

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF THE
CO-OPERATIVE REPUBLIC OF GUYANA**

**CCJ Application No. 1 of 2006
GY Civil Appeal No. 27 of 2003**

**In the Matter of an Application by Brent Griffith in terms of
Articles 142 and 146 of the Constitution**

BETWEEN

BRENT GRIFFITH APPLICANT

AND

**GUYANA REVENUE AUTHORITY
ATTORNEY GENERAL OF GUYANA RESPONDENTS**

**Coram: The Right Honourable Mr. Justice M. A. de la Bastide, President
 The Honourable Mr. Justice R. Nelson
 The Honourable Mr. Justice D. Pollard
 The Honourable Mme. Justice D. Bernard
 The Honourable Mr. Justice J. Wit**

Appearances:

Mr. Benjamin Ewart Gibson and Ms. Mandisa Adanna Breedy for the Applicant

**Mr. Vashist Maharaj for the First Respondent
Mr. Mohabir Anil Nandlall for the Second Respondent**

**Judgment of the Court delivered on the 12th day of May 2006
by the Honourable Mr. Justice Rolston Nelson**

JUDGMENT

1. Some eighteen years ago Mr. Brent Griffith, the applicant in these proceedings, joined the Customs Department, a department in the Public Service, as a customs guard. The year after he joined he was promoted to the position of Customs Officer. In 1996 it appears he held the post of patrol officer.
2. In 1996 Parliament passed the Revenue Authority Act, 1996 (No. 13) (hereinafter referred to as “the Act”). By the Act the functions and powers, assets and liabilities of the Inland Revenue Department and the Customs Department were transferred to a new corporate body, the Revenue Authority.
3. In 1996 pursuant to section 6 of the Act the government notified the applicant of its desire to transfer him to the Authority. The applicant agreed to be transferred to the Authority rather than remain in the Public Service. The applicant began employment with the Authority on January 28, 2000 when the Act came into force.
4. Between August 23, 2000 and September 23, 2000 the applicant was absent from duty. On September 21, 2000 he submitted to the Authority two medical certificates for the period of his absence, but those certificates were not accepted apparently on the ground of failure to submit a medical certificate within the first three days of absence contrary to item 40 of the Schedule to the Guyana Revenue Authority’s Employee Code of Conduct (prescribing dismissal for the first offence). On the same date September 21, 2000 a letter of dismissal was sent to the applicant. The applicant claims he never received that letter but received a copy of that letter towards the end of October at the head office of the Revenue Authority. On October 23, 2000 the Commissioner of Customs ordered him to leave the Revenue Authority’s premises.

The litigation history

5. By notice of motion dated November 26, 2001 the applicant began constitutional proceedings in which he sought the following relief:
 - “(a) *an order declaring the applicant’s removal from the service of the Authority as illegal, unconstitutional, null and void;*
 - “(b) *an order for the applicant’s reinstatement;*
 - “(c) *an order for the payment of salary and superannuation;*
 - “(d) *costs.*”
6. As the application is drafted, a declaration of nullity, if granted, will result in the dismissal being treated as if it never occurred and in the applicant’s reinstatement. However, in that event the applicant would not be entitled to payment of superannuation benefits. The courts below seem to have treated the claim as one for a declaration that the dismissal was in breach of the applicant’s constitutional

right of property in the public office he held and/or the superannuation benefits he has not been paid. The appeal in this court proceeded on the same basis.

7. On April 22, 2003 Mr. Justice B. S. Roy dismissed the motion on the ground that the Revenue Authority, being a separate legal entity and not a government department, had an employer – employee relationship with the applicant. Breach of that relationship gave rise to damages for breach of contract in private law. The claim for constitutional redress was therefore misconceived.
8. By notice dated May 2, 2003 the applicant appealed the decision of Mr. Justice B. S. Roy. The Court of Appeal (Mme. Justice Singh, Kisooson and Chang JJ.A) dismissed the applicant’s appeal on December 8, 2005. The applicant now applies to this court for special leave to appeal.

