IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 689 of 2013

IN THE MATTER OF an application for leave to apply For Judicial Review of a determination by the President and the Human Resource Manager of the University of Belize not to extend the employment contract of Dr. Abigail McKay.

AND
IN THE MATTER OF University of Belize Act 2000, Chapter 37, Section 27 of the Laws of Belize

AND
IN THE MATTER OF University of Belize Act 2000, Chapter 37, Sections 31 of the Laws of Belize

AND
IN THE MATTER OF the University of Belize Faculty and Staff Handbook, June 15, 2000, Rule 4.1.1

AND
IN THE MATTER OF the University of Belize Faculty and Staff Handbook, June 15, 2000, Rule 4.1(E)

BETWEEN

DR. ABIGAIL MCKAY	**CLAIMANT**
AND	
THE UNIVERSITY OF BELIZE	**1ST DEFENDANT**
BOARD OF TRUSTEES OF UNIVERSITY OF BELIZE	**2ND DEFENDANT**
DR. CAREY FRASER , PRESIDENT THE UNIVERSITY OF BELIZE	**3RD DEFENDANT**
DR. WILMA WRIGHT, PROVOST THE UNIVERSITY OF BELIZE	**4TH DEFENDANT**
HERTHA GENTLE, HR DIRECTOR THE UNIVERSITY OF BELIZE	**4TH DEFENDANT**

Keywords: Judicial Review; Legitimate Expectation; Part 56.3 of the Supreme Court Rules 2005; Part 56.5 of CPR 2005**;** Time Limits for permission to apply for judicial review**;** The University of Belize Act Chapter 37; Civil Proceedings in relation to judicial review; Good Faith; Full and frank disclosure; Material non-disclosure.

Before the Honourable Mr Justice Courtney A Abel in Open Court

Hearing Dates: 29th January 2014
6th February 2014
21st February 2014
28th February 2014.

Appearances:

Ms. Audrey Matura-Shepherd for the Claimant

Mr. Denys Barrow S. C. for the Defendants and Mr. Jose Cardona with him.

Mr. Herbert Panton for the Attorney General's Ministry.

DECISION
Delivered on the 28th day of February 2014

Introduction

[1] Decisions taken by individuals or bodies performing a public function, in certain circumstances, can be challenged and reviewed by this court - by proceedings known as judicial review. But first, this court must give them permission to do so.

[2] This court will only give permission if there in an arguable case and the application for permission is made promptly in accordance with certain rules of court (including without unreasonable delay). In determining whether there has been unreasonable delay the court may consider if substantial hardship or prejudice to the rights of any person will be caused or if the delay will be detrimental to good administration.

[3] This case concerns such an application for permission to apply for judicial review. It is brought under Part 56.3 of the Supreme Court Rules 2005.

[4] The Applicant is a former Dean of a faculty of the Defendant University and has made the application against the University, its governing body (its Board of Trustees), as well as three named individuals of its senior management.

[5] The decisions which the applicant would like permission to challenge are:

(a) A decision made on 1st October 2010 which was embodied in: (1) a contract of the same date to grant a thirty-six month (3 year) contract with a provision for extension for an additional 2 years ("subject to satisfactory performance") and with a condition "subject to the University of Belize Regulations as stipulated in the Faculty Handbook of the University" (2) any other regulations which may be issued from time to time by the Board of the Trustees of the University of Belize . The Applicant is alleging that as the Contract was for a Dean, it should have been a 5 year contract in accordance with the stated rule, regulation or policy of the University as contained in its Handbook.

(b) A decision made by the President on or about 2nd July 2013 to extend the three year contract for only 3 months and not the additional 2 years.

(c) A decision made on or about 18th September 2013 to terminate the Applicant on 30th September 2013.

[6] The Application for permission to apply for judicial review was made on the 18th December 2013.

[7] The Defendants have taken a number (5) of legal and procedural objections to the Application which the court by this decision will decide.

The Application

[8] The Application is for permission to apply for certain reliefs which have traditionally been given Latin names (like Certiorari and Mandamus) asking the

court to quash the decisions or to make directions as well as to make certain declarations as to the legality of the decisions in the Applicant's favour.

[9] In the present case the Applicant would like this court to:

(a) Quash the decisions.

(b) Quash any decision taken by the Board of Trustees of the University, to recommend the termination of the Applicant.

(c) Declare that the Staff Handbook is the basis on which all contracts to Deans should be given and by which any such contracts/appointments must be construed and interpreted as it outlines policies, regulations and procedures of the University.

(d) Declare that there is the five year mandatory term for the appointment of Deans and that the Applicant thereby had a legitimate expectation that she would be contracted for 5 years unless there was some good and sufficient cause not to do so or the Applicant resigned.

(e) Direct the Defendants to reinstate the Applicant to her former post for her to complete the remaining two years appointment to which the Applicant claims she is entitled under University's Handbook.

(f) Declare that the letter delivered to the Applicant on the 18th September 2013 was indicative that no consideration was given by the Defendants to the Applicant 's earlier request for reasons for the unlawful termination of the Applicant by letter dated 11th September 2013.

[10] The grounds of the reliefs being sought and the evidence in support are also set out in respectively the Application and the Affidavit in support of the application, which fleshed out in greater detail the basis of the application as follows:

(a) That the decision was made by the Defendants who are regulated by the University of Belize Act, Chapter 37 of the Laws of Belize.

(b) That the rules under which the decision was made were taken from the Staff Handbook, which were rules made under the University of Belize Act.

(c) The Applicant's employment as Dean of the Faculty of Nursing, Allied Health and Social Work as of 1st October 2010 was under the contract which she understood was under the Handbook, for a maximum term of 5 years with a minimum commitment in the first instance, to be extended at her request.

