of 2003, St. Lucia at paras 145 and 145.

*__Barbuda__ (1999) L.R.C. 1, through the Judgment that was delivered by Sir Dennis Byron, C.J., (Ag.), as he then was, confirmed and commended this approach.*

*The applications in __Spencer__ were for declarations under the Constitution. However, it is my view that the approach that was used and recommended in that case is also referable to claims for judicial review and for declarations outside of the Constitution. Lord Denning, MR, applied it in __Blackman v A.G.__ [1971] 1 WLR 1037, in which a private citizen sought an order declaring that it was unconstitutional for the United Kingdom to submit to the Treaty of Rome. In that case he found that the claim was unmeritorious and did not therefore consider whether the applicant had locus standi.*

*This approach that was recommended in __Spencer__ accords with good law and reason. An applicant for a declaration can have no locus standi in an unmeritorious claim. On the other hand, in a meritorious case, it must be necessary to canvass the issues and the facts in order to determine whether there is sufficient nexus between an applicant and the subject matter of the claim to give him or her locus standi."*

[109] From one perspective, this is essentially the approach that it seems that the respondents are urging to court to adopt. They are effectively saying that the applicants must show the breach of the Constitution that affects them. They must show the meritorious claim even before *standing* can be determined. But on a separate view, their submission reveals them to be saying that even if the Commission has acted improperly, these applicants still do not have the relevant interest to move the court. It is for this reason, and the fact that none of the cases seem to be saying that in all instances, there must be a determination of the substantive issues before issues of standing are considered, that the court in the circumstances of this case, would proceed to determine the issue of 'standing'.

[110] Part 56 sets out certain rules relating to the right to make application for judicial review. It states:

*"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.

[111] Justice of Appeal Rawlins (Ag.) continued his analysis in the case of **Attorney General v Martinus Francois**:[33]

> *"Part 52.2 of the Rules then provides very liberal and relaxed rules of standing for applications for judicial review. These, as we have seen, relate to applications for prerogative orders. Interest groups and bodies are particularly facilitated. There is still a required that the person or body should be 'adversely affected' by the decision. Interestingly, Part 56.2(d) of the Rules confers standing on a body or group that can show that the matter that is complained of is of public interest, and the body or group possesses expertise in the subject matter of the application."*

[112] Are these applicants who have been adversely affected by a decision? Might they also be persons who are affected under a relevant enactment of the constitution?

[113] The applicants in this case are contending that the Commission has acted contrary to the constitutional rules that govern their powers to make recommendations. If there has been a breach of section 50 of the Constitution they say, this will have a direct impact not only on the way they exercise their rights to vote but that also they are members of the National Assembly who intend to run in the next election and the alleged unlawful conduct of the Commission will have the effect of affecting their interest, and possibly unlawfully affect the outcome of the next general elections.

[114] This is an attractive argument. Section 50 is in place to ensure that the Commission functions to make recommendations to divide boundaries is done in a clear and transparent manner, and in accordance with the provisions contained in Schedule 2 of the Constitution; it is an essential part of a free and fair election. If the Court takes the

[33] *Martinus* (n. 32) at para 151.

Applicant's case at its highest, and consider that there has been a breach of section 50, then the result could be a lack of transparency with regards to the entire process. This lack of transparency may mean that the process has been interfered with for the purposes of gerrymandering the elections. If in these circumstances, these applicants are not clothed with interest, I fail to see who could have interest when section 50 is being breached.

[115] I am fortified in this view when I consider the words of Lord Denning M.R. in **Ex Parte Blackburn** cited with approval in **Inland Revenue Commissioner:**[34]

> *"I regard it as a matter of high constitutional principles that if there is good ground for supposing that a Government Department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injure thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the court of law and seek to have the law enforced, and the Court in their discretion can grant whatever remedy is appropriate."*

[116] In the same case Lord Diplock reinforced this very point, when he said:

> *"It would in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."*

[117] More closer to home and treating with the Boundaries Commission in St. Vincent and the Grenadines is the Privy Council's decision of **Randolph B Russell and John G. Thompson v The Attorney General of St Vincent and the Grenadines and the Supervisor of Elections.**[35] In this case the Privy Council was called upon to consider an appeal grounded in sections 33 and 96 of the St. Vincent and the Grenadines Constitution (provisions equivalent to the St Kitts and Nevis section 50 and 96). The question of 'standing' arose and the court stated:

> *"To minimize future controversy it may however be helpful to observe that a breach of section 33 infringes the constitutional rights of all citizens eligible (or who will become eligible) to vote in the next election. They see no reason to confine the remedy for the grievance thus resulting in any category of citizen, and indeed their lordship have tried in vain to formulate a working basis on which the right to apply for relief might be limited. The Court will not of course tolerate being swamped with unnecessary or harassing proceedings, but the grant of declaratory relief is always*

[34] Blackburn [1976] 3 All ER 184 quoted with approval in Inland Revenue Commissioner [1982] A.C. 617 at page 641
[35] Privy Council No. 4 of 1996 per Lord Mustill at paragraph 33

*discretionary, and moreover the court have an overriding power to prevent abuse of its process. These should prove sufficient to keep the jurisdiction within bounds.*

[118] This Court agrees with the principles and the approach set out in the cases above. In answering the first substantive question, the Court has determined that these are applicants who have standing to commence an action for judicial review in the circumstances of this case.

SUBSTANTIVE QUESTION # 2

*Whether an Order should have been made restraining the Governor-General?*

[119] This has been one of the more substantial issues raised by the respondents. They contend that no order should have been made against the Governor General to perform what is essentially a constitutional function. The respondents have presented a number of arguments to persuade the Court that the Governor-General should never have been restrained.

[120] For the Prime Minister, Mr. Astaphan S.C. stated that while it was possible for the report of the Commission to be challenged, it was now too late to do so, as it had already been used as the basis for a draft proclamation from the Governor General, and was submitted to the National Assembly, and had been debated. This means, he submits, the report has been subsumed in the affirmative resolution process, and that there was no report capable of being challenged again. Having regard to the fact that National Assembly can reject the draft proclamation under section 50(5), or approve it under section 50(6), the process has evolved into a parliamentary matter. Bad faith cannot be imputed to the Assembly. More significantly, the Assembly is not required to be guided by those constitutional factors that are prescribed by Schedule 2 Rule 2 on the Commission. The Assembly is at large to debate and exercise their parliamentary powers and decide whether to reject or approve.[36] Their approval and subsequent resolution cannot be thereafter challenged except by a challenge under the limited scope of Rule 1 of Schedule 2 of the Constitution. For these

[36] Incidentally flying in the face of the objections of the respondents on the 'adequate alternative remedy' argument.

reasons, he states, the claimants cannot seek at all to bring this claim for judicial review. This is sufficient to discharge the Order against the Governor General, he argues.

[121] For the Governor-General, Mr. Braham Q.C. adopted the submissions of Mr. Astaphan S.C. He further submitted that it is illogical for the applicants to contend that once the report of the Commission is flawed the Court can impose a conservatory order against the Governor General. He submits that the only person who can act on the Report of the Commission is the Prime Minister, and that once the draft resolution was submitted to the Assembly, and they acted on it, the Report is juristically dead, and that the Commission is *functus*. He states that if there is no challenge to the Resolution, there is no basis to challenge the Governor-General. The resolution emerged from the parliamentary process. Unless it can be shown that Parliament has breached some section of the constitution there the court has no power to intervene. He submits the Assembly is exercising its original and independent powers, and the proclamation is the final act in the parliamentary process. He accepts that the court can interfere in the parliamentary process, but he cautions that this should only be in exceptional circumstances, which do not exist in the present case.

[122] For the Commission and the Attorney General, Mr. Forde Q.C. argued the applicants' approach by way of judicial review is misconceived. He submits that the applicants should have commenced this matter by way of a constitutional motion instead of an application for leave to apply for judicial review. Mr. Forde Q.C. while making these arguments to discharge the conservatory order, sought orally to apply the same arguments with equal force, to the question as to whether leave should be granted at all. He argued that '[i]n the instant case, judicial review is not available against the Governor General for section 50(6) of the Constitution does not require any decision to be made' which is amenable to judicial review. 'On the contrary,' the Learned Queen's Counsel argues, 'the function of the Governor General is merely part of the process of making the law as passed by Parliament. The Governor General's act under section 50(6) of the Constitution is merely the last step in the legislative process. Any challenge against the proclamation made under section 50(6) of the Constitution should be by way of constitutional action instead of

judicial review. Section 50(7) of the Constitution contemplates such a challenge and limits the same.' He added that, 'section 50 the Constitution provides that the Governor General 'shall make a proclamation in terms of the draft'…. the Governor General has no discretion as to whether he should make the proclamation. Indeed he is obliged to do so.'

[123] Mr. Forde Q.C. referred this court to the case of Hon. Shawn K. Richards v The Constituencies Boundaries Commission,[37] where the learned judge concluded that the decisions of the Commission are reviewable. He submits to this Court that that case does not decide that the decisions of the Governor General are reviewable.

[124] The Learned Solicitor General, in written submissions for the Attorney General approaches this argument slightly differently. She contends that *"In order to seek a remedy available generally under any law in proceedings in the in the High Court under section 96(3) of the Constitution, a declaration that a provision of the Constitution has been or is being contravened must first be made by the High Court under that subsection. A declaration can only be made after an application has been filed; in the instant case no application has been filed.*

[125] All of the respondents have contended that it was improper to join Her Majesty's representative, the Governor-General to these proceedings in any event, so that it follows that no order could ever be made against him.

They rely on The Prime Minister and Juno Samuel v Sir Gerald Watt Q.C. Civil Appeal No. 5 of 2012 and Hochoy v Nuge and Others (1964) 7 WIR 174.

[126] The respondents have pointed to section 116 of the Constitution which provides as follows:

> *"Where by this Constitution the Governor-General is required to perform any function in his own deliberate judgment or in accordance with the advice or recommendation or, or after consultation with, any person or authority, the question whether the Governor-General has so exercised that function shall not be inquired into any Court of law.*

[37] Hon. Shawn K. Richards v The Constituency Boundaries Commission and The Attorney General SKBHCV 2009/0159 SKN (unreported) at paragraph 211.

[127] They rely on the case of **Re Blake**[38] where Sir Vincent Flossiac, having made reference to this provision, stated:

> *"In my judgment section 116(2) of the Constitution is an unequivocal constitutional ouster of the jurisdiction of the High Court to entertain any application for judicial review of a decision made by the Governor-General in exercise of the constitutional and prerogative powers conferred upon him by section 52 of the Constitution. In this regard, the Appellant drew the attention of the court to section 119(II) of the Constitution which provides that:*
>
> > *"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any function under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."*
>
> *"Section 119(II) of the Constitution acknowledges the inherent jurisdiction of the High Court to entertain applications for judicial review of judicial, quasi-judicial and administrative decisions of public authorities. But section 119(II) must be read subject to 116(2) of the Constitution which expressly or impliedly excerpts or exempts from judicial review any decision made by the Governor-General."*

[128] The respondents stated that this case concerned a decision of the Governor-General. No decision is made here by the Governor-General. He does not decide whether to make or not make a proclamation. He is constitutionally obliged to do so as part of the parliamentary process, and to give effect to the resolution of the Assembly.

[129] The respondents say that section 116 is not to be construed in isolation. It reflects the constitutional principle that the Governor-General is not to be made the target of legal proceedings, and if he is clothed with power to make decisions the jurisdiction of the high court is ousted. It stands to reason therefore that if the Constitution imposes a duty to make a proclamation, this duty, as opposed to a decision is not subject to the court's jurisdiction and in particular the coercive powers of the court."

[130] In his response, Mr. Mendes Q.C. for the applicants in detailed written submissions supported by oral arguments, states in essence, that the applicants, whether by the ex

[38] (1994) 47 W.I.R. 174 at page 180

parte application for the Interim Conservatory Order, or the Amended Application for leave, has not sought to judicially review any decision of the Governor General. The restraint on the Governor-General is simply to preserve the status quo pending the determination of the issues relating to the Commission's Report.

[131] There appears to be no dispute, Mr. Mendes submits, that having regard to the constitutional limitations imposed on the Commission, the court has the power to review any decision made by the Commission.

[132] Mr. Mendes states that once a final proclamation has been made by the Governor-General, its validity can only be challenged on the ground that it does not give effect to Rule 1 of Schedule 2, and possibly that it is not in the terms of the draft submitted to him by the Prime Minister. He points to the fact that the Court did not see fit to restrain the Prime Minister from laying the draft proclamation before the Assembly, nor restrain the debates, has resulted in a resolution of the Assembly; it really means that all that is left in the process is the making of the final proclamation. This being the case, an aggrieved person would be precluded from challenging the validity of the Report submitted by the Commission, and any challenge that might have already been launched would be pointless.

[133] He reasons it would follow that some relief must be granted to postpone the completion of the process leading to the making of the proclamation by the Governor-General, if an aggrieved person is to be accorded his or her right of access to the Court to challenge the Report of the Commission.

He relies on Toussaint v Attorney General of St. Vincent and the Grenadines [2007] 1 WLR 2825.

[134] He submits that 'no doubt the right of access to court would have been accommodated if an aggrieved person were swift enough to make an application for leave to apply for judicial review immediately upon the execution of the Report by the Members of the

Commission and before the report is submitted to the Governor General. On the application for leave, if it can be heard in due time, interim relief in the form of an injunction restraining the submission of the report to the Governor General could be applied for, and if obtained, would provide sufficient breathing space to properly air the issues which the aggrieved person wished to raise. Of course, being in a position to approach the court in due time would depend upon the aggrieved person having received the Report, studied its impact, taken legal advice, drafted the necessary application and accompanying affidavits, and being accommodated by the Court, all before the Report is submitted to the Governor General. For it is obvious that once the Report has been submitted to the Governor General, it would be too late to restrain its submission.'