The Caribbean Court of Justice

9. On February 14, 2001 in Barbados the Members of the Caribbean Community signed the Agreement establishing the Caribbean Court of Justice (“CCJ”). The CCJ was invested with an original jurisdiction to interpret and apply the Revised Treaty of Chaguaramas establishing the Caribbean Community including the Caricom Single Market and Economy together with an appellate jurisdiction as a final Court of Appeal. The Agreement entered into force on July 23, 2002.
10. The Caribbean Court of Justice Act, 2004 (No. 16) (“the CCJ Act”), which enacted the Agreement of February 14, 2001 and made it part of the municipal law of Guyana, came into force in Guyana on April 1, 2005 by Order No. 10 of 2005 made by the Attorney General and Minister of Legal Affairs. By the CCJ Act the Agreement establishing the CCJ and the Rules have the force of law in Guyana. On June 17, 2005 the President of the CCJ made and issued the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2005 (“the CCJ Rules”).
11. On the date of the judgment of the Court of Appeal therefore, December 8, 2005, the CCJ was Guyana’s final court of appeal. Since the intended appeal was a constitutional matter the appellant had an appeal as of right but was required by rule 10.2(a) of the CCJ Rules to obtain from the Court of Appeal leave to appeal to this court and by rule 10.3(1) to apply to do so within 30 days of the date of the Court of Appeal judgment. The applicant did not do so.

The present application

12. By application filed on January 16, 2006 the applicant seeks from this court special leave to appeal as well as special leave to appeal as a poor person.

13. The applicant claims he is entitled to come to this court for special leave since owing to his attorneys' unfamiliarity with the procedure for exercising the new right of appeal to this court, no application for leave was made to the Court of Appeal within the prescribed time. He invited this court to exercise its discretion in his favour for the further reason that his appeal had merit and had a real prospect of success.
14. Counsel for the respondents opposed the motion. They contend that this court cannot entertain an application for special leave to appeal in a constitutional matter since special leave applications are restricted to criminal and civil matters. Counsel for the Attorney General further invited this court to reject both applications because the appeal lacked merit and was doomed to fail. Counsel for the Revenue Authority submitted that the CCJ had no jurisdiction to waive security for costs for a poor person since its jurisdiction was limited by section 13 of the CCJ Act to fixing the period within which security was to be provided.
15. The main issues arising out of these contentions are:
 - (1) Whether this court has jurisdiction to grant special leave to appeal where the intended appeal is neither civil nor criminal but relates to constitutional rights – the procedural question;
 - (2) Whether, if this court has jurisdiction, the applicant's case has sufficient merit to warrant the grant of special leave – the substantive question;
 - (3) Whether the applicant is entitled to special leave to appeal as a poor person – the *in forma pauperis* question.

The procedural question

16. The applicant at first conceded that his application did not fall within section 8 of the CCJ Act (special leave to appeal in civil and criminal matters), but fell rather within 6(d) of the CCJ Act (appeals as of right in constitutional matters). He later withdrew this concession which in our view had been rightly made. The real question is what flows from the fact that the intended appeal is as of right.
17. Appeals to the CCJ lie (1) as of right, (2) with the leave of the Court of Appeal or, (3) with special leave granted by the CCJ: see sections 6, 7 and 8 of the CCJ Act.
18. Special leave is not defined in the Act. It is a term commonly used by lawyers to connote approval for an appeal to proceed given by the court to which the appeal is directed. The phrase is used in contradistinction to leave to appeal obtained or obtainable from the court whose decision is the subject of the appeal. Thus, an application for leave if made to a final court as a preliminary to filing an appeal is

an application for special leave, whether the subject-matter is civil, criminal, constitutional or other. The intended appellant must, however, satisfy the court that it ought in the circumstances to exercise the discretion which it undoubtedly has, in favour of granting special leave.