(d) That the Applicant had a legitimate expectation to be employed as Dean for a mandatory 5 year term in accordance with the Staff Handbook.

(e) That she conducted her work as Dean in an efficient, productive and professional manner.

(f) That she still remains the best qualified person for the post of Dean and as at the date of the application no one had been appointed to fill the post.

(g) That by letter dated 29th May 2013 she indicated her interest to remain on the staff as Dean and to serve out her 5 year tenure.

(h) That by email of 2nd July 2013 she was offered a three month extension. This meant that she would remain in post until 31st December 2013 which was contrary to the Handbook. She responded immediately that she did not accept that offer.

(i) That the President acted unreasonably and/or irregularly and or improperly to the detriment of the Applicant to agree to a three month extension of her contract.

(j) That the Defendants acted irrationally or took into account irrelevant considerations or ignored relevant considerations in deciding not to allow the Applicant to remain employed as Dean despite the Applicant's good performance.

(k) That from the 31st August 2013 the outgoing Board of Trustees had been dissolved and by the 18th September 2013 a new Board of Trustees had not been appointed.

(l) That there was a meeting of the entire management team on the 5th September 2013 in which it was indicated that the President did not support the extension of 2 years.

(m) By letter dated 17th September 2013 the Applicant wrote to the President requesting a written reason not to extend the contract for two years and the reason for the extension of 3 months.

(n) That the Applicant received a written letter dated 11th September 2013 which was received on 18th September 2013 informing the Applicant that her final date of employment was 30th September 2013.

(o) That the Applicant's contract as well as the Handbook were breached and that she was wrongfully terminated.

(p) That a new Board of Trustees had been appointed on the 11th October 2013.

(q) That a letter was written by the Applicant's Attorney to the President on the 21st October 2013 which was copied to the New Board of Trustees.

(r) That there were procedural improprieties and bad faith by the Defendants in refusing to provide reasons or grounds to unlawfully terminate the Applicant's appointment as Dean.

(s) That there was a response received on the 29th October 2013.

(t) That the Applicant alleged that the Handbook was part of the Regulations of the University and had been breach by the contract.

(u) That the Defendants acted ultra vires their powers.

[11] On the 29th January 2014, in the interest of justice I ordered that a hearing be held in open court and that notice of the hearing be given to the Attorney General (hence the representation of the Attorney General in the present proceedings).

The Law

The University of Belize Act

[12] The University of Belize is a state sponsored University (under the 'general' directions of the Minister of Government with responsibility for Education and partially funded or underwritten by Government) which is the creature of a statute, namely the University of Belize Act, Chapter 37, Revised Edition 2000, Laws of Belize ("the Act").

[13] The Act not only establishes the University but provides for all the usual matters associated with the administration of a university.

[14] These matters include its "management, maintenance and development[1]" by a Board of Trustees[2] ("the Board"), its funding[3] (including by the Government), the appointment of a President (as the Chief Executive Officer of the University) and the procedure which is to be followed by the President's appointment etc.

[15] By Section 4 of the Act, it is formally provided that:

(1) There is to be established by the Act a University to be known as the University of Belize.

(2) The campus or campuses shall be located in such place or places as the Board may, from time to time, determine.

(3) Classes shall be conducted in such place or places as the Board may from time to time determine.

[16] Section 5 contains the objectives of the University, and Section 6 of the Act provides:

> *"There shall be established a Board of trustees to be known as the Board which shall be a body corporate with perpetual succession and a common seal with power to purchase, take, hold and dispose of land and property of whatever kind and to enter in contracts, to*

[1] Section 8 of the Act.
[2] Which under Section 30 of the Act may delegate its powers and functions to certain persons or bodies (except the power to make rules under section 31 of the Act).
[3] Section 23 of the Act.

sue and be sued in its corporate name and to do all things necessary for the purposes of this Act.

[17] The Act then contains provisions, among others, dealing with 'Objects of the Board', 'Membership of the Board' and matters dealing with their disqualification and other incidental matters, their powers and functions.

[18] Generally, in relation to the powers and functions of the Board it is clear that it is largely concerned with defining and/or establishing policies in relation to various matters involved in running the University, awarding certificates, establishing scholarships, bursaries, approving the budget etc.

[19] Also under the Act, the Board has the power to delegate the management of the University to the President, to appoint committees, and provision is made for rules and procedures for the management of the Board.

[20] Section 19 of the Act, very pertinently to the present case, provides:

No civil or criminal proceedings shall lie-

(a) against the Board for any act which in good faith is done or purported to be done by the Board under this Act; or

(b) against the President, any member, officer, servant or agent of the Board, for any act which in good faith is done or purported to be done by the President, such member, officer, servant or agent under this Act or on the direction of the Board.

[21] Section 19 clearly is an attempt to provide some protection to the Board and its officers and staff from legal action by any act, by any of them, done in good faith. It is to be noted that it is not stated that no proceedings 'whatever' shall lie but that only 'No civil or criminal proceedings shall lie'. More will be said about this section later.

[22] I do not accept, however, as suggested by the innovative argument of learned Counsel for the Defendants, that this provision is analogous to the situation which has historically existed and may still exist in the UK, in relation to their

universities where so-called 'Visitors' were part of the administrative landscape of such Universities along with the attendant and the restricted role the courts played there in the lives of Universities.

[23] The University of Belize, being a creature of Statute, and not the product of evolutional process and conventions, to which UK Universities were subject, must be construed by the terms of the statue which created it, and interpreted by permissible rules of construction as an aid to such construction.

