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LEGAL TOPIC: JUDICIAL REVIEW

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INTRODUCTION

The High Court has historically exercised a supervisory jurisdiction over the proceedings of inferior Courts, tribunals, public bodies, public authorities or persons acting in the exercise of a public duty or function in accordance with any law, by the procedure known as Judicial Review. Judicial Review is the procedure whereby the High Court reviews the decision-making processes of these public bodies to determine whether these bodies acted in accordance with the law when making its decisions.

By this procedure the High Court can control the sometimes unfettered actions of decision-makers. In these proceedings the decision in question is not reviewed in relation to the merits of same but rather it is the process by which the decision is made that is reviewed. Judicial Review proceedings are governed by the Part 56 of the Civil Proceedings Rules 1998 (as amended) and Judicial Review Act 2000 Chapter 7:08 of Trinidad and Tobago.

BODIES AMENABLE TO JUDICIAL REVIEW:

- Public bodies
- Private bodies that exercise public functions

The appropriate test for determining whether the decision is a matter of public law is the determination of the issue as to whether the



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decision maker is performing a public function: **R v Panel on Takeovers and Mergers, ex p Datafin [1987] 1 QB 815 and R. v Lord Chancellor Ex p. Hibbit & Saunders [1993] COD 326.**

APPLICANTS WHO CAN APPLY FOR JUDICIAL REVIEW:

An Application for Judicial Review may be made by any person, group or body that has sufficient interest in the subject matter of the Application: Rule 56(2) of the CPR. The Applicant must be a person whose interests are adversely affected by a decision: section 5(2)(a) of the Judicial Review Act; or a person (or a group of persons) that satisfies the Court that the Application is justifiable in the public interest in the circumstances of the case: section 5(2)(b) of the Judicial Review Act.

GROUND UPON WHICH AN ACTION FOR JUDICIAL REVIEW MAY BE BROUGHT:

Section 5 (3) of the Judicial Review Act sets out a non-exhaustive list of the grounds upon which an action for judicial Review may be brought. These are as follows:

- a) The decision is unauthorized or contrary to law;
- b) The decision maker exceeded his jurisdiction;
- c) There was a failure to satisfy or observe conditions or procedures required by law;
- d) There was a breach of natural justice;
- e) There was an unreasonable, irregular or improper exercise of discretion;
- f) There has been an abuse of power;
- g) Fraud, bad faith, improper purpose or irrelevant considerations;
- h) Acting on instructions from an unauthorized person;
- i) Conflict with the policy of an Act;
- j) Error of law, whether or not apparent on the face of the record;
- k) Absence of evidence on which a finding or assumption of fact could reasonably be based;

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- l) Breach of or omission to perform duty;
- m) Deprivation of legitimate expectation;
- n) Defect in form or a technical irregularity resulting in the miscarriage of justice; or
- o) Exercise of power in a manner so unreasonable that no reasonable person could have so exercised that power.

These grounds can be summarized under three main heads identified by Lord Diplock in the case of **Council of Civil Service Unions v Minister of Civil Service [1984] UKHL 9** as follows:

- **Illegality:**

Lord Diplock defined illegality as follows: "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

- **Irrationality:**

A decision is unreasonable or irrational if it is so unreasonable that no reasonable person acting reasonably could have made it, as per Lord Greene in **Associated Provincial Picture House v Wednesbury Corporation (1948) 1 KB 223**. This concept is known as "*Wednesbury Unreasonableness*". Lord Diplock in **Council of Civil Service Unions (supra)** defined an irrational decision to be one which was so "outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to it could have arrived at it."

