**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No: CV 2012 – 03883

IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF PUBLIC PROSECUTIONS TO MAKE A CLAIM FOR JUDICIAL REVIEW UNDER CPR PART 56:3 AND THEJUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE DECISION OF HER WORSHIP MS MARCIA MURRAY, DATED 26 JUNE 2012

BETWEEN

**DIRECTOR OF PUBLIC PROSECUTIONS**

Claimant

AND

**(1) HER WORSHIP MARCIA MURRAY**

**(2) BASDEO PANDAY**

Defendants

**Before the Honourable Mr Justice James C. Aboud**

**Dated: 11 April 2014**

**Representation**

- Mr Ian L. Benjamin and Ms Anju Bhola instructed by Ms Nalini Jagnarine for the claimant
- Mr Avory Sinanan SC leading Mr Larry Lalla and Ms Cherisse Nixon instructed by Ms Leah Thompson of the Chief State Solicitor's Department for the first defendant
- Mr Rikki A. Harnanan instructed by Ms Mickela Panday for the second defendant

**JUDGMENT**

1. I heard and determined an application by the claimant for leave to apply for judicial review of a decision of Her Worship Marcia Murray ("the magistrate") given on 26 June 2012. The

leave application was filed on 21 September 2012 and determined on 26 September 2012. The application was heard without notice to the defendants. Leave to apply for judicial review was granted. Directions were given for the filing of a Fixed Date Claim Form, and a date was set aside for the case management conference. On that day the defendants, having been served with the Fixed Date Claim Form, appeared. Mr Harnanan, who represents the second defendant ("Mr Panday"), indicated his intention to apply to set aside the leave on the grounds of delay, the availability of alternative remedies, and non-disclosure. Mr Panday's set-aside application was filed on 9 November 2012 and what followed thereafter were a series of hearings beginning on 19 July 2013, in which the parties' written submissions were orally presented. Three hearings were rescheduled due to counsel's professional and personal engagements. In one case, the court had a scheduling conflict.

2. I now decide whether the leave granted on 26 September 2012 should be set aside.

**The claimant's leave application**

3. The claimant contends that the magistrate made an error of law when she stayed the prosecution of Mr Panday on certain criminal charges. The charges arose out of Mr Panday's alleged failure, as a person in public life, to disclose certain funds held in the name of himself and his wife at the National Westminster Bank in the United Kingdom. It is alleged that his declarations of Income Assets and Liabilities for the years 1997, 1998 and 1999 were false and offended the Integrity in Public Life Acts, 1987 and 2000 ("the Integrity Act").

4. The claimant's CPR Part 56.3 Notice of Application sets out the grounds for judicial review of the magistrate's decision. In a nutshell it is said that she wholly misconstrued the provisions of the Integrity Act and wrongfully interpreted the powers of the claimant to independently prosecute Mr Panday for offences under the Integrity Act. The magistrate impugned the conduct of the Integrity Commission and the decision of the Director of Public Prosecution (DPP) to prosecute Mr Panday. She therefore came to the conclusion that the prosecution was abusive. She stayed the proceedings and discharged him.

5. The matters raised on the leave application deal exclusively with the unreasonableness of the magistrate's decision to stay the proceedings. The affidavit in support sets out in greater detail what transpired in the Magistrates' Court:

   (a) The magistrate commenced the hearing of the matter *Senior Superintendent Virgil v Basdeo Panday* on 13 June 2011. It was described as the second re-trial. The charges were laid by summary complaint, not by information. The magistrate was therefore not an examining magistrate. She had jurisdiction to dispose of the proceedings by making findings of law and fact.

   (b) At the close of the prosecution's case the defence counsel made two applications. The first was a submission that there was no case to answer. The magistrate overruled that submission. The second application was one seeking a stay of the proceedings on the grounds that they amounted to an abuse of process. The magistrate upheld that submission. Briefly put, the magistrate felt that the Integrity Commission had a duty under the Integrity Act to have advised the President of Trinidad and Tobago to appoint a tribunal and, in the absence of that step, the decision of a former DPP (the

claimant's predecessor) to initiate the prosecution was abusive of Mr Panday's rights and offended the court's sense of justice and propriety.

(c) On 26 June 2012 the magistrate stayed the proceedings and delivered a written decision, comprising 19 pages, fully setting out her reasons. A copy was attached to the claimant's supporting affidavit.

(d) The claimant says, in his supporting affidavit, that "as far as [he is] aware there is no alternative form of redress that exists to challenge the decision." He further says that he has made no complaint to the magistrate: "In my view the Learned Magistrate is *functus* and no such complaint can be made. Furthermore no appeal can be made to the Court of Appeal against the magistrate's decision."

6. The application for leave to apply for judicial review was filed three days short of three months after the magistrate's decision.

7. In the CPR Part 56.3 Notice a number of statements are made. In response to the standard form question: "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 claimant succinctly stated, "No alternative and/or equally efficacious form of redress exists." In response to the question: "Whether the time limit for making the application has been exceeded and if so, why," the claimant stated, "No time limit has been exceeded. This application has been made promptly following receipt and consideration and advice of the decision." (sic)

8. I granted leave to apply for the reliefs set out in the Notice. These reliefs were:

(a) A declaration that the decision is unlawful, illegal, irrational and/or unreasonable, disproportionate, and/or is or amounts to an unreasonable, irregular, or improper exercise of a discretion, is invalid, null, void, and of no effect;

(b) An order of *certiorari* to bring into this court and quash the decision.

(c) Such other orders, directions or writs as is just in the circumstances;

It is to be noted that no writ of *mandamus* was specifically sought to direct that the matter should be remitted to the magistrate for the conclusion of the trial, or to another magistrate for a third re-trial. It seemed to me that the issues raised on the leave application were concerned solely with the matters of law that the magistrate took into account in deciding to stay the proceedings.

9. On the basis of the papers then before me, I felt that there were good grounds to question the reasonableness of the decision. My mind was not directed to the question of promptness in making the application (save that the application was not made later than three months after the decision). I was not asked to consider the potential hardship to Mr Panday, nor supplied with adequate material to properly evaluate it. The existence of alternative remedies by way of appeal was dealt with in a summary or concise manner. In granting leave I noted the absence of an order of *mandamus* as one of the reliefs. In hindsight I have come to the realization that every application made without notice offends the maxim *audi alterem partem*, and I now rarely grant leave without notice to the parties named in the suit. Of

course, hindsight has been even further magnified under the microscope of Mr Panday's application.

