

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. C.V. 2009-03462

BETWEEN

**GILBERT EVELYN**

**Claimant**

AND

**EVELYN ANN PETERSEN  
REGISTRAR OF THE SUPREME COURT**

**Respondent**

**Before The Honourable Mr. Justice des Vignes**

**Appearances:**

Mr. Gerald Ramdeen  
Instructed by Mr. Mark Seepersad for the Claimant

Mr. Christopher Sieuchand for the Respondent

**REASONS FOR GRANT OF LEAVE TO APPLY FOR JUDICIAL REVIEW**

## **The Proceedings**

1. On the 25<sup>th</sup> September 2009, the Claimant filed an application for leave to apply for judicial review. This application was supported by an affidavit in the name of the Claimant, also filed on the 25<sup>th</sup> September 2009.
2. In the Claimant's Statement in support of the application, the following reliefs are sought:
  - (1) A declaration that the failure of the Defendant to fix a date for the hearing of the Claimant's review of sentence from the 17<sup>th</sup> February 2009 until present is unlawful, unreasonable and irrational.
  - (2) An Administrative Order directing that the Defendant do within 7 days from the making of this order do fix a date for the hearing of the Claimant's sentencing review pursuant to the Order of Mr. Justice Smith.
  - (3) A declaration that the detention of the Claimant from the 3<sup>rd</sup> February 2009 until the date of the Claimant's review is unlawful and illegal.
  - (4) Costs to be assessed.

## **Undisputed Facts.**

3. It is not in dispute that the Claimant was charged for two murders arising from a fire he had set to a dwelling house. He was tried in 1996 and found guilty of manslaughter on the basis of diminished responsibility. By Order of the trial judge, the Claimant was ordered to be detained “until the President’s pleasure is known.” The Claimant was detained in prison pursuant to this order until 2007 when **CV 2007-04514, Gilbert Evelyn v. Attorney General of Trinidad and Tobago** (hereinafter referred to as “the previous action”) was commenced on his behalf.
4. In the previous action, the Claimant claimed that the order for his detention was not valid on the grounds that it offended against the constitutional principle of the separation of powers and that the manner of his detention was in breach of sections 4 (a) and (b) and 5 (2)(a) and (h) of the Constitution.
5. On the 3<sup>rd</sup> February 2009, Smith J. heard and determined the previous action and, inter alia, made the following orders:

*“THIS COURT DECLARES that”*

1. *The sentencing order in relation to the Claimant passed on the 26<sup>th</sup> day of June 1996 that the Claimant be detained “until the President’s pleasure is known” is illegal as it offends against the principle of separation of powers enshrined in the Constitution.*

*IT IS ORDERED that there be an Order varying the sentence of the Honourable Justice Mc Millan so that it will read and have the effect that the Claimant be detained “until the Court’s pleasure is known”.*

*THIS COURT FURTHER DECLARES that:*

- 1. The Claimant is entitled to have his sentence reviewed by the High Court periodically and accordingly that the Claimant be brought before the High Court sitting in its Criminal jurisdiction as soon as practicable for a review of his detention on a date to be fixed by the Registrar of the Supreme Court.*
6. By letter dated 13<sup>th</sup> February 2009, the Claimant’s Attorney notified the Defendant of the Order of Smith J. dated 3<sup>rd</sup> February 2009 and requested that the criminal section of the High Court make the necessary arrangements for the review of the Claimant’s detention as soon as possible.
7. By letter dated 19<sup>th</sup> February 2009, the Defendant acknowledged the letter from the Claimant’s Attorney and informed him that she will be making the necessary arrangements to have the sentence of the Claimant reviewed by a Judge of High Court. The Defendant also sought confirmation of the number of the criminal proceedings.
8. By letter dated 29<sup>th</sup> February 2009, the Claimant’s Attorney responded that he could not confirm the number of the criminal proceedings and requested that the Claimant’s sentencing review be listed immediately before a Judge of the High Court.

9. No further correspondence was exchanged between the Claimant's Attorney and the Defendant prior to the institution of these proceedings on the 25<sup>th</sup> September 2009.

