[2019] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 65/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**INDEPENDENT COMMISSION OF INVESTIGATIONS**	**APPELLANT**
AND	**EVERTON TABANNAH**	**1ST RESPONDENT**
AND	**WORRELL LATCHMAN**	**2ND RESPONDENT**

Richard Small, Terrence Williams and Miss Courtney Foster instructed by Miss Courtney Foster for the appellant

Robert Fletcher and Miss Althea Grant instructed by Wesley Watson for the respondents

13, 15 February, 13 March 2017 and 17 May 2019

MORRISON P

[1] I have had the privilege of reading in draft the carefully nuanced judgment prepared by Brooks JA in this matter. I entirely agree with his reasoning and conclusions and have nothing to add.

BROOKS JA

[2] On 23 June 2016, a judge of the Supreme Court granted leave to Deputy Superintendent Everton Tabannah and Constable Worrel Latchman (the respondents) to

apply for judicial review of the refusal by the Commissioner of the Independent Commission of Investigations (Indecom) to disclose certain material to them. The learned judge also awarded costs against Indecom.

[3] Indecom had acquired and used the material in arriving at its decision to recommend that the respondents be prosecuted. Indecom intended for DSP Tabannah to be charged with making a false statement to Indecom, with the intention to mislead. In the case of Constable Latchman, the intended charge was murder.

[4] Indecom's position, in this appeal from the learned judge's decision, is that the learned judge was plainly wrong in granting leave because:

a. disclosure in civil proceedings is not available where a person is to be charged with a criminal offence as the disclosure will be made during the criminal proceedings;
b. judicial review is not available where an alternative remedy exists, and in this case the alternative of disclosure during the criminal proceedings exists; and
c. the Independent Commission of Investigations Act (the Act) prevents the Commissioner from disclosing the information.

[5] Learned counsel for the respondents, Mr Fletcher, argued that the learned judge carefully examined all the relevant issues in the case and that it cannot be said that he was plainly wrong in either his analysis or his conclusion that leave to apply for judicial review should be granted. Mr Fletcher submitted that the appeal should be dismissed.

The factual background to the proceedings

[6] Both respondents were members of a team of police officers that went on an operation to Rose Heights, in the parish of Saint James, on 31 October 2012. During the operation, Constable Latchman shot and killed Mr Donald Chin at the latter's home. The circumstances in which Mr Chin met his death are the subject of controversy.

[7] Indecom, in pursuance of its statutory obligation, investigated the incident. It took statements from a number of persons, conducted question and answer sessions with each of the respondents, among others, and secured forensic evidence, including expert reports. This material collected will be referred to herein as the "source material".

[8] Indecom prepared a report based on the source material. In that report, it summarised the contents of the source material and made the recommendations for the prosecution of the respondents and another police officer. It sent copies of the report to a number of persons including the Director of Public Prosecutions, the Commissioner of Police and both respondents.

[9] The Commissioner of Police and an attorney-at-law for the respondents each requested copies of the source material. Indecom refused to provide it, stating that it

was precluded from doing so by virtue of section 28 of the Act. Indecom stated that it would provide full disclosure once charges had been laid against the respondents.

[10] The respondents filed an application for leave to apply for judicial review, not of Indecom's recommendation that they be charged, but of the refusal to disclose the source material. The intended application for judicial review, the respondents stated, would seek an order of *certiorari* to quash the decision to refuse to provide the source material and an order for *mandamus* to compel its production. The respondents also applied for an injunction to prevent Indecom or any of its agents from instituting criminal charges against any of them until the judicial review was concluded.

[11] Those were the applications that went before the learned judge. He granted both the leave to apply for judicial review as well as the injunction.

The learned judge's orders

[12] The parties did not produce a formal order or a minute of the learned judge's order. It is, however, not contested that these are the orders that he made:

> "a) Leave to apply for Judicial Review.
>
> b) An order by way of an injunction that the Commission, its servants, employees, agents or anyone acting or purporting to act on its behalf or by themselves is restrained from taking steps or further steps to give effect to or implement the recommendation to have Everton Tabannah and Worrell Latchman charged with any offence whatsoever arising from the Commission's investigations into the death of Donald Chin including but not limited to the offences identified in the recommendation of the Commission until the judicial

review proceedings are heard and determined in the Supreme Court.

c) Costs of this application to the Applicants."

The appeal

[13] The grounds of appeal are:

"1. The learned Judge erred in not approaching the issues to be determined by first considering whether the [respondents] had satisfied the tests for the grant of leave. The burden is on the [respondents] to show that they are entitled to Leave.

2. The Learned Judge erred in failing to rule that there is no right to disclosure before a person is charged.

3. The Learned Judge erred in finding that Section 28 of the [Act] permits pre-charge disclosure in these circumstances when on a true construction of the section such disclosure is not permitted.