**The grounds of Mr Panday's application**

10. The grounds of the application can be conveniently summarized like this:

    (a) The alternative remedies argument –
    The claimant has a right of appeal to the Court of Appeal under sections 128 and 156 of the Summary Courts Act, Chap. 4:20 and section 36 of the Supreme Court of Judicature Act, Chap. 4:01;

    (b) The lack of promptness argument –
    The claimant did not give any explanation why it took almost three months to apply for leave and that this unexplained delay will cause substantial hardship or prejudice to Mr Panday and be detrimental to good administration; and

    (c) The non-disclosure argument –
    The claimant failed to put the long history of these proceedings against Mr Panday before the court, or to set out any explanation for the delay, or disclose the availability of alternative remedies.

**Evidence adduced after leave was granted**

11. Mr Panday filed an affidavit on 9 November 2012. The claimant filed two affidavits on 29 November 2012, one by himself and one by Anju Bhola, an attorney-at-law at the office of the Director of Public Prosecutions.

**Mr Panday's affidavit**

12. Mr Panday provides a long history of the criminal prosecution beginning with the laying of the charges on 18 September 2002. This evidence was not before me at the leave application. At the first trial before then Chief Magistrate Sherman Mc Nicholls in 2003, an allegation was made that the charges infringed his constitutional rights and he was advised to file a constitutional motion. It was dismissed in the High Court and the Court of Appeal. On 16 February 2006 the Judicial Committee of the Privy Council refused leave to appeal.

13. The trial before the Chief Magistrate began on 20 March 2006. It concluded on 24 April 2006 with a conviction and a maximum sentence of two years imprisonment with hard labour together with heavy fines and financial penalties. Mr Panday was remanded in custody and obtained bail on 28 April 2006. Bail was granted by a Judge in chambers on the basis, among other matters, that he could not receive adequate medical treatment in prison for his heart condition and his diabetes. He had had open heart surgery in 1989 and an angioplasty in 1995. He said that he continues to this day to suffer with heart disease and with diabetes, as well as glaucoma, and takes daily medication for all these ailments.

14. Mr Panday appealed the conviction and sentence and on 20 March 2007 the Court of Appeal quashed the conviction and sentence on the basis of the apparent bias of the Chief Magistrate. He had been accused of being involved in a certain land transaction that was said to be suspicious and, as well, being involved in certain communications with the then Attorney General, a member of a political party that Mr Panday opposed, as well as with the

then Chief Justice. The Court of Appeal ordered a re-trial. This decision was appealed but the Privy Council dismissed it on 9 April 2008.

15. In the meantime the re-trial was listed before Her Worship Ejenny Espinet on 31 July 2007. An application was made for her recusal herself on the grounds of apparent bias. It was based on her hearing of other committal proceedings which involved her appraisal of corruption allegations against Mr Panday identical to the evidence intended to be led at the re-trial.

16. Magistrate Espinet's refusal to recuse led to Mr Panday's application for judicial review. Madame Justice Judith Jones heard the application and on 24 November 2009 quashed her decision and remitted the matter to another magistrate, specifically excluding Magistrate Espinet from hearing the matter on the grounds of apparent bias.

17. The second re-trial was listed to be heard before His Worship Melvin Daniel in June 2010, but it was not proceeded with. A reason was not supplied. Eventually, the second re-trial began before Her Worship Marcia Murray, the first defendant, on 13 June 2011. At the close of the prosecution's case Mr Panday's attorneys indicated that they intended to make a submission of no case to answer, and, if that failed, a submission of abuse of process.

18. Mr Panday's attorneys made the no case submission, but on 17 May 2012 the magistrate overruled it. She declined Mr Panday's request for written reasons, a decision that was allegedly supported by the claimant's Queen Counsel. Mr Panday says that the written reasons would have permitted him to apply promptly for judicial review of the decision to overrule the no case submission in the event that the abuse of process submission failed.

19. Immediately after the ruling Mr Panday's attorneys made the abuse of process submission. Both parties were heard on it. The submission is apparently set out in the magistrate's written decision which she delivered on 26 June 2012. I say "apparently" because Mr Panday does not fully set out what the submission was, and the claimant has asserted that the written decision was not entirely reflective of the submissions of either party. Upon finding the proceedings abusive and ordering a stay the magistrate formally discharged Mr Panday. The attorneys representing the claimant did not indicate an intention to appeal or to challenge the decision.

20. Mr Panday says that he felt that he was "finally and permanently freed" of these charges that had been pending for a decade and that he could now begin to enjoy the remainder of his life.

21. On 4 July 2012, eight days after the magistrate's decision, an interview of the claimant's Queen's Counsel was published in the Newsday newspaper. The Queen's Counsel is quoted as saying, "I am so surprised at the judgment that I am going to break the habit of a lifetime in commenting on a case in which I have been involved." He then went on to say that based on the interviewer's summation of the reason for the decision (which is mostly accurate in my view) the idea that the Integrity Commission should have sought the appointment of a tribunal before reporting the matter to the DPP was wrong in law. The Integrity commission, in his view, could not be said to have acted improperly. Further, he said that the DPP has his own powers to investigate crime independent from the Integrity Commission, and that it was not abusive for the DPP to exercise these powers. "In the

context of this case, where it is clear on evidence that an offence has been committed, where on earth is the injustice in not holding a tribunal to decide whether someone is to be reported to the DPP? If there is indeed a *prima facie* case, as was found by the magistrate, a reasonable tribunal would inevitably confirm it and report it," he said. I pause to note that this part of the interview, and other parts as well, mirror the main planks of the claimant's application for judicial review.

22. Mr Panday also produced a newspaper report that asserted that the State expended some $17 million in prosecuting the 2002 charges. Mr Panday says that the State has unlimited resources but his resources are limited. He says that events giving rise to the first charge occurred in 1997, some 15 years before the claimant's leave application. Next month, in May 2014, Mr Panday will be 81 years old. He was 79 years old when the magistrate gave her decision.

