

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

S. 1203 OF 2002

**IN THE MATTER OF AN APPLICATION BY CHESTER POLO  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**BETWEEN**

**CHESTER POLO**

**AND**

**PUBLIC SERVICE COMMISSION**

**Before the Honourable Madam Justice M. Dean-Armorer**

**Appearances:**

*Anand Ramlogan for the Applicant*

*Delisa Noel and Anushka Singh for the Public Service Commission*

## **JUDGMENT**

1. In this matter, the Applicant, Chester Polo, has applied for judicial review of the decision of the Public Service Commission to appoint Mr. Kenneth Kerr to act in a post in which he, the Applicant, had acted for almost 3 years. By his original Application, the Applicant sought the following relief:
  - (a) An order of certiorari quashing the decision to terminate the Applicant's acting appointment as Registrar, Pesticides and Toxic Chemicals of the Chemistry Food and Drugs Division, Ministry of Health;
  - (b) Alternatively, an order directing the Public Service Commission ("PSC") to reconsider its decision to terminate the Applicant's acting appointment as Registrar, Pesticides and Toxic Chemicals of the Chemistry Food and Drugs Division, Ministry of Health;
  - (c) In the further alternative and/or additionally an order directing the Public Service Commission to provide the Applicant with a statement of reasons as to why his acting appointment as Registrar, Pesticides and Toxic Chemicals of the Chemistry Food and Drugs Division, Ministry of Health was terminated;
  - (d) A declaration that the decision to terminate the Applicant's acting appointment as Registrar, Pesticides and Toxic Chemicals of the Chemistry Food and Drugs Division, Ministry of Health is unreasonable, irrational, unfair and illegal contrary to the rules of natural justice;
  - (e) A declaration that the decision to terminate the Applicant's acting appointment as Registrar, Pesticides and Toxic Chemicals of the Chemistry Food and Drugs Division, Ministry of Health is so

unreasonable that no reasonable public authority could have so exercised its discretion or power.

(f) Damages;

(g) Costs,

(h) Such further and/or other reliefs as this Honourable Court may think just in the circumstances;

The Applicant subsequently sought the Court's leave to amend his Notice of Motion and the Statement filed under O. 53 of the *Rules of the Supreme Court* to include additional declaratory relief.

2. The grounds upon which the Applicant has approached the Court are essentially that the decision was illegal, irrational and contrary to his legitimate expectation and in breach of the principles of natural justice.
3. On the 9<sup>th</sup> July, 2002, the Honorable Madame Justice Rajnauth-Lee heard and granted the Applicant's application for leave to apply for judicial review. Pursuant to this Order, an Originating Notice of Motion was filed on his behalf on the 5<sup>th</sup> August, 2002. The Application was supported by the Applicant's affidavit which was filed herein on the 19<sup>th</sup> July 2002. In response to the Applicant's affidavit, the Respondent filed an affidavit, which was sworn by the Director of Personnel Administration, Michael Mahabir, and filed on the 28<sup>th</sup> October, 2002. The Applicant responded to the affidavit of Michael Mahabir by way of an affidavit filed on the 6<sup>th</sup> January, 2003.
4. The substantive hearing of this matter began on the 20<sup>th</sup> January, 2003, when learned Counsel for the Applicant applied for an Order in terms of his Notice filed on the 10<sup>th</sup> January, 2003 to produce documents under Order 24 rule 10

of the *Rules of the Supreme Court* (“*R.S.C.*”). This application was initially resisted, it was eventually ordered, by consent that the Respondent produce the Applicant’s Staff Reports for the years 1999-2002.