[24] Section 27 of the Act then goes on to provide that:

> *"The President may appoint and employ, with the approval of the Board, such members of professional, administrative, supporting and ancillary staff as he may deem necessary for the efficient management of the University, on such terms and conditions of service as may be generally established by the Board."*

[25] Section 30 of the Act provides:

> *"(1) The Board may in writing delegate to the Chairperson or to any other member or to any committee appointed by it, or to the President or to any officer or servant of the Board any of its powers and functions not already delegated, except the power to make rules under this Act.*
>
> *(2) The Chairperson, other members, the committee the President, or the officer or servant to whom any of the powers or functions of the Board have been delegated under subsection (1) above, shall exercise or perform the powers or functions so delegated, subject to the direction of the Board.*
>
> *(3) Any delegation under this section may at any time be revoked by the Board and while in force shall not prevent the exercise or discharge by the Board of any of its powers or functions.*

[26] Under section 31 of the Act it is provided that the Board, with the approval of the Minister may make rules for the better carrying out of the provisions of this Act, including for the terms and conditions of service, wages, salaries and other

remuneration of its employees including the appointment, dismissal and disciplinary control over such employees.

The Law relating to applications for permission to apply for judicial review.

[27] A claim for judicial review includes a claim to review the lawfulness of a decision of a body (or a person or persons) performing public duties or functions (including duties under a statue or subordinate legislation).

[28] The lawfulness of the decision of the body or person being challenged by judicial review would include the unlawful exercise of a public power or unlawful failures to perform public duties including such policies of a public body.

[29] Such a ground may be found to have been established, and therefore lie, where the claim is made that the public authority may have made an error in law in exercising its powers or performing is duties. Or where it is claimed that there has been a breach of natural justice or procedural fairness (such as a fair hearing in relation to dismissal from a public office) before a decision is taken. Or, where a person may have had a legitimate expectation that they will be given a hearing or be consulted before a decision is taken (where there is an extant policy covering the situation) and such expectation has been disappointed.

[30] The court is also concerned to ensure that public bodies do not abuse their powers i.e. by ensuring that they exercise their powers in order to further the statutory purpose(s) for which the powers were conferred and do not act for an improper or ulterior purpose.

[31] Such abuse of power may arise particularly where the public body has adopted general policies governing the way in which they will exercise their discretion: such as where they have made an unqualified representation that it will act in a particular way and the person has relied on such representation to their detriment (provided that the exercise of their discretion is not fettered and there is no overriding public interest justifying the decision to resile from the representation).

Part 56(3) of the Rules of the Supreme Court – Applications for Permission to Apply for Judicial Review.

[32] Under Part 2.2(2) of the Civil Procedure Rules "Civil Proceedings" is defined to include "applications for judicial review".

[33] Under Part 56(3) of the Rules of the Supreme Court:

(a) Permission must first be obtained to apply for judicial review.[4]

(b) "*An application for permission to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made*"[5].

(c) The "*judge may refuse permission to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application*"[6] and may consider whether the granting of permission would be likely to "*cause substantial hardship to, or substantial prejudice, the rights of any person*"[7]; or "*be detrimental to good administration*"[8].

(d) The application must state whether any time limit for making the application has been exceeded and if so why[9].

(e) The judge may grant permission on such conditions or terms as he considers just[10].

(f) Where the application is for an order (or writ) of prohibition or certiorari the judge must direct whether or not the grant of permission operates as a stay of the proceedings to which the application relates[11].

[4] Part 56.3(1) of the Supreme Court Rules.
[5] Part 56.5(3) of the Supreme Court Rules.
[6] Part 56.5(1) of the Supreme Court Rules.
[7] Part 56.5(2)(a) of the Supreme Court Rules.
[8] Part 56.5(2)(b) of the Supreme Court Rules.
[9] Part 56.3(3)(g) of the Supreme Court Rules
[10] Part 56.4(7) of the Supreme Court Rules.
[11] Part 56.4(8) of the Supreme Court Rules.

(g) The judge may grant such interim relief as appears just[12].

(h) On granting permission, the judge must direct when the first hearing or, in the case of urgency, the full hearing of the claim for a judicial review should take place[13].

(i) Permission must be conditional on the applicant making a claim for judicial review within 14 days of the receipt of the order granting permission[14].

[34] The Court of Appeal of Belize in its decision of **Froylan Gilharry Sr dba Gilharry's Bus Line v Transport Board & Chief Transport Officer & The Minister of Transport and The Attorney General**, very usefully and fully sets out many of the relevant and applicable provisions contained in Part 56 of CPR 2005 including the above provisions relating to applications for permission to apply for judicial review.

[35] The UK house of Lords case of **R V London Borough of Hammersmith and Fulham and Others[15]**, also contains a discussion of the provisions relating to 'Delay' similar to those contained in Part 56.5 of the Rules of the Supreme Court, and they were fully considered in the context of the UK Supreme Court Act (relating to applications for judicial review), planning law (specifically an application for planning permission), and for judicial review of such decisions and also the rules of court.

[36] It is clear that all of these provisions have to be looked at as a whole with a keen eye to a specific time limit (a date from which time begins to run) and with reserve powers existing in relation to applications made within the time limit to deal with cases which would create specific difficulties[16], or require prompt action; and generally to give effect, in appropriate situations, to the plainly discretionary jurisdiction of the court in relation to judicial review proceedings.

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[12] Part 56.4(9) of the Supreme Court Rules.
[13] Part 56.4(10) of the Supreme Court Rules.
[14] Part 56.4(11) of the Supreme Court Rules.
[15] [2002] UKHL 23
[16] (To deal with the particular exigencies of a particular situation requiring urgency.

[37] In exercising its discretion whether to give permission to apply for judicial review, the court will, of course, have regard to any undue delay in making the application for permission and the prescribed rules relating to such delay.