[135] He points out that in this case, 'the Report was executed on September 5th 2013, and submitted to the Governor-General on September 6th 2013, making it impossible to invoke the court's supervisory jurisdiction in time.'

[136] Mr. Mendes contends that the major flaw in the respondents' arguments is their failure to appreciate as a general rule, a decision of a public authority which is held to be invalid, is treated as being without legal effect, *ab initio*, with the consequence that anything done on the basis of that decision is likewise invalid.' Neither the Prime Minister nor the Governor-General is bound to carry out their statutory duties in relation to a Report which is unlawfully made (in the case of the Prime Minister) or in relation to a draft proclamation which has been produced as a result of an unlawful process. Even though the Governor General is required by the Constitution to make a proclamation in terms of the draft submitted to him, therefore, this court nevertheless has jurisdiction to restrain him from perfecting that which might turn out to be an unlawful process, if judicial review proceedings in relation to the Commission's report is brought to a successful conclusion for the applicants.

He relies on F Hoffman-La Roche v Secretary of State for Trade and Industry [1975] AC 295 and Boddington v British Transport Police [1999] 2 AC 143.

[137] Mr. Mendes points out that the ordinary case, because a declaration of invalidity operates retrospectively, such that a proclamation issued on the basis of an illegal report would be itself set aside; there would be no need to restrain the validity of the proclamation unless rights are immediately affected. But in this case there would be every reason to restrain the making of the proclamation because, once made, it can only be set aside on limited grounds, not including that the report on which it is based is invalid, and in any event, Parliament might be dissolved and an election held on the basis of the altered boundaries making it impossible to obtain effective relief later on.

[138] He further submits that it is misconceived to argue that the report has become subsumed in the resolution of the Assembly and is now immune from challenge. It is irrelevant that the process leading up to the final proclamation might be characterized as 'legislative'. In short he says that while the court should not intervene too readily in the internal process of the Assembly, 'the separation of powers doctrine has never been involved to deprive the High Court of jurisdiction to review the legality' of actions taken by the Assembly.

He relies on the cases of Bahamas District of the Methodist Church v Symonette [2000] UKPC 31 at paras 25-37; Rediffusion (Hong Kong) Ltd. Attorney General of Hong Kong [1970] AC 1136.

Analysis and Finding

[139] These arguments have raised squarely the extent of the powers of the court to intervene at the various stages of the process created by section 50 of the Constitution. At one extreme, it seems to be common ground that the Court is empowered to review a decision of the Commission to ensure that they have acted contrary to the instructions given to them by the Constitution. At the other extreme, it also seems to be common ground that once the proclamation is made under section 50(6) by the Governor-General, the court's role is limited by section 50(7), to ascertaining whether it is in compliance with Rule 1 of Schedule 2. It is between these two extremes that the dispute as to the Court's jurisdiction falls. The applicants would have it that once the court has reason to believe that the

Commission has acted as no reasonable Commission would, then the Report would be deemed to be void *ab initio*, and such a determination ought to have, in the circumstances of this case, the effect of nullifying every subsequent step taken on the basis of the unlawful Report, and thereby allowing even an order which has the effect of preventing the Governor-General from making the proclamation under section 50(6). The respondents are of a different view; they would wish that any power to review the Report were lost when Parliament was seized of the draft proclamation. In any event they say it was improper to restrain the Governor-General. The Learned Solicitor General states that the applicants now need a declaration. And their failure to file an application seeking such a declaration means all is lost.

[140] The Court in approaching this issue considers that it is useful to determine first what is the effect of section 50(7) of the Constitution. Does it limit the court's powers to intervene even before the Governor-General has acted under section 50(6) as Mr. Forde Q.C. suggests? Is the Court entitled to approach its powers to intervene in the limited sense that is prescribed by section 50(7)?

[141] The answer to this question must be found in the language of section 50(7) itself. This subsection states:

> *"The question of validity of any proclamation by the Governor-General purporting to be made under subsection (6) and reciting that a draft thereto has been approved by resolution of the National Assembly shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in schedule 2."*

[142] Applying ordinary rules of interpretation, the literal words of this provision states that it relates to 'the question of the validity of any proclamation by the Governor-General under subsection (6)'. This subsection does not speak to any of the events that are governed by the other subsections of section 50. There is no expression in this section 50(7) that the Commission's Report or the Assembly's resolution is not subject to the court's oversight. It must therefore mean that only when the Governor-General has acted under section 50(6) is the Court drawn into the limitations of section 50(7). Section 50(7) then is a limited ouster clause, and it is not triggered in this case.

[143] That this is the correct view to be taken of this subsection can also be discerned from an examination of section 96 which states:

> *"(1) Subject to sections 23(3), 37(10(b), 50(7) and 116(2) any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section."*

[144] Section 96 is a provision that allows a person with relevant interest to apply to the High Court for relief when any provision of the Constitution other than those contained in Chapter II has been contravened. This section is subject to a number of ouster clauses contained in the Constitution, one of which is Section 50(7). Logically therefore, relief may be granted under section 96 if the complaints relates to any other subsection in section 50 apart from subsection 50(6), a challenge in relation to which is curtailed by subsection 50(7). The equivalent provisions in the Dominican Constitution were considered in the case of Constitution Boundaries Commission and Another v Baron.[39] The Court stated:

> *"In my view, when s 103 [SKN Section 96] specifically excepted only s 57(7) [SKN s 50(7)] from its application, the clear implication was that every other aspect of s 57 was justiciable. Until the s 57(7) stage is reached, therefore, there is jurisdiction in the courts to inquire into the matter and to grant relief. Without this jurisdiction to grant relief before the resulting act is completed, the citizen intended to be protected would be deprived on any remedy."*

See also Russell (Randolph) and Another v Attorney General of St Vincent and the Grenadines and Another 51 WIR 110.

[145] This Court is therefore of the view that before the final proclamation is made by the Governor General under section 50(6), the Court has jurisdiction to intervene at any stage to ensure that in making recommendations the Commission does not misconstrue their instructions.

[146] In fortifying this conclusion, the Court will proceed to consider this issue from another angle, namely whether apart from the power to review the decision of the Commission, the

[39] 58 WIR 153

Court is able to separately review the actions of the second and third actors, Prime Minister and the Assembly in laying the draft and debating it respectively? This approach really seeks to answer the question as to whether these respective functions can be considered lawful even though the underlying Report that grounded these subsequent actions is itself unlawful?

[147] This issue will turn in part, on what would be the effect of the court declaring that the Report itself was void from the beginning. As was noted by the learned Authors Wade and Forsythe in their treatise on Administrative law: *"An act or an order which is ultra vires is a nullity, utterly without existence or effect in law. That is the meaning of 'void', the term most commonly used."*[40] The learned authors were quoted with approval by Lord Diplock when he stated:

> *"It would however, be inconsistent with the doctrine of ultra vires as it has been developed in English Law as a means of controlling abuse of power by the Executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any less consequence in law than to render the instrument incapable of having had any legal effect."*[41]

[148] As lord Irving stated in **Boddington v British Transport Police:**[42]

> *"Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced unlawful, but is then recognized as never having had any legal effect at all.*

[149] Notwithstanding the existence of this principle and approach of the court which in most cases would have the effect of invalidating everything which followed the invalid act, there are cases when the acts of the second and or the third actor relying on the invalid act may yet be considered valid acts in their own right. Lord Styen in **Boddington** treated with the issue in the following passage:

[40] H. W. R. Wade and C. F. Forsyth, 'Administrative Law' 10th edn. Oxford University Press 2009, at page 250
[41] Hoffman-LaRoche at page 365
[42] [1999] 2 AC 143 at page 155:

*"It has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of invalidity may take decisions and act on the assumptions that these acts are valid. When this happens the validity of these later acts depends on the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the backdrop of the familiar proposition that an unlawful act is void."*

[150] The applicants have commended the above approach for the Court's guidance, and the court considers that this is the proper approach on this issue. So the Court will now address the crucial issue – does the second, third and fourth actors (the Prime Minister and the Assembly, and the Governor General) have the legal power to act notwithstanding the invalidity of the first act. Arguably it may be contended that since, the Commission was only making recommendations and that the decision to change boundaries are really the function of the Assembly, separate legal power is given to the Prime Minister to lay the draft proclamation, and the Assembly to debate and approve the draft proclamation and the Governor-General to make the final proclamation. This argument however, ignores the entrenched provisions contained in Schedule 2 of the Constitution that is to guide the Commission in their functions. No one could be in doubt that the interpretation and application of constitutional provisions including those found in Schedule 2 of the St. Kitts and Nevis Constitution, must be broad, generous and purposive so as to 'reflect the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded'.[43]

[151] A Constitution calls for a generous interpretation, avoiding what has been called the austerity of tabulated legalism[44]. In **Frederick Alexander James v Commonwealth of Australia and the State of New South Wales and Others**, the Privy Council stated:[45]

"It is true that a Constitution must not be construed in any narrow and pedantic sense… It has been said that interpreting a constituent or organic statute… that construction most beneficial to the widest possible amplitude to its powers must be adopted."

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[43] Baptiste J.A. in Steadroy C.O. Benjamin v The Commissioner of Police and the Attorney General HVCAP 2009/023 quoting with approval the words of Byron C.J. Attorney General of Grenada v The Grenada Bar Association

[44] Lord Wilberforce in Minister of Home Affairs and Another v Collins MacDonald Fisher and Another [1980] A.C. 319 at 328.

[45] [1936] UKPC 52 per Lord Wright Master of the Rolls

[152] Parliament must have intended that in the context of the fundamental importance of free and fair elections in any democratic society, the constitutional provisions contained in Schedule 2, must be given full effect to have real meaning. What else could be the 'deeper inspiration and aspiration of the basic concepts on which the provisions of Schedule 2 of the St. Kitts and Nevis Constitution are founded? As was noted by the High Court of Kenya comprising of four judges, in the case of Republic v Independent Electoral and Boundaries Commission and another Ex Parte Councillor Elliot Lidubwi Kihusa & 5 Others:[46]

> *"The right to vote is a prerequisite of any form of democratic governance and interference with this right is sufficient to constitute a breach of the constitution. At the very minimum, each citizen have the right to vote, to cast that vote in secret, and to have that vote honestly counted and recorded. The fundamental tenet of democracy is recognized in Article 21 of the Universal Declaration of Human Rights which state that: 'The will of the people shall be the basis of the authority of government; this will shall be expressed in the periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

[153] These constitutional provisions ought not to be taken as 'tabulated legislation' and to be seen as mere rules to be disregarded. It is significant that these provisions are among the entrenched provisions contained in the Constitution. Once these provisions is given due respect, it could hardly be said that any part of section 50 could have permitted the Assembly to debate a draft proclamation, which debate would validate a Report of the Commission which was formulated in violation of the provisions of Schedule 2; it would render Schedule 2 meaningless.

[154] The learned authors of Wade has also pointed to the emergence of at least one principle which can assist in this case in determining the validity of the acts of the second actor. They note that where it is shown that there is a separate avenue to challenge the first act, this will show that the legislation has given the second actor the power to act notwithstanding the invalidity of the first act. In this case, by virtue of the wide language of section 96 of the Constitution, it is clear that the Report of the Commission, the draft proclamation and the resolution of the Assembly are all open to challenge in their own right

[46] [2012] eKRR at page 38

under the Court's power to ensure that they have acted within the confines of their legislative mandate. There is no separate avenue to challenge (or appeal) the Commission's Report that excludes a challenge to the acts of the Prime Minister and the Assembly.

[155] This Court also found the case of **The Prime Minister and Juno Samuel v Sir Gerald Watt, KCN Q.C.** instructive in this analysis. In this case, the Governor General had a power under the **Representation of the People (Amendment) Act 2001**, to remove a member of the Antigua and Barbuda Electoral Commission on the advice of a Tribunal appointed to investigate the issue of removal. A Tribunal was properly appointed to investigate whether the Chairman, Sir Gerald Watt KCN QC should be removed. A report issued by the Tribunal advised that it could not recommend that the chairman be removed. The Prime Minister notwithstanding this recommendation without any authority to do so recommended to the Governor-General that the chairman be removed and the Governor-General followed this recommendation. The Court of Appeal upheld the High Court ruling that (i) the chairman of the Commission could only have been removed by the Governor-General acting upon the Report of the Tribunal, (ii) the actions of the Prime Minister were amenable to judicial review as he had acted illegally in recommending the removal of the chairman, and (iii) the consequential actions of the Governor-General were themselves the fruit of an illegal act.

[156] That case makes the point that the actions of the second actor can be declared void if the acts of the first actor are illegal or otherwise void. There is also no doubt that the court has a power to restrain even the final legislative act of the Governor-General in assenting to a Bill passed by the Assembly.[47]

[157] In answering the question as to whether the second (third and fourth) actor had the power to act even though the first act was invalid, the answer must be, in the circumstances of this case, having regard to the provisions of the constitution, a 'No'. Thus there would be

[47] Bahamas District of the Methodist Church v Symonette [2000] UKPC 31 paragraphs 25 to 37; Rediffusion (Hong Kong) Ltd. v Attorney General of Hong Kong [1970] AC 1136

no bar to the applicants to institute and maintain an application for judicial review of the decision of the Commission contained in its report. There would be no need to file a specific and separate 'application' to seek a declaration; all of this would be addressed in the judicial review proceedings.[48]

[158] The next logical step in this discussion, is to consider whether, notwithstanding all the above in this analysis, the respondents are right about the Governor-General being wrongfully joined as a party, so that the effect must be that no order should have been made against him in any event, and that regardless of what has been done improperly by the Commission, the Prime Minister or the Assembly, the Governor-General must be allowed to make the final proclamation under section 50(6).