19. Even where the local statute or the Constitution (as the case may be) grants an appeal “as of right”, leave must still be obtained from the local court from which the appeal lies: see rule 10.2(a) of the CCJ Rules, which have the force of law in Guyana. The local Court of Appeal must then form a view as to whether “the proposed appeal raises a genuinely disputable issue in the prescribed category of case”: see per Lord Nicholls in *Alleyne-Forte v Attorney-General* [1997] 4 LRC 338, 343; (1997) 52 WIR 480, 486E. However, this is little more than a gate-keeping exercise since the appeal is as of right. There is no discretion in the Court of Appeal to withhold leave in an as-of-right case on the ground that the appeal lacks merit: see *Lopes v Chettiar* [1968] AC 887 (PC). Similarly, where the appeal is as of right the local Court of Appeal may not in its inherent jurisdiction impose terms and conditions not contained in the legislative instrument granting the right of appeal: see *Crawford v Financial Institutions Services Limited* (2003) 63 WIR 169.
20. In granting leave in as-of-right cases the local Court of Appeal should prescribe a timetable for preparation and transmission of the record of appeal; it may prescribe the amount and form of security for costs, if any, as well as other necessary conditions, orders or directions: see rule 10.8 of the CCJ Rules.
21. Pursuant to section 13 of the CCJ Act the local Court of Appeal may impose conditions as to security for the due prosecution of the appeal and the payment of costs. On granting leave the local Court of Appeal may also grant a stay of execution and make orders as to the preparation of the record of appeal: see sections 13-15 of the CCJ Act.
22. Special leave may be granted under section 8 of the CCJ Act in civil and criminal cases. This is intended to apply to cases which do not fall within either section 6 or section 7 of that Act i.e. cases where the appeal does not lie as of right and leave to bring the appeal cannot be obtained from the Court of Appeal. If the case falls within either of those sections, an application for leave should be made to the Court of Appeal.
23. But this court may also in the exercise of its inherent jurisdiction grant special leave when the Court of Appeal has wrongly refused leave (either in an as-of-right case or one where the conditions for leave under section 7 are satisfied) or has granted leave subject to conditions which it had no power to impose. The same inherent jurisdiction is in our view also exercisable when no application for leave has been made to the Court of Appeal. The court however always has the option of refusing special leave, even in as-of-right cases, if it finds that the appeal has no realistic chance of success. The court in the exercise of this

inherent jurisdiction is not limited to cases which fall into the category of either 'civil' or 'criminal'.

24. At first the applicant sought to justify his application to this court as his only recourse since although the decision and reasons of the court had been delivered orally on December 8, 2005 the certified copy of the judgment became available only on February 6, 2006. The suggestion was that the judgment was delivered more than 30 days after the oral decision so that he was now entitled to make an application for special leave within 42 days of the judgment. There is no substance in this point since it is trite law that a judgment takes effect from the day of its date, i.e the date upon which it is pronounced. That date was clearly December 8, 2005. We therefore hold that judgment was delivered on December 8, 2005.
25. Another reason offered for the failure to apply for leave to the Court of Appeal, was the absence of any Court of Appeal rules defining the procedure for obtaining leave from it. In the light of section 3 of the CCJ Act, which gave the CCJ Rules the force of law in Guyana, it is not wholly true to say there were no rules, although those rules needed to be supplemented by local rules defining the method of applying to the Court of Appeal for leave, the timetable for providing security, the maximum figure to be imposed in order to guarantee the due prosecution of the appeal and payment of costs. Provision had to be made for a stay of execution as well as the several other matters covered in the Barbados jurisdiction by *Practice Direction No. 1 of 2005 (Procedure in Appeals to the Caribbean Court of Justice)*.
26. Nevertheless, it is a fact that Guyana has not had a second tier of appeal in civil and criminal matters since 1970 and in constitutional matters since 1973. We take into account the novelty of the new jurisdiction to the legal profession and the uncertainty that may have been fostered by the realization that local rules had to be drawn to make the Court of Appeal phase of the new appeal jurisdiction fully operational. Further, we have no reason to believe that the applicant deliberately set out to bypass the Court of Appeal. We therefore considered it right to treat this as an application for special leave to appeal as of right although no application had been made to the court below.
27. Although we consider it right to entertain this application, it must be remembered that special leave to appeal is granted purely as an act of grace: see **Bentwich: The Practice of the Privy Council in Judicial Matters** (2nd ed. 1926) at page 152. In other words the grant of special leave is always a matter of discretion and never a matter of right. Thus it is a condition precedent of the exercise of that discretion in favour of the applicant that he or she should have an arguable case. Accordingly where it is clear that the appeal as presented is wholly devoid of merit and is bound to fail special leave will not be granted. The respondents have contended that the instant application should be dismissed on that ground.