[38] The court is primarily concerned with considering whether to grant permission to apply for judicial review, and is required to perform a 'gate-keeping function' to eliminate at an early stage, claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration.

[39] As such, the court will grant permission, only if satisfied that the papers disclose that there is an arguable case that a ground or grounds for seeking judicial review exists and which merits full investigation at a full oral hearing with all the parties and all the relevant evidence.

[40] In exercising its gate-keeping function it is clear that the court has a discretion, and therefore may refuse permission to argue certain grounds because a particular ground or challenge does not raise an arguable point, and may therefore grant limited permission: to hear one or more of the grounds while refusing permission in respect of others.

[41] As judicial review is concerned not with the merit of a decision by a public authority but the lawfulness of the decision making process itself, at the point of considering an application for permission to apply for judicial review, the court will be concerned with identifying whether or not one or more grounds of judicial review may be established.

The Objections of the Defendants

[42] Lead Counsel for the Defendants made 5 legal and procedural preliminary objections to the application for permission to apply for judicial review; the first of which is the central or principle one:

(a) That under Section 19 of the University of Belize Act, Chapter 37, Laws of Belize, no civil proceedings shall lie against the Board of Trustees or against the President, any member, officer, servant or agent of and at the

direction of the Board for any act done in good faith under the act; and that the Applicant has not alleged/established that it can bring herself within Section 19 of the Act.

(b) That the time limit (of 3 months) imposed by Part 56.5(1)(3) of the Rules of the Supreme Court 2005 for making the application for permission to apply for judicial review has been exceeded.

(c) That the Applicant has not made a full and frank disclosure of material facts to the court in is Application in that she has deliberately suppressed the 1st page of the Contract which sets out the fact that the decision being challenged was originally made on the 1st October 2010, and also that the decision to extend the contract for only three months beyond 36 months was notified to the Applicant on the 2nd July 2013.

(d) That the claim against the University of Belize is bad as it does not exist in law.

(e) That the Handbook is not a statute or regulation made pursuant to any law and therefore is not susceptible to judicial review.

[43] It was submitted that 'the proceedings' include an application for permission to apply for judicial review under Part 56.3 of the Supreme Court Rules 2005. See **R v Commissioners of Inland Revenue, ex parte Mead and Cook [1993] COD 324.**

[44] It was submitted that under Section 19 of the Act, there is no allegation of bad faith and therefore permission to apply for judicial review should not be granted.

[45] Also submitted was that the provision of Section 19 of the University of Belize Act is not unusual, and by analogy see the Halsbury's Laws of England, Fourth Edition Reissue, Vol 15, Paragraph 260, in relation to 'Visitors'; which historically, and more recently by charter and appointment, the Crown usually is the visitor, with the visitor having untrammeled power to investigate and right the wrongs done in the administration of the internal laws of the foundation.

[46] That the role of the courts usually confines itself "*to questions of demonstrated errors of law and will not interfere with any exercise of the visitor's discretion or judgment unless satisfied that it is wrong in law*.[17]"

[47] It was pointed out that:

> *A dispute as to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances falls within the jurisdiction of the visitor, subject to the supervisory jurisdiction of the High Court, and therefore the court usually lacks jurisdiction in the first instance to intervene. However the court does have jurisdiction over employment disputes between a university and its academic staff until a reference has been made to and accepted by the visitor of the university. A refusal by an officer to perform a duty imposed by the university's statutes is a matter for the visitor*[18].

[48] It was further submitted that the Applicant was notified on the 2nd July 2013 of the decision of the President to only extend for 3 months. This is the decision which is being contested, and is more than 3 months before the Application for permission for judicial review.

[49] It was also submitted that the documents of the Applicant are misleading by design. That Exhibit AM 2 to the Applicant's Affidavit (the Contract) only contained Schedule 1, but that there was something else missing and of which, therefore, there has not been full and frank material disclosure by the Applicant, and which has been deliberately suppressed.

[50] Without objection the Court was handed and referred to the Agreement to which the Schedule is attached. Under this agreement, made the 1st October 2010, the Applicant was explicitly engaged as Dean of Faculty of Nursing, Allied Health and Social Work for a period of thirty six months commencing 1st October 2010 subject to Schedule 1 and II.

[17] Volume 15 Halsbury.s Law of England Fourth Edition Reissue, Paragraph 260
[18] Ibid.

[51] It was also submitted that unless the Applicant brings herself within the exception contained in Section 19 of the University of Belize Act (being an act not in good faith) that civil proceedings cannot be brought by the Applicant.

[52] It was further submitted that the University of Belize does not exist; that the Board of Trustees is the body Corporate with legal existence. That under Section 4(1) the University of Belize Act is established but under Section 6, the Board of Trustees is established as a body Corporate with perpetual succession and with a common seal with power, inter alia, to enter into contracts, to sue and be sued in its corporate name and to do things for the purposes of the Act.

[53] It was observed as a point to be noted that the extensive powers of the Board are set out in Section 15 of the Act.

[54] It was therefore submitted that the decisions in question were decisions of the Board of trustees and that the Handbook is not a statute, regulation or made pursuant to any law.

[55] Without objection the Court was handed the 'Faculty and Staff Handbook' of June 2000 and it was submitted that no law making powers are conferred by the Board of Trustees to make any law, and that the applicable law is the Act.

The Case by the Applicant for Permission in relation to the Preliminary Objections.

(a) Section 19 of the University of Belize Act,

[56] It was submitted by the Counsel for the Applicant that Section 19 does not apply in relation to the present proceedings because judicial review proceedings are not 'civil proceedings' for the purpose of Section 19 of the Act.

