

JUDICIAL SUPERVISION OF EXECUTIVE ACTION IN THE COMMONWEALTH CARIBBEAN

Presented by

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On the occasion of

**INAUGURAL TELFORD GEORGES MEMORIAL
LECTURE**

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DELIVERED ON 31st MARCH, 2006)**

As this is the first in what it is hoped will be a series of lectures in memory of the late Right Honourable Philip Telford Georges, I may be permitted to say a few words of my own about the man whose memory we honour this evening. But first of all let me say how honoured I am to have been invited by the Dean of the Law Faculty with the blessing of Telford's widow, Joyce, to deliver this inaugural lecture. I would have wished though to have had the honour without the responsibility of addressing such a distinguished audience.

Telford Georges was my friend and mentor over a period of some 35 years. I was first introduced to him by the law librarian in the Red House in Port-of-Spain shortly after I returned from England in late 1961 to take up an appointment as Crown Counsel in the office of the Attorney-General. The librarian, who like all law librarians that I have ever known, was a woman, thought it was important for me to meet Telford whom she rated highly both as a lawyer and as a person. Not long before Telford had appeared for the petitioner in an election petition which challenged the result of a general election. The petitioner, as it happened, was by trade a mattress-maker. During the hearing of the petition eminent counsel appearing for the respondent referred disparagingly to the petitioner as 'a man of straw'. Telford was on his feet in a flash pointing out to the Judge that his client, far from being a man of straw, was in fact a man of fibre!

In August 1962, I was sent to Tobago to prosecute at the assizes. I had the mixed fortune to find Telford on the opposite side in one of the listed cases. He was defending a young man who was charged with raping a woman, a visitor who had taken up residence in Tobago. The prosecution's case was that the accused had broken into the woman's home in the middle of the night, wakened her from sleep and raped her at knife-point. I thought I had a pretty strong case, but there was an entry in a station-diary which suggested that the initial report made to the police by the virtual complainant, was of robbery rather than rape. Telford exploited this very skillfully. His defence as put to the jury in a short closing speech, was that the jury could not be sure that they had heard the whole truth. The jury must have agreed because they acquitted the young man. While the verdict was something of a disappointment to me, I had the benefit of an early and practical lesson in the art of advocacy.

It was when we both served on the Wooding Constitution Commission between 1971 and 1974, that I got to know Telford better and developed a great admiration for the quality of his mind and the strength of his principles. I will permit myself one reminiscence from that period. While the Commission was conducting a programme of public meetings, a State of Emergency was declared in Trinidad and Tobago confined to certain parts of Trinidad, that is, the oil and sugar belts. Telford felt very strongly that the Commission should defer its public meetings until the state of emergency ended, as people could not reasonably be expected to leave their homes at night to attend meetings and there express themselves freely during a state of emergency. Some of us on the Commission agreed with him, but others who appeared to be in the majority, did not. Telford was about to tender his

resignation as a member and Deputy Chairman of the Commission but I urged him not to concede defeat without taking the matter to a vote. I might mention that it was recognised that the Prime Minister would not have appreciated the Commission suspending its planned activities as this would serve to underline the seriousness of any state of emergency, even one which his critics were describing as a “false” state of emergency. Telford reluctantly agreed. The matter went to a vote at a meeting of the Commission and by the narrowest of margins there was a majority vote in favour of suspending our public meetings until the end of the State of Emergency. I have always cherished the memory of these events because while I was so frequently a beneficiary of Telford’s advice, this was one occasion when I was able to deflect him from one course of action to another which produced a better result.

But my remit tonight is to talk in Telford’s memory, not about him.

And so I turn with some trepidation to the subject of my lecture. This has been rather ambitiously entitled “Judicial Supervision of Executive Action in the Commonwealth Caribbean”. In an effort to avoid disappointing my audience, there are some things that I should say concerning the topic and my treatment of it. The topic, titled as it is, might be dealt with adequately in a full-size text-book. In fact, it has been, as those of you familiar with the excellent work by Professor Fiadjoe entitled “Commonwealth Caribbean Public Law” can attest. It would be foolish of me to attempt to duplicate his efforts, more so as my present occupation does not permit me time off for scholarly research, and in any case to encapsulate the fruits of the research in a single lecture, would be akin to writing out the Bible on a pin-head.