The substantive question: viability of the appeal

28. At the heart of the proposed appeal is the proposition that the law accords protection to an office-holder by permitting such person to recover an office by the appropriate form of public law action: see *Ridge v Baldwin* [1964] AC 40 (HL). By these proceedings the applicant seeks to obtain analogous relief by a constitutional motion on the basis that in breach of his constitutional rights he has been deprived of ‘property’ consisting of the public office which he held.
29. But a servant or employee under an ordinary contract of service, if wrongfully dismissed, has only a remedy in damages for breach of contract: *Ridge v Baldwin* (supra) at p. 65. In effect the High Court and the Court of Appeal held that that was the position of the applicant.
30. The applicant relied on the definition of “public office” in the Constitution and on section 6 of the Act for his contention that he held public office. The Constitution was also the basis for the applicant’s contention that his superannuation benefits were property of which he was unconstitutionally deprived.
31. Article 232 of the Constitution contains the following relevant definitions:
- “public office” means an office of emolument in the public service and for the avoidance of doubt it is hereby declared that the expression includes the office of a teacher in the public service and any office in the Police Force;*
- “public officer” means the holder of any public office and includes any person appointed to act in any such office;*
- “the public service” means, subject to the provisions of paragraph (5), the service of the Government of Guyana in a civil capacity;*
32. It is common ground that prior to his transfer to the Revenue Authority the applicant held the office of Customs Officer which is a post within the Public Service of Guyana governed by the Public Service Commission Rules of 1985 and 1998.
33. Persons holding offices of emolument in the service of the government are public servants or employees. Those officers in the higher grades, to which the applicant did not belong, are given special statutory status. For example, the Auditor General. In *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1584 Lord Reid observed in relation to elected public bodies:

“Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or ‘offices’ are given special statutory status or protection.”

34. Article 232 of the Constitution does not drive one to the conclusion that the applicant is an office-holder as opposed to an employee.
35. The applicant contended that section 6 of the Act granted to employees of the Revenue Authority terms and conditions similar to but no less favourable than those enjoyed by public officers. The argument seemed to be that the new employees of the Revenue Authority continued to have the status of public officers.
36. Section 6 of the Act provides:
- “6.(1) Before the appointed date, the Government shall notify such of the employees of the Departments as it wishes to retain for the purpose of transfer to the Authority and such employees shall be engaged on terms and conditions in relation to their emoluments as may be agreed upon between the Authority and the person so employed and, which taken as a whole are no less favourable than those applicable to him immediately before that date and shall in respect of any person so employed be the successor of the Government with regard to his leave or superannuation, rights or benefits whether accrued, earned, inchoate or contingent.”*
37. The effect of section 6 is mainly to preserve the continuity of the applicant’s pensionable service so that for superannuation purposes his service with the government could be aggregated with his service to the Revenue Authority. Section 6 also ensures that the terms and conditions to be agreed with the transferred employee taken as a whole are no less favourable than those he formerly enjoyed in the government service. The wording of the section does at least contemplate the possibility that one or more terms and conditions, including those relating to superannuation benefits, may be less favourable, provided that the overall package is comparable or superior to the terms enjoyed in the government service. The existence of the same or similar terms of employment to those enjoyed as a public servant hardly indicates that the applicant’s status as a public officer or servant carried over into his employment with the Revenue Authority.
38. It is true that the functions of the Revenue Authority described in section 10 of the Revenue Authority Act are essentially governmental i.e to administer the tax law enacted by Parliament and to collect and pay over revenue to the government to enable it to meet its obligations.
39. Section 10 of the Act states:

“10(1) The functions of the Authority are –

- (a) *to assess, charge, levy and collect all revenue due to the Government under such laws as the Minister may by order specify;*
- (b) *to ensure that Guyana's best interest are adequately safeguarded in the negotiation of international taxation agreements;*
- (c) *to promote compliance with the written laws relating to revenue and create in the society full awareness of the obligations and rights of revenue payers;*
- (d) *to advise the Minister on all matters relating to revenue;*
- (e) *to perform such other functions in relation to revenue as the Minister may direct."*

40. Thus it is clear that the Revenue Authority is a public authority. Counsel for the Attorney General conceded that the Revenue Authority was a public authority. However, the Revenue Authority does not by virtue of that status become synonymous with the government or with a government department. Nor do the employees of the Revenue Authority become public officers, or even public servants.

