IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL 133/23

BETWEEN:

THE KING

-v-

THE INTEGRITY COMMISSION OF THE TURK AND CAICOS ISLANDS (THE COMMISSION) — **RESPONDENT**

Ex parte **THE HON. ARLINGTON MUSGROVE** — **APPLICANT**

DECISION ON *EX PARTE* APPLICATION FOR LEAVE TO MOVE FOR JUDICIAL REVIEW

Before The Hon. Mr Justice Anthony S. Gruchot

Decided on the papers in Chambers

Background

1. Mr Musgrove is an elected Member of the House of Assembly and the Minister of Immigration and Border Services, Customs, Civil Aviation and the Turks and Caicos Islands ('TCI') Airports Authority.

2. He was elected into office and assigned the above portfolio in February 2021. Mr Musgrove is the registered proprietor of parcels 60611/111 & 112 on which is constructed a substantial building ('the Property').

3. On or around 18th June 2009, some 12 years prior to his being elected, he entered into a commercial lease agreement with the then Governor acting on behalf of the Turks and Caicos Islands Government ('TCIG') in respect of the Property. The intended and current use of the Property was/is to be used as a detention centre for the Department of Immigration to house migrants who have entered the TCI without lawful permission and have been detained by the border control authorities for processing.

4. The term of the lease was for 4 years and it has been renewed on 3 occasions, the last renewal being on 12th June 2019 for a period of 4 years. That term expired without renewal on 20th June 2022 and TCIG is holding over on a periodical tenancy, from month to month. Mr Musgrove states that he has indicated to TCIG that he wishes vacant possession of the Property but has not taken any steps to determine the periodical tenancy as to do so would not be in the public interest because there is no suitable alternative accommodation in which to house those entering the TCI without lawful authority, albeit alternative accommodation is actively being sourced with a prospective building having recently been identified.

5. Mr Musgrove states that he receives no benefit from the day-to-day operations of the Detention Centre, other than the receipt of rent which has not been increased following the expiry of the last renewal term. He also states that he has no intention to renew the lease or to seek any increase in the rent.

6. The existence of the lease has been disclosed to the Integrity Commission ('the Commission') in Mr Musgrove's bi-annual statutory declarations as to his financial affairs which are filed by requirement of the Integrity Commission Ordinance (Cap. 1.09) ('ICO').

The Proposed Judicial Review

7. Mr Musgrove seeks leave to review the following decisions made by the Commission:

a. The decision of the Commission that a conflict of interest exists between his personal interest in the Property and his public duties as Minister of Immigration[1].

b. The decision of the Commission delivered by way of letter from the Commission dated 8th August 2023 that the existence of the alleged conflict amounts to a breach of the Code of Conduct for Persons in Public Life ('the Code').

c. The decision of the Commission to recommend or direct the Governor and the Premier that he be immediately assigned another Cabinet portfolio/Ministry as set out in the letter from the Commission dated 8th August 2023.

8. An order of *certiorari*[2] is sought in respect of each of the above decisions, together with a declaration that Mr Musgrove has not breached the Code.

9. In addition, if leave to move for judicial review is granted, Mr Musgrove seeks an order pursuant to Ord. 53 r. 3(10) staying the decisions pending determination of the matter.

Discussion

10. The application for leave to move for judicial review was filed in Form 86A on 28th September 2023 supported by an affidavit of Mr Musgrove sworn on 27th September 2023.

11. Ord. 53 r. 3(1) provides:

> "*An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the 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*."

[1] The date of which decision is not known.
[2] An order quashing each of the decisions.

12. It is apparent that there have been ongoing communications between the Commission and Mr Musgrove since being elected, this being recognised in the letter from the Commission dated 24th April 2023.

13. Mr Musgrove responded to the Commission by way of email dated 12th June 2023. This responsive email was acknowledged in the Commission's letter of 8th August 2023 but was not, and has not been, substantively responded to.