Accordingly, I would like with your leave to re-title my talk “Some Aspects of Judicial Supervision of Executive Action in the Commonwealth Caribbean”. Similarly, it is not practical for me to undertake a survey of developments in each jurisdiction of the Commonwealth Caribbean separately. You will find that much of my focus is on Trinidad and Tobago. This is not merely because it is the jurisdiction with which I am most familiar, but also because it is the jurisdiction in which there is the highest volume of public law litigation and also the sharpest increase in that litigation in recent years.

Let me illustrate the point. Between 1999 and 2001 there was actually a decrease in the number of judicial review matters filed in Trinidad and Tobago. The number was 48 in 1999, 38 in 2000 and 32 in 2001. In 2002 there was an increase to 58 and in 2003 a very sharp increase to 109. This was followed by a further increase to 142 in 2004 and a slight decline to 125 in 2005. The number of judicial review matters has therefore more than doubled within the last six years. By comparison it is startling to find that Jamaica with more than twice the population of Trinidad and Tobago, had only 14 judicial review matters filed in 2004, 6 in 2005 and 3 this year up to the 15th March. Such a low incidence of judicial review cases causes one to speculate as to the cause. I am not in a position to suggest one. In the Eastern Caribbean States there were no Judicial Review matters filed in 1999, but since then the members have been freely constant, 9 in 2000, 11 in 2001 and in 2002, 6 in 2003, 10 in 2004 and 9 in 2005. I was unable to get the corresponding figures for Barbados.

Finally by way of prefatory remarks, I would point out that I must be careful to preserve my neutrality on issues on which I could be called upon to rule as President of the Caribbean Court of Justice. I will ask you therefore to forgive me if I refrain for the most part from commenting on the decisions to which I refer.

PRE-INDEPENDENCE REMEDIES

Jamaica and Trinidad and Tobago gained their Independence in 1962. They were the first of the former West Indian colonies to do so. Prior to 1962 there were two methods of challenging administrative acts, omissions and decisions. One was by way of the prerogative writs of certiorari, mandamus and prohibition, and the other was by an action against the Attorney General for a declaration, a method which received the approval of the English Court of Appeal in *Dyson v. The Attorney General* [1911] 1 KB 410. In 1933 a new system was introduced by statute in England for applying for the prerogative writs and in 1938 prerogative writs were replaced by prerogative orders. The new orders, however, continued to suffer from many of the “hereditary procedural defects” (as Wade termed them) of the writs they replaced. These defects have been removed by and large by the Administrative Justice Act in Barbados and the Judicial Review Act in Trinidad and Tobago and also by modern Rules of Court adopted in Jamaica and the Eastern Caribbean States. One of the major defects of the old procedure was the inability to combine claims for one of the prerogative writs (or orders) with a claim for other relief such as a declaration, an injunction or damages.

It is to be noted that in Guyana the prerogative writs still survive, and the procedure applicable is that prescribed by the Crown Office Rules, 1906. This is one area in which Guyana clearly has some catching up to do.

ENTER THE CONSTITUTIONAL MOTION

The Independence Constitutions introduced a new and very important weapon for challenging executive acts and decisions in the form of the constitutional motion. These Constitutions typically included a statement of fundamental rights and freedoms and forbade any infringement of them not only by the Legislature but also by the Executive. They also explicitly provided that aggrieved persons could apply to the High Court for redress for any contravention of these rights and the Court was left with a wide discretion as to the form such redress might take. This form of challenge has been used extensively, sometimes in tandem with applications for judicial review, where for instance, there has been a denial of natural justice: See for example *Rees v. Crane* [1994] 1 All ER 833 where a judge’s challenge of the disciplinary proceedings initiated against him was pursued both by judicial review proceedings and by a constitutional motion.

But constitutional motions can be used to enforce substantive as well as procedural, rights e.g. the right to life. Thus the orders made by the Privy Council forbidding the carrying out of the death penalty in circumstances in which there has been delay beyond the limit prescribed in *Pratt v. Morgan* [1993] UK PC 1, or while the condemned person is pursuing proceedings before an international tribunal to which the State has by treaty given him a right of access, are examples of judicial control of executive action usually invoked by constitutional motion and exercised under the authority of the Constitution.

The actions and decisions of the Executive can collide with any of the entrenched fundamental rights and freedoms and if they do, a remedy by way of constitutional motion may be available. With Independence therefore, came an extremely important addition to the potential for intervention by our courts in the actions of the Executive. But the courts have not allowed the constitutional motion to be cheapened by over use.