[57] In support of this submission the Applicant relied, by analogy or parallel reasoning, on the unreported Court of Appeal of Belize decision in the case of **Froylan Gilharry Sr dba Gilharry's Bus Line v Transport Board & Chief Transport Officer & The Minister of Transport and The Attorney General**[19].

[19] Civil Appeal No 32 of 2011

[58] This case involved a question of law and procedure relating to the Public Authorities Protection Act ("the PAP Act") which required service of notice of intended proceedings on a public authority at least one month before commencement of proceedings, and the question was considered of whether applications for judicial review are civil proceedings within the PAP Act requiring service of notice of intended proceedings on a public authority under the PAP Act.

[59] It was held by the court of Appeal, in an erudite, careful and finely reasoned decision of the court delivered by Morrison JA, that Crown side proceedings were not ordinarily regarded as 'civil proceedings' in the ordinary – or statutory – signification of that phase, and remains unaffected by the inclusion of judicial review under the rubric 'civil proceedings' in the CPR which was subsidiary legislation which postdated a well-established principle such as was contained in the PAP Act.

[60] The conclusion was arrived at after a compendious review of the background of the proceedings, a consideration of judicial review proceedings, the Crown Proceedings Act (which contained a definition of "civil proceedings"), the PAP Act (including a careful construction of its terms), the Civil Procedure Rules 2005, and considering all the relevant factors, "such as context, history, previous authority and the salutary caution of the right of the access to the courts[20]" for the purposes of judicial review can only be abrogated by the clarity of intent and of language[21]", and noting that "the PAP Act does not apply, either on principle or on authority, to applications for judicial review"[22].

[61] This Court was then referred to various passages in the case of **Froylan Gilharry Sr dba Gilharry's Bus Line v Transport Board & Chief Transport Officer & The Minister of Transport and The Attorney General**, which is worth quoting at length. The relevant passage is under the heading of 'discussion" in the

[20] See Paragraph 71 of Froylan Gilharry Sr dba Gilharry's Bus Line v Transport Board & Chief Transport Officer & The Minister of Transport and The Attorney General.
[21] See Paragraph 71 of the Judgment .
[22] Ibid.

reasoning of Morrison JA, that lead him and by extension, the Court of Appeal to their conclusion:

> *"[66] There can be no question that, as the cases all indicate, there is no lis between the parties in judicial review proceedings. Such proceedings are directed "at the decision itself rather than the parties who made it (per Neill LJ in* ***Ex Parte Waldron****, at page 848). What is vulnerable in such proceedings is the decision and not the decision maker. It is in this sense, it seems to me, that Carey JA took the view in* ***Belize Water Services*** *that an application for judicial review is not a 'dispute', in the way in which the disagreement between contracting parties requiring submission to arbitration in that case was plainly a dispute, amenable to resolution by the mechanisms of private law. Judicial review, on the other hand, "describes the process by which the courts exercise a supervisory jurisdiction over the activities of public authorities in the field of public law" (Clive Lewis QC, 'Judicial Remedies in Public Law', edn, para 2-001).*
>
> *[67] Historically, applications for the prerogative remedies of certiorari, prohibition, mandamus and habeas were made on the Crown side of the Queens's Bench Division in England and did not fall to be considered as 'civil proceedings' in the ordinary – statutory – signification of the at phase. That this was also the case in Belize is surely confirmed by the specific exclusion of such proceedings from the definition of 'civil proceedings' in the CP Act. This is particularly so, in my view, when it is kept in mind that, before and after the passing of the CP Act in 1953, indeed right up to the promulgation of the CPR in 2005, in default of any specific procedure prescribed in the Supreme Court Rules for judicial review proceedings, such proceedings were governed by*

the practice and procedure in the High Court of Justice in England.

[68] This position remains unaffected, it seems to me, by the inclusion of judicial review under the rubric 'civil proceedings' in the CPR. The framers of the CPR were concerned to make specific provision in the rules for the first time for judicial review. I these circumstances, it is hardly surprising that,, in a code designed to regulate "all civil proceedings in the civil division of the Supreme Court" 9rule 2.2(1)), it should have felt necessary to state specifically that 'civil proceedings' for the purpose of the code should include applications for judicial review. But to the extent that the CPR is subsidiary, it is clear that, on general and well established principle, nothing in it can override a clear statutory provision, in this case, section 2(1) of the CP Act.

[69] But in any event, as the rules themselves demonstrate (see paras [32] – [36] above), judicial review applications possess entirely distinctive features. Thus, permission is required before an application for judicial review can be made (unlike in the ordinary claims process), a measure intended to filter our "groundless or unmeritorious claims" (per Lord Diplock in ***O'Reilly v Mackman*** *[1982] 2 All ER 1124, 1131); application are required to show a "sufficient interest" in the subject matter of the application (rule 56.2(1)); there is a shot time limit for making applications for judicial review (ordinarily three months) (unlike the usual limitation periods which apply in ordinary litigation); the procedure for hearing applications for judicial review is intended to be speedy and the application for permission must be considered "forthwith" by a judge of the Supreme court (rule 56.4(1)) and, if permission is given, it must be conditioned on the claim for judicial*

review being filed within 14 days of the grant of permission (unlike ordinary litigation, in which, although under the CPR tight time limits now apply, the entire process may still be notoriously – protracted); disclosure and cross-examination of witnesses is not automatic, but requires permission (rule 56.11(1); and the general rule is that no order for costs will ordinarily be made against an applicant for an administrative order, including judicial review, save in the case of unreasonable behavior on the part of the applicant (which is the opposite of the general rule applicable to ordinary claims that once the court decides to make an order as to costs, costs should follow the event (rule 63.6(1))"

[62] Counsel for the Applicant therefore, submitted that the Act as it does not contain any definition of "civil proceedings" and like the PAP Act, predated the Civil Procedure Rules 2005, and as 'Crown side proceedings' ought not to be regarded as 'civil proceedings' in the ordinary – or statutory – signification of that phase, it remained unaffected by the inclusion of judicial review under the rubric 'civil proceedings' in the CPR. In other words, that CPR 2005, which was subsidiary legislation postdating the well-established principle of 'crown side proceedings" could not affect the pre-existing meaning which would have been contained in the Act, prior to the enactment of CPR 2005.