5. On the first day of hearing, the Applicant also sought and obtained the Court’s leave to amend the originating Notice of Motion to include the following declaration as “(a) (i)”:

*(a) (i) A declaration that the Public Service Commission acted ultra vires and illegally in purporting to terminate the Applicant’s appointment and to appoint Mr. Kerr in his place.*

*(ii) An order of certiori quashing the decision to terminate the Applicant’s acting appointment.....”.*

6. The Applicant also obtained a comparable amendment to the Statement filed under O.53 r. 3(2) *R.S.C.* and to the grounds of the Application by inserting the following:

*“(a) The Public Service Commission had no jurisdiction to make any acting appointments and/or any appointments to the post of Registrar.”*

7. In ascertaining the facts of this case the Court was not required to look beyond the affidavit evidence since there was no application for cross-examination by either side. Ms. Delisa Noel, learned Counsel for the Respondent, applied to have portions struck out of the Applicant’s affidavit. Learned Counsel for the Applicant, Mr. Ramlogan conceded in respect of paragraph 3, of the affidavit filed on the 6<sup>th</sup> January, 2003, which was accordingly struck.

8. Most of the facts of this case were undisputed and are set out hereunder :

- (i) The applicant, Chester Polo, had joined the Civil Service in July 1981 in the Chemistry, Food & Drugs Division as a Chemist II. He held a Bachelor of Science Degree from the U.W.I. He was appointed Chemist I on the 11<sup>th</sup> June 1992.
  
- (ii) He was appointed to act as Registrar of Pesticides and Toxic Chemicals with effect from the 7<sup>th</sup> July 1999. His appointment was made by way of a letter dated the 15<sup>th</sup> July, 1999 and signed “for” the Permanent Secretary. An issue has been raised by the Respondent as to the authority of the Permanent Secretary to appoint the Applicant. It is therefore convenient to set out the terms of this letter:

“ *Mr. Chester Polo*

.....

*Dear Sir,*

*I am to inform you that you have been recommended to act as Registrar , Pesticides and Toxic Chemicals with effect from July, 07,1999 and continuing until further notice.*

.....

*Yours Sincerely*

*P. Sinkia*

*(f) Permanent Secretary*

- (iii) Approximately one year and four months later, the Applicant received a letter dated the 7<sup>th</sup> November, 2000, with obvious retroactive effect, wherein the Applicant was informed that the Public Service Commission

had appointed him to act as Registrar from 7<sup>th</sup> July, 1999 until 31<sup>st</sup> December, 1999. He was further informed that his acting appointment would give him no claim to promotion to the office of Registrar.

- (iv) The Applicant continued to act following the date specified in the letter of the Public Service Commission. He acted from the 1<sup>st</sup> January 2000 up to the 10<sup>th</sup> March, 2000. From 11<sup>th</sup> March, 2000 to 5<sup>th</sup> May, 2000, he had been on vacation leave and it is clear from the subsequent letter dated 30<sup>th</sup> April, 2002 from the Director of Public Administration that his acting appointment persisted while he was on vacation leave. Upon his return, he continued to act as Registrar until 2<sup>nd</sup> July, 2000. Thereafter, he acted as Deputy Chief Chemist from 3<sup>rd</sup> July, 2000 to 1<sup>st</sup> October, 2000.
- (v) The Applicant again took vacation leave from 2<sup>nd</sup> October, 2000 to 26<sup>th</sup> November, 2000. It has not been disputed that Mr. Kenneth Kerr had been appointed to act as Registrar during those times when the Applicant had been on vacation and when he had been acting deputy Chief Chemist.
- (vi) On the 30<sup>th</sup> April, 2002, the Director of Public Administration wrote to the Applicant informing him that he had been appointed to act from 1<sup>st</sup> January, 2000 to 2<sup>nd</sup> July, 2000 and from 27<sup>th</sup> November 2000 to 10<sup>th</sup> March, 2002.
- (vii) The Applicant refers in his affidavit to a meeting on the 22<sup>nd</sup> May, 2002 between himself and the Chief Chemist, Stanley Teemul, who showed the Applicant a letter dated the 30<sup>th</sup> April, 2002. By this letter which is exhibit as "C.P.6", the Director of Personnel Administration informed Mr. Kenneth Kerr of his appointment to act as Registrar from 3<sup>rd</sup> July, 2000 to 26<sup>th</sup> November, 2000 and from 11<sup>th</sup> March, 2002 to 5<sup>th</sup> May, 2003. In this letter, Mr. Kerr like the Applicant was warned that his acting

appointment would give him no claim to promotion to the office of Registrar, Pesticides and Toxic Chemicals.