23. I pause to note that Mr Panday's first constitutional challenge to the prosecution of the charges before the Chief Magistrate, which was dismissed finally at the Privy Council, took three years. Further, that after the conviction and sentence by the Chief Magistrate was set aside, and an order for a re-trial was made by the Court of Appeal Mr Panday's appeal to the Privy Council against the order for the re-trial, took another 1½ years. Other than these steps, all of Mr Panday's applications and appeals were determined in his favour. Taken together with the time it took to list the matter for the second re-trial, these steps accounted for the balance of the 10-year period between the initial charges and the decision under review.

**The claimant's affidavits**

24. The claimant defended his right to seek leave which he said was properly granted on the basis that there are arguable grounds for review. He said that the claim was made "without delay, that is, within three months." He also ssid that there are no alternative remedies. He said that he had discussions with the lead prosecutor as to whether any remedy existed under section 36 of the Supreme Court of Judicature Act and section 128 of the Summary Courts Act. He does not say when he had the discussion or what the Queen's Counsel advised. He does not say whether, if at all, the advice was given in writing. He also said that he had discussions with Ms Bhola, who is a Legal Officer II in his department, on whether any remedy existed under those sections. He does not say when those discussions occurred. I know from Ms Bhola's affidavit that she researched the availability of a remedy under those two sections and she said that, based on her research, she "found case law which supported [her] conclusion that where criminal proceedings were stayed that the proper form of redress was judicial review." Neither of the deponents mention the remedy under section 156 of the Summery Courts Act. When Mr Panday's application was filed it identified an available remedy under section 132, but this was amended (after the filing of the claimant's post-leave affidavits in opposition to the application) to substitute section 156. Neither of these sections formed part of the discussions with the lead prosecutor or Ms Bhola.

25. The claimant says this, in relation to his decision to apply for judicial review: "Based on those discussions I determined that these provisions did not apply and, in any event, were

not applicable where a magistrate had stayed criminal proceedings as an abuse...". The claimant does not say when he made that decision.

26. In further corroboration of the assertion in the Part 56.3 Notice the claimant says that "the permission application was made promptly following receipt and consideration and advice from counsel in respect of the decision." The affidavit evidence goes a little further than the evidence before me at the leave application in that it introduces the idea that Counsel's advice was being sought and that it was received and considered. Again, the claimant does not identify when the advice was received from the unnamed Counsel and whether it was received in response to a formal enquiry or during the course of a conversation. These matters would shed light on their time management after the magistrate's decision. If he is referring to the advice of Ms Bhola and not the Queen's Counsel with whom he had discussions, then he does not say when Ms Bhola rendered her advice. He does not say when he sought the advice of either of his Counsel. In any event, according to the claimant, he took the decision to apply for leave without regard to the newspaper report of the Queen's Counsel's legal opinion. However, he also says this: "I took the decision based on the advice of Counsel and I made the decision in as timely a manner as the ordinary pressures of my office's time and resources permitted." Again, if he did not have regard to the contemporaneously published opinion of the Queen's Counsel, but he nonetheless applied for leave on the basis of "counsel's advice", the questions remain open on his own post-leave evidence as to when he determined that the magistrate's decision was wrong in law, when did he seek the advice of Counsel, when was the advice received, and when were instructions given to prepare the papers to apply for judicial review. In this regard I cannot

imagine that he would not also have sought Mr Benjamin's advice, but he doesn't say if he did so, or when he did so.

27. The reason for my commentary on this part of the claimant's pre– and post– leave evidence is grounded in my awareness that a full understanding of the three alleged alternative remedies was only brought to the court's attention after Mr Panday's application. Save for Ms Anju's post-leave affidavit there was no statement in the claimant's Part 56.3 Notice indicating that there were three potential alternative remedies, analysing them, and rejecting them as viable. It would have been useful, if the Queen's Counsel had rendered an opinion that any of the three potential alternatives were inapplicable, to have been specifically told so. His reasoning could have been audited. This would have assisted me to determine whether the leave application should have been granted without notice, or at all. Moreover, as I said above, the timing of these discussions and/or advices and/or written opinions and/or instructions to file for judicial review would have provided clues into the claimant's time management between the magistrate's decision and the filing of the leave application. These matters obviously bear upon its promptness or lack of promptness.

28. One final note. I must be careful, in reading the claimant's post-leave affidavits, not to allow them to supplant or expand the evidence before me on 26 September 2012. The proper focus of the enquiry must be directed to the material filed on that date, although evidence that explains the meaning of that material is obviously useful.

**The real meaning or effect of the magistrate's decision**

29. Before examining Mr Panday's grounds to set aside leave I must examine the real meaning or effect of the magistrate's decision. This appraisal impacts upon the alternative remedies argument and the prejudice inherent in the lack of promptness argument. It has not been argued before me that the magistrate did not have an inherent power to stay an abusive prosecution, but rather that her power to do so, for the reasons that she gave, was injudicious and unreasonable.

30. A stay of proceedings in the Magistrates' Court is not something that happens often in our jurisdiction. The infrequency of these orders and consequently, the absence of case law on how they may be properly challenged, accounts for some of the uncertainty in this application. In my view, the decision to stay was dispositive of the proceedings. In Mr Panday's words the magistrate, upon delivery of her written decision, formally discharged him. In the words of the claimant himself, she was *functus officio*, meaning that she was void of office. A further ruling on the matter could not be sought of her. The reason why this is so is because there must be finality to judicial decisions before a particular judicial officer. The only recourse to such a decision is by way of appeal or some other challenge to a higher court.

31. In my view, although the stay was not an acquittal, it amounted to a final decision that brought the entire proceedings to an end. The rationale supporting the existence of a judicial discretion to order a stay was expressed by Lord Devlin in *Connelly v DPP* [1964] AC 1254 (H.L) at p. 1354: "The courts cannot contemplate for a moment the transference to the

executive of the responsibility for seeing that the process of law is not abused." In the case of *R. V Jewitt* [1985] 2SCR 128, the Supreme Court of Canada had to decide whether a stay of proceedings amounted to a "judgment or verdict of acquittal" as those words are used in the Canadian Criminal Code. The issue before the court was whether it had jurisdiction to hear an appeal from a decision to stay proceedings in which the prosecution had been found to be guilty of entrapment. The prosecution's argument was that the stay amounted to a judgment or verdict of acquittal, entitling it to utilize the appeal process.