[63] The Applicant therefore asked the court to follow **Froylan Gilharry Sr dba Gilharry's Bus Line** decision that civil proceedings are not covered in the Act.

[64] Counsel for the Applicant accepted the above three decisions being challenged which had to be considered by the court[23].

[65] It was submitted that the absence of 'good faith' applies to all (3) of the decisions from the communications between the parties for the following reasons:

(a) The Applicant was seeking reasons for the decisions.

[23] See Paragraph 5 above.

(b) The Applicant was in dialogue with representatives of the University (4th Defendant) and a letter had already been written since 11th September 2013 but not delivered until 18th September and dialogue was being conducted on the 17th September.

(c) The Applicant was never given reasons for decisions in relation to the 2nd and 3rd decisions being challenged.

(d) That there was lack of procedural fairness in that the Applicant went further in seeking resolution and grounds for decisions and was not given an opportunity to be heard.

(e) Although extension was not done for the additional 2 years, the offer of a 3 month extension was indicative of no good reason to terminate and that the absence of good faith existed. If there was good reason not to extend then there would not have been good reason for the extension of 3 months.

(f) That the new Board was constituted on 11th October 2013 and the Applicant copied her letter to them, displaying the latter decisions to the Board of Trustees – so that the new Board would be appraised of situation and could intervene.

(g) Paragraph 8 of the Grounds of the Application specifically allege bad faith.

[66] Counsel for the Applicants conceded that the 1st, 4th and 5th Defendants ought not to have been made a party to the application (and so could be removed from the proceedings).

[67] This concession arose, quite properly, in response to the court pointing out that the 1st Defendant is not a person which could sue and be sued in law; and also that it is not alleged in the Application and supporting Affidavit that the 4th and 5th Defendants made any of the decisions.

(b) Time limit (of 3 months) imposed by Part 56.5(1)(3) of CPR 2005

[68] It was submitted that there is no statutory time limit for applying for permission for judicial review.

[69] It was also submitted:

(a) That there was no unreasonable delay (of over 3 years) in applying for permission for judicial review of the 1st decision being challenged because the contract made provision for additional 2 years.

(b) That there was no unreasonable delay in applying for permission for judicial review of the 2nd decision as it was first communicated by email on 2nd July 2013 (5 months) and that it would have been bad faith not to seek resolution. Also that from the 18th July 2013 the Applicant was negotiating with the appropriate authority and seeking to challenge the decision as evidenced by the correspondence exhibited to Affidavit.

(c) That there was no unreasonable delay in applying for permission for judicial review of the 3rd decision as it was made within 3 months.

[70] In relation to unreasonable delay, Counsel for the Applicant relied on the decision of **London Borough of Hammersmith and Fulham and Others, Ex Parte Burkett and Another (FC)**[24].

[71] In this UK case , involving the interpretation of rules of court and a statutory provisions similar to those in Part 56.5, relating to an application for permission to apply for judicial review, the House of Lords held as follows:

(a) That in public law the emphasis should be on substance rather than form and where a suitably worded amendment (and consequential amendments) could be made to cure a formal, technical or procedural defect in the application for permission there is no reason why such amendments should not be granted.

(b) In seeking to identify "*from the date when the grounds for the application first arose*", a major consideration would be arriving at an interpretation which would result in a clear and straightforward interpretation which will yield a readily ascertainable starting date.

(c) Where it can be assumed there is an arguable case on the substantive merits of the judicial review application, and in the context of a rule of court which by operation of a time limit may deprive a citizen of the right to challenge

[24] [202]HKHL 23

an undoubted abuse of power which may affect not only individual rights but also community interests, the court may also consider that legal policy may favour simplicity and certainty rather than complexity and uncertainty.

(d) Where the application of the procedural regime may result in the loss of fundamental rights to challenge an unlawful exercise of power, the citizen must know where he stands and it would be unreasonable for an applicant to be required to apply for judicial review in the case of an inchoate, revocable, provisional or conditional decision or resolution.

(e) Or where it may be concluded that negotiations were near a final or formal agreement, or where there is not in existence a decision which creates rights and obligations, the court should avoid the risk of an applicant making a premature application.

(f) Although the court has jurisdiction to entertain an application of such an inchoate, revocable, provisional or conditional decision or resolution the applicant is not required to apply for such relief unless and until his rights are affected: when a decision (such as a grant of planning permission is made).

(g) Finally the obligation for an applicant to apply "promptly" does not contract the three months' time limit by judicial decision to any lesser period such as "six weeks"; and although this may create unnecessary uncertainty and practical difficulty, it does give the court a residual discretion, in truly urgent cases, to refuse relief where it is appropriate to do so - with the burden always being on the applicant to act quickly

[72] It was submitted by Counsel for the Applicant that where, as in the present case, an Applicant was in the process of trying to resolve an issue it would therefore not be proper to move a court until a final decision is made, and that time should start to run when the decision became final. That time begins to run when it is hopeless.

[73] It was also submitted that in considering whether to refuse or to grant permission because of delay, careful consideration should be given to whether it would cause substantial hardship and substantial prejudice to the rights of the Applicant.