- (viii) In the course of the meeting, Mr. Teemul asked the applicant to continue acting until Mr. Kerr's return, when he Mr. Kerr would assume the acting position of Registrar.
- (ix) Mr. Kerr in fact resumed duties on the 8<sup>th</sup> July 2002 and commenced his acting as Registrar. At the date of his affidavit, the applicant was performing the duties of deputy Chief Chemist without an official acting appointment and deposed that upon Mr. Teemul's return from vacation he would revert to his substantive post of Chemist II.
- (x) It is the contention of the Applicant that the letter dated the 30<sup>th</sup> April, 2002, from the Director of Public Administration to Mr. Kerr, effectively terminates his acting appointment.
- (xi) On the 23<sup>rd</sup> May 2002, the day following the meeting, the Applicant wrote to the Director of Public Administration seeking a review of the decision of the Public Service Commission and reasons for their decision. Although the Director of Public Administration has deposed that reasons were sent to the Applicant on 12<sup>th</sup> September 2002, the Applicant has denied that he ever received such a letter.

### The Respondent's Case

9. In the Affidavit of Michael Mahabir, the Respondent does not deny the chronology put forward by the Applicant but, provides the Court with an account of the internal events which produced the chronology advanced by the Applicant. At paragraph 7, the Director of Public Administration deposed that the Applicant had been selected to act as Registrar pursuant to

internal interviews which had been conducted by the Permanent Secretary, Ministry of Health. The Director of Personnel Administration deposed further that these interviews were not authorised by the Public Service Commission.

10. Mr. Mahabir deposed that, on the recommendation of the Permanent Secretary Ministry of Health, he as Director of Public Administration requested the Public Service Commission to consider the appointment of the Applicant to act as Registrar from 7<sup>th</sup> July 1999 to 31<sup>st</sup> December, 1999.
11. The Public Service Commission, according to Mr. Mahabir, considered the said request on the 18<sup>th</sup> February 2000. They observed that Kenneth Kerr had acted as Registrar from the 19<sup>th</sup> November, 1996 to 10<sup>th</sup> January, 1997 and that he held an appointment in the next lower office in the stream.
12. Mr. Mahabir, supplied the Court with the qualifications and experience of Mr. Kerr. He referred to the bewilderment of the Public Service Commission in the light of their information that Mr. Kerr's performance record was good, that he had been overlooked for the first acting appointment in July, 1999, for which he had indicated his interest. Essentially it was the view of the Public Service Commission that for administrative expediency, and because the period of acting had lapsed, they should ratify the appointment of the Applicant whilst seeking reasons of the Permanent Secretary, Ministry of Health for rejecting Mr. Kerr's initial application for an acting appointment.
13. Mr. Mahabir recounted further that the Public Service Commission considered the recommendation of the Permanent Secretary Ministry of Health that Mr. Kerr acted for 2 periods of 4 months and 2 months respectively. Mr. Mahabir deposed further that the Public Service Commission had noted that Mr. Kerr was the most senior in his stream and



that he had acted in the post of Registrar previously with reports that he had performed his duties satisfactorily.

14. On the 9<sup>th</sup> April, 2002 the Public Service Commission made the decision which is impugned herein. They appointed the applicant to act as Registrar during the periods 1<sup>st</sup> January 2000 to the 2<sup>nd</sup> July, 2000; 27<sup>th</sup> November, 2000 to 26<sup>th</sup> November, 2001 and 27<sup>th</sup> November 2001 to 10<sup>th</sup> March 2002 for the sake of administrative expediency. On the same occasion, the Public Service Commission appointed Kenneth Kerr to act from 6<sup>th</sup> May 2002 to 5<sup>th</sup> May, 2003.
15. Mr. Mahabir deposes that he provided reasons on behalf of the Public Service Commission by a letter dated the 12<sup>th</sup> September, 2003 which contains the reasons of the Public Service Commission for selecting Mr. Kerr to act over and above the Applicant. The terms of the letter are set out in full hereunder:

*“Public Service Commission has considered your letter and wished to inform you that it had noted that Mr. Kerr who was the next senior officer in the Pesticides and Toxic Chemicals stream had performed the duties of Registrar, Pesticides and Toxic Chemicals on previous occasions and his performance was found to be very good and without any shortcomings. In all fairness the Commission considered that Mr. Kerr should be afforded the opportunity to act in the position.*

*The Commission also noted further that you had also been advised that the periods of acting appointment approved in the office of Registrar, Pesticides and Toxic Chemicals would give you no claim to promotion to the office.”*

16. The Applicant has not denied that the letter of the 12<sup>th</sup> September 2002 had been sent, but he denies that it ever reached him. The Director of Public Administration has not suggested that the letter ever came to the Applicant's attention, so that in reality there is no dispute that the Applicant never received the letter.
  
17. One of the two facts in dispute emanates in part from the Applicant's affidavit in reply at paragraph 4 where the Applicant denied that there was a next lower stream in the Pesticides and Toxic Chemicals Unit. He produced and exhibited a copy of the organizational structure for the professional officers at the Chemical Food and Drugs Division. The second fact in dispute emanates from the Applicant's denial that Mr. Kerr was senior to him. In support of his assertion, the Applicant states that he had been promoted to grade 56C on the 29<sup>th</sup> April, 1992, Mr. Kerr was promoted to grade 56E on the 29<sup>th</sup> April, 1999. In the light of the concession of learned Counsel for the Respondent it was not strictly necessary for the Court to resolve these issues of fact. It is desirable however to re-iterate that disputes of fact are best resolved by cross-examination, and in the absence of cross-examination the Court will find against the Applicant as the party which carried the burden of proof. See the Judgment of Blackman, J in HCA #1617/1990 *Andy Allan vs. Public Service Commission* Vol. 3 TTLR 73.

### *Submissions and Law*

18. Written Submissions were filed by both Counsel and were supplemented by oral submissions which were made on the 20<sup>th</sup> and 21<sup>st</sup> January 2003.

## *The Ground of Illegality*

19. At the outset the Court wishes to note the concession of learned Counsel for the Respondent that the effect of s. 5 *of the Pesticides and Toxic Chemicals Act* No. 42/79 (“the Act”), deprives the Public Service Commission of jurisdiction to appoint persons to the post of Registrar of Pesticides and Toxic Chemicals. Section 5 of the Act provides:

*“The Minister shall designate an officer in the Food and Drugs Division to be the Registrar of Pesticides and Toxic Chemicals.”*

20. By s. 39 (1) (b) (ii) of the *Interpretation Act* Ch. 3:01 power to appoint a person to hold an office when conferred by a statute, implies the power to appoint persons to act in the office.

21. In the Court’s view, the provisions of s.5 of the Act and indeed the concession of learned Counsel, places beyond doubt that it falls to the Minister of Health rather than the Public Service Commission to appoint persons to hold or to act in the office of Registrar.

22. The definition of “*illegality*”, as a ground for judicial review dates back to the formulation of Lord Diplock in the case of *CCSU v. Minister for the Civil Service* [1984] 3 All E.R. 935 where the learned Law Lord defined illegality as meaning :

*“By illegality ...I mean that the decision-maker must correctly understand the law that regulates his decision making power and must give effect to it .....*

23. If this definition is applied to the instant facts, it is clear that the decision-maker was wholly unaware of the law that regulates the appointment of a

Registrar. This leads inexorably to a finding by this Court that in all its deliberations and purported, albeit belated appointments, the Public Service Commission had been acting beyond its powers and therefore illegally. A concession of this kind, in this Court's view puts an end to the matter. There could be no question that the subsisting appointment of Mr. Kerr is *ultra vires*, and illegal.