### **Submissions at the hearing of application**

#### The Claimant's submissions

10. The Claimant's application for leave to apply for judicial review was listed for inter partes hearing on the 9<sup>th</sup> October 2009. On that date, I was informed by both Counsel that on the 7<sup>th</sup> October 2009 the Claimant's Attorney was notified that a sentencing review had been listed for hearing before Mr. Justice Mondesir on the 8<sup>th</sup> October 2009.
11. As a consequence of this development, Counsel for the Claimant conceded readily that relief (2) in his application had been rendered otiose. However, he contended initially that he was entitled to pursue reliefs (1) and (3). In the course of his submissions, however, Counsel also accepted that relief (3) had also been rendered otiose and he concentrated his arguments on relief (1).
12. In support of the claim for relief (1), Counsel for the Claimant relied on the following:
- “ (c) Objective consideration of the length of time that the Claimant has been incarcerated without being reviewed would have required that the Claimant's sentencing hearing be listed forthwith by the Defendant. (emphasis added)

- (d) A reasonable period of time for the Defendant to comply with the Order of Smith J. for a date to be fixed for the hearing of the Claimant's review of sentence is 14 days after the date of the making of the order. (emphasis added)
- (e) To date the Claimant has not been informed of any steps being taken by the Defendant to list the Claimant's sentencing review."

13. In his oral submission, Counsel for the Claimant did not argue that the Defendant ought to have listed the sentencing hearing forthwith. He submitted, however, that the Defendant ought to have listed the review within 14 days from the 3<sup>rd</sup> February, 2009. This would mean that by the 18<sup>th</sup> February 2009, the Defendant was in breach of her obligation to list the review and the Claimant's entitlement to challenge her failure to act under Section 15 of Judicial Review Act arose on that day. Accordingly, he argued that the Court ought to grant leave to the Claimant having regard to the length of time that had elapsed since the Order of Mr. Justice Smith was made.

#### The Defendant's submissions

14. Counsel for the Defendant made the following submissions in support of his contention that leave should not be granted to the Claimant to apply for judicial review:

- (a) The Claimant had annexed incorrect exhibits to his affidavit. In particular, he had failed to annex the Order

of Justice Smith although he had purported to do so. Such errors constituted material deficiencies in the application;

- (b) The Claimant had failed to send a pre-action letter to the Defendant as he ought to have done and if he had done so, these proceedings may not have been necessary.
- (c) All three reliefs claimed by the Claimant had been rendered academic. In support of this submission, he relied on the dicta of his Lordship, Mr. Justice of Appeal Mendonca in **C.A. No. 29 of 2006, Chandresh Sharma v. Lenny Saith, at paras. 39 and 40.**
- (d) The Court should consider the overriding objective of the Civil Proceedings Rules which required the Court to deal with matters justly and save expense. There was no future value in making the declaration sought by the Claimant in relief (1).
- (e) The Claimant having submitted that a reasonable time for the Defendant to have listed the sentencing review was fourteen days, time should be calculated from the expiration of that period to determine when the Claimant ought to have made the application for leave. Using the time suggested by the Claimant, the three

months limited by the Judicial Review Act for making the application expired since mid-May 2009. Therefore, the Claimant was guilty of delay and the Court should not extend the time for the Claimant to make the application for leave.

The Claimant's submissions in reply

15. Counsel for the Claimant submitted that the Claimant must show exceptional circumstances for bringing the application outside the period of three months. He conceded that the affidavit of the Claimant had not provided any explanation for the delay. He also accepted that no pre-action letter had been sent to the Defendant prior to the filing of these proceedings.
16. However, he argued that the Claimant's rights had been affected and the Claimant was entitled to know whether the Defendant had acted reasonably in failing to list the sentencing review between 3<sup>rd</sup> February 2009 and 7<sup>th</sup> October 2009. Having regard to the length of time that had elapsed between February and October the Defendant was not entitled to rely on a presumption of regularity. Further, he submitted that it could never be reasonable for the Defendant to take eight months to list the sentencing review.

### **Determination of application**

17. On the 14<sup>th</sup> October 2009, I granted leave to the Applicant to apply for judicial review in respect of the failure of the defendant to list the matter until the 7<sup>th</sup> October 2009.