32. Dickson CJ, in a lucid judgment, examined the conflicting opinions of courts in Canada and held that the stay is tantamount to a judgment or verdict of acquittal and that it is subject to the appeal procedures laid down in Canadian law. This is not an issue for me to determine, but it sheds light on the adjacent issue of the meaning and effect of a stay of proceedings. I find the following passages useful:

> "A stay of proceedings is a stopping or arresting of judicial proceedings by the direction or order of a court. As defined in *Black's Law Dictionary* (5th ed. 1979) it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as, for example, when a non–resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of the proceedings." (para 27).
>
> "Can it be said that (a) the decision to stay was not based on procedural considerations, but rather, on questions of law; and (b) the decision was a final decision, that is to say, a judgment rendered on a question of law after the accused was placed in jeopardy, such that if

> the accused were charged subsequently with the same offence he could plead *autrefois acquit* ?" (para 47).
>
> "I see no logical reason why a decision to quash an indictment on a question of law should be considered a judgment or verdict of acquittal whereas a decision to enter a stay on a question of law should not. Anderson J.A pointed out it would be an anomalous and absurd result if dismissal of the charges on the basis that they constitute an abuse of process would permit an appeal but a stay of the proceedings [on the same grounds] would not." (para 51).
>
> On a true reading of [the Canadian Criminal Code], to determine whether a stay of proceedings is a 'judgment or verdict of acquittal,' we must look to the substance of the action of the trial judge and not the label he used in disposing of the case. Substance and not form should govern. Whatever the words used, the judge intended to make a final order disposing of the charge against the respondent. If the order of the court effectively brings the proceedings to a final conclusion in favour of the accused then I am of the opinion that, irrespective of the terminology used, it is tantamount to a judgement or verdict of acquittal and therefore appealable by the Crown." (Para 55).

33. Dickson CJ was examining the meaning of the words "judgment or verdict of acquittal" in the Canadian Criminal Code. However, his overall assessment of the meaning and effect of a stay of proceedings is very persuasive. The issue before me is not whether the magistrate's decision amounted to a "judgment or verdict of acquittal" according to Canadian law. Rather it is whether, in substance, it amounted to a final disposition of the prosecution against Mr Panday. In considering the available avenues to challenge the magistrate's decision the first recourse should be to those found in the criminal justice system. A mixing of the streams of the criminal and civil justice systems is only possible along certain well-defined, if not restricted channels. The default setting, in my view, is that

they should remain separate unless no other channel for achieving justice exists. The ideal is that each system resolves its own disputes, save in those cases where a co-mingling is impossible to avoid, either as a result of statute or common law.

34. Earlier in my judgment I mentioned that the claimant was not seeking an order of *mandamus* to compel the magistrate to conclude the hearing of the case, or to direct a third re-trial before a different magistrate. I drew this to Mr Benjamin's attention during the course of one of the hearings and enquired whether this was a deliberate omission. I asked him to confirm whether, if Mr Panday's set-aside application was dismissed, and the judicial review successful, he would ask me, under my inherent power, to make such a consequential order. I asked this question in relation to my assessment of the risk of prejudice to Mr Panday caused by the claimant's delay in seeking leave. Mr Benjamin sought his client's instructions. He later advised me that the claimant could not say whether or not the prosecution of the criminal charges would be resumed as a consequence of an order of *mandamus* or some other order being sought at the substantive trial. I take that to mean that all options are open and that one possibility of success at the substantive hearing is a resumed prosecution or another prosecution before a different magistrate.

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**The alternative remedies argument**

35. The High Court's supervisory jurisdiction over inferior tribunals and public authorities is meant to protect the integrity of the proceedings before those bodies or the processes that have been used to arrive at their decisions. The High Court will therefore foil procedural impropriety, unfairness, or bias in those bodies: *R v Hereford Magistrates Court, ex parte*

*Rowlands* [1997] EWHC Admin 119. It is well established that an error of law can amount to procedural impropriety. The challenge mounted by the claimant in these proceedings is not one that alleges any lack of integrity in the proceedings before the magistrate. Rather it is mounted on the footing that the magistrate made an error of law amounting to procedural impropriety. In such cases, judicial review is not the automatic procedure to reverse an error of law. The statutory provisions will have to be individually examined.

**Section 36 remedy**

36. The first alternative remedy is said to be section 36 of the Supreme Court of Judicature Act, Chap 4:01. This is what it provides:

> 36(1) Upon application by or on behalf of the Director of Public Prosecutions in criminal matters and by or on behalf of the Attorney General in any other matter, the Court of Appeal may, if it thinks fit, order any Judge, Magistrate, or Justice presiding in any inferior Court, to send to the Registrar the record of proceedings in any case, and may also, if it thinks fit, require in addition to such record a statement showing in detail the proceedings taken in reference to the whole case or any particular matter, and if it appears to the Court of Appeal that there has been any material error in the proceedings of the inferior Court, the Court of Appeal may set aside or vary any judgment or order of proceedings of the inferior Court and pass such judgment and remit the case or matter to the inferior Court with such directions as justice requires.
>
> (2) It shall be the discretion of the Court of Appeal to exercise the powers given to it by this section either without hearing any person or after hearing such person as it thinks fit, and the Court of Appeal may, if it thinks fit, direct that an order *nisi* be served upon such person as the Court think is fit, and upon making absolute any such order *nisi*, may order the costs to be paid by all or any of the parties served as the Court thinks just."

37. By section 2 of this Act "Inferior Court" includes a Magistrates' Court. The words "material error in the proceedings" in sub-section (1) are not defined in the Act. It seems to me that the phrase includes errors in procedure, and, as well, where the error in procedure is attributable to a misapprehension of law. The phrase doesn't exclude an error of law or fact, or mixed law and fact, not involving a procedural error.

38. In *DPP v Chief Magistrate (No. 2)* (2003) 67 WIR 240 Madame Justice Margot Warner JA examined the section 36 remedy. In that case accused persons in the course of committal proceedings applied for a list of documents in the possession of the prosecution. The magistrate made the order and the DPP appealed pursuant to section 36(1). A preliminary issue was whether the Court of Appeal had any jurisdiction. Warner JA held that the section 36 appeal could lie against an examining magistrate engaged in committal proceedings (para 13). The question as to a final determination by a non-examining magistrate was left open. However, in holding that the section could apply to an examining magistrate in the course of committal proceedings, it logically follows that it would also apply in relation to a magistrate hearing a complaint and having jurisdiction to finally dispose of the matter. If not, then its purpose would be severely restricted.