24. Learned Counsel for the Applicant persisted however in seeking declarations that the Public Service Commission's decision to terminate the Applicant's acting appointment was unreasonable, irrational, unfair, illegal and contrary to the rules of natural justice. He disagreed with learned Counsel for the Respondent and argued that notwithstanding s. 5 of the Act, the first appointment of the Applicant was *intra vires* and valid, because it had been made by the Permanent Secretary Ministry of Health, who, under the **Constitution**, carries out the work of the Minister and referred to the case of *Carltona Ltd. v. Commissioners of Works & Ors.* [1943] 2 All 560 at p. 56 A-B.
25. Learned Counsel argued further that the Permanent Secretary is protected by the presumption of regularity in appointing the Applicant to act as Registrar. He also referred to the exhibits of the supporting affidavit. He submitted that the Public Service Commission failed to consider relevant material namely the seniority of the Applicant and the fact that whereas Mr. Kerr's staff reports were good, those of the Applicant were outstanding.
26. The boundaries of unreasonableness or irrationality as a ground for judicial review are well established, the two landmark authorities being, of course, the formulation of Lord Greene, M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 K.B. 223 and the subsequent formulation of Lord Diplock in *CCSU v. Minister for the Civil*

**Service (supra).** For the purpose of this case the *Wednesbury* formulation at p. 233 of the Report bears repetition:

*“I do not wish to repeat myself but I will summarize once again the principle applicable. The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority it may still be possible to say that although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it”.*

27. Learned Counsel for the Respondent referred to and relied on the Privy Council decision in P.C. #35 of 2001 *Vinode Jhagroo vs Public Service Commission*, which the Court has found useful in determining the issues of legitimate expectation and the appropriate relief in this case. Learned Counsel for the Respondent has argued that it was not appropriate to appoint the Applicant to a post held by another. It is at this stage that the Court wishes to observe that the Applicant has not sought an order for reinstatement.
  
28. Vinode Jhagroo, had been appointed by the teaching Service Commission to act as a Teacher III for a series of specified periods for approximately 3¼ years. The Appellant would normally be appointed to act by the Teaching Service Commission by a letter which in most cases appointed him retroactively. On the 21<sup>st</sup> December, 1994 the Appellant was shown a letter from the Director of Public Administration appointing him to act for a period ending 31<sup>st</sup> December, 1994. He subsequently received another

letter dated the 6<sup>th</sup> January, 1995 indicating the reluctance of the Teaching Service Commission to offer him employment after that date.

29. The decision of the Judicial Committee was delivered by Lord Walker of Gestingthorpe, who referred to the decision of the Court Appeal in C.A. 52/85 *Public Service Appeal Board v Tudor* in which the Court of Appeal held:

*“No law, correctly interpreted permits a temporary appointment other than for a specified limited period. There cannot be a temporary appointment ad infinitum....”*

30. The learned Law Lord considered what he described as the last standard form appointment letter of the Teaching Service Commission, and said at paragraph 36 of the Advance Copy:

*“The decision to issue a .....standard form letter of appointment must have been made on the same occasion (as the decision not to continue the applicant’s appointment).....It was a flawed decision because although it was in form conferring on the applicant the benefit of a fixed term appointment, it was in substance part of a decision to terminate the appellant’s career in the teaching service.*

31. The learned Law Lord then proceeded to find:

*“At the beginning of December, 1994 the Appellant was a member of the Teaching Service .....He was not holding an appointment for a fixed term. He was therefore holding office for an indeterminate period under s. 58 of the Act”.*

An office which was being held for an indeterminate period could only be terminated by one of the modes provided at s. 62 of the *Education Act*. The purported termination by the letter dated the 6<sup>th</sup> January, 1995 was therefore illegal. It was on this narrow ground that the Privy Council allowed the appeal.