- **Procedural Impropriety:**

Lord Diplock defined procedural impropriety as follows: "I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person

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who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

EXISTENCE OF ALTERNATIVE REMEDIES:

According to section 9 of the Judicial Review Act, the Court shall not grant leave to an Applicant for Judicial Review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances: **Saga Trading Limited v The Comptroller of Customs and Excise TT 1998 HC 132.**

THE PROPER RELIEFS TO BE SOUGHT:

- On an Application for Judicial Review, the Court may grant the following forms of relief as set out at section 8 (1) of the Judicial Review Act:

(a) an order of *mandamus* (an order compelling persons to do particular things), *prohibition* (an order restraining particular persons from particular actions) or *certiorari* (an order quashing the decision and possibly remitting to the lower court: section 21 of the Judicial Review Act & Rule 56.15 (2) of the CPR);

(b) a declaration or injunction;

(c) an injunction under section 19 of the Act; or

(d) such other orders, directions or writs as it considers just and as the circumstances warrant.

- According to section 8(4) of the Judicial Review Act, on an Application for Judicial Review, the Court may award damages to the Applicant if the Applicant has included in the Application a claim for damages arising from any matter to which the application relates; and the Court is satisfied that, if the claim has been made in an action begun by the Applicant at the time of making the Application, the Applicant could have been awarded damages.
- The Court may, having regard to circumstances, grant in addition or alternatively an order for restitution or for the return of property, real or personal: section 8(5) of the Judicial Review Act.

JUDICIAL REVIEW PROCEEDINGS:

1. THE APPLICATION FOR LEAVE:

In order to make an Application for Judicial Review leave to make same must first be obtained: section 6(1) of the Judicial Review Act; Rule 56.3(1) of the CPR. The Application for leave to apply for Judicial Review may be made without notice: Rule 56.3(2) of the CPR. A High Court Judge may give leave without a hearing. However, if a Judge is minded to refuse or if immediate interim relief is claimed or if a hearing is desirable in the interest of justice the Judge must have an open court hearing of the Application for leave: Rule 56.4(3) of the CPR.

This Application for leave must be made within 3 months of the date that the grounds first arose unless the Court considers that there is good reason for extending the period of time within which the Application is to be made: section 11 of the Judicial Review Act & Rules 56.5 (1) & (2) of the CPR.

The judge may refuse leave to an Applicant where he considers that there has been unreasonable delay before making the Application. When considering whether to refuse

or grant leave to an Applicant because of delay, the Judge must consider whether the granting of leave or the relief would likely to:

- Cause substantial hardship to or substantially prejudice the rights of any person: Rule 56.5 (3) (a) of the CPR.; or
- Be detrimental to good administration: Rule 56.5 (3) (b) of the CPR.

The position as it relates to delay was discussed by the Privy Council in the case of **Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5** wherein a more lenient approach was taken in relation to the time frame for making an Application. In this case it was stated that the reason for the delay is only one of the factors to be considered and even in circumstances where no reason for the delay is given, this is not necessarily fatal to the grant of leave. Several other matters ought to be considered when there is delay such as: the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration and the public interest.

The Application for leave must be supported by affidavit.

The test to be satisfied when granting leave to apply for Judicial Review was set out in **Sharma v Brown-Antoine [2007] 1 WLR 780** wherein it was stated that: “The ordinary rule now is that the court will refuse leave to claim judicial review unless it is 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....” This test however has now become more lenient as observed in **Steve Ferguson and Anor v The Attorney General of Trinidad and Tobago (Civil Appeal No. 207 of 2010)** wherein Kangaloo JA stated that it must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the court should exercise its discretion in refusing to grant leave.

According to Rule 56.4 (10) of the CPR, on granting leave the Judge must either direct when the case management conference shall take place or, in cases of urgency, or where he considers a case management conference is not necessary, fix the date of hearing of the Application for a Judicial Review and give any appropriate consequential directions. Leave must be conditional on the Applicant making a claim for Judicial Review within 14 days: Rule 56.4 (11) of the CPR.

2. THE SUBSTANTIVE APPLICATION:

Where leave is granted the Applicant must then apply for Judicial Review under Rule 56.7(1) of the CPR. The Application is to be made by a Fixed Date Claim Form which sets out the reliefs being sought and an affidavit of Claimant or appropriate officer of the body making the claim is to be filed with the Fixed Date Claim Form.

The Claim Form and the affidavit in support must be served on the Defendants not less than 14 days before the date fixed for the case management conference: Rule 56.10 (1) of the CPR.

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