39. In the course of her judgment Warner JA said this:

> "Section 36 proceedings are, in our view, analogous to judicial review proceedings. It provides to the DPP a specific statutory remedy for challenging an order or judgment by way of an application to the Court of Appeal...Historically, *certiorari* evolved as a general remedy to quash the proceedings of inferior tribunals and was used largely to

> supervise justices of the peace in the performance of their criminal and administrative functions. Section 36, in my view, embodies this type of function. There are, of course, certain procedural differences. For example, no leave of the court is required." (Para 17).

40. What is noteworthy in *DPP v Chief Magistrate (No.2)* was that the Court of Appeal adopted a flexible approach in order to explain its intervention in pending proceedings. Such interventions are infrequent. Warner JA said this:

> "The emphasis on a 'material error' clearly indicates that the power ought not to be exercised readily or routinely. I do not, however, agree with counsel that the fact that no evidence has been taken or that, in the absence of evidence, any application to this court is precluded. If for example, an inferior court falls into jurisdictional error or disregards the scope or limits of its powers, then, while it may be acting within the general area of its jurisdiction, it falls into jurisdictional error if it does something which it has no authority to do." (Para 19)

41. To my mind these statements suggest that the remedy is in fact more apposite to final determinations of the character of the decision under review than to orders made in the course of committal proceedings not involving a verdict. The scope of the application is more wide in relation to the former than the latter:

> "The jurisdiction is an original jurisdiction available only to the DPP in criminal matters. I can see no reason why the remedy ought not to be available to the Director during the course of committal proceedings, in an appropriate case. The court will discourage interlocutory appeals, but will intervene where the discretion of the prosecution as to the withholding of information and the timing of disclosure...might be rendered nugatory or subverted by an order of the magistrate. The section 36(1) jurisdiction is properly exercisable and similar to that where the courts will grant judicial review of an

> order in criminal proceedings: see *Fernia v Hand* (1984) 53 ALR 731 at 733." (Para 20)

42. There is no prescribed procedure under the CPR for the DPP to access the Court of Appeal. However, any jurisdiction conferred by statute cannot be defeated on the basis that rules of court have not been made for that purpose: *Peters v AG* (2001) 63 WIR 244, CA.

43. The Court of Appeal has specific power, once its jurisdiction has been invoked, to "set aside or vary any judgment or order of proceedings of the inferior court and pass such judgment and remit the case or matter to the inferior court with such directions as justice requires." The words "judgment or order" do not, to my mind, exclude the order for a stay of the proceedings. If it were satisfied, the Court of Appeal has power to set aside the order for the stay and to remit the matter to the magistrate to conclude the hearing and determination of the matter. If the claimant is right about the rationale of the magistrate's decision, and he has advanced a strong case on the papers, then it would certainly amount to a "material error" of the type described in the section.

44. There is no statutory time limit for accessing this jurisdiction, although, it is well accepted that where no time limit is imposed an authority must still act within a reasonable time in all the circumstances.

45. Mr Benjamin urged me to note the passage in Warner JA's judgment where the section 36 application and the judicial review application was equated. He submitted that of the two remedies judicial review is more suitable and expeditious. He said that judicial review

provides a quicker and more easily accessible procedure than a section 36(1) application. He relied on a decision of Judith Jones J in *Vernon Reid v Magistrate Joan Gill* (unreported), CV No 2009 – 02631, judgment dated 23 February 2010. In that case Jones J was dealing with the decision of an examining magistrate who, in the course of committal proceedings, reinstated certain indictments that had lapsed due to inadvertent errors in the records of the court. I do not find this case very helpful, although it reinforces the point that the High Court retains a supervisory jurisdiction over the processes of inferior tribunals. In that case an appeal process was available, but Jones J held that judicial review was more efficacious. That was a case of pure procedure in a pending action. That is quite different from the decision in this case, which finally disposed of the proceedings.

46. Section 9 of the Judicial Review Act Chap. 7:08 provides:

> "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."

47. The choice to abandon an avenue of appeal created by statute and, instead, to access the avenue of judicial review can only be justified in exceptional circumstances. If it were otherwise then the public law courts would be inundated with judicial review applications. On the papers before me I can see no evidence of exceptional circumstances. The exceptional circumstances justifying the approach to this court is said to be the irrationality of the magistrate's decision. The decision, however allegedly unreasonable or illogical, is not beyond the powers of the Court of Appeal to correct. A statutory avenue of appeal cannot be de-selected on the grounds that a decision is outrageous. If in fact, it is, the Court of Appeal is the ideal forum to challenge it, and immediately put the matter beyond all

doubt. Judicial review is a remedy of last resort and is only available when all other remedies have been exhausted: *R. V The Law Society, ex parte Bratsky Lesopromyshlenny Complex* [1995] C.O.D 157-232, 216.

48. I also take into consideration that the "cure," as Lord Wilberforce described it in *Calvin v Carr* [1980] AC 574, to a defect in natural justice may not necessarily be found in appeal proceedings. He posited a situation where the defect was so flagrant and the consequences so severe that the most perfect appeal would not produce a just result. However, I cannot see that there is any cure available to address the alleged impropriety of the magistrate's decision that is not available in the Court of Appeal. Both courts would be asked to do the same things in substance. The rights of the claimant would be vindicated in both courts in the same way exactly, that is, to quash the decision on the same grounds sought in the declarations.

