THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2016-00764

IN THE MATTER OF SECTION 4 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF THE DECISION BY THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF PORT-OF-SPAIN TO APPROVE OF THE CONSTRUCTION AND LOCKING OF THE GATES AROUND TAMARIND SQUARE

BETWEEN

HUGH BERNARD

Applicant

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF PORT-OF-SPAIN

Respondent

Before the Honourable Madam Justice Eleanor Donaldson-Honeywell

Appearances:
Mr. Christopher Hamel Smith SC, Mr. Imran Ali and Ms Krystal Richardson, Attorneys-at-Law for the Applicant
Mr. Eduardo Martinez, Attorney-at-Law for the Respondent

Dated: October 6, 2016

Judgment

I. Introduction

1. The Applicant, Hugh Bernard, describes himself as a person of no fixed abode other than Tamarind Square, Port of Spain. He has based his Claim on his alleged homelessness and he raises for consideration herein the important concerns of socially displaced persons regarding the protection of their human rights as guaranteed under the Constitution. This

novel claim can be seen as a timely intervention since the Court takes judicial notice of the acute crisis of socially displaced persons occupying the pavements and other public places with seemingly no place to call home.

2. It is not a new phenomenon. However, for decades communities such as the City of Port of Spain have been increasingly faced with the problem of homelessness. Street dwelling is a concern not only for those unfortunate persons who, whether by choice or having suffered dire life experiences, seek to stake a claim to entitlement to reside in public places but also presents a threat to other members of the public whose freedom of movement, safety and enjoyment of public places may be adversely affected by such occupation.
3. These concerns are not unique to Trinidad and Tobago and there is some precedent for matters having been taken before Courts in other jurisdictions to seek protection of the rights of homeless persons, not necessarily to reside in public places, but to have access to adequate shelter. The matter was considered at the 31st session of the Human Rights Council of the United Nations in March 2016, in preparation for which countries and Organisations were invited to submit reports on the issue. Those submitting reports included Trinidad and Tobago, Malta, Canada, Ghana, The United States of America and Organisations from India, Ireland and the United Kingdom. In overall summary it was noted as follows:

> *"Homelessness has emerged as a global human rights crisis even in States where there are adequate resources to address it. It has, however, been largely insulated from human rights accountability and rarely addressed as a human rights violation requiring positive measures to eliminate and to prevent its recurrence. While strategies to address homelessness have become more prevalent in recent years, most have failed to address homelessness as a human rights violation and few have provided for effective monitoring, enforcement or remedies*.[1]"

[1] Homelessness and the Right to Housing – Downloaded from ***United Nations Human Rights Office of the High Commissioner*** http://www.ohchr.org/EN/Issues/Housing/Pages/Homelessnessandhumanrights.aspx on September 10, 2016

So there is continued need to address the problem and seek workable solutions.

4. On 15 March, 2016 the Applicant filed an application for leave to apply for judicial review in accordance with S**.6 Judicial Review Act, Chap. 7:08 ("JRA")**. The Applicant seeks to review:
    a. The decision of the Respondent to place padlocks on the gate around Tamarind Square with the intention or objective of excluding members of the public, and more particularly the Applicant and other socially displaced persons, from Tamarind Square, without there being any reasonable alternative location available to the Applicant and other socially displaced persons; and/or
    b. The decision of the Respondent to exclude members of the public, and more particularly the Applicant and other socially displaced persons, from Tamarind Square, without there being any reasonable alternative available to the Applicant and other socially displaced persons.
5. The Applicant seeks relief in the following forms:
    a. An Order requiring the Respondent to leave the gates of Tamarind Square unlocked so as to allow the Applicant and other socially displaced persons access to Tamarind Square as a place of refuge until a viable alternative is available to them;
    b. An Order requiring the Respondent to provide tents and access to portable toilets in Tamarind Square for the protection of the homeless until a viable alternative is available; and
    c. Damages.