32. Their Lordships did not consider the alternative ground of legitimate expectation. At paragraph 37, his Lordship stated that it had not been necessary to go into the alternative grounds of legitimate expectation, which had been addressed only briefly. I therefore respectfully agree with learned Counsel for the Respondent, that the decision of the Court of Appeal in terms of legitimate expectation, remains undisturbed. At the Court of Appeal, Justice of Appeal Permanand, whose decision may be found at *Unreported Judgment C.A. #49 of 1996*, held that there was no legitimate expectation because the Applicant had been warned in each of the appointment letters that his acting appointment was not a prelude to a permanent appointment. The learned Justice of Appeal stated at page 17 of 18 of her Judgment:

*“The simple point is that the Respondent was well aware of the appointment he held in accordance with the clear unambiguous terms of the letters of appointment”.*

33. Their Lordships considered the appropriate relief. His Lordship, Lord Walker of Geshingthorpe stated at paragraphs 42 and 43:

*“In the present case there would be a high degree of unreality in a declaration that the Appellant is still a member of the Teaching Service or in an order directing the Teaching Service Commission to re-appoint him”.*

At paragraph 43, His Lordship stated:

*“Their Lordships feel great sympathy for the Appellant in these great misfortunes. But it would not be appropriate to make an order which had the practical effect of requiring the Teaching Service Commission to appoint the Appellant to an office which is no doubt now held by another history teacher”.*

The relief which their Lordships granted were:

*“(i) a declaration that immediately before the 6<sup>th</sup> January 1994, the Appellant held office as an Assistant Teacher III, - for an indeterminate period”.*

34. In respect of the appropriate relief to be granted, learned Counsel for the Respondent referred to the case of P.C. #1 of 2001 ***Doodnath Rajkumar v. Kenneth Lalla and Others***. The case of ***Rajkumar*** concerned the claim of a Prison Officer I, who had acted as a Prison Officer II for a number of years. The Privy Council found that the approach of the Public Service Commission was “...*fundamentally flawed*...”. The Judicial Committee found itself unable to accede to setting aside the flawed decision “*in so far as they appoint others whose promotion their Lordships are not empowered to question*...”. In those circumstances, the Judicial Committee was prepared to remit the case for the urgent attention of the Public Service Commission.
35. In her written submissions, learned Counsel for the Respondent also submitted that the Court should consider the effect on good public administration of any relief sought or granted. Learned Counsel referred



to the judgment of Sir Donaldson, M.R. in *R. v Monopolies & Mergers Commission & Ors. Exp. Argyll P/C*. [1986] 1 All E.R. 257.

36. In his Application the Applicant has sought a declaration that he is entitled to be supplied with reasons. Learned Counsel for the Applicant has relied on s. 16 of the *Judicial Review Act*.

37. Section 16 of the *Judicial Review Act* entitles the Applicant to apply for reasons within 28 days of notification of the decision by which he had been aggrieved. The terms of s. 16 are set out hereunder.

*“16. (1) Where a person is adversely affected by a decision to which this Act applied, he may request from the decision-maker a statement of the reasons for the decision.*

*(2) Where a person makes a request under subsection (1), he shall make the request –*

*i. on the date of the giving of the decision or of the notification to him thereof, or*

*ii. within twenty-eight clear days after that date, whichever is later, and in writing.*

*(3) Where the decision-maker fails to comply with a request under subsection (1), the Court may, upon granting leave under section 5 or 6, make an order to compel such compliance upon such terms and conditions as it thinks just.*

38. Learned Counsel for the Respondent has placed before the Court the decision of the Honourable Justice Avory Sinanan, (as he then was) in the case of *Everest Big Ben v. Minister of National Security*, in which the applicant, Big Ben had challenged the decision of the Minister of National Security to refuse his application for permanent resident status. One of the grounds of his application for judicial review was that the Minister had failed to give the applicant proper reasons for the refusal of his application. The learned trial Judge found that the Minister had been under a duty, in the circumstances of the case, to provide reasons, but observed that reasons had been provided, however belatedly, in an affidavit filed on behalf of the Minister. The learned trial Judge decided ultimately that he would not make an order that is otiose or produces a barren result. There appeared in that case to have been no application for a declaration as to the failure to grant reasons. Moreover, the case of *Big Ben* had been heard and determined prior to the regime of s. 16 of the *Judicial Review Act*

38. Learned Counsel for the Applicant referred to the case of *R. v. Westminster City Council Ex p. Ermakov* [1996] 2 All E.R. 302, which concerned the application of s. 64(4) of the *Housing Act*, which provides:

*“If the local housing authority notify the applicant  
....(c) that they are satisfied that he became  
homeless.....intentionally.....they shall at the same time  
notify him of their reasons”.*

39. In the case of *Ermakov*, an officer of the respondent decided that the applicant had become homeless intentionally and pursuant to s. 64 (4) provided reasons. When the applicant applied for judicial review, the officer of the respondent council who had made the impugned decision swore to an affidavit seeking to correct the original reasons given. The

respondent contended that the requirement at s. 64 was purely procedural and that the respondent was entitled to correct it by way of affidavit. The Court of Appeal disagreed with the contention of the respondent council.

40. *Ermakov* is essentially quite different from the instant case, firstly because in the former, the duty to give reasons sprung from the statute which conferred the decision-making power, whereas, in this case the duty to give reasons springs from the statute which confers the right to apply for judicial review. The second distinguishing feature is that in *Ermakov*, the duty to give reasons is expressly required to be given at the same time as the homeless person is notified of the reason, whereas under s. 16 of the *Judicial Review Act*, the aggrieved person must make a request for reasons within a certain time.
41. The Court has nevertheless found the decision in *Ermakov* to be useful, in so far as it has re-iterated that the *raison d'être* of the obligation to provide reasons is to enable persons affected to know whether to challenge the decision.

Thus Lord Justice Hutchinson at p.309 of the Report decreed it to be

*“...well established that an obligation whether statutory or otherwise, to give reasons for a decision is imposed so that persons affected may know ...why they have won or lost and in particular may be able to judge whether the decision is valid ...or invalid and therefore open to challenge”*

This rationale is also true of s. 16, of the *Judicial Review Act*.

### *Findings and Conclusion*

1. In the instant case, the illegality of the impugned decision of the Public Service Commission is glaring. Whereas the terms of s. 121 (1) and (7) of the *Constitution* are general in their application, the terms of s. 5 of the Act are specific. The former cannot therefore derogate from the latter and s. 5 must be interpreted as investing in the Minister of Health, and no one else, the power to designate the Registrar. The natural result of such a finding is that the impugned decision is ultra vires, null and void.
2. In the light of this finding, it is not necessary to consider whether the decision of the Public Service Commission was irrational or contrary to the Applicant's legitimate expectation. Since Learned Counsel for the Applicant has persisted in his argument I will express my views on these issues.
3. The decision of the Public Service Commission fits squarely into the *Wednesbury* definition of unreasonable behavior, in that no reasonable tribunal, properly directing itself on the law would usurp the power which has been allocated by Parliament to another. If one were to assume that the decision had not otherwise been illegal, it may very well have been that it was also unreasonable in the *Wednesbury* sense in that the Public Service Commission, according to the affidavit of the Director of Public Administration concentrated its attention on the salutary quality of Mr. Kerr's performance. There had been no evidence of bias. However, it appeared unfair for the tribunal to consider the good reports and qualifications of only one contender for the post and, to ignore totally the outstanding reports and qualifications of the Applicant, as the other contender for the post. In

this regard the Public Service Commission disregarded relevant material.

4. On the issue of legitimate expectation, the Court feels bound by the decision of the Court of Appeal in *Jhagroo*. The Applicant had been consistently warned that his acting appointment was not a prelude to a permanent appointment. Assuming therefore that the Public Service Commission had the authority which in fact it lacked, the Court would not have found the existence of a legitimate expectation.
5. In respect of the issue of the giving of reasons, the Court observes that it has not been disputed that the Applicant never received the letter dated the 12<sup>th</sup> September, 2002. There had been no suggestion for example that the Applicant had been required to sign as having received the letter or that the Permanent Secretary through whom the letter was sent was willing to depose that the letter was given to the Applicant. It must therefore be taken that the first sight which the Applicant had of the letter was when the affidavit of the Director of Public Administration was served on him, presumably in October, 2002. In this factual context, the Court must consider whether the supply of reasons at this stage satisfies the requirements of s.16, which being silent as to the time within which reasons should be provided, requires them to be provided within a reasonable time.
6. The Court finds it necessary to distinguish *Big Ben* in which the Minister has no statutory obligation to provide reasons. The learning set out in *Ermakov* asserts that the purpose of reasons is to enable the recipient to know whether to challenge the decision. It is the view of this Court that the rationale for s.16 is the same. The aggrieved subject of a decision is assisted in determining whether or not to apply for judicial review by reasons at an early stage. For this reason, the