[159] The first point which was made before, but is required to be made again in this context, is that the applicants' complaint is not against a decision of the Governor-General; their complaint is against the Report of the Commissions. Thus, this Court is of the view that **Re Blake** is not applicable to this case and as that case relates to a 'decision' of the Governor –General made pursuant to some power given by the Constitution.

[160] Further it would appear that the Constitution itself by section 50(7) allows a challenge to be made with regards to the proclamation that is made by the Governor-General under section 50(6), so that the acts of the Governor-General are not completely immune from the court's jurisdiction.

[161] This is not the end of the issue, however, as there is merit in the respondents' position that the Governor-General should not have been named as a party to these proceedings. Even the applicants have stated that they are not 'wedded' to His Excellency remaining as a party. This view is grounded in the case of **The Prime Minister and Juno Samuel v Sir Gerald Watt QC**, in which the OECS Court of Appeal has effectively provided guidance

[48] Part 56 of CPR allows an applicant to seek a declaration and the applicants in this matter has in fact sought a declaration in their amended Notice of Application for Leave to apply for judicial review, that the report of the Commission is a nullity, and the grounds in support states *inter alia* that this is because the Commission has acted in contravention of rule 2 of Schedule 2 of the Constitution.

when it is considered necessary to bind the Governor General by an order of Court. Mitchell JA stated:

> *"Since the judgment of Sir Hugh Wooding CJ in the Hochoy case the actions of the Governor General of Antigua and Barbuda are amenable to judicial review in a suitable case. It is a different matter to assert that the Governor-General should be named as a party and the proceedings personally served on her. As Sir Hugh Wooding stated in his judgment:*
>
>> *"…I would suggest that in future the practice to be followed of naming the Attorney General as defendant whenever the validity of any act of state done by the Governor-General is being called in question…in my personal view, the ordinary civilities dictate that the same course should be followed in this country as was followed in New Zealand when Cock and others challenged the validity of an appointment made there by the Governor in Council under its Commissions of Inquiry Act, 1908: they sued the Attorney General- see 28 NZLR 405. In think the same procedure might commendably be adopted here. I recommend accordingly.*
>
> *And Hyatalli JA in his judgment in the same case was of the same view. He said,*
>
>> *"As a footnote merely, to this judgment, I would add that that the constitutional status of the State is now such that it would be more in keeping with its dignity, if matters of this kind were litigated against the Attorney-General. No prejudice is likely to result from adopting this procedure and I join with the leaned Chief Justice in commending its acceptance."*

[162] The OECS Court of Appeal has elevated this to a recommended rule of constitutional practice as Mitchell JA went on to state that, "there is no merit in the suggestion that the Governor-General ought properly to have been named as a party and brought before the Court."

[163] It is to be noted however, that the Learned Justice of Appeal hastened to add that "…there is no merit in the suggestion that her absence means that no lawful order can be made which binds her. She was properly joined as a party when the Attorney General was named in her place in accordance with the recommended constitutional procedure."

[164] This Court will adopt the recommended constitutional procedure and declare that the Governor-General should not have been joined. In exercise of the Court powers under

CPR 2000, the Court will direct that the Attorney-General should be the party who is to stand in His Excellency's shoes for the purposes of these proceedings.[49]

[165] In answer therefore to the second substantive question, and the Court at this stage will phrase it in this manner, as other issues are still to be dealt with – Whether an Order ***could*** have been made against the Governor-General assuming that the applicants did have an arguable case for the purposes of the grant of interim relief - the answer is 'Yes'.

[166] This leads logically to a consideration of the issue as to whether the applicants have shown that there are serious issues to be tried

SUBSTANTIVE QUESTION # 3

*Whether there was a serious issue to be tried (arguable case) grounding the grant of the interim Order?*

[167] At the hearing for the discharge of the interim order, the respondents have contended that notwithstanding that a court might consider that there was 'at first blush' an arguable case on the papers then before it, it was now necessary for the Court to re-examine the case, having regard to all of the affidavits now filed on this Application, to decide whether there is really a serious issue to be tried.[50] The Court agrees that it is right to do so at this stage.

[168] The approach which the Court should take and the tests which are to be applied have been laid down by Lord Diplock in the landmark case of American Cyanamid Co v Ethicon Limited[51] in which he stated:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. …So unless the

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[49] CPR 19.3

[50] Bahamas Oil Refining Company v Rolle (1988) No. 1181 of 1984 Bahamas unreported; Farrington v O'Brien Loans Ltd. (1989) No. 1578 of 1988 Bahamas unreported.

[51] [1975] AC 396

> material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[169] While an order has already been granted, the Court is required on such an application to discharge, to re-examine these issues at this stage.

[170] On their application for interim Relief, the applicants relied on four grounds for complaining that the Commission has acted as no reasonable Commission would. First, they say that the Commission relied on a flawed Census Report to make recommendations to changes to the boundaries of certain constituencies. This amounted to the Commission taking an irrelevant consideration in their decision making process. Second, the applicants submit that the chairman acted on his own without regard to any recommendations to do so, to split the town of Sandy Point. They are effectively saying that he had made a predetermination, and he was not allowed to do this, and again they are saying that the Commission acted as no reasonable Commission would. Third, they say that the Commission failed to take into account the 'other factors' set out in the Second Schedule to the Constitution, Fourth, they say that despite embarking on consultation, the Commission failed to conduct this process fairly and effectively in accordance with known legal principles of consultations. Are these, on the evidential backing of the affidavits, serious issues to be tried?[52]

*The Manner in which the Commission Carried out its Functions.*

[171] The affidavit of Mr. Peter Jenkins, sworn to on the 13th September 2013 and the affidavit of Mr. Vincent Byron, sworn to the 18th September 2013 provide the Court with an insight on the workings of the Commission. Though the affidavits of these gentlemen vary in certain matters, quite a few matters are not contradicted. In this regard, it is instructive to note paragraph 8 of Mr. Jenkins' affidavit:

[52] Tetrosyl Ltd. v Silver Paint and Lacquer Co. Ltd. [1979] C.A.T. reported in New Law Journal August 28, 1980

*"…The Commission commenced its work on or about December 6, 2012 and not February 27, 2013… At its first meeting the Commission agreed on the procedure to be adopted to execute its mandate. It was decided that certain document would be presented to members of the commission to guide the proceedings. These documents were the Constitution, judgment of this Honourable Court in Civil Suits No. SKBHCV2009/0159 and 0179, the Census Report of 2011, and the report of the previous boundaries Commission. It was also decided that experts would be consulted and that all political parties would be invited to present written proposals on whether the Boundaries should be changed and how. Further it was decided that after the commission reviewed the proposals of the political parties, individual commission members would tender their own proposals. After the process was completed, a draft report would be prepared by me for consideration by members and the final report would be prepared."*

[172] While Mr. Vincent Byron challenges, by reference to the minutes of the meeting on the 6th December 2012 when certain decisions were taken by the Commission on the procedure to be adopted, he accepts that most of what Mr. Jenkins says about the procedure was in fact carried out by the Commission. He does state that he has difficulty accepting that any decision was taken that the chairman would prepare the final report and produce to the others. The Court does not consider this to be a material issue for the reasons that will soon become apparent.

[173] Whilst it is no part of the Court's function at the interlocutory stage to resolve conflicts on the affidavit, it would be important in this exercise to determine whether any conflicts on these two affidavits are material in the sense that they raise a triable issue. In examining the evidence, the Court has considered the Report of the Commission that was signed by four of the five members. The abstaining member was Mr. Vincent Byron. In the usual case of challenge to a decision of a statutory or constitutional body, an applicant is left often with speculative contentions on how the body may have approached its task. If that were the case in this matter, the Court could have easily relied on the Report and disregard such attacks as being without basis. In this case, however, the Court is actually faced with evidence from a member of the Commission who is attempting to place in doubt certain matters that are contained in the Report. This has given the Court some pause in terms how to view the Report. Whist it is accepted that the Report is valid once the majority has accepted its contents, Mr. Byron is raising certain matters that has to be

examined to determine whether they affect the report and the conclusions the Court can draw on serious issues to be tried.

[174] It is in this context that the Court has approached the examination of the evidence relating to each complaint.

*The 'Flawed Census Report'*

[175] The evidence of the complaint comes first from the affidavit of the 1st named Applicant, Mr. Shawn K. Richards sworn to on the 9th September 2013. He stated at paragraphs 9 and 10 that:

> *"9. The Commission had its first working session on February, 2013 and has met subsequently. I have been informed by Senator Vincent Byron who was appointed to the Commission by the Leader of the Opposition, and I verily believe, that the Commission has purported to rely on a document termed Preliminary Census Data 2011 to carry out its work in reviewing the number and boundaries of the constituencies in St. Kitts and Nevis. Senator Byron has also informed me and I verily believe that the Permanent Secretary in the Ministry of Sustainable Development responsible for the Census Exercise had informed the Commission that the Census Exercise is still being conducted and that the process of verification had to be completed and computer checks and edits have to be begun, and that both processes can lead to change in the data, even if marginal. The Gazetted Preliminary Census Data is shown to me…."*
>
> *10. Senator Byron has also informed me that an opinion was sought from the learned Attorney General on the use of this preliminary Census data. In that Opinion, the Learned Attorney stated "To use the preliminary census as is without more when it is clearly stated that the information is not final and is likely to experience changes is not recommended because this can lead to questions about the accuracy of the information, the accuracy of the work carried out by the Commission and the very question that is now the subject of this opinion, that is, whether the Commission ought to rely on the report." The Attorney General continued: "It may be argued that the report states that the information is likely to experience only marginal change. However, in the context of our small society a marginal change may have a big impact. This especially has to be borne in mind in context of the understanding that the decisions made as to the composition and delineation of the constituencies also determines the boundaries for electoral purposes. Such decisions make a significant impact especially in electoral areas that are hotly contested and where the margin of victory for the winning candidate is usually slim." Senator Byron has provided me with a copy of that opinion ..."*

[176] The Court now turns to the Report. The Report states that during the Commission's work, Mr. Byron took objection to the use of the Preliminary Census Report. This led to the Commission seeking advice from the Attorney General's Office. Following this advice, the Commission decided to have technical input on the Preliminary Report. In this regard, they had meetings with Ms. Beverley Harris, the Permanent Secretary in the Ministry of Sustainable Development, the person responsible for conduct of the Population Housing Census 2011, and Mrs. Angela Walters-Delpeche, the Head of the Statistics Department (Nevis Island Administration) who 'looked at the Census data, and assisted with interpreting the data. This included discussions in 'the differences in Density of the population in the respective islands of St. Kitts and Nevis and the respective parishes' of both islands'.

[177] Quite apart from specifically examining the Preliminary Report, there was also technical input from Mr. Randolph Elmeade, Director of Physical Planning and the Environment, who 'assisted in identifying the movements and shifts in the population within the country'. The Commission also met with Mr. James Buchanan, a private land surveyor for technical input. He 'shared his expertise on matters to be considered in locating of boundaries as they relate to Schedule 2, including geographical features; existing administrative boundaries; the means of communications; and the need to ensure adequate representation of sparsely populated rural areas.'

[178] Mr. Vincent Byron, on behalf of the applicants, (and answering an affidavit on behalf of the respondents sworn to by the Chairman of the Commission, Mr. Jenkins on the 13th September 2013), treats with these matters in his affidavit sworn to on the 18th September 2013. He states, beginning at paragraph 12:

> *"12. With respect to the attendance of Beverley Harris at the meeting of July 2nd 2012, I note that Ms Harris informed the Commission that the verification process had been completed in St. Kitts except in relation to one parish and that she was not certain how much of St. Kitts had to be verified. She said also that the verification process in relation to St. Kitts would be completed at the end of July. As far as Nevis was concerned she said that the verification process in Nevis started late but given the small size of Nevis, they should be able to catch up. I personally asked Ms Harris if she would be satisfied at the end of the verification, which was not yet complete, that it provide a reliable basis upon which she could*

*get a count or would she want to complete the computer editing to get the final number. Ms Harris indicated that the computer verification and edits would be needed. I therefore maintain that in the absence of computer verification and edits bearing in mind the possibility of change in data, even if marginal, the preliminary census data should not be used… my position is hardened when I question why there is a rush to adjust the boundaries, elections not being constitutionally due until 2015, when Ms Harris had said that the verification process, including computer edits, would be completed shortly. Finally on the use of the Preliminary Census Data 2011, I have no recollection of the Commission making the decision to use the Preliminary Census Data 2011, although I know that it, and not the final work product of the census authorities was used. I know that the chairman used such a decision based on unseen advice as is reflected in his Review of Proposals document…. For my part I have always maintained my objection to use of this incomplete data…"*

*13. I agree that in May 2013, I was present at a meeting in which oral presentations were made by Randolph Edmeade, Director of Planning and Mr. James Buchanan Licensed Land Surveyor, on the review of boundaries in St. Kitts, as alleged in paragraph 14 of Jenkins affidavit. Mr. Buchanan did give a general presentation of Boundaries in Nevis, but Mr. Edmeade declined to do so, as there was according to him, a Director of Planning in Nevis. While these gentlemen did raise certain elements of subparagraph b(i) to (v) of schedule 2, it was done briefly, and there was no discussion of same amongst the members. Further my concern is that respect to the proposals before the commission, there was absolutely no discussion amongst the members with respect to the matters set out in subparagraphs b (i) to (v) of schedule 2."*

[179] What does this evidence of Mr. Byron do to the Report's version? I repeat that this is not an exercise in resolving contradictions but it is one to determine whether any contradictions found are material, and whether they raise serious issues to be tried. He does not contradict the Report when it states that Ms Harris was called to discuss the data, but he states he was not satisfied that the Commission should use the data having regard to her responses. It is to be noted that he does not make any reference to Ms. Delpeche, the statistical officer who the Report states 'assisted in interpreting the data'. The Court notes that while he says that Mr. Edmeade declined to make a presentation, he along with Mr. Buchanan did raise certain elements of 'subparagraph b(i) to (v)'[53] albeit briefly. It is difficult to see how Mr. Byron is contradicting the Report in material matters. It might have been material for him to say that the Commission failed to seek any guidance on what impact the minor changes might have. But he actually gives evidence that they did in fact

[53] (The Court is forced to assume that he means Rule 2 (a) to (e) of Schedule 2).

do so. He does say that there were no discussions between members, but this is not a matter that the Court should intervene in to direct the Commission how they should conduct themselves. The Commission is constitutionally entitled to regulate their own procedure. They are the ones to say that they should have discussions or more discussions. What the Court considers relevant is that the Commission appears to have actively addressed the concerns that were constantly being raised by Mr. Byron; his affidavit does not rebut this. To my mind the essential complaint still remains as Mr. Richards has formulated it, that is whether 'in acting on the preliminary report without it being verified, the Commission has acted improperly and in breach of their mandate?"