II. Background Facts

6. The Respondent is a creature of statute established by the **Municipal Corporations Act, Chap. 25:04 (" MCA")** and is responsible for the government of the Municipality of Port of Spain and the suppression of nuisances (S.221 MCA).
7. The Applicant is a displaced/homeless person who having been deported from the United States of America in 1993 has been living on the streets and using the public spaces as a place to rest at night. He claims to be unemployed but says he supports himself by trading in scrap metal, cigarettes and occasionally doing ad hoc physical labour. The income he earns is not sufficient he says to afford any accommodation for himself other than public

spaces. According to the Applicant there is no viable alternative for homeless persons due to the poor conditions of the Centre for Socially Displaced Persons ("CSDP") at the Riverside Car Park. The CSDP is a Non-Governmental Organisation ("NGO") set up in 1991 by the St. Vincent de Paul Organisation, another NGO. The Applicant avers that there was an agreement between the government and the CSDP that the government would pay the CSDP a subvention for the service as a temporary measure of housing "the most vulnerable citizens" at Riverside Car Park.

8. The Applicant says he tried to set up residence at the CSDP facility some 12 years ago but left due to poor conditions. He outlines the conditions experienced at the CSDP as follows:
    a. The CSDP was initially a car park facility and was intended as a temporary measure. As a result, the ceilings are low and there is poor ventilation.
    b. The CSDP also houses all categories of homeless persons including the medically ill, mentally challenged, drug addicts and deportees and there are no proper facilities to regulate the interactions among these groups. Security officers at the venue were also abusive according to the Applicant.
    c. The washroom facilities were disgusting and, in the Applicant's opinion, not conducive to human health. The mattresses are also bug infested.
9. The Applicant states that as a result of these conditions he began spending nights at Woodford Square. He states that he could sleep there without fear of harassment and unhealthy conditions. Two years ago however, the Port of Spain City Corporation began locking the gates of that Square at night and the Applicant relocated to Tamarind Square. There he says he and other socially displaced persons found the only other viable alternative to seek refuge with "some small degree of personal security at night".
10. After spending his nights at Tamarind Square for approximately two years, the Applicant noted that between December 2015 and January 2016 the City Corporation began to erect a fence around its perimeter. From on or around the end of January 2016 he says they locked four of the five gates around the square at night. Although there was still one gate left open the applicant's complaint is against what he saw as the decision to lock all the gates to the park, blocking access to the Applicant at night. Before commencing the instant claim the Applicant's Attorneys, with input from one of his supporting witnesses Mr. Anthony Salloum by letter dated December 16, 2015 wrote to the Mayor of Port of Spain

who heads the Respondent seeking to have the gates to Tamarind Square left open. The letter also requested that tents be placed in the square for the use of the Applicant and other homeless persons. Finally the Mayor was asked to hold a meeting with the Attorneys to discuss a process to implement an appropriate alternative to Tamarind Square.

11. There was no response to the said letter so the Applicant seeks by this Claim filed three months later, on March 15, 2016 to have the alleged decision to close all the gates reviewed on the grounds that this decision is:
    a. Contrary to the Constitutional Rights of the Applicant, in particular the right to freedom of movement and the right to life, liberty and security of the person;
    b. Contrary to the legitimate expectation of the Applicant and other socially displaced persons to be able to access Tamarind Square;
    c. Ultra vires the powers of the Respondent; and/or
    d. Irrational and unreasonable due to the fact that it disregards the needs of the socially displaced persons who seek refuge there without having had proper consultations with these persons as stakeholders.

III. <u>Issues</u>

12. The issues in the present case are as follows:
    a. Whether the application for judicial review is the proper recourse to be taken by the Applicant or whether there is some alternate remedy.
    b. Whether there has been delay in bringing the current application and if so, whether that delay is sufficient to defeat the application.
    c. Whether there has been a decision made by the Respondent capable of review.
    d. Whether the Applicant has brought sufficient evidence to show he is a socially displaced person with no proper alternative accommodation.
    e. Whether leave should be granted to apply for judicial review based upon the substantive grounds of the application.

IV. <u>Law and Analysis</u>

13. According to s.6 of the JRA:

"(1) No application for judicial review shall be made unless leave of the Court has been obtained in accordance with Rules of Court.

(2) The Court shall not grant such leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates."

14. In **Sharma v Brown-Antoine**[2] the legal formulation for the threshold for leave to pursue judicial review of a decision and the proper approach to be taken, was articulated by the Privy Council as follows:

"(4) 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: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed.(2004), p 426. 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 its application. As the English Court of Appeal recently said, with reference to the civil standard of proof, in R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:

> *"... the more serious the allegation or the more serious the consequences, if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities." 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": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733."*

15. The Applicant must show arguable grounds for judicial review having a realistic prospect of success. The Respondent has raised certain issues relating to the application which it

[2] [2006] UKPC 57, paras. 14 (3) & (4)

contends are preliminary issues. The analysis and determination of these issues concerning alternative remedies, delay, lack of a decision to be challenged and *locus standi* will be set out first and thereafter the issue as to whether there are adequate grounds herein for judicial review will be addressed.