It has been established by the Privy Council, that the jurisdiction of the Court to control administrative action should not be invoked by constitutional motion whenever the act or decision complained of can be classified as a breach by an organ of Government or a public authority or public officer of a fundamental right or freedom of the aggrieved person. If the traditional method of invoking the supervisory jurisdiction of the Court by judicial review is available, then that should be utilized: see Lord Diplock in *Harriskisoon v. The Attorney-General of Trinidad and Tobago* [1980] A.C. 265 at 268. Similarly, if there is a parallel remedy available by way of a common law action e.g. in debtinue, and there are disputed issues of fact, then the common law remedy should be sought: see *Jaroo v. The Attorney General of Trinidad and Tobago* Privy Council Appeal No. 54 of 2000. Where, however, in a case of wrongful dismissal there was an allegation that the Prime Minister had abused his power by purporting to remove a public servant from office because of his political affiliation, the Privy Council approved the use of the constitutional motion to seek redress notwithstanding the existence of a parallel remedy at common law (see *Attorney-General of Antigua and Barbuda and Others v. Lake* [1998] 4 LRC 348).

It is fair to say that courts are much more reluctant today than in the past to deny redress to a party with a genuine complaint because he has used the wrong procedure to approach the Court. The Privy Council itself in *Attorney-General of Trinidad and Tobago v. Ramanoop* [2005] UK PC 15 has indicated that if it should emerge after proceedings are instituted by constitutional motion that that is not the appropriate form of action, the court may order that the action continue as though begun by writ.

SERVICE COMMISSIONS AND THE OUSTER CLAUSE

The Independence Constitutions established a number of Service Commissions and invested them with powers to appoint, promote, transfer and discipline persons employed by the Government in the respective services for which the Commissions were given responsibility. Typically there was a Judicial and Legal Service Commission, a Public Service Commission and a Police Service Commission. These Commissions exercise very wide powers over the careers of that very substantial section of the population that are (or aspire to be) employed by the Government. The Commissions were therefore an obvious target for judicial review. The typical Independence Constitution, however, contained an ouster clause which imposed a fetter on the right of the courts to review the actions and decisions of these Commissions. In Barbados, the ouster clause is section 106 of the Constitution which provides in part that:

“The question whether –
 (a) any Commission established by this Chapter has validly performed any
 function vested in it by or under this Chapter
 ...
 shall not be enquired into in any Court.”

Substantially the same provision is found in the constitutions of Jamaica and Trinidad and Tobago. But courts have never been well disposed towards ouster clauses and this was no exception. It was soon established that if the complaint against a Service Commission was that it had committed a breach of natural justice or had acted ‘ultra vires’, then the ouster clause did not apply. The view which the Privy Council took of the scope of the ouster clause was that it served to prevent inquiry

“into procedural irregularities not of a fundamental kind” (*Charles v. Judicial and Legal Services Commission* [2003] 2 LRC 422 at 428).

Despite these limitations on the scope of the ouster clause, there was a significant extension of the supervisory jurisdiction of the Supreme Court of Trinidad and Tobago when the ouster clause was repealed by Act No. 43 of 2000. The effect was to widen the range of complaints against the Service Commissions which the courts could entertain and this undoubtedly had a significant, though not immediate, impact on the volume of judicial review applications, as is reflected in the statistics which I have earlier provided.

PUBLIC INTEREST APPLICATIONS

In the year 2000 the Trinidad and Tobago Parliament passed the Judicial Review Act which extended access to judicial review remedies to persons outside the category of those who could show a sufficient interest in the subject matter of the application. A similar provision was contained in the Administrative Justice Act of Barbados which was passed in 1980 and proclaimed in 1983.

The traditional common law position incorporated into Rules of Court and legislation in the United Kingdom was that in order to apply for judicial review, a person had to have a sufficient interest in the subject matter of the application. This was understood to mean that the applicant must have been adversely affected by the administrative decision, act or omission which he was seeking to challenge. The Administrative Justice Act in Barbados and the Judicial Review Act in Trinidad and Tobago sanctioned the making of an application for judicial review by a person who was not adversely affected by the act complained of, if the application was ‘justifiable in the public interest’.

In Jamaica and the Eastern Caribbean States there is no comparable legislation but the new Rules of Court adopted in both these jurisdictions, while not going quite as far as the statutory provisions in Barbados and Trinidad and Tobago, provide for the making of applications for judicial review by any body or group in the following circumstances:

- (a) if requested by a person entitled to apply;
- (b) if its members may be/have been adversely affected by the decision challenged; and
- (c) if the matter is of public interest and the body or group possesses expertise in the subject-matter of the application.