[180] Having regard to the fact that I have essentially stated that there are no material contradictions of facts between the two versions raising triable issues, I will then consider whether as a legal question, the Commission could have used this preliminary data in their deliberations?

[181] The applicants cannot be complaining that the boundaries cannot be changed. The essential complaint here, and the only complaint that the applicants can be making is that in acting on the preliminary census report, the Commission acted on data or information that is unreliable. In this regard it is noted that the applicant, Mr. Shawn Richards, exhibited as 'SR1' to his affidavit of the 9th September 2013, letters which he wrote the Commission during the consultation process requesting more information including detailed ED data and that the Commission pointed him to the preliminary census data published in the Gazette. There may be an implication here that the Commission really did not rely on any other source of information. The applicants say that in acting on the Preliminary Census Report, the Commission has acted on irrelevant considerations and therefore acted as no reasonable Commission would.

[182] How does a reasonable Commission act? Should a reasonable Commission have acted on this Preliminary Report? An important passage is found in Professor H. W. R. Wade

text on Administrative Law (5th edn., 1982) p 362 quoted with approval in R v Boundary Commision ex Parte Foot and Others[54] at page 626 :

> *"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended."*

[183] The question then is what is the objective standard. This was the approach of the Court in ex parte Foot in which the role of the Boundaries Commission in the UK was being examined. In this case, having quoted this passage Sir John Donaldson MR proceeded to answer it by saying:

> *"The locus classicus on the subject is a passage from the judgment of Lord Greene MR. in Associated Provincial Picture Ltd v Wednesbury Corp [1947] 2 All ER 680 at 683…in which he stated what has become known as the 'Wednesbury principle' Counsel for the appellants expressly accepted that this principle applies so as to govern and limit the powers of the court to intervene in regard to the activities of the commission…. The Wednesbury principle would or might on our opinion entitle the court to intervene if it was satisfied that the Commission had misdirected themselves in law, or had failed to consider matters which they were bound to consider or had taken into consideration matters which they should not have considered. It would not, however, entitle it to intervene merely because it considered that, left on its own, it might (or indeed would) have made different recommendations on the merits; if the provisional conclusions of the commission are to be attacked on grounds of unreasonableness, they must be shown to be conclusions to which no reasonable commission could have come. The onus falling on any person seeking to attack their recommendations in the courts must thus be a heavy one, which by its very nature may be difficult to discharge."*[55]

[184] Discussing these principles in the context of consideration of irrelevant considerations, Sir John Donaldson MR. in the case of R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd., stated:[56]

> *"…it is said to follow that the first stage in every decision-making process involves the decision-maker considering and determining precisely what are the limits of his*

[54] [1983] 1 Q.B. 600
[55] *Ex parte Foot* (n. 54) at pages 626 to 627
[56] [1987] 2 All ER 1025 at p 1032

> *discretion and what are the precise parameters delimiting matters which are and which are not relevant to his consideration."*

He continued later on:

> *"Good policy making, administration and decision making involve studying problems from all angles. It is a practical process and must never be allowed, and still less induced, to become a theoretical or legalistic exercise. For my part I can see nothing whatsoever to criticize in the approach of a decision maker which involves him in saying to himself. 'I do not know whether, as a matter of law, Factor A is or is not a relevant consideration. This is or may be a difficult, but I do not need to consider it further, because I am quite satisfied that other factors, which are admittedly relevant, are of such comparative weight that my decision will be the same whether or not I take account of factor A.'*

[185] In this case, from the evidence on both sides, the Commission had considered the Preliminary Census Report. The members of the Commission were aware that it was not completed. They sought specific advice on how they should treat with it. They got advice from the Attorney General that it would not be appropriate to act on it having regard to the possible consequences of marginal shifts following the verification process. With this in mind they called upon the Ministry responsible for the Report and other technical persons and discussed these shifts. In this Court's view they were doing essentially what was recommended by Sir John Donaldson MR in the *ex parte* Wellcome Foundation case. It could not be said that they should not consider this Report at all. In fact if this Commission had failed to give any consideration to this Report in their decision making process, they would have been open to a challenge that they failed to take relevant matters into considerations. Once they were aware of the possible shortcomings of the Report and they understood what marginal shifts could mean, it could hardly be said that they blindly followed the Report. Here the Commission was approaching the decision making process from different angles; they were meeting with experts, they were looking at guidance from some of the relevant case law, they were looking at their constitutional powers. Surely in this process, they were entitled to look to the available census report. In looking at this document, they were constantly reminded that it was possible that there could be marginal changes in the final data. It was necessary that they seek clarity on what effects those possible marginal changes could have on the ground. If they then proceeded to seek technical guidance and discuss these possible changes, could it be argued that the weight

that they had given to this aspect of the Report was not reasonable in the circumstances?[57] Should they have done as the applicants are contending, that is wait for the Census Report to be finalized? Is that the only reasonable stance that the Commission can take?

[186] From the standpoint of the applicants, they are satisfied that the legal opinion of the Learned Attorney General makes the point quite clearly. Marginal changes may likely have significant impact on the ground. The applicants have presented some evidence that the margin of votes separating candidates at the last two elections were, in certain districts, within a hundred of votes. They opine that any small change can have a devastating impact on the outcome of the elections one way or the other. But this is not a matter that the Commission could properly have regard to in their deliberations. If a Commission were to begin to consider who would likely win or lose his seat in the Assembly if changes are to be made in Boundaries, that would consciously or unconsciously have the effect of influencing their decisions and could by itself 'gerrymander' the elections. Nothing in schedule 2 informs the Commission that they must have regard to whose stronghold they would be splitting, or whether any changes would dismember any member's constituency and affect his chances at the next elections, or whether having regard to the voting patterns, any minor change might have the effect of removing a member's support base in a constituency. This Court would go as far as to say that these are matters that they must not have any regard to. They are entitled to hear about these things during consultations, but they must not let these things affect their decisions on changing boundaries. In fact, if it needs to be stated again, if those are the effects of boundary changes, so be it. It cannot be reasoned that because the effect of proposed changes is to adversely affect a person's chances at being returned as a member of the Assembly, it therefore means the process is flawed. If questions are being raised, the process can surely be examined, but it must be examined without regard to those matters.

[57] (R (on the Application of Beresford) v Sunderland City Council [2001] 4 All ER 565 where it was held that even though the committee had taken into account certain irrelevant consideration, they had been immaterial to its ultimate decision.

[187] Thus, for all the reasons set out above, nothing that the Applicant has presented indicates that the Commission approached their decision making in an unreasonable manner.

[188] In these circumstances, this Court is not satisfied that there is a serious issue to be tried or an arguable case that the Commission, in considering the preliminary Census Report, had regard to an irrelevant consideration or gave such undue weight to that aspect of it which was still open to changes. On this ground, the Court considers that the interim order cannot be supported.

The Chairman's Decision – Predetermination

[189] The Applicant states that 'Senator Byron has informed him that 'the Chairman of the Commission has on his own, without any sight of any recommendation from anyone to that effect, proposed to split the town of Sandy Point in two, thus splitting [his] constituency in two. One half of Sandy Point will be appended to the villages of Newton Ground and St Paul's, the home village and stronghold of the Prime Minister.

[190] This is a complaint that there was a predetermination on the part of the Chairman when he arrogated to himself without there being any basis for him to do so, the right to make decisions to recommend change to boundaries. Taking the applicants case at its highest, this raises a legal issue: "Whether a body such as this Commission is barred from making a decision which flows from a recommendation from one of the members on his own initiative or upon the advice by a third party, including his own political party?"

[191] The point has been made that where the body is one that is exercising quasi-judicial powers then the appearance of bias tests (of which predetermination is a specie) should be applied to its fullest extent.[58] On the other hand, where the body is not exercising a quasi-judicial function however, the courts would not be inclined to intervene. In fact the courts 'have consistently declined to intervene where an administrative decision is

[58] See the discussion beginning paragraph 240 below on the issue of bias. R (Island Farm Development Ltd.) v Bridgend County Borough Council [2006] EWHC 2189 (Admin) at para. 30

influenced by the party political views of the elected decision maker.'[59] In R (Island Farm Development Ltd.) v Bridgend County Borough Council,[60] the local council was negotiating with the local rubgy union to dispose of certain lands to them to build a rugby 'school of excellence'. Before terms could be agreed, elections were held in which the proposed development was an issue. A party came to power which had been publicly opposed to the sale and passed a resolution not to sell the land. The decision not to sell was challenged on the basis that it was predetermined. The judge was pressed to apply the fair-minded observer test but expressing his doubts[61], he said:

> *"The reality is that Councillors must be trusted to abide the rules which the law lays down, namely that, whatever their views, they must approach their decision with an open mind in the sense that they must have regard to all the material considerations and be prepared to change their views if persuaded they should…unless there is positive evidence to show there was indeed a closed mind. I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision."*

[192] In this case, all there is, is that Mr. Richards states that the Chairman to 'effectively arrogate unto himself and to the exclusion of other members the responsibility for making the recommendations as to boundary changes'[62] meant that the Commission has not acted as a body, not really that the Commission itself has acted with a closed mind. In this regard, the applicants' version is that when the recommendation was made by the Chairman, the Commission then took these recommendations and sought technical input, looked at census data, and considered feedback from their consultations. This is one way a Commission can function. Individual members in any body such as this should not be barred from bringing their own views and recommendations for other members and the Commission as a whole to consider. It should be recalled that the Commission is entitled to regulate its own procedure. This Commission as a whole discussed these recommendations to change boundaries and by a majority agreed on these

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[59] Per the learned authors of Wade on Administrative Law 10 edn. at page 391 citing with approval R v Waltham Forest LBC ex parte Baxter [1988] 1 QB 419; R v Amber Valley District Council ex parte Jackson [1984] 3 All ER 501

[60] [2006] EWHC 2189 (Admin); discussed by Professors H W R Wade and C.F. Forsyth text on Administrative Law (10th edn., 2009) at page 390; see also Bovis Homes Ltd. V New Forest plc [2002] EWHC 483 (Admin)

[61] Collins J. para. 30 distinguishing Porter v Magill on the ground that it concerned a quasi-judicial decision.

[62] Paragraph 40 of Richards' affidavit of the 11th September, 2013.

recommendations. Additionally this is not a quasi-judicial body and is one simply making recommendations.[63]

[193] This to my mind is an effective answer to this complaint of predetermination. The interim order cannot be sustained on this basis.

### The Duty to Consult

[194] It is under this head that the Court has taken a different view. This issue will be dealt with under the discussions relating to the application for leave to apply for judicial review. At this stage it is sufficient to say that the here the applicants have raised a serious issue to be tried. And for this reason this interim order can be sustained on this basis.

### SUBSTANTIVE QUESTION # 4

*Whether if there are serious issues to be tried, is the question of damages applicable to this case, and if not does the balance of justice favour the continuation or discharge of the order?*

[195] Having confirmed that there was a serious issue to be tried raised on the application for an interim order, the Court has also, for the reasons which will be set out under the discussions under the Application for leave to apply for judicial review, decided that this is not a case in which damages would be an adequate remedy, which incidentally none of the parties have argued. For the reasons also found in the next section of this judgment, the Court considers that the balance of justice does not require that the interim order be discharged. In any event, the interim order will be replaced with the Order granted today.

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[63] R (Island Farm Development Ltd.) v Bridgend County Borough Council [2006] EWHC 2189 (Admin); see also R(Loudon) v Bury School Organisation Committee [2002] EWHC 2749 (Admin) – see further discussion on the nature of the Commission at para. 208 below.