Alternative Remedies

16. The Respondent submits firstly that there are alternative remedies available to the Applicant in the form of a constitutional motion or a claim for breach of contract.
17. With regard to the remedy under contract law, the Respondent points out that the Applicant had averred in his notice of application that there was agreement by the government to pay a subvention to St Vincent de Paul for the establishment of a CSDP. The Respondent contends that this is sufficient to form a claim in breach of contract against the government.
18. However, the Applicant submits that this alleged agreement does not satisfy the requirements of offer, acceptance and consideration required to establish breach of contract. Further it is clear that there would be no privity of contract between either of the parties herein and the parties to such a contract if it existed. Therefore, an action based on the CDSPs breach of contract if any could not be an alternate remedy available for the Applicant.
19. The Respondent also submits that the Applicant has an alternate remedy in the form of a constitutional motion. It states that the major thrust of the Applicant's case lies in the breach of constitutional rights, which was borne out even further in the Applicant's submissions. The Application in fact, claims relief inter alia on the ground of constitutional breaches of the rights to life, liberty and security of the person, as well as the right to freedom of movement with focus mainly on the latter in submissions.
20. The Applicant submits that the reason for not proceeding to seek relief via constitutional motion is that there have been decisions of the Court determining that the constitutional motion is only to be resorted to where there is no other option available and that it is only appropriate in cases where there is no substantial factual dispute – **AG v Ramanoop**[3]; **Harrikissoon v AG**[4]. However, the Respondent contends that this is, in fact, such a case

[3] [2006] 1 AC 328
[4] [1980] AC 265

as the only real dispute is one of law as to whether the actions of the Respondent violate the constitutional rights of the Applicant.

21. The Applicant in its submissions on the Respondent's alleged infringement on the Applicant's constitutional rights to liberty and freedom of movement, cited decisions on judicial review applications in **Adeyami v Tobago Regional Health Authority**[5] and **TOSL Engineering Ltd v Minister of Labour**[6]. In these Judgments, however, the decisions in question were not challenged on the ground of infringement of constitutional rights. At para 33 of **Adeyami** and para 24 of **TOSL**, the court discusses the extra scrutiny and considerations to be had in a case where fundamental human rights will be impacted but breach of constitutional rights does not unlike the present case, form the basis of the challenge.
22. The Applicant also cites the decision of **Victoria (City) v Adams**[7] as a case in which homeless persons were allowed to sleep in the City parks at night due to the unavailability of shelters to the homeless. However, this was a Canadian constitutional decision which focused not on the right of freedom of movement but on the right to security of the person.
23. A synopsis of the decision is provided in Canada's country report to the United Nations[8] as follows:

> "*In Victoria (City) v. Adams (2009), the Court of Appeal for the province of British Columbia considered the rights under section 7 of the Charter in a case that dealt with challenges to a city bylaw that prohibited homeless persons who were **legally** sleeping in parks from erecting temporary overnight shelters on public property without securing a permit. The Court upheld the lower court's finding that the bylaw violated the claimants' section 7 rights, stating that **homeless persons have the right to cover themselves with temporary overhead shelter while sleeping overnight in parks** when the number of homeless persons exceeds the number of*

[5] CV2015-01384
[6] CV2013-02501
[7] [2008] BCSC 1363
[8] Canada's Response to Questions from the United Nations Human Rights High Commission Special Rapporteur on Adequate Housing Homelessness and the Right to Housing – Downloaded from ***United Nations Human Rights Office of the High Commissioner*** on September 10, 2016.
http://www.ohchr.org/EN/Issues/Housing/Pages/Homelessnessandhumanrights.aspx

available beds in homeless shelters in the City of Victoria. The decision therefore established that, in specific circumstances where there is no practicable shelter in the city for homeless persons, homeless persons are exposed to a risk of serious harm, including death, and that this risk of harm is an interference with their rights to life, liberty and security of the person."