4. The Learned Judge erred in failing to answer all of the following issues that the [respondents] have to establish:

(i) What is the issue that gives rise to the claim to be judicially reviewed?

(ii) What is the ground upon which that issue is to be judicially reviewed?

(iii) What is the argument to be put forward?

(iv) Is the argument one with a realistic prospect of success?

(v) Are there available alternative remedies?

5. The Learned Judge erred in ruling that there was an arguable case put forward by the [respondents] in

circumstances where there was no identifiable submissions made to this effect and the Learned Judge failed to make any findings as to what was the arguable case or to assess whether it was likely to succeed.

6. The Learned Judge erred in finding that an application of this nature is amendable [sic] to Judicial Review when it is settled law that such applications are not amendable [sic] to Judicial Review because there are suitable alternative remedies and the [respondents] had:

   (a) denied that there were available alternative remedies. and

   (b) failed to offer any explanation why Judicial Review is more appropriate or why the alternative has not been pursued.

7. The Learned Judge erred in finding that an application of this nature is amendable [sic] to Judicial Review when it is settled law that such applications are not amenable to Judicial review as they undermine the criminal trial process.

8. The learned Judge erred in ruling that the [respondents] would be given leave to challenge the decisions of [Indecom] despite the fact that this challenge is based on a factual assessment of the evidence.

9. The learned Judge erred in holding that the Commissioner [of Indecom] was not saying that the [respondents] had the possibility of tampering with the witnesses.

10. ...

11. The Learned Judge erred in granting injunctive relief to the [respondents] as they had failed to establish the basis for an order for leave to proceed to Judicial Review."

Mr Williams, one of Indecom's counsel before this court, formally abandoned ground 10. That ground will, therefore, not be discussed.

[14] It is possible to narrow these many grounds of appeal into five issues, namely:

1. whether the learned judge applied the wrong test in considering the application for leave - ground 1;

2. whether Indecom's refusal to produce the source material is unchallengeable - grounds 2 and 3;

3. whether a viable alternative remedy to judicial review exists and could have been pursued – grounds 6 and 7;

4. whether the learned judge erred on issues of fact – grounds 8 and 9;

5. whether the learned Judge erred in granting an injunction in the circumstances of this case – ground 11.

Grounds 4 and 5 do not need specific individual attention. The issues raised by them, which are largely without merit, will be considered during the analysis of the other grounds.

Underlying principle

[15] All parties recognised that a major principle underlies these proceedings. It is that a heavy burden lies on Indecom in this appeal. In order to succeed it must demonstrate that the learned judge was plainly wrong in arriving at his decision. The learned judge was exercising a discretion provided to him by the Civil Procedure Rules (the CPR). This court will not disturb his exercise of that discretion, made after hearing submissions from both parties, merely because it would have come to a different conclusion (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2 and paragraph [22] of **Sharma v Brown-Antoine and Others** [2006] UKPC 57; (2006) 69 WIR 379). It may be said, at this stage, that the learned judge delivered a careful decision spanning 32 pages and 92 paragraphs.

Issue 1 - whether the learned judge applied the wrong test in considering where the burden of proof rested - ground 1

[16] **Sharma v Brown-Antoine** is widely accepted as comprehensively setting out the tests that an applicant should satisfy in order to be granted leave to apply for judicial review. In paragraph [14] of the joint judgment of Lord Bingham of Cornwall and Lord Walker of Gestingthorpe, they set out the guiding principles for considering applications for judicial review. At subparagraph (4), their Lordships set out principles of general application. They said, in part:

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

> (2004), p 426. -But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. -It is a test which is flexible in its application….
>
> It is not enough that a case is potentially arguable: -**an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'**: *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733." (Emphasis supplied)

[17] At subparagraph (5), their Lordships set out principles that are specifically relevant to the institution of prosecution of criminal cases. They said, in part:

> "(5) It is well-established that a decision to prosecute is ordinarily susceptible to judicial review, and surrender of what should be an independent prosecutorial discretion to political instruction (or, we would add, persuasion or pressure) is a recognised ground of review: -*Matalulu*, above, pp 735-736; -*Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, paras 17, 21. -**It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy**…." (Emphasis supplied)

[18] Their Lordships went on to set out a number of reasons for the courts' reluctance to order judicial review of decisions to prosecute persons for criminal offences. Not least among those are the delay that the judicial review process causes to the criminal trial and the desirability that all challenges take place in the criminal trial or an appeal from that trial. It is accepted that the reasons given, were set out in the context that the prosecutor in that case was the Director of Public Prosecutions.