C. THE AMENDED APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

[196] By their Notice of Application dated the 11th September 2013 and amended with permission on the 20th September 2013, the applicants apply to the court for an order granting leave to apply for judicial review against the decision of the Constituencies Boundaries Commission contained in its report dated the 5th September 2013 in order to obtain the following relief –

> *i) An Order of certiorari to move into the Supreme Court and quash the decision of the Constituencies Boundaries contained in its report dated the 5th September 2013;*
>
> *ii) An Order of prohibition against the Constituencies Boundaries Commission from submitting to the Governor-General, or making use of, any report purportedly made (sic) pursuant to section 50(1)(1) of the Constitution or otherwise;*
>
> *iii) A Declaration that the decision of the Constituencies Boundaries Commission contained in its report dated the 5th or 6th September 2013 is ultra vires, null and void and of no effect;*
>
> *iv) An Order of prohibition against the 3rd Respondent prohibiting him from submitting to the Governor-General the draft proclamation approved by resolution of the Assembly on the 9th September 2013 for giving effect to the recommendations contained in the said report, pursuant to section 50(6) of the Constitution of St Kitts and Nevis;*
>
> *v) An order of prohibition against the 2nd Respondent prohibiting him from acting or relying on the Report of the Constituencies Boundaries Commission dated 5th September 2013, whether directly or indirectly, and/or from making a proclamation under section 50(6) of the Constitution of St Kitts and Nevis for giving effect to the recommendations contained in the said Report;*
>
> *vi) Such further and/or other relief as this Court may think fit;*
>
> *vii) Costs.*

[197] On this Application for leave they also seek interim relief, namely:

> *i) An order restraining the third respondent whether by himself his servants and/or agents or persons subject to his control, authority or direction or howsoever otherwise from submitting to the Governor-General the draft*

*proclamation approved by resolution of the National Assembly on September 9th 2013 for giving effect to the recommendations contained in the said Report, until the hearing and determination of this action or until further Order of this Honourable Court; alternatively An Order restraining the second respondent whether by himself, his servants, and/or agents or persons subject to his control, authority or direction or howsoever otherwise from making any proclamation in terms of any draft submitted under section 50 of the Constitution, until the hearing and determination of this action or until further order of this Honourable Court; alternatively*

*ii) An Order continuing the conservatory order granted by this Court on the 9th September, 2013 until the hearing and determination of this action or until further order of this Honourable Court.*

[198] The Applicant note early in their grounds of their Application that this is an Application for leave to apply for judicial review of the decision of the Constituencies Boundaries Commission contained in its report dated the 5th September 2013. They state that they also intend once leave is obtained, to combine with the application for judicial review an originating motion pursuant to section 96 of the Constitution and the general law claiming constitutional relief and Orders with respect to the content of the said report.

[199] As is noted, their substantial complaint is against the Commission's Report of the 5th September 2013. Briefly, their attack on the Report is on four main grounds:

1. They say that the Commission failed to properly consult the relevant persons. The Commission had requested of all the political parties in St. Kitts and Nevis to make recommendations, but the time given was too short, for any to make any meaningful contribution. Further, the Commission failed to notify anyone what changes they were considering to recommend, and this omission rendered the consultation process meaningless.

2. They say that the Chairman of the Commission who apparently made certain crucial decisions, is effectively appointed by the Prime Minister, and having regard to his past and present political affiliations, he is clothed with the perception of bias.

3. They further contend that having regard to the effect that the decision of the Commission is likely to have, the Commission have acted for the improper purposes of disadvantaging members of the Assembly opposed to the Prime Minister. They contend that the effect of the changes is likely to cause certain opposition members to lose their support base once the boundaries are changed.

4. They also say that the Commission took into consideration irrelevant matters, when they chose to act on an incomplete census, when they were advised by the Attorney general not to act on this data. It is also argued that the Commission failed to take into account relevant matters.

THE COURT'S APPROACH AT THE PERMISSION STAGE

[200] On an application for permission to apply for judicial review the court is tasked to weeding out frivolous and unmeritorious cases. As was stated in a leading text on Judicial Review[64]:

> *"The dual purposes of the requirement for permission are to protect public bodies and the courts from the waste of time and resources that would be occasioned by being required to deal with unmeritorious claims, and to reduce the uncertainty caused by challenges to the lawfulness of decisions of public bodies. Even in cases where permission is granted, the permission stage performs the useful function of providing, at an early stage and at a relatively low cost to the parties, an indication from the court as to the merits of the claim."*[65]

[201] The test is one of arguability, and this has been explained by the Privy Council in the case of Sharma v Carla Browne-Antoine in the following terms:[66]

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see R v Legal Aid Board, Ex p Hughes (1992 ) 5 Admin LR 623 , 628 and Fordham, Judicial Review Handbook 4 th ed (2004 ), p 426 . 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 "and the allegation proved on the balance of probabilities. Thus the "flexibility of the standard lies 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*

[64] 'Judicial Review: Principles of Procedure', Jonathon Auburn, Jonathon Moffett and Andrew Shawland, Oxford University Press 2013, page 594 para 26-02 and quoted at para. 9 in the Antigua case of Kasambe Christopher v Attorney General claim no. ANUHCV2013/0378 (unreported)
[65] See also R. (Ex Parte J. Wray and Nephew Limited) v Industrial Disputes Tribunal Claim No 4798 of 2009 (Jamaica)
[66] *Sharma* (n. 23) at para. 14(4).

*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 ."*

[202] The concept of 'flexibility' has been shown to have a completely different meaning in rare cases where the issues are sufficiently important, and the matter is of considerable public importance. In these instances as the English Court of Appeal has held in R (**Gentle**) **v Prime Minister**, leave will be granted even if the case is not arguable in the sense it does not have a realistic prospect of success.[67] The House of Lords, with a fully constituted bench comprising eight law Lords and Baroness Hale of Richmond, did not criticize the English Court of Appeal's grant of leave in these circumstances.[68]

[203] The principle in **Gentle** was applied in **Re Jessica Hamill**[69] where the court stated:

> *"I am satisfied however that in addition to [the arguability test] for granting leave, a court should consider granting leave in light of the importance of the issue and where public concern has been aroused even if the case is not considered to have a real prospect of success. In R (Gentle and Ors) v The Prime Minister and Another (2006) EWCA Civ. 1078, the Court of Appeal considered whether an independent inquiry should be held into the circumstances that led to the invasion of Iraq. The claimants, relatives of members of the British Armed Forces killed during the war, sought to bring a challenge by way of judicial review to the Government's refusal to hold such an inquiry. With some evident reluctance, the Court of Appeal granted permission holding that the case raised questions of general importance that should be finally decided after a full argument. At paragraphs 4 and 5 Sir Anthony Clarke MR. said:*
>
> > *"4. We say at once that we were reluctant to grant permission to appeal against the decision of the judge. On the face of them, the applications for judicial review are unpromising. Matters of this kind are essentially matters for the executive and Parliament. Our initial reaction was that the issues which the applicants seek to raise at an inquiry are not justiciable. They are matters to be resolved by political debate and, as it might be put, at the bar of public opinion.*
> >
> > *5. However, having heard oral argument we have reached the*

[67]See R (Gentle) v Prime Minister [2006] EWCA Civ 1078 at [23]
[68] R (on the application of Gentle) v Prime Minister [2008] 1 AC 1356
[69] [2008] NIQB 44

> *conclusion that we should grant permission to appeal, or more accurately permission to apply for judicial review, so that the matters can be fully debated. We are conscious, as the judge expressed himself to be, of the importance of the issue and the great public concern that it has aroused."*

[204] It is noted that in **Gentle**, the Court of Appeal which granted permission to proceed with judical review, and having voiced provisional views that the case was nearly hopeless, was the very court which proceeded to hear the Application.

[205] For my part, I would add that even where a court finds that the arguability threshold is not met, but is minded to grant permission where the issues are sufficiently important and public attention is aroused, it should not be seen as a blank check for any applicant to proceed with all and every ground raised even those which are completely hopeless and frivolous; there should at least be some compelling reason, possibly based on some perception of the evidence which one side has adopted, which requires further examination of one or more grounds in the public interest.[70]

[206] I also note that in the normal course of an application for permission to apply for judicial review, it would not be appropriate for the court to express a final view of matters that have been raised, especially as it relates to matters of facts. At this stage, this Court does not propose to make any final determinations on the factual issues even though the parties with their considerable arguments appeared to have wished to treat this as a final hearing on the issues. As Auld LJ stated in **R (Mount Cook) v Westminster City Council**:[71]

> *"… judges before whom contested permission applications are listed, and in their conduct of them, should discourage long hearings and/or filing by both parties of voluminous documentary evidence for consideration at them. In short, they should not allow the court to be sucked into lengthy and fully argued oral hearings that transform the process from an inquiry into **arguability** into that of a rehearsal for, or effectively, an expedited and full hearing of the substantive claim."*

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[70] See the Court of Appeal's approach to whether it should grant leave to appeal a refusal to apply for judicial review, where that refusal was based of a finding that there was no arguable case. The Court considered that it has a power to grant leave to appeal if there were 'compelling' reasons to do so – Michelle Andrews PC 16 of New Prospect v The Director of Public Prosecutions and Others HCVAP 2008/003 St. Vincent and the Grenadines, judgment of Chong Q.C. JA(Ag.) citing with approval Blackstone Civil Practice 2008 at page 294, and Practice Note (1999) 1 AER 186 at 187 where Lord Woolf stated: "leave may also be given in exceptional circumstances even though the case has no real prospect of success. If there is any issue which, in the public interest, should be examined by the Court of Appeal.'

[71] [2003 EWCA Civ 1346, [2004] 2 PCR 22 at [73]:

[207] This was not an extended hearing, seeing it only lasted for one day, but the issues raised were substantial. Additionally, this application for leave has been coupled with an application to discharge the interim order granted earlier. On that application, the Court was required to express views and make findings on whether there are serious issues to be tried. On this application, I begun my analysis to only decide whether the grounds presented were arguable, so I could consider whether permission could be granted. Having regard to the substantive submissions made, by the end of my analysis I found myself like the court in R (on the application of Albion Water Ltd) v Water Services Regulation Authority[72] expressing a few provisional views. These are not final views of this Court except where, on certain grounds, I have refused leave to proceed. In short, I will proceed cautiously, ensuring that whatever views expressed, especially on important points of law, which have not been specifically addressed by the parties, are only provisional views. I make it clear that I will attempt to state no final position except where it involves a clear and certain statement of the law.

THE FIRST GROUND – THE DUTY TO CONSULT

[208] The applicants have pointed this Court to the fact that there is no statutory duty on the Commission to consult, and that Thomas J has held in the Boundary Commission case[73] that as a general rule the Commission is not under any common law duty to consult. They argue first that Thomas J has taken an overly narrow view of the common law duty to consult, or that alternatively on the facts of that case, he was correct to find that the duty did not arise.

[209] They go on to argue that in this case, it is clear on the evidence that the recommendations of the Commission in this case would affect substantial changes to the boundaries of the Constituencies in respect of which the applicants are currently the elected representatives. They say that the changes made have resulted in core areas of their support being hived off to other constituencies. They argue that where the recommendations of the

[72] 2012 WL 3062615 Queen's Bench Division (Administrative Court)
[73] *Hon. Shawn K. Richards* (n. 37)

Commission impact significantly on the boundaries in a constituency such that conspicuous unfairness would result if the incumbent candidates are not consulted, the duty to consult will arise and the Commission would be required to inform the incumbent representatives and some cases the constituents themselves of proposed changes and seek their comments. In saying that this is a case where the failure will lead to conspicuous unfairness, they rely on Harrow Community v Secretary of State [2012] EWHC 1921.

[210] They further submit that even if the common law duty to consult does not arise in this case, once the Commission decided to consult with a select group of persons, it was under a duty to do so fairly and properly. They argue that the consultees must be told not only of the proposals being considered by the decision maker but also some specificities of the proposals, so that they can have a proper appreciation of the way in which the ultimate decision might affect their interests.

They rely on R v North and East Devon Health Authority, ex parte Coughlan [2001] 1 QB 213; R v Brent London Borough Council, ex parte Gunning (1985) 84 L.G.R. 168.

[211] The applicants say that in this case proper consultation did not take place for the following reasons:

> "i) The Commission did not inform the consultees of the proposed changes they were considering making to the boundaries of the constituencies. All the Commission did was to provide the consultees with a mass of information and invite them to make recommendations as to what, if any, changes should be made. The consultees were therefore deprived of the opportunity to 'sinking their teeth' into the Commission's proposals and suggesting alternative ways in which the Commission's constitutional mandate might be achieved;
>
> ii) The Commission did not give the consultees adequate time in which to consider the mass of information provided and to come up with recommendations of their own. The Commission in effect, after an extension, allowed the consultees only four weeks, which was much too short a period of time to make any useful contributions.
>
> iii) The Commission did not give conscientious consideration to the recommendations it did receive. The evidence is that the recommendations were never discussed at any meeting of the Commission. Further, in the report itself, no

mention is made of the fact that some consultees had proposed no changes to the boundaries."

[212] The respondents on the other hand, as starting position, rely on the High Court decision of my brother Thomas J in the **Boundary Commission** case when he held at paragraph 403 of his judgment that the then claimants had no right to be heard and the Commission had no duty to consult. And that further, even if there could be such a right, that the claimants in that case had waived their right to be heard or consulted.

[213] They go on to submit that if there is to be consultation, the scope, ambit and the persons to be consulted are matters entirely for the Commission. They say that it 'is not disputed as Mr. Richards accepts at paragraph 11 of his affidavit, that invitations for proposals or recommendations were sent by the Commission and received by a number of political parties. Additionally it ought not be disputed that Mr. Sam Condor and Mr. Timothy Harris were also invited to make proposals or recommendations.

[214] They pointed to the evidence that stated that one of the things Mr. Richards mentioned, in response to the Commission's invitation, was that he needed additional time, and that he was given time for 'any submissions of any written proposals' he might 'make regarding changes to the existing boundaries'. He then replied with his sole complaint or request, was that he be provided with the Final Official Census Report.

[215] The respondents point out that the other responses from the other invitees were all without merit as they varied from (i) the government was illegitimate, (ii) the Commission was using the Preliminary Census Data as opposed to the Final Census Data Report, and (iii) the Chairman is biased (as alleged by Mr. Timothy Harris).