49. I also take account of Lord Bingham's *dicta* in *R. V Hereford Magistrates' Court, ex parte Rowlands* [1997] EWHC Admin 119, in which the long established supervisory jurisdiction of the High Court in judicial review proceedings was re-affirmed, even in criminal cases involving a substantive right of appeal. In that case, Lord Bingham was dealing with three judicial review applications alleging procedural unfairness or bias in the Magistrates' Court. In the first two appeals, an adjournment was refused, depriving both applicants of a right to call witnesses. The applicants were convicted. In the third case, the applicant, who had lawful grounds to assert apparent bias, and whose recusal application was refused, was convicted. Lord Bingham held that a party complaining of procedural unfairness or bias

should not be denied leave to apply for judicial review and left to whatever rights he may have in the Crown Court. Two points to note. *Rowlands* dealt with cases of procedural impropriety amounting to breaches of fundamental rules of natural justice. They did not involve an application to overturn a reasoned decision on the ground that it was wrong in law. Further, Lord Bingham recognized that the grant of leave to apply for judicial review is always, in the end, one of discretion. He said that the fact that a right of appeal was not exercised, is one of the factors to be considered, but it should not ordinarily weigh against the grant of leave (at para 23). In the application before me the section 36 appeal cannot be described as inadequate. The enquiry into whether or not leave was properly granted will need to take account of a number of factors. Among these factors is the availability of adequate alternative remedies, and the reason why they were not pursued. In arriving at a decision, all the factors will need to be weighed and measured

50. I have been shown no authority for the proposition that section 36 was unavailable as an alternate remedy for a decision of the character of the one under review. There is no judgment of the Court of Appeal that struck down this avenue of appeal. In fact there are cases where it has been successfully utilized (see *DPP v Chief Magistrate (No.2) ante* and DPP *v Deputy Chief Magistrate Wellington and Franklyn Khan (Intervener)* (unreported) C.A. App No. 2 of 2008). In the circumstances, the section 36 application was an available avenue to challenge the magistrate's decision, and the claimant had a right to exercise his exclusive powers under the section within a reasonable time.

**Section 128 remedy**

51. Sections 128 and 132 of the Summary Courts Act Chap. 4:20 provide:

> 128(1) where a Court refuses to make a conviction or order the complainant may appeal to the Court of Appeal against such decision.
>
> 132 A notice of reasons for appeal may set forth all or any of the following reasons and not others:
>
> ...
>
> (h) that the decision is erroneous in point of law.

52. These sections set out the ordinary criminal appeal procedure. Mr Benjamin submitted that a criminal appeal was not available because the challenge mounted by the claimant "is to a positive decision made by [the magistrate] and not simply a refusal to convict or make an order; the learned magistrate stayed the proceedings on specific grounds." With respect, I do not agree. In the magistrates own words, taken from her written decision at page 19: "The Court therefore is compelled to stop these proceedings to protect the integrity of the criminal justice system. In the result, these proceedings are now stayed." To my mind, this is a refusal to overrule Mr Panday's abuse of process submission, something that the claimant's Queen's Counsel must have urged her to do. Had she overruled the submission she would have made an order having the opposite effect. The refusal to overrule the submission brought finality to the proceedings. They were at an end. The available ground of appeal in section 132(h) allows an avenue to argue all the judicial review points, which are all directed to questions of law. The question on appeal, had it been pursued, would be whether the magistrate was right in point of law not to overrule the abuse of process

submission. It becomes a question of semantics, and not of substance, if her decision is described as a positive one and not one involving a refusal to make an order. Is it not the claimant's case that her decision was wrong in law? I cannot speak for the Court of Appeal but it seems to me that that is the question it would have in the forefront of its mind. The alleged error led to the discharge of an accused person and the claimant wants to have the error corrected, the order set aside, and the trial to be continued. The stay of the proceedings exhibited all the hallmarks of an acquittal but, of course, it does not amount to an acquittal in law. I see no compelling reason why it is not appealable. With great respect to Mr Benjamin, the argument that it is not a positive decision is semantical and unpersuasive.

**Section 156 remedy**

53. Section 156(1) and (6) provide as follows:

> 156(1) After the hearing and determination of any complaint, the Magistrate or Justice may, in his discretion, on the application of either party to such complaint or on his own motion without such application, state a case on any point of law arising in the case for the opinion of the Court of Appeal. The statement of facts in such case so stated shall, for the purpose of determination therefore, be conclusive.
>
> (6) The Director of Public Prosecutions may, by notice in writing under his hand, require a Magistrate or Justice to state a case on any point of law, and, on receipt of such notice, the Magistrate or Justice shall state such case accordingly.

54. Mr Harnanan contended that an appeal by way of case stated provides a third avenue of alternative redress. In *DPP v Chief Magistrate (No. 2)* Warner JA said that "in this jurisdiction appeals by way of case stated may be made on the application of either party against decisions of a Magistrate exercising summary jurisdiction to try summary offences

'after the hearing and determination of any complaint': see section 156 of the Summary Courts Act." At para 16 she said this: "It is clear therefore that a magistrate has no power to state a case until there is a final determination. A case stated deals with facts which have been proved and legal issues which arose from those facts."

55. In my opinion the appeal by way of case stated involves the holding of a hearing in an inferior court and an appeal against a determination based on that hearing. The word "determination" was not defined by Warner JA. According to Mr Benjamin the word must mean a finding after hearing all the facts, in other words after a full trial. He submitted that a trial stopped midway could not result in a determination. No authority was cited to rule out the availability of this remedy. He instead, relied on the dicta of Warner JA at para 16 quoted above. With respect, I do not agree. It cannot rightfully be said that the complaint against Mr Panday wasn't determined when the magistrate was "*functus officio*" as soon as the decision was given. There was a hearing, and the State led evidence. The evidence was tested and further evidence was elicited during cross examination. The magistrate made findings on the basis of the evidence thus adduced before her. Those findings led her to the conclusion that the prosecution was abusive. She stayed the proceedings, effectively bringing them to an end. The summary criminal proceedings were therefore determined. In *Environment Agency v Stanford* [1998] C.O.D 345-426, 373 Lord Bingham, sitting in the Divisional Court, heard an appeal by way of case stated, of a decision of a magistrate to stay proceedings on the ground that it was abusive. No objection was taken as to the jurisdiction of the Divisional Court to hear such an appeal by way of case stated. In my view, I must have more regard to the substance of the decision than to the terminology used to describe it.

It was a final decision that entirely and effectively determined the proceedings. How could Mr Panday be discharged if the proceedings were not determined?

56. The comments I made above (in paras 45 to 49) relative to the section 36 Supreme Court of Judicature Act remedy also apply to the sections 128 and 156 Summary Courts Act remedies.

57. I now turn to the other grounds of Mr Panday's application.

**The lack of promptness argument**

58. Section 11 of the Judicial Review Act Chap 7:08 provides:

> 11 (1) An application 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.
>
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, substantially prejudice the rights of any person, or would be detrimental to good administration.
>
> (3) In forming an opinion for the purposes of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it may consider relevant.
>
> (4) Where the relief sought is an order of *certiorari* in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or other decision.