24. An important distinguishing factor to note is that apparently the act of sleeping in the park was in that case recognised as legal and it was only in relation to the act of putting up temporary shelters by the homeless that protection was sought. This differs from the position in Trinidad and Tobago where based on statute the act of sleeping and residing in a public place is not recognised as legal and may be subject to criminal or civil proceedings. The country report submitted in 2015 by Trinidad and Tobago to the United Nations[9] sets out these laws as follows:

> "There is no law prohibiting discrimination and stigmatization against persons who are homeless. The law relating to the removal of homeless persons from public spaces and the prohibition of certain activities in public spaces is as follows:
>
> - **The Summary Offences Act, 1921**
>
> ***The Summary Offences Act, 1921***, as amended, sections **45(b) (c), 46(a), 65(a)** contain provisions which may be used to remove homeless persons from public spaces or to prohibit activities in public spaces such as sleeping, camping, eating, sitting or asking for money, and provide as follows:
>
> > *"45. A person committing any of the offences mentioned below in this section may be deemed an idle and disorderly person, and shall be liable to a fine of two hundred dollars, or to imprisonment for one month-*
> >
> > *(b) Any person wandering abroad or placing himself in any street to beg or gather alms, or causing or procuring or encouraging any child to do so;*
> >
> > *(c) Any person found sleeping or loitering in or under any building, including any open outhouse, verandah, gallery, passage, or gateway, or in any vehicle or vessel, without leave of the owner, occupier or person in charge thereof, or on or under any wharf, quay, jetty, bridge, footway, or*

[9] http://www.ohchr.org/EN/Issues/Housing/Pages/Homelessnessandhumanrights.aspx

in any street or other public place, and not giving a good account of himself."

"46. A person convicted a second time of being an idle and disorderly person, and a person apprehended as an idle and disorderly person violently resisting any constable apprehending him and who is subsequently convicted of the offence for which he was apprehended, and a person who commits any of the offences mentioned below in this section, may be deemed a rogue and vagabond, and shall be liable to imprisonment for two months-

> *(a) Any person procuring or endeavouring to procure alms or charitable contributions for himself or others under any false or fraudulent pretence;"*

"65. Any person who, in any street, commits any of the following offences to the obstruction, annoyance or danger of any resident or passer-by is liable, for each offence, to a fine of two hundred dollars, or to imprisonment for one month, that is to say, any person who:

> *(a) places or leaves, or causes to be placed or left, any furniture or goods, or any cask, tub, basket, box, pail, bucket, stool, bench, seat, or package on any footway, or places or causes to be placed any blind, shade, covering, awning, or other projection over or along any such footway unless it is at no point less than eight feet above such footway; Goods on footway, Hanging clothes, Obscene songs, Naked children, Street lamps, bells, knockers, Signboards, Placing materials on street, Hoops, Missiles, bonfires, Obstruction, Offences in streets to the annoyance or dru1ger of residents or passengers,"*

- **The Police Service Act, 2006**

According to section **46(1)(c)** and **46(2)** of *the **Police Service Act 2006**,* as amended:

> 46. "(1) A police officer may arrest without a warrant-
>
> > (c) A person whom he finds lying or loitering in any public or private place or building and who does not give a satisfactory account of himself;

(2) Without prejudice to the powers confined upon a police officer by subsection (1), a police officer, and all persons whom he may call to his assistance, may arrest without a warrant a person who within view of such police officer commits an offence and whose name or residence is unknown to such police officer and cannot be ascertained by him."

- **The Mental Health Act, 1975**

The Mental Health Act 1975, as amended, provides at Section 15:

"15. (1) A person found wandering at large on a highway or in any public place and who by reason of his appearance, conduct or conversation, a mental health officer has reason to believe is mentally ill and in need of care and treatment in a psychiatric hospital or ward may be taken into custody and conveyed to such hospital or ward for admission for observation in accordance with this section.

(2) The Psychiatric Hospital Director or a duly authorized medical officer may, on the application of a mental health officer, admit to a psychiatric hospital or ward a person conveyed thereto pursuant to subsection (1).

(3) The Psychiatric Hospital Director or a duly authorized medical officer, shall as soon as practicable after the patient has been admitted, make or cause to be made on the patient such examination as he may consider necessary for determining whether or not the person is in need of care and treatment.