14. For the purposes of this application, I am prepared to deem that the letter of 8th August 2023 was the conclusion of the Commission's deliberations and as such the relevant date from which time began to run for the making of the application. It was that letter which communicated that the Commission had decided that Mr Musgrove had breached the Code and contained the recommendation to the Governor and the Premier[3].

15. I am satisfied that the application having been filed within 2 months of receipt of the 8th August 2023 letter has been made promptly, taking into account the comprehensive grounds of review (some 20 pages) which have been filed. If any relevant decision was made and communicated before 8th August 2023 then I would, in the circumstances, extend the 3-month period.

16. The test for leave to move for judicial review is simply to see whether the case alleged is arguable. As per Williams J in **The Queen -v- Department of Physical Planning *ex. p* Pirates Landing Limited**[4]:

> *"At this stage my function is not to determine issues that are properly raised by the affidavit that is before me. The purpose of the requirement for leave on the other hand is to eliminate at an early stage any applications which are frivolous or hopeless and to ensure that the matter only proceeds to a*

[3] Pursuant to section 85(3)(b)(iii) the recommendation should be made to the Speaker of the House of Assembly and the Governor.
[4] CL 37/2008; 2008 TCASC 21 (25 June 2008) at para. 12.

substantive hearing if there is a case fit for consideration. I bear in mind that leave should be granted if on the material available the court thinks, without going into the matter in depth, that there is an arguable case for granting relief."

17. In **R -v- Secretary of State for the Home Department ex. p Cheblak**[5] the Court of Appeal stated:

"The requirement that leave be obtained before a substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases which are unarguable. Accordingly, an application for leave is normally dealt with on the basis of summary submissions. If an arguable point emerges, leave is granted and extended argument ensues upon the hearing of the substantive application. If not, it is refused."

18. In **Sharma -v- Brown-Antoine**[6] the Privy Council sitting in respect of an appeal from the Trinidad and Tobago Court of Appeal set out the following test in determining whether leave for judicial review should be granted:

"The ordinary rule is now that the court will refuse leave to claim judicial review unless satisfied 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."

19. The principle in **Sharma** was reaffirmed by the Privy Council in 2021 in **Sookhan (Respondent) -v- The Children's Authority of Trinidad and Tobago (Appellant) (Trinidad and Tobago)**[7]

20. The grounds put forward for review extend to some 31 paragraphs under the following headings:

[5] [1991] 1 WLR 890 at page 901.
[6] [2007] 1 WLR 780 at para. 14.
[7] [2021] UKPC 29 at para. 2.

A. Failure to apply the correct test as to apparent conflict. The failure to apply the correct test makes the decisions as to the existence of a conflict of interest unlawful.

B. Failure to properly consider whether the conflict, if it existed, could be properly managed or avoided. The failure to properly consider whether the alleged conflict could be properly managed made the decision that Mr Musgrove was in breach of the Code unlawful.

C. The decisions are unlawful because they are irrational.

D. The decisions are unlawful because they are tainted by obvious defects of procedural fairness.

E. The finding that Mr Musgrove breached the Code was contrary to Mr Musgrove's legitimate expectation that he could continue to recuse himself from decisions regarding the detention centre without breaching the Code[8].

F. The decision that Mr Musgrove is in breach of the Code is unlawful because it is based on over rigid policy.

G. The decisions violated Mr Musgrove's right to lawful administrative action - Section 19 of the Constitution.

H. The recommendation regarding the transfer of Mr Musgrove to another Ministry was unlawful and outside the Commission's powers.

21. The correspondence from the Commission with which I have been provided does not explain why the Commission has concluded a conflict of interest exists such that it must recommend immediate transfer to another Ministry, particularly so in light of its recommendation for managing such conflict as set out in its letter of 24th April

[8] As he had previously been directed to do by the Commission in order to manage the alleged conflict – See para. 21 below.