59. The claimant's Part 56.3 Notice asserts that "No time limit has been exceeded. This application has been made promptly following receipt and consideration and advice of the decision." (Sic) The first consideration is not whether the time limit has been exceeded, but whether the application has been made promptly. The claimant has therefore reversed the order of priority in the enquiry. The fact that an application has been made within three months does not necessarily mean that it has been made promptly. Whenever there is a failure to act promptly there is "undue delay": *R. V Stratford on Avon, ex parte Jackson* [1985] 1WCR 1319.

60. The philosophy behind the need for promptness was explained by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, 280H – 281A:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of the decision the authority has reached in purported exercise of the decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision".

61. In *Hardy v Pembrokeshire County Council* [2006] EWCA Civ 240, Keane LJ said this at para 10, in relation to another case he had cited:

> "The court there refused applications for judicial review because of a lack of promptness, even though the applications had been made within the three-month period. The reasons for such an approach are clear from a large number of authorities. A public law decision by a public body in almost all cases affects the rights of parties other than the decision-maker and the applicant seeking to challenge such a decision. It is important that those parties and indeed the public

> generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly. As it was put by Sir John Donaldson, MR, in *R. V Monopolies and Mergers Commission ex parte Argyl* [1986] 1WLR 763 at 774, "Good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary."

62. In the criminal law, Parliament has laid down stringent time limits for appeal, perhaps as a reflection of notions of fairness inherent in the need for promptness. In the case of persons who have been acquitted of crimes the need for promptness in appeals against their acquittal is self-evident. The jeopardy they faced has been brought to an end and it is wrong to delude them with a false sense of security for an extended period. In fairness to them, they ought to know as soon as possible whether they are still in jeopardy of a conviction. Most appeals must be filed within 14 days of conviction, which is very little time indeed.

63. The stringency of time to file a criminal appeal is not irrelevant to an evaluation of promptness in those judicial review applications that share the same goals as an appeal. In both cases it is to put the accused person back into the jeopardy from which he was discharged.

64. I cannot understand why an accused person who has been discharged should be entitled to the courtesy of knowing within 14 days that his ordeal is not over, because an appeal has been filed, and yet still have the prospect of judicial review, hanging over his head like Damocles' sword, for three full months. In my view, having re-evaluated the evidence before me at the leave application, there was undue delay in making the application.

65. The claimant's explanations for why it took three days shy of three months to file the application carry little weight. As stated earlier in this judgment, there is no evidence explaining when the claimant approached counsel for advice, when the advice was given, or when the instructions were given to file for judicial review. The opinion of the Queen's Counsel on the correctness of the decision was known within eight days of the decision. When was his opinion sought as to the proper remedy? I am told that the claimant "held discussions" with him. I do not know whether they were conclusive or for how long these discussions lasted. We live in an age of instantaneous electronic communications. I would consider it reasonable to imagine, knowing the industry of most counsel, and especially those with silk, that a decision, one way or the other, could have been taken within eight days of the decision. Instructions to file for judicial review could have been given immediately thereafter. I have always regarded judicial review leave applications as requiring the same urgency as applications for an interim injunction. Here, there is none disclosed on the papers.

66. In *Digicel (Trinidad and Tobago) Ltd v Macmillan and Ors* (unreported), CV 2006-03320, judgment of 25 October 2006, Judith Jones J made some instructive and incisive remarks:

> "... an applicant seeking the exercise of the court's discretion in this regard must give details as to the time expended on these preliminary steps. In my view not only does Digicel fail to provide these particulars but the reasons proffered are not sufficient to justify the length of time taken to access the court. Merely to state that "in addition to engaging in unsuccessful negotiations it sought the advice of Queen's Counsel not previously retained and prepared an extensive and detailed application for the court" is, in my view, not sufficient to

> satisfy the court that there is good reason for its failure to access the court promptly."

67. In his post-leave affidavit the claimant introduced obliquely, another reason for the delay. He said that he took the decision "based on the advice of Counsel and I made [it] in as timely a manner as the ordinary pressures of my office's time and resources permitted." The pressure of work was discussed in *Crown Prosecution Service v City of London Magistrates' Court* [2007] EWHC 1924 (Admin).

Sedley LJ said this:

> "It seems to me that there is a plain want of promptness here. Mr Hellman has elected not to explain it beyond the – if I may say so – somewhat bland assertion that if, which he denies, any explanation was called for, it is the pressure of work... I have to say that I do not find this acceptable. The Crown Prosecution Service is dealing in many instances, including this one, with individual liberty. Its obligation is to act with proper promptness and so far as it can, to arrange its work accordingly. I am not prepared to assume that that is what it has done. Its conduct of this matter is, I have to say, more suggestive of a series of last minute rushes to get things straightened out. This court is well aware of the difficulties under which the Crown Prosecution Service labours but there is a limit to which these can give it special protection from the ordinary principles of justice on which the court acts."

68. I therefore do not feel satisfied that any proper explanation has been advanced for the lack of promptness in filing the leave application. Of course, a lack of promptness by itself cannot be a proper ground to refuse or set aside leave. The court must go on to consider whether the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person or would be detrimental to good administration. It is only if there is both undue delay and prejudice or detriment that the court may refuse to grant or set aside

leave: *Abzal Mohammed v Police Service Commission* (unreported) Civ. App 53 of 2009, C.A. judgment of 31 March 2010, W.N. Kangaloo JA at para 21.

69. The facts disclosed on the affidavits support a finding of substantial hardship or prejudice to Mr Panday's rights. On the date of the decision he was 79 years old. His known medical conditions included heart disease and diabetes. He was entitled to rely on the finality of the magistrate's decision, whether wrong or right in law. The prosecuting counsel in the court when the decision was delivered did not say anything to suggest that the decision would be challenged. She remained silent. I do not understand why. Every junior counsel attending court to receive a judgment will normally ask his or her senior, "what if the court rules against us?" The response would normally be, "indicate an intention to appeal or reserve the right to appeal." The junior counsel testified that she could not say that to the magistrate because she had to first consult the claimant. The failure before the magistrate to take a position or to reserve a position on a possible appeal or any alternate challenge is not inconsequential to a public law court asked to evaluate hardship or prejudice. This is so especially when it involves a decision that finally discharges a prisoner. In other words, it is not an entirely irrelevant consideration, as was pressed upon me.