(4) A person who has been admitted to a psychiatric hospital or ward under subsection (2) shall not be kept therein for more than seventy-two hours unless on examination the Psychiatric Hospital Director or the duly authorized medical officer is satisfied that the person is in need of further care and treatment.

(5) Where the Psychiatric Hospital Director is satisfied that a person to whom subsection (4) applies is in need of further care and treatment in a psychiatric hospital or ward, the person shall be deemed to be a medically recommended patient and all the provisions of this Act relating to a medically recommended patient shall apply to such a person.

(6) A police officer shall, if required by a mental health officer, render such assistance as may be necessary for the apprehension and safe conveyance to a psychiatric hospital or ward of a person referred to in subsection (1).

(7) A person shall not be liable to any suit or action in respect of any act done pursuant to the provisions of this section, if he acted in good faith and on reasonable grounds."

Additionally, under section 13 of the *Mental Health Act, 1975,* if a homeless person is charged for the offence of loitering and the Magistrate forms the opinion that he is in need of psychiatric treatment, an order may be made for him to be admitted to a hospital. Thereafter, a further order may be made that is only rescinded if he no longer needs care and treatment."

25. In Canada as well the decision in **Victoria City v Adams** was not the last word on the question of rights of the homeless residing in public places.

"*More recently, the Court of Appeal for the province of Ontario considered in Tanudjaja v. Canada (A.G.) (2014), the applicants' assertion that the actions and inaction of the governments of Canada and Ontario have resulted in homelessness and inadequate housing, contrary to their sections 7 and 15 rights under the Charter. The majority found that these issues are not justiciable, noting at paragraph 33 that: "[...] there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy." The appellants' leave to appeal to the Supreme Court of Canada was denied.*[10]"

26. From the foregoing it is clear that a factor to be considered by the Applicant if he decides to pursue Constitutional redress instead of Judicial Review will be the prospects of success. From the foregoing it may be important to consider whether the issues raised are better

[10] Ibid.

addressed to the Executive and the Legislature for action. Thereafter, such action or failure to act may be a matter to be adjudicated on by the Courts.

27. However, it is not required herein that a determination be given as to the likelihood of success of a Constitutional Motion based on the concerns raised. It is my determination however based on the authorities mentioned above, that there being the possibility of that alternate recourse to a Constitutional Motion, leave cannot be granted for Judicial Review.

28. Further, in the case of **Seereeram Brothers Ltd v The Central Tenders Board**[11] the court held that where the only complaint and application against a public authority is that the authority had breached his constitutional rights, a court in its judicial review jurisdiction ought not to be called upon to embark upon an enquiry into a breach of constitutional rights in order to determine whether an administrative discretion has been properly exercised. A court could however, exercise its jurisdiction in a case where the complaints are not limited to a constitutional breach and the breach of the constitution had been cited as an instance of illegal action on the part of the board.

29. From the foregoing it is clear that the breach of a constitutional right is not a ground for judicial review and this first ground upon which the Applicant relies cannot succeed as a basis for the grant of leave herein. There are three other grounds relied on however by the Applicant. It remains to be determined whether leave for judicial review can be granted on the basis of the other grounds. Before examining those grounds the other points referred to by the Respondent as preliminary issues will be addressed.

Delay

30. The Respondent submits that there has been delay in bringing this application as over three months have passed since the Applicant's Attorneys wrote the letter to the Respondent concerning the erection of fences around Tamarind Square. That, they say, would have been the time the Applicant became aware of the alleged decision.

31. Section 11 of the JRA provides:

"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

[11] HCA 3123/1991

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, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose 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."

32. Further, Part 56.5 of the **Civil Proceeding Rules, 1998**, as amended ("CPR") states:

"(1) The judge may refuse leave or to grant relief in any case which he considers that there has been unreasonable delay before making the application.

(2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which the order relates.

(3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to:

(a) Cause substantial hardship to or substantially prejudice the rights of any person; or

(b) Be detrimental to good administration."

33. Although the Applicant may be said to have become aware of the decision to keep the gates of the Square closed when there was no response form the Respondent to the December letter, it is reasonable that some time would have elapsed during the period when the Applicant was awaiting a response before making an application for Judicial Review. In cases such as **Oudit v Eastern Regional Health Authority**[12] the Court has made allowances for the period in which the Applicant pursues extra-judicial resolution of the matter. Further, the Applicant states that in December 2015 when the letter was sent construction of the fence had started but it was while awaiting a response that further steps were taken in January 2016 by locking four out of the five gates at night. Therefore, the

[12] CV2015-02112

Applicant's evidence of some decision being made and as to a later date of his awareness thereof was strengthened at that stage.