[19] Those views were endorsed in the other judgment in that case, which was delivered by Baroness Hale, Lord Carswell and Lord Mance. They said, in part, at paragraph [30] of the judgment:

> "We start however by expressing our full agreement with the proposition that judicial review of a decision to prosecute is an exceptional remedy of last resort, for all the reasons which Lord Bingham and Lord Walker identify in paragraph 14."

[20] All the members of their Lordships' Board agreed that a critical test for determining whether judicial review of a decision to prosecute should be granted is whether the challenge to that decision could be resolved within the process of the criminal court.

[21] The learned judge accepted that **Sharma v Brown-Antoine** provided guidance for the assessment of the respondents' application. He made more than one reference to the fact that the obligation lay on the respondents to show their entitlement to leave to apply for judicial review. Before he embarked on his analysis of the issues before him, the learned judge said, in part, at paragraph [21] of his judgment:

> "The court will now examine the objections and then determine whether the applicants have made their case for leave to be granted."

At paragraph [89], after substantially completing his analysis, the learned judge said:

> "The applicants have satisfied the test. They are [sic] raised an arguable case with a real prospect of success and there are no discretionary bars."

[22] Mr Williams' complaint in ground 1 is that, although the learned judge stated the principle, his analysis was such that he effectively placed the burden on Indecom to show why the leave ought not to have been granted. Learned counsel based that submission on the fact that the learned judge commenced each aspect of the analysis by stating the relevant aspect of Indecom's objection to the respondents' application and then showing the basis for the failure of the objection.

[23] Whereas it is accepted that the learned judge's approach was unusual in that regard, it does not necessarily follow that he departed from the principle, which he acknowledged to be the guide. His approach started with an entitlement to judicial review. The learned judge identified at an early stage that Indecom is a public body and, as such, its decisions are open to judicial review. He pointed out that section 24 of the Act required Indecom to inform persons, who were affected by its decisions, that they had a "right to seek judicial review of that decision".

[24] Further, the learned judge cited a number of complaints that counsel for the respondents made before him. He noted that the respondents were complaining about Indecom's decision to refuse to disclose the source material. Another complaint was that Indecom had applied a blanket policy of refusal without considering the specific application that the respondents had made. He said at paragraph [55]:

> "The implication of Miss Grant's [for the respondents] submission is that [Indecom] applied a blanket policy without addressing its mind to whether the concerns that it has arose in this case."

[25] Decisions of public bodies such as Indecom are always open to question. Courts will intervene if, among other things, the public body lacks the jurisdiction to make the particular decision. The learned editors of Halsbury's Laws of England, 5th Edition, 2018, Volume 61A, demonstrate that the decision may be found to be outside of the jurisdiction of the public entity if it is an abuse of the entity's power or is unreasonable in a **Wednesbury** sense (see **Associated Provincial Picture Houses Ltd v Wednesbury Corpn** [1948] 1 KB 223, [1947] 2 All ER 680). The learned editors so state at paragraph 11:

> "…A body will lack jurisdiction in the narrow sense if it has no power to adjudicate upon the dispute…it will lack jurisdiction in the wide sense if, having power to adjudicate upon the dispute, it abuses its power, acts in a manner which is procedurally irregular, or, in a *Wednesbury* sense, unreasonable, or commits any other error of law."

[26] Apart from identifying that general predisposition of decisions, such as Indecom's refusal, to judicial review, it would also seem that the learned judge's approach emanated from his view that the Act gave the respondents at least an expectation that they were entitled, if they so desired, to a judicial review of Indecom's recommendation of prosecution. The learned judge arrived at that position after he reviewed sections 17 and 24 of the Act. He said at paragraph [27] of his judgment:

> "When one examines section 17 (10) [establishing the Indecom's obligation to provide copies of its reports to various persons] along with section 24 [requiring Indecom to inform certain recipients of the report of their right to seek judicial review], the idea must be that the affected persons such as the complainant or the concerned officer or concerned official can, among other things, seek judicial review of the recommendations or any decision of the

> Commission. If it were not so, then section 24 makes no sense. **Section 24 is not conferring the right of judicial review what it is doing is placing a mandatory duty on the Commission to make sure that the affected persons are informed of their rights**. No such duty is imposed on police officers or indeed the JCF by statute or by common law." (Emphasis supplied)

The highlighted portion of the extract demonstrates that the learned judge was aware that the Act did not give the respondents, without more, an entitlement to judicial review of every decision by Indecom. The learned judge was, however, alert to the fact that the respondents sought disclosure in order to determine if they should apply for judicial review.

[27] The learned judge also showed at paragraph [49] the basis for his view that Indecom's decision was reviewable. He said, in part:

> "…The rub here is that a recommendation is a decision and section 24 [of the Act] reminds that decisions of the Commission are reviewable. The statute does not in either express or implicit terms exclude decisions or recommendations for the arrest and charge of police officers from judicial review. Since decisions are subject to judicial [review] it is entirely possible [that] different decisions made at different stages are reviewable."