When the Bill for the Judicial Review Act was presented in the Trinidad and Tobago Parliament in July 2000, the then Attorney General represented that the provision for the making of applications in the public interest represented a significant change in the existing law. Indeed, it would appear to have been so regarded by the legal profession and the public in Trinidad and Tobago, for it produced such a flurry of public interest applications for judicial review that the Cabinet was moved in 2005 to introduce a Bill to repeal the section sanctioning them. But more of that anon.

The fact is, however, that the requirement that applicants for judicial review show a sufficient interest in the subject matter of the application, had already been so diluted by judicial decisions in England that the new statutory provision in Trinidad and Tobago may be regarded as little more than a

codification of the new common law position. The accretion to the common law known as public interest litigation, was firmly established in England by the judgments of the House of Lords in **R. v. Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses Limited** [1982] AC 617. Wade on Administrative Law (9th edition, page 693) describes the effect of the House of Lords decision in that case as “virtually to abolish the requirement of standing” as a distinct concept.

It would appear, however, that even when an applicant has the benefit of the statutory provision, there are still limits to how tenuous the connection can be between him and the subject-matter of the complaint. This is illustrated by the case of **Trinidad and Tobago Civil Rights Association v. Patrick Manning** (sued as Prime Minister and Head of Cabinet) HCA No. 477 of 2004. The applicant instituted the proceedings at the request of the residents of Tortuga, a village in Trinidad, for the purpose of challenging the decision of Cabinet not to re-appoint the first Chairman of the Environmental Commission at the expiration of his initial term of office. The villagers wished to complain to the Environmental Commission of illegal dumping of rubbish near their homes and expressed the fear that they would not receive a fair hearing from the Commission as a result of the failure of the Cabinet to re-appoint the first Chairman. It was held at first instance that although the Cabinet had breached the rules of natural justice in failing to give the first Chairman a hearing before deciding not to re-appoint him, in the absence of any complaint by the first Chairman himself, the fear expressed by the villagers was too tenuous a connection with the subject-matter of the complaint to justify the making of an application on their behalf in the public interest.

The question whether there was a right to make public interest applications for judicial review independently of statute, was one of several interesting questions raised in the recent case in Trinidad and Tobago of **The Civil Rights Association of Trinidad and Tobago and Basdeo v. Attorney-General of Trinidad and Tobago** H.C.A. No.S-1070 of 2005. Shortly after Cabinet introduced in Parliament the Bill (to which I have already referred) to repeal the provision in the Judicial Review Act which provided for public interest applications, a constitutional motion was filed by a Civil Rights Association and an individual challenging the constitutionality of the Bill and the decision of the Cabinet to pursue its passage. The hearing of the motion was adjourned part-heard over the long vacation. In the interim Parliament was prorogued and as a result the Bill lapsed. Gobin J. held that the Bill would have deprived the Supreme Court of an essential part of its supervisory jurisdiction and therefore involved an amendment of entrenched provisions in the Constitution. She further held that notwithstanding the lapse of the Bill and the failure of the Government to reintroduce it, she was entitled to grant the applicant relief. Accordingly, she made a declaration that the action of the Cabinet in introducing the Bill in the Senate and in taking action to engage the legislative process, was unconstitutional in that it amounted to a contravention and/or a threatened contravention of the applicants’ right to protection of the law as guaranteed to them by the Constitution.

In the course of her judgment the learned Judge held that a private citizen had “a legal right to access the Courts to bring public interest litigation” and that this right antedated the Constitution. Even more importantly, however, this decision would seem to establish a right by the courts to prevent the Cabinet from taking to the Parliament, and the Parliament from considering or passing, a Bill which would produce, if passed, an unconstitutional Act. In such circumstances, the court can, if the judgment is correct, effect something in the nature of a pre-emptive strike. The appeal process has

been engaged and will determine whether so early an intervention is justifiable in the context of the Trinidad and Tobago Constitution.

WHO IS SUBJECT TO CONTROL

The cases already mentioned demonstrate that no one involved in administration from the Prime Minister down, is immune from challenge by way of judicial review proceedings or constitutional motion. This is true not only of Trinidad and Tobago but of the region generally. Thus in **C.O. Williams Construction Ltd. v. Blackman & Anor** [1995] 1 WLR 102 the Privy Council restored the first instant decision of Sir Denys Williams C. J. who established that the Barbados Cabinet was within the reach of judicial control when he ruled that the award of a contract by Cabinet was an “administrative act” as defined in the Administrative Justice Act.