34. In all the circumstances, there was no undue delay by the Applicant in making this application in March 2016. It is clear that the court has a discretion to refuse or grant leave in circumstances of delay and in the present case any delay on the part of the Applicant was reasonable and did not cause any detriment to the Respondent. The Applicants action was in fact more pro-active than delayed in that the claim was filed even before the final gate was locked in anticipation of implementation of such a decision.

No Decision

35. The Respondent's third preliminary submission in relation to the substantive application is that there has been no decision made by the Respondent capable of being reviewed as all the gates have not been locked as yet and there is no evidence by the Applicant of a decision of the Corporation.
36. The Respondent's only evidence of there being no decision taken comes from City Engineer, Mr Jason Lalla who swore an affidavit in this matter. The Respondent cites the MCA which states that the City Engineer is one of the Chief Officers through whom the Council acts and carries out the business of the Respondent Corporation. Although the MCA provides for the attendance of the City Engineer at *"all meetings of the committee in charge of physical infrastructure and such other meetings as he may be required to attend by the Council"*, his functions are primarily to execute and plan the engineering works of the Corporation – S.41(a)&(b) MCA. The City Engineer would not be involved in policy decision-making and therefore the affidavit of Mr. Lalla on the facts relating to whether or not a decision was taken does not of itself provide evidence that no decision was taken.
37. On a view of all the circumstances of the case, taking into account the prior fencing and locking of Woodford Square, the actions of the Respondent in erecting a fence and locking some of the gates and the removal of the Applicant and confiscation of his tent from the Square, the Applicant has sound basis for contending that some decision was taken to limit access of the public to the Square. Fencing serves only to limit access, unless it is purely decorative, and it may be gathered from the circumstances that a decision was taken by the Respondent to eventually lock all the gates to the Square at night.

38. It is my finding that the Respondent's submission as to the alleged lack of any decision to be challenged is without merit.

<u>*Standing of Applicant*</u>

39. The Respondent submits that the Applicant has not provided sufficient evidence with regard to the conditions experienced in the CSDP and the length of time the square was used by displaced persons. Further it submits that the Applicant has not proved himself to be a "socially displaced person" as from his own account he has been working for over 20 years.
40. The Applicant has not provided any evidence of his earnings but merely states that he sells scrap iron and cigarettes and works odd jobs every now and then but this is insufficient for him to afford a place of his own. The **Socially Displaced Persons Act, No. 59 of 2000**, which has not yet been proclaimed defines a socially displaced person as "*any idle person habitually found in a public place whether or not he is begging and who by reason of illness or otherwise is unable to maintain himself, or has no means of subsistence or place of residence, is unable to give a satisfactory account of himself and causes or is likely to cause annoyance or damage to persons frequenting that public place, or otherwise to create a nuisance*." This Act though not yet in force provides a useful working definition of a socially displaced person.
41. The definition is broad and encompasses any person who has no place of residence. The Respondent's contention appears mainly to be that the Applicant can afford accommodation or that he has alternate accommodation available to him at the CSDP. However, there does not appear to be any dispute as to the fact that the Applicant does live on the street and has no fixed place of abode. He is a homeless person and appears to have been adversely affected by the decision of the Respondent and therefore is entitled to bring this action in judicial review. The question of whether sufficient evidence is brought to prove that he has sufficient alternative accommodation would be a question to be determined not at the leave stage but in a substantive hearing of the application if leave is granted.

The Substantive Grounds for Leave

42. In order to satisfy the test for leave the pleaded grounds, must be shown to be arguable and have a realistic prospect of success in the substantive matter.

Constitutional Rights

43. As hereinabove determined in considering the Respondent's alternative remedy point the first ground relied on by the applicant is that the alleged decision is contrary to his Constitutional Rights. The Respondent's submission that this is not a ground for judicial review has been found to have merit as has the contention that this action could have been brought via a constitutional motion as it contains allegations of breaches of constitutional rights.
44. There is precedent for homelessness being treated with as a constitutionally protected human rights concern; however, the focus has not been on enforcing as of right permission and/or access to reside on the streets or in public parks. Instead the focus is on rights of access to humane shelter conditions, proper care and medical attention for socially displaced persons who unavoidably have no alternative but to reside in public places[13]. However, the ground of breach of constitutional rights cannot of itself form a ground for judicial review.