[28] Despite the unusual approach, there is not sufficient material to support Mr Williams' submission that the learned judge placed the burden on Indecom to disprove an entitlement to that relief and was, accordingly, patently wrong.

[29] The respondents had contended that they were entitled to disclosure by Indecom, and the learned judge considered that it was arguable that they should have it. In doing so, the learned judge considered and found that the complaint had a

realistic prospect of success. Those issues will be considered in the analysis of other grounds of appeal.

Issue 2 – Whether Indecom's refusal to produce the source material is unchallengeable – grounds 2 and 3

[30] The learned judge identified that the issue in dispute arose from Indecom's refusal to give disclosure to the respondents. He said at paragraph [14]:

> "Thus it is this decision embodied in [Indecom's] letter that has sparked the application for leave to apply for judicial review."

[31] The relevant part of Indecom's letter in issue states:

> "As regards your request that you be furnished with certain documents from our Investigation File; please be advised that having regard to **Section 28** of the [Act], we do not disclose statements received pursuant to our investigations unless to further an investigative purpose, or by way of disclosure after charges have been laid, as:
>
> **[a]** the concerned officers have not yet been charged; and
>
> **[b]** we are concerned for the security of the witnesses on which the prosecution intends to rely.
>
> We will only disclose after charges have been laid and the appropriate orders have been made." (Bold type as in original) (Pages 462-463 of the record of appeal)

[32] Indecom's position on this issue is that the learned judge was plainly wrong to find that it was arguable that the refusal to disclose was open to challenge. It argued, firstly, that the respondents have no right at common law, prior to being charged, to the disclosure that they seek. Its second limb is that section 28 of the Act, which

requires secrecy and confidentiality by Indecom, applies to the circumstances of this case. Indecom contended that although section 28 allows for exceptions, none of those exceptions is applicable to this case.

[33] Whilst the learned judge tackled the section 28 issue squarely, his examination of the common law position was more oblique.

[34] In respect of the common law position, the learned judge concluded that the issue of when to give disclosure depended on what was fair in the circumstances. His analysis of this aspect turned in large measure on the decision in **R v Director of Public Prosecutions, Ex parte Lee** [1999] 2 All ER 737. The learned judge stated his understanding of that decision, at paragraph [44] of his judgment. He said, in part:

> "Despite the statutory regime, Kennedy LJ accepted that in some instances it may be prudent to make disclosure before the defendant would be entitled to full disclosure. It is to be noted as well that the court did not take the obvious point that more disclosure would come after committal and therefore Mr Lee should wait. In other words the court did not take the view that his remedy could be accommodated within the existing statutory regime and therefore declined to entertain his application…."

[35] The difficulty with the learned judge's analysis is that **Ex parte Lee** was decided in the context of Mr Lee having already been charged with an offence. The issue that Mr Lee raised was the level of disclosure that he should have had, subsequent to his arrest, but prior to committal. There was no discussion in that case of an entitlement to disclosure prior to arrest.

[36] Although neither counsel, who addressed this court on this issue, provided any authority on all fours with the present case, Mr Williams cited, among others, **Ferguson (Herbert) v Attorney-General** (1999) 57 WIR 403 as supporting the position that there was no entitlement to disclosure prior to arrest. In that case, Mr Ferguson complained that a coroner had failed to provide him with copies of statements that the police had taken during their investigation of a killing. The coroner, after conducting an inquest into the death, ruled that Mr Ferguson be charged with murder arising from the killing. De La Bastide CJ, as he then was, ruled that the coroner had no obligation to make the disclosure. His judgment was supported by the other members of the panel of the Court of Appeal of Trinidad and Tobago. He said, in part, at page 415:

> "In *R v H M Coroner at Hammersmith, ex parte Peach* [1980] 2 WLR 496 the Court of Appeal in England held that **a coroner was under no obligation to disclose to an interested party statements taken by the police from persons who were not called as witnesses at an inquest.** In fact it was held that it would have been wrong of the coroner to have done so as the statements were the property of the police and for the coroner to disclose them would have been a breach of confidence or trust. **Lord Widgery CJ pointed out that in the case of an inquest there was no-one against whom a charge was being made, and therefore no question of breach of natural justice could arise in those circumstances as a result of a failure to disclose.** It is true that in that case the application for discovery was made on behalf of a party whose interest was in fixing the police with responsibility for the death being inquired into, and not by a person who was suspected of felony. Nevertheless this case is direct authority that there is no such duty of disclosure as is sought to be imposed on the coroner in this case." (Emphasis supplied)

[37] The principle in that extract may be applied to the present case. The recommendation in Indecom's report did not amount to the proffering of criminal charges against the respondents or any of them. Therefore, "no question of breach of natural justice could arise in those circumstances as a result of a failure to disclose" the source material.