[216] The respondents point out that while the invitees in St. Kitts were asking for the Final Report, others made use of the invitations. The Concerned Citizens Movement (CCM) and the Nevis Reformation Party (NRP) made representations to the Commission. So too did the National Integrity Party and the St. Kitts and Nevis Labour Party. Following the

representations made by the CCM and the NRP there was a joint meeting and site visit by the Commission with both political parties in Nevis.

[217] The respondents also point the Court to the evidence that shows that while Mr. Richards, on behalf of PAM refused to make any proposals and recommendations because he did not have the Final Official Census Data Report, Mr. Vincent Byron a member of the Commission and also a member of PAM had also presented written submissions to the Commission outlining recommendations for the review of boundaries.

[218] They say that any allegation on the part of the applicants, that the consultees were not given the opportunity to provide their comments at 'a formative stage or otherwise' is clearly not supported by any of the evidence of the applicants.

[219] The respondents further submit that there is no merit in the complaint made by the applicants that they were not given adequate time to consider the material provided to them and to formulate their own proposals, 'in the absence of any proposals from the Commission'. They say that the 'simple answer to this is that the applicants made no such complaint to the Commission. All they requested was the Final Census Data Report and some enumeration information, the latter of which was either not used or allowed to be disclosed by law. They also say that there is also no merit in a complaint that the Commission did not give 'conscientious consideration to the responses submitted by the consultees.'

Discussions and Findings of Arguability

[220] Both sides have agreed that there is no statutory or constitutional right to consult. There is therefore no need for me to treat with this.

[221] With regard to the common law duty to consult, both sides have raised the decision in the Boundaries Commission case[74] in support of their own position. It is useful therefore, to

[74] *Hon. Shawn K. Richards* (n. 37)

first examine what exactly was decided in that case on this issue of consultation. It is important to note Thomas J did not treat with promises of consultation or legitimate expectation as those aspects relating to the consultation issue did not arise in that case.[75] It is also important to note, that in approaching the issue of any obligation to consult, Thomas J considered as important, the nature and functions that is performed by the Commission. He stated at paragraph 395 of the judgment that:

> *"…the Commission function is confined to purely making of recommendations concerning constituency boundaries in St. Kitts and Nevis. It can go no further, so that no question of financial or quasi-judicial power arises. This rests on the proposition that such bodies also do not determines rights or obligations and as such the issue of natural justice does not arise. As such the Court agrees with the respondents' arguments that the line of cases in which it was held that the bodies concerned were concerned with the rights of individuals arose and as such, the rules of natural justice had to be observed.*

[222] The cases that were referred to by Thomas J were Cooper v Wandsworth Board of Works,[76] Ridge v Baldwin[77] and Wiseman Bourneman.[78] This Court has also examined these cases, and there is no doubt that these cases all concern the exercise of executive or quasi-judicial powers that affect rights and or obligations.

[223] In Cooper v Wandsworth Board of Works[79] a statute provided that no one should construct any building in London without giving seven day's notice to the Board of Works. A breach of this requirement would entitle the Board of Works to demolish the building. A builder began constructing a building in breach of the provision and by the time he got to the second storey, the Board of Works demolished the structure. The builder was successful in his claim for damages on the ground that the Board had no power to act without first asking him what he had to say for himself. Earle CJ said at pages 188, 189:

> *"I think that the Board ought to have given notice to the plaintiff, and to have allowed him to be heard…I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and*

[75] See *Shawn K. Richards* (n. 37) at paragraph 402
[76] (1863) 14 CBNS 180
[77] [1963] 1 WLR 935
[78] [1969] 3 All ER 275
[79] (1863) 14 CBNS 180

*in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before inflicting upon him such a heavy loss."*

[224] In **Ridge v Baldwin**,[80] the issue related to a police officer dismissed by the Watch Committee without being afforded a hearing, while the *Wiseman's* decision involved a taxpayer's rights. Lord Guest dealt with the matter this way in the latter case at page 272:

> *"It is reasonably clear on the authorities that where a statutory tribunal has been set up to* ***decide final questions affecting parties rights and duties****, if the statute is silent on the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. This implication will be made on the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their request."* [emphasis supplied]

See also the cases discussed by Rajendra Ramlogan in his text 'Judicial Review in the Commonwealth Caribbean' beginning at page 136 under the Heading "Right to Consultation" – **In the Application of Rai Ramrattan HCA No 1304 of 2003 (TT)** a case dealing with a right of promotion; **In the Application of Ajodha Persaud HCA No 323 of 2003 (TT)** a case which involved an intended rescission of an custom officer's out-posting; **In the Application of Carl Hanoman HCSCJ No 23M of 1999 (GY)** a case which involved the rejection of nominees to be appointed to the Medical Council.

[225] The case cited by the applicants in this case, **Harrow Community Support Ltd. v The Secretary of State for Defence**,[81] coming years after the decision in the Boundary Commission's case, whilst important and instructive for certain points to be made later, does not in any way change the basis upon which Thomas J proceeded. In fact it is to be noted that even though the Secretary of State's decision would arguably have affected the rights of a group of persons, the court found that there appeared to be a legislative scheme which obviated the need, in instances such as existing in that instant case, to seek permission and thus to have any consultations with any of the residents. Haddon-Cave J provided some rationale as to why the courts should be slow to find a duty to consult in certain cases. He stated:

[80] [2963] 1 WLR 935

[81] [2012] EWHC 1921 (Admin),

*"The general law will be slow to require a public body to engage in consultation if there is no obligation or promise to consult. In R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 at [41] and [48] Laws LJ said as follows:*

> *"There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretion which it is their duty to exercise in the public interest. They have to decide the content and pace of change. Often they balance different, indeed opposing interest across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."*

[226] I have noted the discussion in the **Boundaries Commission** case at paragraph 394, in which submissions had been made to the court that 'by referring to a statutory tribunal has been set up to **decide final questions affecting parties' rights and duties'.** Lord Guest was not referring to bodies such as the Constituency Boundaries Commission which do not exercise executive or quasi-judicial powers. I agree that this is indeed the position. The Commission is not a body that exercises executive or quasi-judicial powers that affect rights and duties of particular. I agree that one of the effect of the distinction between statutory bodies which affect rights and duties and bodies such as the Constituency Boundary Commission is reflected in the approach of the Court of Appeal of New South Wales in the case of **Minister of Local Government v South Sydney Council** (No 2)[82] where it was stated:

> *"As properly conceded at trial, the Commission had no obligation to hold an inquiry. Neither did the Commission have an obligation to seek ministerial approval to that end. The statute is silent in this regard and there is no basis for finding an implicit procedural obligation."*

[227] This Court also finds that the approach of the court in **R v Boundaries Commission ex parte Foot** is instructive. In that case, Sir John Donaldson MR dealt with the issue in this way:

> *"There are undoubtedly distinctions between the position of the commission and that of a minister or local authority taking executive action under statutory powers which affects individual citizens. The commission has no executive power. Their function and duty is limited to making advisory recommendations. Furthermore the commission task is ancillary to something which is exclusively the responsibility of Parliament itself, namely the final decision of parliamentary representation and constituency boundaries."*

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[82] [2002] NSWCA 317

[228] The Master of the Roll returned to the issue developing his point, when he said:

> *"The situation of the commission is different from that of many other public authorities in that, even at the very end of their inquiries and deliberations, they make no final decision, they merely make a recommendation to the Secretary of State who, after making any modification to their Report which he thinks appropriate, has to pass on the Parliament for final approval or rejection. This distinctive nature of the function of the commission might well make the court in the exercise of its discretion more slow to intervene in regards to the their activities than it would in relation to those of many other public authorities."*

[229] In *ex parte* Foot it is noted that the Commission did consult, but this was on the basis that there was a statutory requirement to do so. Thomas J in the Boundaries Commission case pointed to the contrast in the position in New South Wales where there is no such legislative prescription and where it has been held that the Commission is under no obligation to consult.[83] These distinctions are crucial in the consideration as to whether there arise on the common law any right to consult, and I agree with Thomas J that in the ordinary way, such a common law duty does not arise. Thomas J however, did not decide the issue of whether legitimate expectations may give rise to a duty to consult, as that did not arise in that case for determination. I am mindful of the learning presented by the applicants from the same Harrow Community case where Haddon-Cave J stated:

> *"A duty to consult does not arise in all circumstances. If this were so, the business of the government would grind to a halt. There are four main circumstances where consultation will be, or may be, required. First where there is a statutory duty to consult.* ***Second, where there is a promise to consult****. Third, where there has been an established practice of consultation.* ***Fourth, where in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there would be no duty to consult."*** *(See R v (Cheshire East Borough Council) v Secretary of State for Environment, Food and Rural Affairs [2011] EWHC 1975 (Admin) ([68-82] esp. [72]).* [Emphasis supplied]

[230] The question that will arise is whether the ***second*** and the ***fourth*** questions are only relevant to cases in which again, rights are being affected? Or do these considerations of legitimate expectations cross the divide between the acts of executive and quasi-judicial bodies and latch themselves on to even bodies like the Boundaries Commission. Put another way, does the concept of legitimate expectation arise in all cases regardless of whether the decision maker will affect the rights and duties of individuals? And what about

[83] Minister for Local Government v Smith Sydney Council (No. 2) [2002] NSWCA 317

'conspicuous unfairness'? If the body does not affect rights and duties, can conspicuous unfairness be said to arise where there is a failure to consult?

[231] This first, is really a question as to what is the scope and extent of the doctrine of legitimate expectation. A useful starting point is to be found in Professors Wade and Forsyth's text, 'Administrative Law' at page 446 where the learned authors have stated:

> *"The classic situation in which the principles of natural justice apply is where some legal right, liberty or interest is affected, for instance where a building is demolished or an office holder is dismissed or a trader's licence is revoked. But good administration demands procedural justice in other situations in other situations also. Where some boon or benefit has been promised by an official or has been regularly granted by the official in similar circumstances), that boon or benefit may be legitimately expected by those who have placed their trust in the promises of the official. It would be unfair to dash those expectations without at least granting the person affected an opportunity to show the official why his discretion should be exercised in a way that fulfils his expectation. Hence there has developed a doctrine of the protection of legitimate expectations, primarily in the context of natural justice (although… it extends beyond procedure in exceptional cases). The doctrine is a welcome addition to the armory of the courts in ensuring that discretions are exercised fairly… the phrase must not be allowed to collapse into an inchoate justification for judicial intervention."*[84]

[232] This passage does indicate that the promise or the expectation must generally relate to some right, liberty or interest is affected or in some cases where some boon or benefit has been promised. The 'boon' or 'benefit' that is identified here cannot simply mean the right to be consulted, but it must mean some underlying benefit or advantage over and above the consultation. This appears to support a view that the doctrine of legitimate expectation may not apply to bodies which do not exercise executive or quasi-judicial powers effecting rights or interest of individual, and thus does not relate to the work of the Boundary Commission.

[233] A number of legitimate expectation cases reviewed by this Court all involved situations where the body whose decision was being questioned was exercising powers of an executive or quasi-judicial nature and were effectively directly affecting rights and other

[84] H.W.R. Wade and C. F. Forsyth, 'Administrative Law' 10th edn. Oxford University Press 2009.

interests. One such was the case Attorney General of Hong Kong v Ng Yuen Shiu,[85] in which the court was faced with the right of alien claiming a right to be consulted before a deportation order was executed.

See also R v North and East Devon H.A. Ex parte Coughlan [2000] 2 W.L.R. 622; Council for Civil Service Unions v Minister for the Civil Service [1985] A.C. 374; R v Inland Revenue Commissioners, Ex p Preston [1985] A.C. 835; R v Inland Revenue Commissioners Ex parte Unilever Plc. [1996] S.T.C.; see also Lennox Linton v The AG Claim No. ANUHCV2007/0354, where the Blenman J as she then was, accepted that if a claim of legitimate expectation could be invoked in relation to incorporation of the RTC into domestic law, this could only be in 'relation to rights claimed by the applicant under the treaty, and not in relation to the referral provisions of the RTC'.[86]

[234] This line of reasoning supports the view that the doctrine of legitimate expectation may not apply to bodies such as the Boundaries Commission. I have offered a provisional view, and in no way am I saying that I have made up my mind about this. I also note that this was never subject to full arguments from the parties. In this regard this is clearly an arguable matter before this Court.

[235] Quite apart from the above analysis, the applicants contend that having regards to the evidence, once the Commission had decided to consult with a select group of persons, it was under a duty to do so fairly and properly. This is arguably the case even with bodies such as the Boundaries Commission having regard to the exceptional nature of this case and arguably the possibility of conspicuous unfairness that may result from a failure to consult, in which case I agree with the respondents that it is relevant to note the case of R v North and East Devon Authority, ex parte Coughlan where Lord Woolf stated: [87]

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[85] [1983] 2 All ER 346

[86] No. 354 of 2007 High Court of Anguilla, in which the judge quoting with approval a passage from an article by Professor Anderson, 'The Caribbean Court of Justice in its original jurisdiction: ensuring the integrity of Caricom Law and the stability of the Caribbean Community."

[87] [2001] 1 QB 213 at para 108.

*"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon, it must be carried out properly."*

[236] Lord Woolf went on in **Coughlan** to address what 'proper consultation' would entail. He said:

*"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those to be consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken…*

*"It has to be remembered that consultation is not litigation: the consenting authority is not required to publicize every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligations is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."*

[237] In such a case it would seem that there is an arguable case that the Commission was under a duty to have proper consultation, which would have required that the consultees be told what changes were being proposed to the boundaries with some specificity into which those consulted could get their teeth into'.[88] That being the case, I am nonetheless not satisfied on the evidence that there is an arguable case that the Commission did not give the respondents adequate time to respond, or that the Commission did not give conscientious considerations to the recommendations it did receive.