In Jamaica in **Tapper & McKenzie v. Director of Public Prosecutions and The Attorney General** (1999) SC 4 the constitutional court set aside a *nolle prosequi* which had been entered by the Director of Public Prosecutions in circumstances in which it was clear that the only purpose of the DPP’s action was to prevent the case from being tried by the Resident Magistrate before whom it was listed.

In Trinidad and Tobago judicial review was sought even of the decision of the Prime Minister to remain in office at a time when the Parliament was deadlocked as a result of the two main political parties having gained an equal number of seats in the 2001 general election. A new election held before the case was disposed of, broke the deadlock and relieved the Court of the need to rule on any substantive issue. See

In England there has been in recent years a tendency to add to the types of bodies that are amenable to judicial review. Thus in **R v. Panel on Takeovers and Mergers Exp. Datafin** [1987] 1QB 815 (CA), the takeover panel of the Stock Exchange was held to be subject to judicial review although as a body it lacked the visible statutory or prerogative source of power previously thought to be necessary. It was held to be sufficient that it was exercising public law functions or functions that had public law consequences.

In Trinidad and Tobago the question has arisen as to whether a company called the Urban Development Company of Trinidad and Tobago (UDCOTT) which was incorporated as a limited liability company by the Government for the purpose of carrying out the Government’s policy of urban redevelopment, is subject to judicial review. The answer recently provided by the Court of Appeal in **NH International (Caribbean) Ltd. v. UDCOTT and Hafeez Karamath Limited** Civ. App. No. 95 of 2005 (Warner and Kangaloo JJA, Sharma CJ dissenting) is that it depends on the nature of the functions which it is performing at the relevant time. In this case the majority held that the award of a contract after a tendering process lacked the public law flavour which would make it susceptible of judicial review. The Privy Council of course may still have the last word. The focus on the nature of the functions being performed seems to be in line with the decision in the **Datafin** case and arguably provides a more satisfactory criterion than the way in which the body or corporation is set up.

PROTECTION AGAINST ABUSE OF POLITICAL POWER

The people of the Commonwealth Caribbean would judge very harshly any system of public law which did not protect them against political victimization. It would be as well therefore to give one or two illustrations of how the Courts in this region have responded to appeals for protection against this. In this connection I have already mentioned in passing the case from Antigua and Barbuda of *Attorney General v. Lake* (supra) in which the local Courts supported by the Privy Council held that a person who was allegedly dismissed from public office by the Prime Minister for having supported an opposition candidate in an election, was entitled to claim constitutional relief, and rejected the objection of the Attorney-General that the officer had a private law remedy for damages for wrongful dismissal.

In the Anguillan case of *Benjamin v. The Minister of Information* AI 2001 PC 1 the Government summarily suspended a call-in programme which it had instituted on a radio station owned by it, because of criticisms which were being voiced on that programme of the proposed introduction by the Government of a national lottery. The host of the programme and two regular listeners filed a constitutional motion alleging that there had been an infringement of their freedom of expression as defined in section 11 of the Constitution. Saunders J (as he then was) upheld their claim and granted a declaration that the action of the Minister in suspending the programme constituted an abridgement of the constitutional rights of the applicants and ordered that damages be paid to the applicant who had hosted the programme. The Privy Council endorsed and restored his judgment which had been reversed in the Court of Appeal.

In the Trinidad and Tobago case of *Devant Maharaj v. The Statutory Authorities Service Commission (SASC)* HCA 305 of 2004 the applicant challenged the decision of the respondent Commission to appoint someone else in preference to him to act as Deputy Director of the National Lottery Control Board. The applicant had in fact been selected by the Commission for the appointment but pursuant to a practice which the Commission had adopted in imitation of that prescribed by the Constitution for the making of appointments to certain key offices by other Service Commission, the Prime Minister was consulted and he vetoed the applicant's appointment. There was no law that required the Prime Minister to be consulted on appointments made by the respondent Commission or gave the Prime Minister a power of veto over them. The Commission nevertheless accepted the veto. The Court held that the Commission's deference to the objection of the Prime Minister was unlawful and quashed the decision to appoint the other candidate. The matter of the appointment was remitted to the Commission for its re-consideration. An order was also made that if the Commission did not appoint the applicant, it should furnish him with reasons in writing within 14 days of its decision.