41. In *Tamlin v Hannaford* [1950] 1 KB 18 the question was whether a dwelling-house owned by the British Transport Commission as a result of the nationalization of the British railway network was exempt from the Rent Restriction Acts by virtue of being Crown property. The answer depended on whether the British Transport Commission was the servant or agent of the Crown. Denning LJ delivering the judgment of the court said this, which we respectfully adopt mutatis mutandis:

"In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by the Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government."

42. Recently in Trinidad and Tobago Parliament transferred the postal service then run by the government to a body corporate established by the Trinidad and Tobago Postal Corporation Act 1999. When the postal services in that country were a department of government its employees were public servants. After privatization postal employees were given similar options to those which the Act gave to former customs officers in Guyana i.e to retire voluntarily; to transfer to the new corporation or to remain in the public service at a similar grade in any available department.

43. In *Perch v Attorney-General of Trinidad and Tobago* (2003) 62 WIR 461 (PC) it was argued before the Judicial Committee, but not before the court below, that since the new corporation was subject to close governmental control it was simply a postal service run by the government in a different way and the employees of the new corporation worked in the service of the government in a civil capacity. Therefore the power to appoint them to the new corporation or to remove them from the Post Office was exclusively vested in the Public Service Commission. Accordingly the present and former employees of the Post Office were entitled to the protection of section 121(1) of the Constitution, which prescribed how a public servant could be appointed or removed. Section 36(2) of the Act establishing the new corporation, which provided the options of retirement, transfer or lateral movement within the public service was therefore void.
44. Lord Bingham, who delivered the opinion of the Judicial Committee, firmly rejected the notion that the new corporation remained a service operated by the government. He said as follows at page 467G:
- “Those transferring were not regarded as remaining in the public service: hence the provision that the terms and conditions on transfer should be no less favourable than those enjoyed in the public service”.*
45. After referring to the passage from *Tamlin v Hannaford* (supra) cited earlier in this judgment, he concluded at p. 469C:
- “The Board is of the clear opinion that employees of the new corporation are not holders of any public office and are not employed in the service of the Government in a civil capacity within the meaning of section 3(1) of the Constitution.”*
46. This court is firmly of the view that the Revenue Authority is a new corporate entity distinct from the government although it is a public corporation. The employees of the Revenue Authority are not holders of any public office nor are they employed in the service of the government of Guyana in a civil capacity; see also *Chue and Hyman v Attorney General of Guyana* (unreported, H.C.A. No. 6 of 1998) at pages 27 and 43 per Carl Singh J. (as he then was).
47. The Court of Appeal in *Michael Scotland v Guyana Electricity Corporation* (unreported, Civ. App. No. 122 of 2000) considered legislation which placed electricity under the management of a public body and held rightly that the employees of that public body were not public service employees within the meaning of article 232 of the Constitution.
48. Because the applicant was not a public officer or a public sector worker his arguments under article 142 and article 149B of the Constitution failed *in limine*.