[238] With regards to the issue of waiver, this is a matter which having regard to the seriousness of this matter and the factual issues which it raises, would require examination at the substantive hearing, and I do not think it would be correct to examine all these matters of facts to determine this at this stage.

[239] Having regard to all the foregoing, I find that there is an arguable case on the duty to consult and a duty to conduct that process fairly and properly.

[88] See R v Brent London Borough Council, ex parte Gunning.[88] (1985) 84 LGR 168 at 169

THE SECOND GROUND – CHAIRMAN'S DECISION – COMPLAINT OF BIAS

[240] The applicants argue that in this case the Chairman with his ongoing political affiliations was tainted with a perception of bias, the test would be whether the fair-minded and informed observer would consider that there was a real possibility of bias.[89] This is even more crucial in this case, they argue as 'four of the members of the Commission are taken from the Assembly, two each being appointed on the advice of the Prime Minister and the Leader of the Opposition. There will accordingly be a constitutionally built-in and sanctioned perception on the part of the fair-minded and informed observer that four members of the Commission would be predisposed in favour of solutions that would advance the fortunes of their own political parties. In those circumstances, the position of the Chairman becomes pivotal.

[241] They say that in this case on the evidence, the Chairman has ongoing political affiliations and financial connections with the sitting government, in that he is:

1. *He is a member and activist of the St. Kitts/Nevis Labour Party and was a member of its executive;*

2. *He has financial interests in two enterprises, Jenkins Funeral Home and Jenkins Construction, which have contracts with the Government. He is also personally employed by the Social Security Board as the project manager for two government projects;*

3. *He is also the Chairman of ZBC Corporation, a government owned radio and television station;*

4. *He has a financial interest in a commercial entity which is set to develop a 144 condominium project on land that was acquired or is to be acquired from the government. The financing for this project is being sought from the state owned bank.*

[242] In addition, the applicants say there 'was obvious communication between the Chairman and the Government concerning the delivery of the Commission's report given that the Order Paper for the sitting of the Assembly on 9th September 2013 was issued, listing as

[89] Meerabux v AG of Belize [2005] 2 A.C. 513

an item for debate 'Reports of Committees' almost simultaneously with the execution of the Commission's Report and its delivery to the Governor General.'

[243] The applicants say that the evidence as well as the changes which have been 'made have affected the political fortunes of those in opposition to the Prime Minister, which would create in the fair-minded and informed observer the perception that the majority in the Commission has manipulated the boundaries so as to benefit the ruling party and to disadvantage those in opposition. It is particularly curious that Dr. Harris' constituency already contained the number of inhabitants needed to achieve equality among all constituencies. Yet still, a large number of constituents were removed from his constituency and an almost equal number added to bring it back to its original number. The fact that the report was signed by one of the members of the opposition is of no moment in this case since this member made it clear that he did not agree to the changes made in St. Kitts.'

[244] They argued, relying on Constituency Boundaries Commission v Urban Baron,[90] that the presence of factors that raised a perception of gerrymandering was sufficient to cause the well informed and fair-minded observer to conclude that there was a real possibility of bias.

[245] The respondents contend that the allegation of bias is 'an afterthought' on the part of the applicants. They say that the 'Leader of the Opposition is a party to the application for leave to apply for judicial review, so too is Mr. Timothy Harris. There was not the slightest mention of any allegation of bias in this application or in the application for interim relief. Bearing in mind Counsel's statement that they (the applicants) were working on this matter since June 2013, the failure to plead or mention ought not to be considered an oversight.

[90] *Urban Baron (n. 1)*

[246] The Respondent also submitted:

> 1. *There is no constitutional restriction placed on the appointment of the Chairman other than he must not be a member of the Assembly or the Nevis Island Assembly;*
>
> 2. *Mr. Jenkins was appointed Chairman to the Commission on August 1, 2012. Section 49(1)(a) of the Constitution required the Governor-General to act in accordance with the advice of the Prime Minister only after he has consulted with the Leader of the Opposition or such other persons as the Governor General, acting in his own deliberate judgment, has seen fit to consult.*
>
> 3. *There is no pleading or allegation that the Leader of the Opposition was not consulted by His Excellency the Governor General;*
> 4. *At the time of Mr. Jenkins's appointment Mr. Timothy Harris was a member of the Cabinet. It is therefore fair to say that Mr. Harris would have known of the intention to appoint and of the appointment of Mr. Jenkins and;*
>
> 5. *Save for the bold allegation that Mr. Jenkins is an activist, there is no evidence or particulars of this alleged activism. In fact this allegation has been denied although Mr. Jenkins does admit he is a member of the Executive of the St. Kitts and Nevis Labour Party.*

[247] It was submitted that there is no proper basis for leave to be granted in relation to any allegation of bias. Further and in the alternative, it is submitted that the applicants 'have waived any right to object to Mr. Jenkins' appointment. At the very least Mr. Harris knew him as they both would have been members of the same political party and the Leader of the Opposition was consulted.

[248] Also, it is inconceivable the Third Respondent argues, that Mr. Vincent Byron and Mr. Vance Amory, the two members appointed by the Leader of the Opposition to the Commission were unaware of Mr. Jenkin's affiliation to the Labour Party. Yet they sat with Mr. Jenkin's at several meetings without objections and Mr. Amory signed the Report.

[249] In these circumstance they contend, it is now too late for this allegation to be taken.

[250] The Third Respondent also argue that the applicants' raising 'another spectre of bias with their allegation 'obvious communication between the Chairman and the Government', is

nakedly a fishing expedition premised absolutely on speculation. There is absolutely no evidence to justify this allegation.'

The respondents relied on the following cases: Dr. Vaughan Lewis v Attorney General & Monica Joseph Civ. App. No. 12 of 1997 St. Lucia; Sir James FA Mitchell v Ephraim Georges Civ. App. No. 14 of 2011 SVG; Soyna Young v Vynette Frederick Civ App. No. 22 of 2011 SVG.

Discussions and Findings on Arguability

[251] What is bias? Many courts have defined this and this is not the first time it is being raised for consideration in this jurisdiction.[91] Bias has been defined as 'an attitude of mind which prevents a judge from making an objective determination of the issues he has to resolve'. It is said that 'actual bias' is that finding which takes place after inquiry that the decision maker has actually 'acted in a fashion which is in fact biased'[92]. Actual bias has also been found in cases where the decision maker has some direct pecuniary interest or some other relevant or personal interest, which is not 'negligible', in the outcome of the decision.[93] As Lord Bingham stated in Davidson v Scottish Ministers:[94]

> *"[6] … Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of* ***actual bias****. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."*

[91] Vance Amory v Thomas Sharpe Civ. App. No. 13 of 2009 SKN; *Hon. Shawn K. Richards* (n. 37)
[92] Resolution Chemicals Ltd v H Lundbeck A/S 2013 WL 5338207 Chancery Division (Patents Court) at para 38
[93] Davidson v Scottish Ministers [2004] UKHL 34, [2004] HRLR 34; see also JSC TBA Bank v Ablyazov [2012] EWCA Civ. 1551; R v Bow Street Magistrates Ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119 (HL); see also Dr. Vaughan Lewis v Attorney General & Monica Joseph
[94] [2004] UKHL 34

[252] So it seems clear that '*actual bias may arise from a variety of causes, such as a desire to decide a case one way or the other regardless of the legal merits.*[95] Predetermination has also been regarded as a specie of bias and *'arises when a judge or other decision maker reaches a final conclusion before he or she is in possession of all the relevant evidence and arguments.'*[96] In practice, findings of actual bias or predetermination are rare as it is generally difficult to prove either of these.[97]

[253] Apart from cases of actual bias, a decision maker may, also be affected by 'apparent bias', that is a perception of bias.

[254] The courts in this region have accepted the modern law of apparent bias was definitively stated by Lord Hope in Porter v Magill[98] as: "*The question is whether the fair- minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".*[99] The test of the fair-minded observer also applies in cases of apparent pre-determination.

[255] Who is the fair-minded observer? How does one identify this legal construct which fulfils an important role in answering this vexed question of whether the decision maker is clothed with the perception of bias? The characteristics and defining traits of the "fair-minded and informed observer" were described by Lord Hope in Helow v Secretary of State for the Home Department as follows: [100]

> *"1. My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are*

[95] Per Lord Justice Jackson in Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail [2011] EWCA Civ 1617 at para. 44; see also Vance Amory v Thomas Sharpe Civ. App. No. 13 of 2009 SKN at para [8]

[96] per Lord Justice Jackson in Lanes Group plc v Galliford Try Infrastructure Limited t/a Galliford Try Rail [2011] EWCA Civ 1617 at para. 44

[97] Re Alternative A5 Alliance's Application for Judicial Review 2013 WL 617770 Queen's Bench Division (Northern Ireland) at para. 49 where actual bias has been described as 'a rare phenonenon'

[98] [2002] 1 All ER 465

[99] In Porter and Magill, 'The House of Lords made it clear that earlier suggestions that the test should be one of a "real danger" of bias should no longer be followed and instead the "real possibility" test was confirmed. At paragraph 100 Lord Hope agreed with dicta which had criticised the use of the "real danger" test as placing too much emphasis upon the Court's view of the facts and inadequate emphasis upon the public perception of the matter.' See R. (on the application of Al-Le Logistics Ltd) v Traffic Commissioner for the South Eastern and 2010 WL 308559 Queen's Bench Division (Administrative Court) at para. 94

[100] [2008] UKHL 62, [2008] 1 WLR 2416

*available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.*

*2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488 , 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*

*3. Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."*[101]

[256] It has been properly said that 'the fair-minded and informed observer is a legal construct upon whom remarkable qualities have been grafted, geared no doubt to insulate the administration of justice from the contaminants of unfairness and partiality.' The point is made that the court is the 'touchstone and carries the mantle of the fair minded and informed observer.'[102]

[101] See also Gillies (AP) v Secretary of State for Work and Pension

[102] Per Baptiste JA in Vance Amory v Thomas Sharpe Civ. App. No. 13 of 2009 SKN at para. 12.

[257] The recommended approach of the cases is that a court, faced with an allegation of bias, must first ascertain all of the circumstances that ground and relate to the suggestion of bias. Then the court must consider whether the fair-minded observer would conclude that the tribunal was biased. In seeking to ascertain what the fair-minded observer would conclude, the Court is entitled to look at all the information before the court and not only what might have only been known to the hypothetical observer when the decision was being made. In this regard the fair-minded observer must be taken to be informed of all the relevant facts that are capable of being known by members of the public generally.

[258] I have considered the evidence of Mr. Richards[103] that Mr. Jenkins is the Chairman of a State Corporation and he has a financial interest in a company that will develop lands that were or are to be acquired from the Government, and that the he has several commercial dealings with the government – storing cadavers from the state owned government hospital, involved in several road projects. I have also noted the evidence that indicates that Mr. Jenkins is a known activist and an executive member of the St Kitts and Nevis Labour Party. Whilst there has been some dispute about some of this, I recall my role in not attempting to resolve disputes on affidavits at this stage.

[259] So I go on and ask from the standpoint of arguability: "What is the cumulative effect of all of this?" The applicants appear to be saying not only is he an activist, being an executive member of the ruling party, he is also getting business from government on many different levels, and so it would be in his interest that he should take steps to ensure that the government remains in power. Does this make an arguable case that Mr. Jenkins is clothed with actual bias? Does it also make an arguable case that the fair-minded observer can find that there is an appearance of bias having regard to the political connections of the Chairman? I note that in Vance Amory v Thomas Sharpe the Court of Appeal felt that it was significant for the fair-minded observer to consider that:

> "…*the support staff of the Commission with the exception of Sir Richard, the senior counsel, consist of known supporters, affiliates or activists of the Nevis Reformation Party, the party which opposed Mr. Amory when he was premier of Nevis and at whose behest the Commission was established. It is the appearance*

[103] paragraphs 41 to 46 of his Affidavit of the 11th September 2013.

*that these facts give rise to that matter. In paying regard to the political context within the milieu of apparent bias, the fair-minded and informed observer in Charlestown Nevis would certainly regard the composition, political connection, activities and allegiance of the impugned support staff of the commission as relevant and weighty factors in concluding that there was apparent bias against Mr. Amory.*

[260] But that was a case involving a Commission of Inquiry, established to investigate the allegations of corruption and maladministration in Nevis under the premiership of the claimant, Mr. Vance Amory. This is not that type of Commission. The special rules relating to the composition of this Commission must be examined. Here, I must return to the point made by Mr. Astaphan S.C. that the Court must pay due regard to the fact that this Commission, unlike its counterpart in many other Caribbean jurisdictions, is a largely political construct. Learned Senior Counsel has used this argument to ask this Court to avoid making determinations that there was an arguable case of bias, since the Commission is required to comprise of members who are primarily political appointees and as such are likely to be partial. This is an important distinction. I note that the Urban Baron case relates to a Boundary Commission in Dominica, where the ordinary membership of the Boundary Commission cannot include a member of the House. There, the court was very critical of political activists being recommended for appointment by the ruling government. The court noted that it was not realistic to believe that the Chairman who is the Speaker was expected to bring some balance to the composition of the Commission. The court felt that this was an attempt to impose the political will of the Government on the process of the court, and stated:

*"In my view, the appearance of such an imposition is completely alien and repugnant to the Constitution and will have to be rejected as an insidious contravention of the Constitution."*[104]

[261] The St. Kitts and Nevis Constitution however, not only directs that all the regular members of the Commission be political appointees, but also directs that can they only be selected from active members of the Assembly. This is the constitutional construct that must therefore guide the way the fair-minded observer must approach this Commission. He cannot be heard to say that he does not countenance this imposition of the political will of the Government on the Commission; the Constitution approves of this; there is no

[104] *Urban Baron (n. 1) at* p. 160

Constitutional repugnancy here - there is no contravention, much less an 'insidious contravention'. In this case the Chairman is appointed in accordance with a strict constitutional process. I accept that by virtue of section 49, the Governor General's appointment of Mr. Jenkins could have only been done after he had consulted with the Leader of the Opposition and in accordance with the advice of the Prime Minister. There is no evidence in this case that this has been otherwise. It is also important, as the respondents have pointed out that there is only one category of persons from which persons are ineligible of being appointed chairman, namely the category comprising of members of the Assembly of either St. Kitts or Nevis. Therefore in approaching this issue of bias, it is important to bear at all times the very political make-up of this body. On such an approach, and on taking into consideration my analysis on the other grounds, I do not find that there is an arguable case that the Chairman has been affected with actual bias; there is no evidence that Mr. Jenkins has been *improperly* receiving government contracts. It is thus a leap to conclude that because he has been getting government contracts he will act in a biased manner, or that it could arguably ground a case that he is clothed with actual bias.