The remitting of the matter to the Commission is reflective of the understandable reluctance of courts to substitute their own decision for that of the person or body in whom the law has vested the power to make it, even when, as in this case, the decision would seem to be clear cut in light of the Court's ruling.

MALA FIDES AND UNEQUAL TREATMENT

Another indicator of the increased readiness of the courts to shed constraints on their power to correct injustice caused by maladministration, is a change in attitude towards the need to prove ‘mala fides’ when discrimination is alleged against a public authority or official. The issue was raised, but did not have to be decided, in *Bhagwandeem v. The Attorney General* [2004] UKPC 21, an appeal to the Privy Council from Trinidad and Tobago. The Constitution of Trinidad and Tobago includes among the rights which it guarantees, the right to equality of treatment from any public authority in the exercise of its functions. It was generally accepted that to invoke that right it was necessary not only to prove unequal treatment but also mala fides – see the judgment of Bernard J. in *L.J. Williams Ltd. v. Attorney-General and Smith* (1980) 32 WIR 395. In *Bhagwandeem*, however, the Privy Council pointed out that mala fides was not required in discrimination cases in the United Kingdom and served notice that the law of Trinidad and Tobago relating to discrimination by public officials might require further consideration in the light of their observations. A strong hint was thereby given that their Lordships are likely to bring the law of Trinidad and Tobago into line with that of the United Kingdom by removing the requirement of mala fides in discrimination cases.

The matter was recently considered by the Court of Appeal of Trinidad and Tobago in *Central Broadcasting Services Ltd. & Anor v. The Attorney General of Trinidad and Tobago* Civ. App. No. 16 of 2004. Of the three Judges who heard this appeal, only Hamel-Smith JA was prepared to hold that it was no longer necessary to prove mala fides to obtain redress against discrimination. Mendonca JA held that mala fides could be inferred from overt acts, and Warner JA adopted a line taken by the Court of Appeal in the *KC Confectionery Ltd.* case i.e. that if a case of illegality could be made out without alleging mala fides, it would not be necessary to prove it.

It seems to be only a matter of time, however, before proof of mala fides as a separate requirement in cases of discrimination, is expressly dispensed with by the Privy Council.

LEGITIMATE EXPECTATION

Some 37 years ago the doctrine of legitimate expectation first made its appearance in the public law of England and by extension of the Commonwealth Caribbean. It is a product of judicial inventiveness designed to fill a gap in the protection which the courts offer against arbitrary action by public officials and authorities with power to make decisions that affect others. The genesis and development of legitimate expectation have been chronicled in text-books and it is not necessary for me to cover the same ground. What the courts have established is the principle that if a public official or authority has either expressly or implicitly conveyed to a person or group of persons the impression that they will receive or continue to enjoy a certain benefit or concession, then in the absence of some overriding public interest to justify disappointing the expectation thereby created, the courts will not countenance the denial or withdrawal of that concession or benefit, even though there is no legal right to it. Initially, however, the courts in applying this doctrine of legitimate expectation would not order the relevant authority or official to provide a substantive benefit which had been promised, but only a procedural benefit in the form of an opportunity to be heard or consulted before the substantive benefit was refused or taken away.

But it would seem that the English Court of Appeal has finally accepted the principle that a court will not allow a public authority or official to renege on a promise, even of a substantive benefit, unless there is a sufficient overriding public interest to justify it.

In the Commonwealth Caribbean the judges were for a long time reluctant to accept that the doctrine of legitimate expectation could give rise to a right to receive a substantive, as opposed to a procedural, benefit. Calvin Eversley in an article in the *Caribbean Law Review* of December 2003, cites three cases as examples of this reluctance. The three cases are *Attorney General v. K.C. Confectionery Ltd.* (supra), *Marks v. Minister of Home Affairs* [1984] 38 WIR 106 and *Re: Gayman Jurisingh* [1984] 35 WIR 106.

In the *KC Confectionery* case the Court of Appeal of Trinidad and Tobago recognised the doctrine of legitimate expectation but held that on the facts the appellant had failed to establish that it had a legitimate expectation of the substantive benefit claimed, that is, the negative listing of a certain product. In *Jurisingh* the Court of Appeal of Trinidad and Tobago expressed itself as strongly opposed to the extension of legitimate expectation for the purpose of challenging the decisions of the Executive on their merits and clearly wished to confine it to procedural expectation. In *Marks* where the complaint was of the refusal to renew a doctor's work-permit, the Bermudian Court of Appeal recognised, and seemed prepared to give effect to, the doctor's substantive expectation that his work permit would be renewed as well as his procedural expectation that he would be heard before a renewal was refused, but while it quashed the decision to refuse the renewal, it declined to make any order of mandamus against the Minister.