[74] It was finally submitted that the 3rd decision was made within the time limit of 3 months and there is, in any event, good reason for extending the period in the case of the 1st and 2nd decisions.

(c) Full and Frank Material Non-Disclosure

[75] The Counsel for the Applicant submitted that the application was not made Ex. Parte and that therefore the need for full and frank disclosure is not so great.

[76] Further and in any event that any non-disclosure was not material.

Consideration of the merits of the application

Section 19 of the University of Belize Act

[77] I had no difficulty in accepting the submission of Counsel for the Defendant, and it has not been suggested otherwise by Counsel for the Applicant, that 'proceedings', under Section 19 of the Act, include the present application for permission to apply for judicial review under Part 56.3 of the Supreme Court Rules 2005.

[78] I consider that as the Act does not contain any definition of "civil proceedings", and therefore the provisions purporting to oust the jurisdiction of the court in relation to civil proceedings by the Board or the President for acts done in good faith etc, this term has to be interpreted by the court.

[79] There is no suggestion that the claim for judicial review cannot attach to the 2nd and 3rd Defendants as a body and person performing public function.

[80] I must say that at a first glance I was immediately drawn to the suggestion that applications for judicial review or an application for permission to apply for judicial review ought to be considered "civil proceedings" for the purposes of the Act.

[81] However I must say that I found very persuasive, the argument of Counsel for the Applicant, utilizing by analogy or parallel reasoning, the argument of the Court of Appeal in the case of **R v Commissioners of Inland Revenue, ex parte Mead and Cook [1993] COD 324.**

[82] After careful consideration I have concluded that 'judicial review' ought not to be regarded or construed as 'civil proceedings' for the purposes of Section 19 of the Act, in the ordinary – or statutory – signification of that phase.

[83] I came around to accepting the compelling force of the somewhat counter-intuitive argument, in the case of **R v Commissioners of Inland Revenue, ex parte Mead and Cook [1993] COD 324,** that the Act, like the PAP Act, predated the Civil Procedure Rules 2005, and that the equivalent of judicial review proceedings, prior to the enactment as subordinate legislation of the Civil Procedure Rules, would have been considered 'Crown side proceedings', as opposed to 'civil proceedings', and ought not therefore to be regarded as 'civil proceedings' for the purposes of the Act in the ordinary – or statutory – signification of that phase.

[84] Further, such a definition predating the CPR, remains unaffected by the inclusion of judicial review under the rubric 'civil proceedings' under CPR, which, as subsidiary legislation, could not amend its postdated, and primary legislature of the Act.

[85] And finally, that the well-established principle of 'Crown side proceedings' prior to the enactment of CPR 2005 therefore remains attached to the Act even after the enactment of CPR 2005.

[86] In any event, and in addition, I am disinclined to accept the submission of Counsel for the Defendants, that the Applicant has not alleged, nor can she establish, the absence of 'good faith' necessary to bring the Application within Section 19 of the Act.

[87] First, the Applicant at paragraph 8 of the grounds of her application specifically alleged that the Defendants acted in 'bad faith' in refusing to provide reasons or ground to unlawfully terminate the claimant's appointment as Dean.

[88] Secondly, when looking at the Application, the supporting grounds and the Affidavit in support, it is clear that the Applicant by alleging denial of her legitimate expectation that the 2nd and 3rd Defendants were acting unreasonably and irrationally, and acting in a procedurally improper manner, were alleging the absence of good faith.

[89] In these circumstances I have come to the conclusion that there is an arguable case that judicial review proceedings may lie against the Board and the President; and that Section 19 of the Act does not oust the jurisdiction of the court to consider such proceedings.

[90] As to whether or not the Applicant will be able to determine the absence of 'good faith' will remain for the trial.

[91] In particular I found the nuanced argument of Counsel for the Defendants on the interpretation of the Section of the Handbook on which the Applicant relied a point that needs the fuller consideration of a trial and that certainly the Applicant has at least an arguable case in relation to it.

(b) Time limit (of 3 months) imposed by Part 56.5(1)(3) of CPR 2005

[92] In relation to the decision, the subject of the grant of a three year contract on or about 1st October 2010, I have no hesitation in finding that the grounds for the application for permission to apply for judicial review first arose in or around 1st October 2010. As a result the application filed on the 18th December 2013 for permission to apply for judicial review is clearly out of the three months' time limit contained in Part 56.(3) and therefore permission in relation to this decision is not granted.

[93] In relation to the decision allegedly taken by the President dated on or about 2nd July 2013 to grant an extension of time of only 3 months on or about 2nd July

2013, I have no hesitation in finding that the grounds for the application for permission to apply for judicial review first arose in or around 2nd July 2013. As a result the application for permission to apply for judicial review filed on the 18th December 2013 is also clearly out of the three months' time limit contained in Part 56.(3).

[94] However, in view of the negotiations which were taking place between the Applicant and the 2nd and 3rd Defendants for a further extension of time, I consider that, in the circumstances of this case and for the reasons outlined by the Applicant, it would cause substantial hardship and prejudice to the Applicant and would be detrimental to good administration, not to extend the period within which the application for permission should be made and would therefore extend the period within which the application for permission to be made to the 18th December 2013.

[95] In relation to the decision allegedly taken by the President dated 18th September 2013 to terminate the Applicant at the end of the 3 months extension (30th September 2013) instead of extending the time of the contract to make up the 2 additional years, I consider that the application was just within the time limit contained in Part 56.(3).