[262] Notwithstanding, with regards to apparent bias, it is arguable that Mr. Astaphan's argument may be a double-edged sword, and may also work against the conclusion he is hoping for. Here, the fair-minded observer might consider that the fact that the regular members of the Commission is expected to comprise of members of the Assembly might make it arguably even more important that the chairman should be selected from a publicly neutral group of persons, or at the very least, arguably not be a person who is an executive member of the ruling party and who may arguably from a factual standpoint, be an activist; and this is quite apart from all the issues being raised in relation to his business dealings with the Government. I confess that I have also had difficulty finding arguability on 'apparent bias' as well, having regards to (i) this Court's conclusions that this Commission is not exercising an executive or quasi judicial function, (ii) this Court's approach on the 'predetermination' issue, as well as (iii) the questions of waiver, and (iv) the delay in moving on this ground. But this is an exceptional case. There are compelling reasons, this being a matter relating ultimately to free and fair elections, and this being a unique feature

of the St. Kitts and Nevis Constitution that there is no express prohibition to appointing a non-neutral person, why leave should be granted on this ground, so that a full hearing can proceed on this ground. Accordingly, I will grant the applicants permission to proceed with their application for judicial review on this ground of bias.

THE THIRD GROUND – IMPROPER PURPOSES

[263] The applicants also rely on the evidence which they say support an arguable case for a perception of bias to contend that, having regard to the effect that the decision of the Commission is likely to have, an inference can be drawn that the Commission have acted for the improper purposes of disadvantaging members of the Assembly opposed to the Prime Minister. They contend that the changes to the boundaries are likely to cause certain opposition members to lose their support base.

[264] This Court prefers the respondents' approach and will agree such allegations are grave and they must not be treated as a synonym for an honest but mistaken reliance on a factor that is in law irrelevant, or even on evidence that might show a perception of bias. I consider relevant the case of Attorney General v Kenny D. Anthony[105] where the Court of Appeal said:

> *"The allegation of bad faith carries with it, as is expected, allegations of dishonesty and improper use of the powers granted by the legislation. In R v Port Talbot BC 14 Lord Nolan commented on the meaning of bad faith in this context as follows:*
>
> > *'As Megaw LJ said in Cannock Chase DC v Kelly [1978] 1 All ER 152 at 156, bad faith means dishonesty: 'it always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant.'*
> >
> > *And in Smith v East Elloe Rural District Council and Others* Lord Radcliffe described mala fides, another way of saying bad faith, as – '…a phrase often issued in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud and corruption.'

[105] Civil Appeal No. 31 of 2009 at paras. 67 to 68 per Webster J.A. (Ag.)

> *[68] There is no gainsaying the gravity of the allegation of bad faith, and the evidential burden on the respondent is commensurate with the seriousness of the allegation. Dishonesty and bad faith can be proved by inference from established facts, but the inference is not to be drawn from evidence which is equally consistent with mere negligence."*

[265] There is no arguable case of actual bias, and this Court is of the view that having regard to the grave charges, allegations of bad faith and improper purposes involves, it is not proper to allow the applicants to pursue this as a ground when they seek to ground it in an inference to be drawn from evidence that might be equally open to other inferences. As noted earlier, the facts that these are serious issues being raised, and this being an exceptional case is not a blank check for the applicants to pursue everything they might conceive as being relevant, short of the kitchen sink.

THE FOURTH GROUND – IRRELEVANT CONSIDERATIONS – THE PRELIMINARY CENSUS REPORT – FAILURE TO TAKE RELEVANT CONSIDERATION INTO CONSIDERATION.

[266] This ground has been discussed earlier in the context as to whether there was a triable issue to sustain the interim order and the Court has found that there was no triable issue. An interim or interlocutory order cannot be supported on this basis.

[267] Notwithstanding, this is an exceptional case. It relates to the changing of the constituency boundaries and general elections in this country. There has never been a successful change of boundaries since independence, and there has been one aborted attempt which itself had engaged the courts' attention for over two years. The fact that the work of the Boundaries Commission is once again in the courts, has engaged the attention of not only the citizens in this jurisdiction, but also the entire region. Reports of this case are constantly in the media. The applicants are elected members of the Assembly. They claim that their political fates are have been affected by the Commission's Report. They effectively are saying that a significant number of persons in St. Kitts and Nevis will cease to have effective representation. A substantial plank of their complaint rests on their perception that the use of the Census Report was improper. It was one of the underlying

themes from the moment it was being suggested by the Commission. It has been the subject of much correspondence between the parties. The same thing applies to the complaint that the Commission failed to take relevant matters into consideration. These provide compelling reasons why, having regard to the public interest, why this matter should be pursued at a substantial hearing.

[268] This is the kind of serious and exceptional case, which I dare say, might only come along every time a boundary change is recommended, as there might always be some dissatisfaction or perceptions that one side is attempting to gerrymander the elections.

[269] Having regard to the serious issues being raised and this is one of those exceptional cases, the Court grants leave to apply for judicial review on this ground.

THE QUESTION ON INTERIM RELIEF

[270] The Court has stated quite clearly that permission will be granted for this matter to proceed to a hearing for judicial review on certain specified grounds. Hoping for this eventuality, the applicants in their arguments have also sought to persuade the Court to grant interim relief.

[271] The applicants have argued that it would be pointless to find that the applicants have a good case for leave for judicial review, but at the same time permit the Prime Minister to submit the draft proclamation to the Governor General, or the Governor General to make the proclamation, with the result that section 50(7) kicks in to deprive the court of jurisdiction to review the decision of the Commission. What is at stake, the applicants say, is the preservation of the jurisdiction of the High Court to review the decision of the Commission.

[272] The applicants have called in aid certain death penalty cases, noting that in extraordinary circumstances, the Privy Council has granted a stay of execution pending an appeal against a judgment that has not yet been delivered for the purpose of preserving its

jurisdiction. They ask the Court to consider the case of **Guerra and Wallen v The State (No. 2).**[106] They say that these are extraordinary circumstances, and that this is an exceptional case.

[273] They say that they were entitled to reasonable notice of the changes of the boundaries so that they could have approached the Court in due time to obtain relief at an early stage, without the need to resort to restraining the Prime Minister or the Governor General from performing duties which they are otherwise required to perform.

[274] They say that it 'therefore now ill suits the respondents to contend that denial of access should be made complete and irrevocable by allowing the Governor General to make the proclamation. Section 50(6) of the Constitution must be interpreted in such a way as to be consistent with the fundamental rights provisions of the constitution, in this case with the right of access to court. They ask the Court to consider the case of **The Public Service Appeal Board v Maraj.**[107] The obligation placed on the Prime Minister to submit the draft proclamation to the Governor General or on the Governor General to make the proclamation ought not be interpreted as denying this Court jurisdiction to protect the applicants' of access to court to pursue the leave granted or, which is the same thing, to preserve the jurisdiction of the court by granting appropriate interim relief.

[275] The respondents have essentially relied on their arguments relevant to the discharge of the interim order. I have noted those again.

### The Power to Grant Interim Relief

[276] The power to grant interim relief is not in doubt at this stage, as I believe that even the respondents have conceded in their arguments that on the grant of leave the court has a power to grant an injunction. I am mindful that it is not usual that an injunction will be granted in public law matters because the decisions of public bodies are to be respected

[106] (1994) 45 WIR 400
[107] [2010] UKPC 29

until set aside.[108] But the court is given an express discretion by Section 26 of the Eastern Caribbean Supreme Court Act, Chapter 3:11 of the laws of the Federation. This discretion can be exercised in the appropriate case.

[277] In approaching an exercise of this jurisdiction, the court is guided by the private law principles contained in American Cyanamid applied with appropriate flexibility. As Lord Walker stated in Bacongo v Department of the Environment of Belize (Practice Note)[109]:

> *"Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in American Cyanamid… but with modifications appropriate to the public law element of the case. The public law element is one of the 'special factors' referred to by Lord Diplock in that case, at p.409. Another special factor might be if the grant or refusal of interim relief were likely to be, in practical terms, decisive of the whole case."*

[278] Having found an arguable case on a number of grounds, I have to then consider the other relevant principles. In this regard, I am of the view that the question of adequacy of damages often has to be looked at differently in public law matters. This is well illustrated in these proceedings, as having regard to the matters being raised in these proceedings and the fact that no side is contending that damages will be an adequate remedy for the respondents. This issue then turns on whether the balance of convenience favours the grant of the interim order, that is, whether the balance of justice in the case calls for the grant of the order. As was noted recently by Lord Justice Beatson in R. (on the application of Miranda) v Secretary of State for the Home Department:[110]

> *"The court must assess whether the balance of convenience favours the grant of interim measures and choose the course which in all circumstances appears to offer the best prospect that an eventual injustice can be avoided or minimized…"*

See also ex parte Factortame (No 2) [1991] 1 All ER 70 at 107 and National Commercial Bank v Olint Corporation Corporation Ltd. [2009] UKPC 16 at [16] to [18]; The Belize Alliance of Conservation Non-Government Organisations v The Department of the Environment and Another UKPC Appeal No. 47 of 2003

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[108] R v MAAF, ex p. Monsanto [1999] Q.B. 1161
[109] [2003] UKPC 63 [2003] 1WLR 2839 at 2849 paragraph 35
[110] 2013 WL 4411328 Divisional Court

[279] In R. (on the application of KO) v Lambeth LBC[111] the High Court of the United Kingdom stated:

> *"In cases where public law issues arise, such as here, it is also necessary to consider the public interest when deciding whether or not to grant **interim relief**. Finally, there is also no dispute that it is right to consider the question of balance of prejudice, see National Commercial Bank v Olint Corporation Corporation Ltd. [2009] 1 WLR 1405, albeit that is a decision which was not taken in a public law context.*

[280] I have considered a number of factors, including the entrenched nature of the guidelines set out in schedule 2 of the Constitution. What is of considerable significance is that if His Excellency the Governor General were to be allowed to act on a draft proclamation which is founded on what could be, depending on one outcome of the substantive proceedings, an invalid Report of the Boundary Commission, then this Court would have no jurisdiction to make an order of real significance. Having regard to the English Court of Appeal's decision in ex parte Foot, the Court really needs to hear more about whether a declaration is the appropriate remedy in the St. Kitts and Nevis context. For now, in the circumstances, not to grant this interim relief may likely have the effect of interfering with the applicants' right of access to Court. In the premises, the Court grants an interlocutory order.

[111] 2013 WL 4411403 Queen's Bench Division (Administrative Court),

## Conclusion and Orders

[281] Having regard to all the above, the Court finds the respondents have not presented any good reason why the interim order granted on the 9th September 2013 should be discharged. The Court does not find favour with any of the arguments going to jurisdiction and has also found that whilst there is no serious case to be tried on a number of the complaints brought on the ex parte application dated the 9th September 2013, there is a serious question to be tried in relation to the duty to consult. That being said, this interim order will be replaced with the Interlocutory Order made today.

[282] There being no jurisdictional bars, the Court has also found that there is an arguable case on the grounds of bias, and the duty to consult and will grant leave to apply for judicial review on those grounds.

[283] While the Court has not found that there is an arguable case presented on the complaint that the Commission had taken irrelevant matters into consideration and had failed to consider relevant matters, the Court considers that it was these complaints that appeared to have triggered the applicants to move to court. Much has been made of the improper use of the Preliminary Census Data Report, and considerable public attention has been aroused in relation to this issue. These are compelling reasons why these matters should be further ventilated at a full *inter partes* hearing. For these reasons, the Court will also grant leave to the applicants to proceed on this ground.

[284] The Court however has not found that there is an arguable case on the complaint that the Commission has acted for improper purposes. These are serious allegations and have not been grounded in the evidence. For this reason, the Court considers that it will not grant leave to the applicants to proceed on this ground in their application for judicial review.

[285] The Court consider that it is proper to grant an interlocutory order, and in the circumstances of this case grants the following order:

*"An Order directed to the Hon. Attorney General in his capacity as Representative of the Governor General, restraining the Governor General, whether by himself, his servants and or his agents or persons subject to his control, authority or direction or howsoever otherwise from making any proclamation in terms of any draft submitted under section 50 of the Constitution, until the hearing and determination of this action or until further order of this Honourable Court.*

[286] The costs on both these applications shall be in the cause.

[287] I wish to thank all Counsel in this matter for their helpful submissions.

Darshan Ramdhani
Resident Judge (Ag.)