It has been argued with some force that it is illogical to protect a legitimate expectation that a person will be heard before being denied a substantive benefit, but to offer no protection to the legitimate expectation of receiving the substantive benefit itself. There are other decisions by Caribbean courts which indicate that a measure of protection will be afforded to substantive as well as procedural expectations.

In *Kent Garment Factory Ltd. v. The Attorney General and the Minister of Trade and Tourism* Civ. App. No. 5 of 1991 the appellant, a garment manufacturer, imported cloth into Guyana under licences issued by the competent authority appointed by the Minister of Trade. The Court of Appeal held that in the circumstances of the case the applicant had a legitimate expectation that a licence which had expired would be renewed at least until goods which had been ordered and paid for during the currency of the expired licence, were received. It was held however that the applicant had approached the Court by the wrong procedure and had dishonestly tampered with the expired licence, and so was disentitled to the relief which presumably it would otherwise have been afforded.

In *Ameena Ali v. North West Regional Health Authority* HCA No. S-1812 of 2003, the respondent Authority as part of a programme of reorganisation abruptly terminated the employment of the applicant who had shortly before transferred from the public service to its employ, and declared her post redundant. Ventour J. found that the appellant had a legitimate expectation of a substantive benefit, that is, that she would hold her position until the contract which she had been given, was terminated in accordance with its terms. The Judge also found that there was no evidence of an overriding public interest that would justify the decision to abolish the applicant's position or terminate her employment. Accordingly, the Court declared that the decisions of the Authority with

regard to the abolition of the applicant's post and termination of her employment, were unlawful, illegal and null and void and ordered that they be quashed.

In *Leacock v. The Attorney General of Barbados* HCA No. 1712 of 2005 a police officer challenged by judicial review the decision of the Commissioner of Police not to recommend his application for study leave to pursue the course leading to the Legal Education Certificate at the Hugh Wooding Law School. One ground of his claim was that he had a legitimate expectation that he would be granted the study leave requested based on a long-standing practice whereby officers who had successfully completed the course for the LLB degree at the University of the West Indies, were granted study leave in order to enable them to obtain their professional qualification at the Law School. The applicant had obtained his LLB degree and indeed, had been given leave to attend classes while studying for it. Chief Justice Sir David Simmons sitting at first instance, having made a careful and thorough review and analysis of the authorities, came to the following conclusion:

“Thus, it can now be said with confidence that the doctrine of legitimate expectation which originated as a public law innovation to ensure procedural fairness, such as to give the right to be consulted or be heard, has now evolved and expanded to protect benefits, advantages or interests of a substantive nature which an applicant can reasonably expect to be permitted to enjoy.”

He found on the evidence that the applicant legitimately expected that he would be granted the study leave for which he had applied. He found no overriding consideration to justify a departure from what had been the previous practice and held that to resile from that practice in this instance would be a breach of the applicant's legitimate expectation. The Chief Justice declared the recommendation of the Commissioner against the grant of study leave to the applicant to be unreasonable and null and void and made an order of certiorari quashing it.

What is clear is that the doctrine of legitimate expectation is still at a developmental stage in the Commonwealth Caribbean. There are conflicting judicial views in the region with regard to the treatment of substantive expectations. The question now is not so much whether they will be protected, but in what circumstances and by what sort of order will that protection be afforded. It will probably not be long before the matters in issue are authoritatively resolved by the final court of appeal – the Caribbean Court of Justice in the case of Barbados and Guyana, and the Privy Council in the case of the rest of the Commonwealth Caribbean.

JUDICIAL ACTIVISM IN THE REGION

In the article by Calvin Eversley to which I have already referred, the author suggests that courts in the Commonwealth Caribbean have not only the right, but the obligation, to be more interventionist than courts in the U.K. in their supervision of executive and legislative action because in our constitutions it is the Constitution, and not, as in the U.K., Parliament, which is supreme, and the responsibility for ensuring adherence to the Constitution by the executive and legislative arms of Government, is vested in the Judiciary. I am not sure whether their Lordships in the Privy Council could be persuaded to accept this proposition in so far as it relates to executive action outside the sphere of death penalty cases. It might not be easy to persuade them to approve and adopt an extension in our jurisdictions of

the court's power to strike down administrative actions or decisions which was at variance with what would be considered settled law in England – or should I say in Europe. That consideration of course does not affect the courts in Barbados and Guyana which no longer send their appeals to the Privy Council, and perhaps should not act as a deterrent even in those jurisdictions which still do.