[38] Mr Williams also relied on the decision of the Administrative Court of England and Wales in **R (on the application of S) v Oxford Magistrates' Court** [2016] 2 All ER 385 in support of his submissions in this issue. The decision confirmed that a decision of the relevant authorities to institute prosecution for a criminal offence was subject to judicial review, but only on narrow grounds (see paragraph [15]). It also supported his submission that disclosure is not usually allowable to determine the reasonableness of a decision to institute charges against a person in a criminal court (see paragraph [25]).

[39] The law regarding disclosure has undergone radical changes emanating from the Privy Council decision in **Linton Berry v The Queen** [1992] UKPC 16; (1992) 29 JLR 206; [1992] 3 All ER 881. Their Lordships, at page 6 of the judgment, outlined the protocol that obtained prior to that time, in relation to disclosure by the prosecution in criminal cases. As part of that outline, they quoted from the decision of this court in **R v Barrett** (1970) 16 WIR 267, saying:

> "…Shelley JA, delivering the judgment of the court, observed that the defence is entitled to see [a statement concerning the identification of a perpetrator], not by virtue of any general rule of law, but by virtue of the prosecution's duty to inform the defence of statements in their possession made

> by a witness whose evidence at the trial differs substantially from what has been said in the statements. Citing with approval *R v Clarke*, *Archbold* (26th edn, 1922) and *R v Purvis and Hughes*, he stated (at 268):
>
> > **'The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as minister of justice whose prime concern is its fair and impartial administration**.'" (Emphasis supplied)

Their Lordships had no criticism of the stance taken by this court. They stated that it "represent[ed] what will normally be an acceptable way of achieving fairness to the accused".

[40] The extract from **R v Barrett** demonstrates that prior to **Linton Berry v The Queen** it could not be said that there was any right to disclosure prior to a person being charged with a criminal offence.

[41] Since the watershed decision of **Linton Berry v The Queen**, the practice in this country, with regard to disclosure by the prosecution, has changed. The prosecution now routinely discloses to the defence all the material that it has in its possession. The practice only obtains, however, after a person has been charged with an offence. There is no practice of providing material to a person who may be charged with an offence. A proposal that such disclosure should take place would be impractical. Such a person would be no more entitled to the material than would any other member of the public. There would be no basis for disclosing to the public anything other than a summary of

the material collected during an investigation. The practice just described refers to prosecutions initiated by police investigations.

[42] The next question is whether Indecom, as a public body, owes any obligation greater than that, which would obtain in a normal investigation by the police. This question addresses the second aspect of Indecom's complaint on this issue. The first point to be made in respect of this second aspect, is that the Act does not impose any greater obligation to disclose than a police officer would have, prior to charging a person. Section 17 of the Act, which deals with Indecom's obligation to prepare and produce a report, does not require Indecom to produce the material, from which it creates the report. Section 17(9) requires the preparation of the report and section 17(10) stipulates the persons and entities to whom copies of the report should be provided.

[43] Importantly, as the learned judge pointed out, the Act does not grant an entitlement to recipients of, or persons affected by, the report, to apply for judicial review of Indecom's decisions. Section 24 only mandates Indecom to inform such persons that they have "the right to seek judicial review" of such decisions. The right to seek judicial review would be subject to all the stipulations for making applications for leave to apply for judicial review, namely:

a. the person would have a legitimate interest in Indecom's decision (**Council of Civil Service Unions v Minister for the Civil Service** [1985] AC

374 at 408, [1984] 3 All ER 935 at 949, HL, per Lord Diplock);

b. the person has an arguable case for challenging that decision; and

c. there is no alternative remedy or other discretionary barrier that would prevent the grant of judicial review.

[44] It must also be borne in mind that "[j]udicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful" (Halsbury's Laws of England 5th Edition, 2018, Volume 61A, paragraph 2).

[45] The relevant issue at this stage of the analysis is whether the respondents have an arguable case for challenging Indecom's decision. Indecom continues to rely heavily on section 28 of the Act as its justification for its refusal to disclose the source material. The section states:

> "(1) **The Commissioner and every person concerned with the administration of this Act shall regard as secret and confidential all documents, information and things disclosed to them in the execution of any of the provisions of, this Act, except that no disclosure**–
>
> (a) made by the Commissioner or any such person in proceedings for an offence under section 33

of this Act or under the Perjury Act by virtue of section 21(3) of this Act; or

(b) **which the Commissioner or any such person thinks necessary to make in the discharge of their functions**; and which would not prejudice the security, defence or international relations of Jamaica, [sic] shall be deemed inconsistent with any duty imposed by this section.