2023 in which it stated:

> *"As discussed with the Commission early in your tenure as a Minister, you will be also expected to continue recusing yourself during cabinet meetings where the immigration detention center (sic) is to be discussed. This is in an effort to manage the Conflict of Interest."*

22. Further, on the face of the correspondence, and as submitted by Mr Musgrove, neither the letter of 24th April 2023 or 8th August 2023 would appear to satisfy the requirements of section 85 of the ICO, such that would amount to a written report of the findings of any inquiry or investigation held by the Commission under that Part.

23. I remind myself that in an application for leave it is not for me to carry out an in-depth consideration of the issues raised, but I am to consider if they are frivolous, vexatious or hopeless[9]. Having considered the application in full I am satisfied that there is an arguable case which requires further investigation. Accordingly, leave to move for judicial review is granted.

Application for a Stay of the Decisions

24. Mr Musgrove concludes his application with an application for a stay of the decisions in the event leave is granted.

25. Ord. 53 r. 3(10) provides:

> *"Where leave to apply for judicial review is granted, then –*
>
> *(a) If the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of proceedings to which the application relates until the determination of the application or until the court orders otherwise orders; …"*

26. Section 85 ICO provides:

[9] See The Supreme Court Practice 1999 ('the White Book') at note 53/14/21 and note 53/14/55

*"85. (1) The Commission shall prepare **a written report** of the findings of an inquiry or investigation held under this Part, and indicate its conclusion in the report that—*

… (b) it has determined that the public official subject to the inquiry or investigation contravened the Code of Conduct.

(2) If the Commission determines that a public official contravened the Code of Conduct, it may include in the report any recommendations as to the punishment or disciplinary measures that it believes would be appropriate to be taken against the public official.

(3) The Commission shall send a copy of the report, including copies of evidence and material documents submitted during the inquiry or investigation, to—

(a) the public servant who was subject to the inquiry or investigation; and

(b) the following persons in the following cases—

… (iii) the Speaker of the House of Assembly and the Governor, in the case of an alleged contravention of the Code of Conduct by a member of the House of Assembly; …

(4) A person who receives a report from the Commission under subsection (3)(b) in which the Commission has determined that the public official subject to the inquiry or investigation contravened the Code of Conduct shall—

*(a) decide **without delay** what measures shall be taken, if any, in response to the report and shall implement such measures without delay; and*

*(b) inform the Commission, as soon as practicable but not later than **thirty days** after receiving the report—*

(i) of the follow-up actions or disciplinary measures that will be or have been taken against the public official in response to the report;

(ii) that no further action is required to be taken against the public official in response to the report; or

(iii) that no decision has been made as to the measures to be taken in response to the report, of the reasons for the delay, and of the date by which a decision will be made and sent to the Commission. (My emphasis)

27. It appears that no action has been taken by the Speaker of the House of Assembly and/or the Governor with respect to the 2 letters, assuming the same are to be considered, either together or separately, a report as required by section 85 ICO.

28. I am directed to Article 34 of the Constitution which provides:

" 34. (1) Any Minister shall vacate his or her office—

…

(d) if the Integrity Commission determines that he or she has breached the Code of Conduct for Persons in Public Life for the time being in effect; …"

29. In light of the above, the issue of a stay of the Commission's recommendation is an important matter. I have not been directed to any authority upon which the criteria for granting a stay have been considered.

What jurisdiction does the Court have to order a stay of an executive decision?

30. In **R (H) v Ashworth Hospital Authority and Others; R (Ashworth Hospital Authority) v Mental Health Review Tribunal for West Midlands and North West**

Region and Others[10] Dyson LJ discussed an apparent jurisdictional conflict.