18. My reasons for granting leave to the Applicant are set out hereunder.

### **The threshold test for the grant of leave**

19. In **Sharma v. Brown-Antoine [2007] 1 WLR 780 @ 787**, the Privy Council enunciated the test to be applied by the Court in considering whether or not to grant leave to apply for judicial review:

*“The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in application.....It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the Court may strengthen.”*

## **Analysis**

20. I considered the objections raised by Counsel for the Defendant to the grant of leave and I did not consider that there is much substance in his arguments based on the failure of the Claimant to annex the correct exhibits or to send a pre-action protocol letter. While I agree that the Claimant ought to have been more careful in the preparation of the affidavit and the annexure of the relevant exhibits, in my opinion, the omissions and errors were not material to the application before me. It was not in dispute that the Claimant filed the previous action for constitutional relief and his Lordship Mr. Justice Smith made the Orders set out at paragraph 10 of the Claimant's affidavit on the 3<sup>rd</sup> February 2009. I also took judicial notice of the Reasons of Justice Smith in the previous action dated 6<sup>th</sup> July 2009 which confirmed the Orders made by him.

21. I also agree that the Claimant's Attorney ought to have issued a pre-action protocol letter in accordance with Appendix D to the Practice Direction issued by Chief Justice Sharma on the 15<sup>th</sup> November 2005. However, his failure to do so goes more to the issue of costs rather than the substantive issue of whether the Defendant ought to have listed the Claimant's sentencing review prior to the 7<sup>th</sup> October 2009.

22. In respect of the Defendant's submission that all three reliefs had been rendered academic and that the Court would not usually grant a declaration unless it has some current or future value, the Claimant relied on the following dicta of his Lordship, Justice of Appeal Mendonca in **Chandresh Sharma v. Dr. Lenny Saith, C.A. No. 29 of 2006:**

*"40. A declaration is of course a discretionary remedy and the Court will not grant such a remedy unless there is a need for the relief to be granted. The Court will not usually grant a declaration unless it has some current or future value and is not simply a comment on past events (see **R. v .Secretary of State for the Environment, ex parte Nottinghamshire County Council (1986) The Times L.R. 586**).*

23. Having considered this dicta, I was of the opinion that the facts of this case are distinguishable since there may be some value to the Claimant of the Court making the declaration sought in relief (1) of the Application. Pursuant to the Order of his Lordship, Justice Smith, made on the 3<sup>rd</sup> February 2009, the Claimant was entitled "to be brought before the Court sitting in its criminal jurisdiction as soon as practicable for a review of his detention on a date to be fixed by the Registrar of the Supreme Court." If, as contended for the Claimant, the Defendant did not fix a date for the sentencing review "as soon as practicable" the Claimant would be entitled to ask the Court for a declaration to that

effect and it cannot be said that because a date has recently been fixed, the Claimant's contention that the Defendant's failure to fix a date between February and October is unlawful, unreasonable and irrational has been rendered academic or otiose.

24. In determining what meaning I should give to the expression "as soon as practicable", I adopted the definition used by his Lordship, Justice of Appeal Mendonca in the same case of **Sharma v. Saith**. Accordingly, I was of the opinion that the Claimant was to be brought before the Court for a review as soon as the fixing of a date for the review by the Registrar was capable of being carried out. The Claimant has applied for leave to apply for judicial review to seek "a declaration that the failure of the Defendant to fix a date for the hearing of the Claimant's review of sentence from the 17<sup>th</sup> February 2009 until present is unlawful, unreasonable and irrational." Having regard to the passage of eight months since the Order of Mr. Justice Smith was made, I was satisfied that the Claimant has raised an arguable ground for judicial review having a realistic prospect of success.

25. The more important question, as far as I was concerned, was whether there existed a discretionary bar such as delay which affected the ability of the Claimant to apply for leave at this stage. Counsel for the Claimant submitted that the Defendant ought to have listed the sentencing review within fourteen days. However, the application for leave to apply for judicial review was filed on the 25<sup>th</sup> September 2009.

Therefore, prima facie, using the time period suggested by the Claimant, the application was filed well outside the three month limit stipulated in the Judicial Review Act for making such applications.

26. Section 11 of the Judicial Review Act provides as follows:

*“11. (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application should 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, or 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 considers relevant.*

27. The Claimant did not in his affidavit set out any explanation for the delay in making this application. Further, subsequent to the correspondence exchanged between the Claimant's Attorney and the Defendant in February 2009, there was no communication whatsoever about the listing of the review by the Defendant. The Claimant's Attorney did not write a pre-action protocol letter to the Defendant but proceeded to file this application on the 25<sup>th</sup> September 2009.