(2) **Neither the Commissioner nor any of the persons aforesaid shall be called upon to give evidence in respect of, or produce any such document, information or thing in any proceedings, other than proceedings mentioned in subsection (1) or section 25**." (Emphasis supplied)

[46] The section supports Indecom's stance. There is a general ban on disclosure. The section, however, does create some exceptions, which should be considered.

[47] The first exception is created by paragraph (a) of subsection (1). Paragraph (a) entitles Indecom to provide disclosure in proceedings for an offence under section 33 of the Act or proceedings under the Perjury Act. Section 33 of the Act refers to persons who generally obstruct Indecom in its work. The ambit of the section includes the offence for which Indecom had recommended that Superintendent Tabannah be charged. The request by the respondents does not, however, constitute proceedings for the offence. Neither an application for judicial review of the recommendation nor an application for judicial review of the refusal to disclose would constitute proceedings for the purposes of paragraph (a). The Perjury Act provision does not apply in this case.

The reference to it need not be further examined. The respondents cannot fit themselves within the first exception.

[48] The second exception is created by paragraph (b) of subsection (1). The learned judge misconstrued the paragraph, but it quite plainly creates a subjective test as to what Indecom may disclose on its own initiative. The test is what Indecom considers necessary to discharge its functions. "Necessary", in this context, according to the 6th edition of Collins English Dictionary, 2003, means "needed to achieve a certain desired effect or result; required". Indecom's functions, from the tenor of the Act, would, for these purposes, be the investigation of the incident and the provision of a report to the relevant persons. There is nothing in the Act that requires Indecom to provide copies of the material that it collects during its investigation. The limit on Indecom's discretion, if it were minded to make a disclosure, pursuant to paragraph (b), is that it may not make a disclosure in cases where "the security, defence or international relations of Jamaica" may be prejudiced.

[49] The learned judge took the view that the exercise of Indecom's discretion in this case was reviewable because it was arguable that it had applied a policy decision of non-disclosure, without considering the facts and circumstances of the particular case. He said, in part, at paragraph [57]:

> "…The submission from Miss Grant [for the respondents] is that in this particular case that policy [of non-disclosure] cannot apply with the same rigidity because the main reasons, (a) section 28 and (b) safety of witnesses, do not apply at all or with the same strictness because the content of the material already provided effectively undermines those positions. In the context of this case, that submission

> is quite correct. This is all the more reason for saying that even if there is a policy each case needs to be assessed on its individual circumstance in order to see whether the particular case justifies a departure from the policy. The affidavit from [Indecom] does not address the individual merits of this case but simply says that it made the decision not to disclose based on its policy."

And again at paragraph [59]:

> "Miss Grant is also saying that because [Indecom] applied a blanket policy without considering the merits of this particular case then it may have acted unfairly…."

[50] It is easy to disagree with the learned judge's approach. He is incorrect in his assessment that "section 28 is not comprehensive" (see paragraph [50] of his judgment). Whereas the exception set out in paragraph (b) allows the exercise of a discretion by Indecom, the tenor of the section as a whole does not lend itself to judicial review of the decision to refuse disclosure. The general tenor of the section prevents disclosure. Indecom has refused to disclose. There can be no arguable case that it has exercised its discretion unreasonably in a **Wednesbury** sense. The respondents cannot fit themselves within that exception. It will also be considered in assessing issue 4, whether the learned judge made an error of fact in stating that Indecom's objection to disclosure was not based on a concern for the safety of the persons from whom statements had been taken.

[51] Subsection (2) creates the third exception. The respondents cannot fit themselves within this exception. Their request for disclosure does not constitute

proceedings within section 25 of the Act. Section 25 concerns prosecutions which are being conducted by the Director of Public Prosecutions.

[52] Support for this analysis may be drawn from **Regina (Green) v Police Complaints Authority** [2004] 1 WLR 725. In that case, Mr Green made a complaint against a police officer. The Police Complaints Authority supervised the investigation of the complaint. The Authority issued a recommendation not to pursue any criminal proceedings against the police officer. The decision was acknowledged to be flawed and the Authority undertook to review the case and make a fresh decision. Mr Green sought disclosure of the statements and documents that had been collected during the initial investigation. The Authority refused the request, citing a section of the relevant legislation as preventing such disclosure. Mr Green sought judicial review of the decision to refuse disclosure. His application was refused and he appealed to the House of Lords.