49. Article 142 was also invoked in support of a contention that the applicant's dismissal had deprived him of superannuation benefits, but neither an existing right to such benefits nor the deprivation thereof was proved.
50. The mere allegation of a claim to superannuation benefits does not render them "property" within article 142. One can accept that, by his dismissal, the applicant was deprived of the possibility of qualifying for superannuation benefits at some future date, but the loss of that opportunity does not qualify as a deprivation of property, though it may be compensated by damages.
51. The applicant's submission that article 144(8) granted an express constitutional right to a fair hearing was rightly rejected by the Court of Appeal since the Revenue Authority was never constituted a court or tribunal.
52. The argument for an implied right to a fair hearing prior to dismissal from public office was based on Rees v Crane [1994] 1 AC 173 (PC) but was also misconceived. In Rees v Crane (supra), the Privy Council quashed the suspension of a judge and the decision of the Judicial and Legal Services Commission to represent that the judge's removal from office ought to be investigated. The Privy Council held that the rules of natural justice had to be implied at the preliminary (representation) stage of the three-stage process outlined in the Constitution. Natural justice was implied because of the seriousness of the allegations and the potential damage to the judge's reputation if he was not given an opportunity to be heard at the representation stage. In the instant case no similar constitutional provision is involved.
53. The applicant relied heavily on article 153 of the Constitution as enabling a court to grant constitutional redress of the widest variety, including redress which would normally be claimed by prerogative writ. In the first place the applicant has not established any arguable case for constitutional redress so an argument about the range of orders a constitutional court may make, does not arise. Secondly, the applicant never explained how, if at all, the technical rules which circumscribe the scope and operation of the prerogative writs could be circumvented by an application for constitutional redress. Thirdly, applications for constitutional relief cannot be used as a general substitute for the normal procedures for invoking judicial control of administrative action, where those procedures are available: see Harrikisoon v Attorney General of Trinidad and Tobago [1980] AC 265 (PC), or where a common law action is available e.g for wrongful dismissal, and the facts are in dispute: see Jaroo v Attorney General of Trinidad and Tobago [2002] 1 AC 871 (PC).
54. Indeed the applicant in any event failed to persuade this court that there was any arguable case for public law relief. He failed to bring himself within any exception to the rule that in a pure case of master and servant there is no right to a hearing prior to dismissal. In Vine v National Dock Labour Board [1957] AC 488 the courts by way of exception protected a statutory status i.e that of a

registered dock worker. Another exception relates to dismissal contrary to statutory procedures. This point was made by Sir John Donaldson MR in *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All E.R 425, 430 F-H where he points out that *Ridge v Baldwin* (supra) and *Malloch v Aberdeen Corporation* [1971] 2 All E.R 1278; [1971] WLR 1578 turned on powers of dismissal arising out of statute.

55. In *ex parte Walsh* (supra) it was held that a senior nursing officer could not bring proceedings for judicial review under Order 53 of the English Rules of the Supreme Court to quash his dismissal on the ground of breach of natural justice. Although conditions of service approved by the Secretary of State were grafted on to his contract of employment the court held that thereby the health authority merely granted the employee the required contractual protection and a breach of contract was not a matter of public law. Thus an employee of a public authority under a contract of employment would not normally have a right to judicial review.
56. The applicant has not succeeded in demonstrating that his intended appeal has any real prospect of success by showing either that he held public office during his service with the Revenue Authority or that he had an existing right to property in the form of superannuation benefits or that he had a constitutional right to natural justice in respect of the termination of his employment with the Revenue Authority. We therefore refuse to grant him special leave to appeal against the decision of the Court of Appeal. Although we have carefully considered this application, we do not consider it to be a viable appeal worthy of a fuller hearing.

The in forma pauperis question

57. Since special leave to appeal is refused, as a consequence special leave to appeal as a poor person is also denied. In *Farrington v R* (1996) 48 WIR 16 (PC), a constitutional motion in a death penalty case was refused on the ground that it was doomed to fail. The applicant sought leave to appeal as a poor person. Lord Keith said at p. 19C:

“For the avoidance of doubt... their Lordships consider that it would be inappropriate to grant special leave to appeal as a poor person where it is plain beyond rational argument that the appeal is doomed to fail.”

These dicta are apposite to the application for special leave as a poor person.

Costs

58. We have anxiously considered the question of costs. This is the first application to this court from Guyana. For thirty years and more there has been no second

tier of appeal so that the jurisdiction is as yet unfamiliar. In addition the application has provided an opportunity to clarify some points of practice for the benefit of practitioners generally. In all the circumstances there will be no order as to the costs of this application.

Disposition

59. The application filed on January 16, 2006 for special leave to appeal and for special leave to appeal as a poor person is dismissed. There shall be no order as to the costs of the application.

M.A. de la Bastide (President)

Justice Rolston Nelson

Justice Duke Pollard

Justice Désirée Bernard

Justice Jacob Wit