31. Dyson LJ cited the case of **R v Secretary of State for Education and Science *ex. p.* Avon**[11] where although a stay was refused on the facts, he noted that the Court of Appeal held "*that the phrase "the proceedings" in RSC Ord 53 r 3(10)(a) should be construed widely and that, so construed, it embraced not only judicial proceedings, **but also administrative decisions "and the process of arriving at such decisions***"." (My emphasis)

32. In **Minister of Foreign Affairs, Trade and Industry -v- Vehicle and Supplies Ltd**[12] the Privy Council dismissed an appeal from the Court of Appeal of Jamaica on the grounds that there was no basis for interfering with the decision of the first instance judge, in the exercise of his discretion, to set aside the stay. The Privy Council went on to say that there was "every ground for challenging the order of a stay as a matter of law". As per Lord Oliver[13]:

> *""It seems in fact to have been based upon a fundamental misunderstanding of the nature of a stay of proceedings. A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being "breached" by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (e.g. to provide security for costs), prevent a defendant*

[10] [2002] EWCA Civ 923 at paras. 32 to 46.
[11] [2002] EWCA Civ 923 at para. 35; [1991] 1 QB 558 at pages 561, 562.
[12] [1991] 1 WLR 550.
[13] At page 556E.

from applying to dismiss the action if the condition is not fulfilled: see La Grange v McAndrew (1879) 4 QBD 210"."

He then referred to section 564B(4) of their Judicature (Civil Procedure Code) and continued:

"This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, ***but it can have no possible application to an executive decision which has already been made****. In the context of an allocation which had already been decided and was in the course of being implemented by a person who was not a party to the proceedings it was simply meaningless. If it was desired to inhibit J.C.T.C. from implementing the allocation which had been made and communicated to it or to compel the minister, assuming this were possible, to revoke the allocation or issue counter-instructions,* ***that was something which could be achieved only by an injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made****. The minister's apprehension that that was what was intended by the order is readily understandable, but if that was what the judge intended by ordering a stay, it was an entirely inappropriate way of setting about it."* (My emphasis)

33. In **Ashwood Hospital Authority** Dyson LJ went on to say:

"It will be seen that there is a conflict between these two authorities as to whether the court has power to grant a stay of administrative decisions. This court is bound to follow Avon, …[14]*"*

34. He goes on:

"The purpose of a stay in a judicial review is clear. ***It is to suspend the "proceedings" that are under challenge pending the determination of***

[14] At para. 38

the challenge*. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In* Avon*, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions. In my view, it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in* Vehicle and Supplies *would appear to deny jurisdiction even in case A. That would indeed be regrettable, and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review. As I have said, this extreme position is not contended for by Mr Pleming. Thus it is common* ***ground that "proceedings" includes not only the process leading up to the making of the decision, but the decision itself****. The Administrative Court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect. A good example is where a planning authority grants planning permission, and an objector seeks permission to apply for judicial review. It is not, I believe, controversial that, if the court grants permission, it may order a stay of the carrying into effect of the planning permission*[15]*.*

And:

As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision

[15] At para. 42.

to be made. ***If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation****. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and* ***any decision taken will cease to have effect: it is suspended for the time being****.*[16]" (My emphasis)

35. Having decided that there are sufficient grounds to move for judicial review, the effect of not granting a stay given the circumstances of this case would arguably render any decision nugatory, as Mr Musgrove would be forced to vacate his office and the functioning of the Administration must continue under the auspices of an alternate Minister.

36. Taking guidance from the above authorities, I am satisfied that the power granted by Ord. 53 r.3(10)(a) is wide enough to give me jurisdiction to stay the enforcement or implementation of the recommendation of the Commission pending disposal of the substantive hearing or further order of the Court. I would therefore direct that the grant of leave shall operate as a stay of the proceedings.

Disposition

37. Mr Musgrove is granted leave to move for judicial review of the decisions of the Commission as set out in paragraph 7 above.

38. I also direct that the grant of leave shall operate as a stay of the proceedings to which this application relates.

39. Costs of the application shall be costs in the judicial review.

14th November 2023

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court

[16] At para.45.