applicant may seek to enforce the provision of reasons at the application for leave to apply for judicial review. It appears to me that the provision of reasons when the applicant has already obtained leave to apply for judicial review and the application for judicial review has already been made is to defeat the spirit and intention of s.16.

7. The Court feels reluctant to grant the declaration sought at (c) of the Notice of Motion. To do so in the Court's view would now be artificial since the Applicant has seen the reasons as an annexure to the affidavit of the Director of Public Administration. However, the Court will grant a declaration, under the relief sought at paragraph (h) that the Public Service Commission failed to provide reasons in accordance with s.16 of the *Judicial Review Act*.
  
8. The Court finds itself constrained to disagree with Mr. Ramlogan as to the effect of the purported appointment by the Permanent Secretary. The terms of the letter dated the 15<sup>th</sup> July 1999 do not suggest that an appointment had been made by the Minister. Indeed, it does not suggest that there had been a designation at all and says merely that a recommendation had been made. If such appointment had properly been made, it would have been permissible for the Permanent Secretary to relay information to the Applicant, but it would have been necessary for the Permanent Secretary to state that a designation had been made by the Minister and that the communication was being made at the direction of the Minister. In any event, learned Counsel for the Applicant has not sought an order for re-instatement and the Court is not required in this Application to adjudicate upon the purported decision of the Permanent Secretary by way of the letter 15<sup>th</sup> July, 1999.

9. It is now left to consider whether relief ought to be granted in so far as any declarations or orders for certiorari will affect a third party, namely Mr. Kerr. In the case of ***Dougnath Rajkumar*** their Lordships refrained from setting aside a decision which appointed persons “...*whose promotions they were not empowered to question...*”. In this case, because of the glaring lack of authority of the Public Service Commission, the Court can, without any reflection on Mr. Kerr, question his appointment. It is regrettable that Mr. Kerr had not been made a party to these proceedings and the Court has had no insight as to the effect of the decision on him.
  
10. The Court is inclined to refrain from granting an Order of certiorari. Such an Order, in the Court’s view, would nullify an appointment in respect of which there has already been service by and remuneration to the benefit of Mr. Kerr. This appeared to be both unfair to a third party and detrimental to good administration, since, in the capacity of acting Registrar, even if pursuant to an *ultra vires* appointment, Mr. Kerr would have performed duties, the validity of which could be called into question. The Court may have held a different view if at the outset the Applicant had obtained an injunction restraining the appointment of Mr. Kerr. The remedies which are available in judicial review are granted according to the discretion of the Court.
  
11. The appropriate relief in my view is a declaration as to the *vires* of the decision of the Public Service Commission and, as in ***Dougnath Rajkumar***, an order that the appointment of a Registrar be remitted immediately for the consideration of the Minister of Health.

Orders

- i. A declaration that the Public Service Commission acted ultra vires and illegally in purporting to terminate the Applicant's appointment and to appoint Mr. Kerr in his place.
- ii. A Declaration that the Public Service Commission failed to provide reasons as required by s.16 of the *Judicial Review Act*.
- iii. A declaration that the decision to terminate the Applicant's acting appointment as Registrar, Pesticides and Toxic Chemicals of the Chemistry Food and Drugs Division, Ministry of Health is unreasonable, irrational, and unfair.
- iv. The question of the appointment of the Registrar be remitted by the Public Service Commission immediately for the consideration and determination of the Minister of Health.
- v. The Respondent to pay to the applicant the costs of this application fit for advocate attorney.

Dated the 16<sup>th</sup> day of April 2003.

M. Dean-Armorer  
Judge.