70. Mr Panday said that the magistrate formally discharged him and that he felt that he could now begin to enjoy his life again after 10 years of "continuous persecution and oppression." He said that had he been notified of the leave application he would have appeared and contested the claimant's application. He said that the belated leave application has prejudiced his right to challenge the magistrate's overruling of his no-case submission.

There was a difference of opinion in the submissions as to whether or not his failure to challenge the ruling on the no-case submission could be taken into account in evaluating substantial prejudice. He says that he is in a quandary as to whether to now retain attorneys to do so in light of the application before me. It is not necessary for me to embark on a speculative exercise to resolve this point. Had the claimant acted promptly Mr Panday would obviously have ordered his life differently, and this includes filing any appropriate challenges open to him, whatever they might be and whether they would be maintainable or not. It is not for me to resolve unfiled applications, but only to recognize that they were available and were not pursued.

71. I must also bear in mind that the events giving rise to the prosecution took place in 1997, 1998 and 1999 and that the first trial began in 2003. A lot of time was spent in the appeal process but most of Mr Panday's applications were based on grounds that questioned the integrity of the proceedings and in most cases he was vindicated. In this regard, I must also bear in mind the considerable legal expense he would have endured, and still endures, in relation to these charges. The resources of the State are certainly greater than his. I do not accept that I must receive detailed evidence of financial prejudice, such as was adduced in *Fishermen and Friends of the Sea v The EMA and Anor* [2005] UKPC 32. Given the long history of these proceedings it is self-evident that considerable resources would have been expended. Finally, I must take account of the fact that a renewed prosecution has not been ruled out as a remedy at the substantive trial. Such a possibility would be traumatic to any individual, but especially so for a person of advanced age.

72. In my view, the application was not made promptly and Mr Panday will face substantial hardship or prejudice if the decision is quashed and the claimant resumes the prosecution.

**The non-disclosure argument**

73. In my view the claimant ought to have set out the long intricate history of this 10-year old prosecution in the leave application. He ought to have specifically identified the statutory sections said to amount to alternative remedies and have produced legal authorities to show why they were unavailable: *R. V Horsham DC, ex parte Wenman* [1995] 1WLR 680 at 710, per Brooks J.

74. The claimant also failed to disclose the reasons for the delay in making the leave application. He did not, prior to leave being granted, or since, provide a proper explanation. Had an explanation been provided the court would have been put on notice as to whether the explanation was a good one. In the absence of such notice the court took the statements at face value, and was deprived of the opportunity of fully bringing its mind to the question. Non-disclosure may result in the setting aside of leave: *Fidelity Finance and Leasing Company Limited and Ors v Mc Nicholls and DPP,* (unreported) decision of Bereaux J (as he then was) in CV 2008 1228, applying *Brink's Mat Ltd v Elcombe* [1998] 1 WLR 1350.

**Disposition of the application**

75. I now come to the nettlesome question of how Mr Panday's application should be determined. It is nettlesome because while Mr Panday has his rights to challenge the grant of leave, the claimant also his rights to obtain a comprehensive statement on the law that the magistrate is said to have misapplied. In real terms the magistrate's decision, if left

undisturbed in our jurisprudence, is the only statement of the law governing prosecutions for breaches of the Integrity Act. In her view, if an offence has been committed the office of the DPP has no independent right to prosecute unless the Integrity Commission first causes a tribunal to be appointed. This obviously will restrict the exercise of the powers created by the Integrity Act. Further, she has held that the Integrity Commission is part of the executive of the Republic. There are many good reasons why such far reaching conclusions should not be allowed to remain on the record books without being tested and evaluated. While it is detrimental to good administration that Mr Panday, or any accused person, should not have been kept in suspense, it is also detrimental that potentially defective statements of the law should not be evaluated and, if so held, be put right. The importance of the Integrity legislation to our Republic, especially in modern times, cannot, even slightly, be underestimated.

76. It seems to me that the questions of law raised on the application for judicial review need to be answered. But they must be answered in a way that does not offend Mr Panday's public law rights to oppose the grant of leave. At the end of the day all relief is discretionary, and even in cases involving delay, alternative remedies, or non-disclosure, a court might still, exercising its discretion in service of the interests of justice, still proceed to hear an application in an exceptional case. This is such a case.

77. In the circumstances, I will set aside the leave to apply for an order of *certiorari* and will instead hear that part of the substantive application that seeks the declaration that the decision is unlawful, illegal, irrational, and unreasonable, as fully set out in the Part 56.3

Notice and the Fixed Date Claim Form. The setting aside of the leave in relation to the order of *certiorari* is meant to protect Mr Panday's public law rights relative to the judicial review application and to assert that if any prosecution is to be resumed it shall not, even obliquely, be launched on the platform of this judicial review application. While I reserve the right at the substantive hearing to make such other orders or directions as the circumstances warrant pursuant to section 8 of the Judicial Review Act, I put all parties on notice that I will not make any order of *mandamus* or give any direction for a resumption of the proceedings before the magistrate or a third re-trial before a different magistrate.

78. As for Mr Panday, his continued involvement in the abbreviated judicial review application is a matter for him and the claimant to resolve. Despite the passage of time, the claimant's right of access to an alternative remedy to challenge the magistrate's decision is not to be regarded as obstructed by this judgment. His next step (if any are still available) in the process of securing the ends of justice is a matter for him and his counsel to explore. With respect to the magistrate, she is not entitled to the identical public law considerations that Mr Panday has relied on to question the grant of leave. While Mr Panday's alternative remedies and non-disclosure arguments would normally provide her office with a shield it is not a shield that can be easily raised in the circumstances of this case, especially as her decision involves a question of great public importance. There is no allegation of non-disclosure that interferes with the magistrate's public law rights. The magistrate has made no application to set aside leave and advanced no evidence or argument as to why the undue delay has caused prejudice to her or her office. All the necessary materials for judicial review of her decision are already before the court, namely, the notes of evidence and the written decision. What is

ultimately at stake for the magistrate at the substantive hearing is the correctness of the decision-making process as set out in her decision. It is a matter that does not expose her to any public law detriment, and one, indeed, that she should be eager to have resolved.

79. I now invite the submissions of counsel on the issue of the costs of Mr Panday's application.

**James Christopher Aboud**
**Judge**