[53] The statutory provision, on which the case turned, was section 80(1) of the Police Act, 1996. Despite a difference in terminology, its general import is similar to section 28 of the Act. Lord Rodger of Earlsferry, with whom the rest of their Lordships agreed, found that section 80 provided a general ban on disclosure, outside of the specific exceptions, which were stipulated in the section. The relevant exception to that case, which is similar in effect to section 28(1)(b), allowed some disclosure, insofar as it was "necessary for the proper discharge of the functions of the Authority". The relevant portion of section 80(1) states:

> "**No information received by the Authority in connection with any of their functions under sections 67 to 79 or regulations made by virtue of section 81 shall be disclosed by any person who is or has been a member, officer or servant of the Authority except**-(a) to the Secretary of State or to a member, officer or servant of the Authority **or, so far as may be necessary for the proper discharge of the functions of the Authority, to other persons**…" (Emphasis supplied)

[54] His Lordship reasoned that the tenor of the section was such that it would be a criminal offence to make the disclosure if disclosure was not necessary for the proper discharge of the Authority's functions. He reasoned that the Authority's decision whether or not to disclose was based on an exercise of judgment rather than an exercise of discretion (see paragraph 39). He found, after considering, among other things, the confidentiality of witness statements, that disclosure was not necessary in that case.

[55] A strong parallel exists between **Regina (Green) v Police Complaints Authority** and the present case. It is noted, however, that the test for disclosure in the relevant exception in section 80(1) is objective, while in section 28(1)(b), it is subjective, relying, as it does, on such disclosure as Indecom "thinks necessary to make in the discharge of [its] functions". Indecom, relying on, among other things, the security of the witnesses, cannot be arguably said to have exercised its discretion unreasonably. In fairness to the learned judge, it should be noted that **Regina (Green) v Police Complaints Authority** was not cited in submissions to him.

[56] For those reasons it may be said that the learned judge, was plainly wrong in finding that Indecom's exercise of discretion under section 28 was subject to judicial review in the circumstances of this case. Consequently, his discretion was wrongly exercised and it is open to this court to look at the matter afresh. In light of the fact that there are real risks involved in disclosing, before charges are laid, information to determine if charges should be laid, the Commissioner would be well within his rights to state that there is no reason to depart from the section 28 secrecy.

[57] The reasoning above demonstrates that leave to apply for judicial review should not have been granted in this case.

Issue 3 - whether a viable alternative remedy to judicial review exists and could have been pursued – grounds 6 and 7;

[58] The learned judge also considered the issue of whether the existence of an alternative remedy presented a bar to the grant of leave to apply for judicial review. He examined rule 56.3 of the CPR, which speaks to the issue of an alternative form of redress. The learned judge concluded that the existence of an alternative form of redress did not automatically bar the grant of leave to apply for judicial review. He said, at paragraph [75] of his judgment:

> "The wording of this provision must rest on the assumption that there may be other means of redress available and the applicant needs to justify why judicial review is more appropriate. If this is correct then it is no longer correct to say that judicial review can only be pursued if no alternative form of redress exists. What he can do is show why judicial review is more favoured than the others."

[59] The learned judge also found that a trial for a criminal offence would not afford the respondents the remedy which they seek by way of judicial review. He held that the question that they wished to be determined was whether they were entitled to disclosure by Indecom, before they were charged with an offence. He said, in part at paragraph [84]:

> "However, the narrow point raised by the [respondents] is whether they would be entitled to disclosure at an earlier stage [than when a prosecution has been initiated]. [Indecom's] Commissioner has said that he is prepared to make full disclosure after the [respondents] have been arrested and charged. **This would mean that the [respondents] would have suffered the harm without having an answer to their question of whether they are entitled to disclosure, in this case, earlier than the time proposed by the Commissioner**. This explains why judicial review is necessary to have this question answered. After arrest and charge, the point becomes academic. When viewed in this way the court is inclined to grant leave to apply for judicial review. The court does not agree with Mr Small that the narrow question raised by the applicants can be properly addressed by the trial court." (Emphasis supplied)

[60] The learned judge identified the question as being a narrow one because he recognised that the respondents did have an alternative remedy in terms of actual disclosure. He perceived that the respondents would most likely have had disclosure once they had been charged with an offence. Similarly, they would be entitled to apply to the court for dismissal of the charges on the basis of abuse of process, if they were of the view that that option was a viable one.

[61] The narrow question would seem to be purely academic, if not pedantic, and, based on the discussion in issue 2, doomed to failure. It necessarily follows that an

application for mandamus should not be allowed since a viable alternative remedy is available (**Sharma v Antoine and Others**). The alternative here is the request for disclosure in the criminal proceedings.

[62] It is unnecessary to decide definitively in this judgment whether rule 56.3 of the CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests, as the learned judge held, that at the leave stage the existence of an alternative remedy is not an absolute bar to the grant of leave. The relevant part of rule 56.3(3) states:

> "The application [for leave to apply for judicial review] must state –
>
> …
>
> (d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued.
>
> …"

The issue is whether the alternative is more suitable than judicial review. In this case it is.