Be that as it may, recent decisions of courts in the Commonwealth Caribbean (many of which I have already referred to) seem to reflect a higher level of judicial activism in the field of public law than was previously evident. Possibly the high-water mark of this trend to date is the judgment of Gobin J. in *Trinidad & Tobago Civil Rights Association and Basdeo v. Attorney-General* (supra). The fate of that judgment, is still to be determined by the Court of Appeal or possibly, the Privy Council. I would like to add here another example of a bold judicial solution to a difficult constitutional problem created in this case by the Legislature. I refer to the judgment of Jones J. in *Sharma v. The Cabinet of Trinidad and Tobago* HCA No. S-854 of 2005. The problem briefly stated was as follows. The Freedom of Information Act ('the Act') required the Cabinet to designate Ministers to be 'responsible' inter alia for the Service Commissions for the purpose of the administration of the Act. The Cabinet failed to designate any responsible Minister for these Commissions and the applicant, an Opposition M.P., brought proceedings to compel the Cabinet to do so. The Cabinet's excuse for its inaction was that the Act gave certain functions and powers to the responsible Ministers that were inconsistent with the independence which these Commissions enjoyed under the Constitution, and therefore to designate Ministers for these Commissions would involve it in a contravention of the Constitution. The Judge noted that there were three sections of the Act which conferred powers on the responsible Ministers. The Judge found that while the powers conferred by one of these sections did not interfere with the independence of the Commissions, the powers conferred by the other two did. The solution which the learned Judge found, was to amend the offending sections by 'reading in' or inserting at the beginning of each, the words 'Except in the case of a public authority established by the Constitution'. She then proceeded to make an order of mandamus directing the Cabinet to advise the President who were the Ministers to be assigned responsibility for the Commissions for the purposes of the Act.

Whatever view one takes of the correctness of this decision (a matter on which the Court of Appeal will have its say), one cannot help but admire the courage of the Judge in amending an Act of Parliament and issuing a mandatory order to the Cabinet, in the course of a single judgment.

I would not like to leave you with the impression that I support unbridled judicial activism. Far from it. Many of the arguments for recognising the 'imperative of judicial restraint' maintain their validity in societies in which the Constitution, and not Parliament, is supreme. I will set out some of those arguments:

Judges are not well equipped to make policy decisions which are better left to those whose business it is to make them.

Judges too must obey the law and therefore must respect the right of public officials and authorities to exercise the decision-making powers which the law has vested in them.

It is wrong for Judges to breach the social contract embodied in the Constitution by disregarding the allocation of responsibilities and functions which that contract makes as between the three arms of Government.

As a practical matter, excessive interference by the Judges in the business of administration will create a loss of efficiency and effectiveness in administration, not to mention frustration and tension.

While under the doctrine of separation of powers the turf of the Judiciary is rightly much more jealously guarded than that of the Executive or the Legislature, I do not think that it leaves the Judiciary free to make incursions at will into the territory of the other two arms of Government. On the other hand, the courts are not only entitled but have a duty to interfere with executive or administrative actions for two purposes – to prevent injustice and to secure compliance with the law, above all the Constitution. I welcome what I see as a recent trend of Judges in the region showing a good deal of courage and inventiveness in the pursuit of these objectives. The challenge to all Caribbean judges, especially those who have responsibility for making final decisions, is to steer a course between the Scylla of passivity and the Charybdis of what I will call judicial adventurism.

I will end with a caution by a judge who was never anything but reasonable and practical. This is from a judgment which he gave while sitting on the Court of Appeal of Bermuda in *Mucklow v. The Minister of Home Affairs* Civ. App. No. 20 of 1978. The Judge was Telford Georges J.A. (as he then was) and the relevant passage is as follows:

“The fact is that courts are driven to formulate some tests which can exclude cases where judicial review is considered inadvisable even though the rules of natural justice have not been observed. As a matter of practical good sense it is clear that administration would be considerably impeded if every decision of all administrators were susceptible to review by the courts on an allegation that the rules of natural justice had been breached. The effect of total supervision may well be total frustration of indispensable administrative processes.”

I will leave Telford with the last word.

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