[96] In addition, for the same reason as above, I consider that the application was made promptly and made without unreasonable delay and in any event, that in the circumstances of this case and for the reasons outlined by the Applicant, it would cause substantial hardship and prejudice to the Applicant and would be detrimental to good administration, not to extend the period within which the application for permission should be made and would, if I had to, therefore extend the period within which the application for permission is made to the 18th December 2013

Full and frank disclosure of material facts to the court

[97] I do not consider that the Applicant failed to make a full and frank disclosure of material facts. The facts which were not disclosed, in my view were not material, and in any event were mitigated by being inter partes and not ex parte.

The Claim against the University of Belize

[98] As already noted the Applicant has conceded that the claims against the 1st 4th and 5th Defendants cannot proceed. In the circumstances permission is not granted to apply for judicial review against them.

The Handbook is not a statute or regulation made pursuant to any law

[99] I do not accept the submission of learned Counsel for the Defendants that the Handbook is not a statute or regulation made pursuant to any law. I do accept therefore that it may be arguable, and that it was is therefore susceptible to judicial review. It is certainly arguable that the Handbook is a Regulation because the Contract says it is and also, the Handbook on its face states that it was made by the Board.

[100] It is also quite clear to me that the Handbook may contain the agreed policies of the University and as such may well be an appropriate subject for judicial review. This is obviously something which the Applicant will have to prove in order to ground any claim for judicial review on this basis. I do not consider that any claim for breach of the Handbook or for wrongful termination is amenable to challenge by judicial review – and I therefore consider such claims to be unarguable in judicial review proceedings.

[101] In arriving at my conclusion that permission should be granted for the applicant to apply for judicial review, I have given some weight to the fact that I have found an arguable case on the substantive merits of the judicial review application, and in the context of considering time limits and delay in relation to the later decisions, I did not want by operation of such time limit and considerations of delay to deprive a citizen of the right to challenge a very possible abuse of power which may affect not only individual rights but also community interests, preferring to err on the side of protecting and safeguarding such rights by allowing them to be fully argued.

Terms and Conditions of Permission to apply for judicial review

[102] The permission to apply for judicial review is therefore granted but in accordance with rules of court and subject to the following conditions:

(a) That the Defendants are only the 2nd and 3rd Defendants.

(b) That the application for judicial review (including appropriate declarations and orders or prohibition and certiorari) is of the decisions of the 2nd and/or 3rd Defendants dated 2nd July 2013 and 18th September 2013.

(c) That the two later decisions may be challenged on grounds including that they were procedural irregularities, in relation to construing the extension of the 3 year contract.

(d) That only the Board on the recommendation of the President could have terminated the services of the Applicant and that this was not done.

(e) That the Applicant had a legitimate expectation as a result of the contents of the University's policy as contained in its Handbook which were unlawfully disappointed by the decisions of the 2nd and 3rd Defendants.

(f) That the two latter decisions were taken in a procedurally improper manner and/or made in bad faith in refusing to provide grounds for the termination of the Applicant.

(g) That the Applicant must make a claim for judicial review within 14 days of the receipt of this order granting permission.

(h) That the grant of permission operates as a stay of the proceedings to which the Application relates.

[103] I consider all the other grounds to either be out of time or unarguable.

[104] In view of the nature of the proceedings any application for judicial review ought to be expedited and as such I fix the hearing of any such application to the 20th May 2014 for three (3) days subject to Counsel's availability.

Costs

[105] Costs of this application are reserved.

Disposition

[106] Permission is granted to the Applicant under Part 56.3 of the Supreme Court Rules 2005, for the Applicant to apply for judicial review.

[107] The Permission is granted only in relation to (a) a decision taken by the President on or about 2nd July 2013 to grant an extension of time of only 3 months instead of two years which the Applicant alleges should have been granted, and (b) a decision made on or about 18th September 2013 to terminate the Applicant at the end of the 3 months extension (30th September 2013) instead of extending the time of the contract to make up the 2 additional years.

[108] Permission is granted specifically for the following reliefs:

(a) For Certiorari to quash the decisions allegedly taken by 2nd and/or 3rd Defendants, to defeat the alleged legitimate expectation of the Applicant not to extend the Applicant's contract beyond the 3 years granted by contract and to provide only a three months extension of the said contract and to thereafter terminate the services of the Applicant.

(b) For Certiorari to quash any decision taken by the Board of Trustees of the University, to recommend the termination of the Applicant at the end of the 3 year contractual term granted;

(c) For a Declaration that the Staff Handbook is the basis on which all contracts to Deans ought to be given and as such by which any extension of contracts/appointments must be construed and interpreted as it outlines agreed policies of the University.

(d) For a Declaration that the five year term for the appointment of a Dean is mandatory, and that the Applicant had a legitimate expectation that she had a 5 year contract and that other than for good and sufficient cause or resignation of the employee it ought not to be changed without consulting with the Applicant in good faith and giving her an opportunity to be heard;

(e) A Declaration that the letter of 11th September 2013 but delivered on the 18th September 2013 to the Applicant was indicative that no consideration

was given by the Defendants to the request fro reasons for the alleged unlawful termination by letter of 17th September 2013.

[109] I also give the following directions:

(a) That this case could be dealt with by Affidavit Evidence.

(b) That the Claimant and Defendant make standard disclosure on or before the 4th day of April, 2014.

(c) That the Claimant be at liberty to call 3 witnesses.

(d) That the Defendant be at liberty to call 3 witnesses.

(e) That the parties file and serve Affidavits on or before the 25th day of April 2014.

(f) That all filed and served Affidavits do stand as examination-in-chief.

(g) All witnesses are to attend the hearing for cross-examination, unless the other side dispenses with such attendance by notice in writing. Failure of any witness to attend will result in their Affidavit not being admitted into evidence.

(h) That any application for judicial review is fixed for hearing on the 20th May 2014 for three days.

The Hon Mr. Justice Courtney A. Abel