Issue 4 - whether the learned judge erred on issues of fact – grounds 8 and 9

[63] Mr Williams submitted that the learned judge erred in stating that Indecom was not apprehensive about the safety of witnesses in this case. The submission was used to bolster the argument that the learned judge erred in fact and thereby allowed this court to substitute its own assessment of the case.

[64] The learned judge did not make a statement in the terms that Mr Williams has argued. He recognised at paragraph [16] of his judgment that Indecom "conducts its operations in an endeavour to calm [the anxiety of witnesses concerning their whereabouts being disclosed], foster public confidence, and diminish the opportunity for witness tampering". He went on, at paragraph [57] to show that the affidavit evidence from the Commissioner of Indecom did not speak to the security of the witnesses. The paragraph has already been quoted above, but for convenience is repeated below. The learned judge said:

> "…The submission from Miss Grant is that in this particular case that policy [of non-disclosure] cannot apply with the same rigidity because the main reasons, (a) section 28 and (b) safety of witnesses, do not apply at all or with the same strictness because the content of the material already provided effectively undermines those positions. In the context of this case, that submission is quite correct. This is all the more reason for saying that even if there is a policy each case needs to be assessed on its individual circumstance in order to see whether the particular case justifies a departure from the policy. **The affidavit from the Commission does not address the individual merits of this case but simply says that it made the decision not to disclose based on its policy**." (Emphasis supplied)

Mr Williams' submissions are therefore not quite accurate in fact. In any event, an error such as that would not have been sufficient to have said that the learned judge was patently wrong in his analysis. **Tweed v Parades Commission for Northern Island** [2007] 1 AC 650 is authority for the principle that judicial review is predominantly concerned with legal issues. The grounds in respect of this issue fail.

Issue 5 - whether the learned Judge erred in granting an injunction in the circumstances of this case – ground 11

[65] The analysis in respect of issue 2 would necessarily result in the view that the learned judge ought not to have granted an injunction in a case where the result could have been to stall the prosecution of a criminal case. The court in **R (on the application of S) v Oxford Magistrates' Court** held that a complaint against a District Judge's decision to refuse to adjourn a criminal case pending an application for judicial review concerning the prosecution, was unarguable. Sir Brian Leveson P stated at paragraph [31]:

> "If the threat of judicial review necessarily required magistrates to adjourn in all cases, both delay and unnecessary additional hearings would result. That is neither in the public interest nor does it assist in the efficient disposal of the work. If the circumstances are such that there is particular prejudice in the criminal case proceeding pending judicial review, an application should be made in the judicial review proceedings for such relief. For all those reasons the case against the decision of the District Judge is unarguable and I would refuse the application for permission to apply for judicial review of this decision."

The ground in respect of this issue should succeed.

Costs

[66] Although this was not set out as a ground of appeal, Miss Foster argued, on behalf of Indecom, that the learned judge also erred on the issue of the award of costs. She submitted that costs ought not to have been argued at the leave stage of an application for judicial review. Learned counsel submitted that Indecom had not behaved in any way that would have warranted a departure from the usual custom regarding administrative orders.

[67] Miss Foster is correct. The general rule is that costs are not awarded in applications for judicial review, albeit that the protection is mainly for the applicant (see rule 56.15(5) of the CPR). It is also unusual for costs to be awarded in an application for leave to apply for judicial review, in that it is in the actual application that the merits of the case would be determined. Rule 56.15(5) stipulates that an award of costs at the stage of an application for leave should normally only be made where a party has behaved egregiously. There is no indication that Indecom behaved in any such way in this case. In any event, the learned judge did not so justify his departure from the norm.

[68] In the end, however, the point is academic as Indecom should succeed in this appeal, and the costs order in the court below should be set aside.

[69] I would order that the appeal be allowed, the orders of the learned judge made on 23 June 2016 be set aside, and that there should be no order for costs either here or in the court below.

Postscript

[70] This judgment has been long delayed. The delay is sincerely regretted. It should be noted however that the injunction granted by the learned judge should not have delayed any properly arranged prosecution. The injunction did not affect the Director of Public Prosecutions, who was not a party to the proceedings before the learned judge, and was not subject to the injunction, as she is not an "agent" of Indecom.

[71] It is also to be noted that, based on the reasoning in **The Police Federation and Others v The Commissioner of the Independent Commission of Investigations and Another** [2018] JMCA Civ 20, Indecom, even if it had not been restrained by the learned judge, would have been ill-advised to have sought to prosecute the respondents itself, or by one of its officers.

F WILLIAMS JA

[72] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

MORRISON P

ORDER

1. The appeal is allowed.

2. The judgment and orders of the court below, made on 23 June 2016, are set aside.

3. The applications for leave to apply for judicial review and for injunctions are refused.

4. No order as to costs either in this court or in the court below.