Accordingly, Counsel for the Applicant was not in a position to rely on any facts in the Applicant's affidavit in support of an application for an extension of time to make this application. Section 11 (1) makes it clear that an application for judicial review must be made "promptly and in any event within three months from the date when grounds for the application first arose" Since, according to the Claimant's grounds, the grounds for the application first arose on the 18<sup>th</sup> February 2009, I should only grant leave if I "consider that there is a good reason for extending the period.."

28. In considering the Defendant's submissions on the Claimant's delay, I bore in mind that the calculation of the time for the claimant to make the application for leave depended on whether or not I accepted the claimant's argument that the defendant ought to have listed the review within 14 days. If I accepted that "as soon as practicable" meant that the Defendant ought to have listed the review after fourteen days, then the Claimant ought to have explained the delay which he failed to do. However, if I did not agree with that argument, then time would not have begun to run against the Claimant on the 18<sup>th</sup> February 2009.
29. Since this was an application for leave to apply for judicial review, I only had the benefit of the Applicant's affidavit and did not have the benefit of any facts from the Defendant. Accordingly, I was not able to form a conclusive opinion on whether the fixing of a date for the review

was capable of being carried within two weeks, as contended for by the Applicant.

30. However, a most important fact that I could ignore was that between the 3<sup>rd</sup> February 2009 and the 7<sup>th</sup> October 2009, notwithstanding the Order of his Lordship Mr. Justice Smith, a date for the sentencing review had not been fixed by the Defendant. In my opinion, this raised at least a prima facie case of neglect in complying with the Order of Mr. Justice Smith requiring an answer from the Defendant.

31. So the question raised by this application for leave to apply for judicial review was whether or not the order of Mr. Justice Smith was carried into effect “as soon as it was capable of being carried out in action”. This Order ought to have been complied with and the Defendant remained under a continuing duty to comply with same. It may very well be that there are important facts that the Defendant can put before the Court to satisfy this Court that the Order of Justice Smith was carried into effect as soon as it was capable of being carried into action.

32. By section 11(2) of the Judicial Review Act, I may refuse to grant leave to apply for judicial review if I consider that there has been undue delay in making the application and that the grant of any relief at this stage would cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration. I was not satisfied that the grant of relief in this matter would cause

substantial hardship or prejudice to any person and I was also not satisfied that it would be detrimental to good administration. If anything, it may facilitate and promote good administration to call upon the Registrar to explain the circumstances in which the listing of the sentencing review did not take place until 7<sup>th</sup> October 2009. In this regard, I took into account the decision of the Court of Appeal in **Civ. App. No. 144 of 2005, Chandresh Sharma v. Patrick Manning**. In that case, His Lordship, Mr. Justice of Appeal Mendonca opined as follows:

*“24. There clearly is delay as on the Appellant’s case grounds would have first arise well outside the three month period. The question that arises is whether time should be extended under section 11(1).*

*25. The Judge concluded that there was no evidence upon which her discretion to extend time could be exercised. In our judgment however in so doing the Judge paid no or no sufficient attention to the fact that what is alleged is a continuing breach of a continuing duty. ..*

*27. Under section 11(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 or substantially prejudice the rights of any person, or would be detrimental to good*

*administration. This however is not relevant here. The grant of relief would not cause substantial hardship or prejudice to any person or be detrimental to good administration. If anything it may facilitate the right to access information given by the FOIA and promote good administration.*

*28. The possibility of a continuing breach and the nature of the duty in this case in our judgment provide good reason to extend the time for making the application for leave.”*

33. Applying this reasoning to the facts of this matter, I was of the view that the existence of a continuing duty on the Defendant to comply with the Order of Mr. Justice Smith and the delay of eight months by the Defendant in listing the Claimant’s sentencing review provided good reason to extend the time for making of the application for leave.

34. Therefore, in respect of the sole relief as set out in paragraph 1 of the application filed on 25<sup>th</sup> September 2009, on the 14<sup>th</sup> October 2009, I granted leave to the Applicant to apply for judicial review in respect of the failure of the defendant to list the matter until the 7<sup>th</sup> October 2009.

35. I also directed that the application must be filed within 14 days and in default the Claimant would not be entitled to pursue the application. The application for judicial review has been fixed for a case management conference on the 25<sup>th</sup> November 2009 at 9.00am in POS 20.

Dated this 5<sup>th</sup> day of November 2009.

**André des Vignes**  
**Judge**