Legitimate Expectation

45. The second ground relied on by the applicant is a breach of legitimate expectation. The Respondent, citing **PHI Americas Limited v Trinidad and Tobago Civil Aviation Authority**[14] submits that there must be a clear and unambiguous promise, or a settled practice to form the basis for such reliance. It is the Respondent's submission that not enough evidence has been provided in the application to indicate a settled practice of the Applicant being among a group making their home at Tamarind Square. The 50 years that

[13] See Country and Organisation Reports to the United Nations at Homelessness and the Right to Housing – http://www.ohchr.org/EN/Issues/Housing/Pages/Homelessnessandhumanrights.aspx on September 10, 2016

[14] CV2016-00715

homeless persons are alleged in the Application to have used the Square as a place of refuge is unsubstantiated. Further the Applicant himself has only begun to use Tamarind Square in the past two years and the Respondent submits that this period is insufficient to be the basis of a legitimate expectation. Furthermore the Applicant from his own evidence would have been aware of the practice of closing the Woodford Square gates at night and as such was alerted that there was no tacit promise that homeless persons could reside in public parks.

46. Further under this head, the Respondent submits that its powers and functions are limited by the MCA and therefore it has no jurisdiction to provide accommodation or facilities to displaced persons. The Respondent cites the **PHI Americas case**[15] and the decision of **Rainbow Insurance Co. Ltd. v Financial Services Commission of Mauritius**[16] for the proposition that there can be no legitimate expectation in a circumstance where the action expected of a relevant authority would be in violation of a statute.
47. The Applicant in its submissions does not address this ground of legitimate expectation at all, limiting its submissions to the other grounds stated in the Application regarding Constitutional rights, ultra vires and natural justice.
48. In all the circumstances there is insufficient indication in the Application of any long-standing practice that could give rise to a legitimate expectation. Further, as the authorities suggest, a legitimate expectation cannot arise from a practice that is in violation of a statute.

Ultra Vires

49. The third ground contended by the Applicant is that the Respondent acted Ultra Vires in making the challenged decision. The Applicant's submission under this head is that although the Respondent has the authority to regulate access to public spaces within its remit, the MCA requires that any such restriction must be done by the passing of bye-laws by the Council. S.134(1) MCA states:

[15] CV2016-00715 PHI Americas Limited v The Trinidad and Tobago Civil Aviation Authority delivered on April 27, 2016
[16] 2015 UKPC 15

"134. (1) Subject to the provisions of the Highways Act and to section 110 of the Motor Vehicle and Road Traffic Act, a Council may make Bye-laws for all or any of the following purposes, that is to say:

(a) for declaring and limiting the use by the public of any street within the Municipality both or either as to the time of such public use or as to the character of the traffic on such street."

50. According to the Applicant the Respondent did not follow this procedure in making its decision to restrict the public access to the park. The Applicant's further suggestion is that this action by the Respondent unduly limits its freedom of movement rights under S.4 of the **Constitution, Chap. 1:01**.
51. The Respondent's response to this contention is that the failure to make bye-laws before taking a decision to close the parks is not illegal due to the use of the word "may" in the section. There is no dispute that the word "street" used in the section includes a square as provided in S.124(1) and that the Respondent Corporation does have the power to limit the public's use of the Square. The Respondent contends that the use of the word "may" in the section only gives the Respondent a discretion to make bye-laws for the purpose of restricting access to squares but does not impose a duty to do so.
52. In analysing the failure of an authority to comply with a procedural or formal requirement in a statute, the courts will determine whether the requirement should be interpreted as mandatory or merely discretionary. The court must look to the purpose of the section and its relationship to the scheme and objective of the statute in order to assess the importance Parliament attached to it[17]. Where it is merely directory, the party complaining of the breach must show some prejudice[18]. Therefore, the Respondent's argument is that the use of the word "may" in the statute connotes that the making of bye-laws before exercising that function is not mandatory.
53. However, in looking at that part of the MCA as a whole, it is clear that there is a distinction between powers exercisable by the Council without more and the powers that require some extra element to be satisfied. S.131(1) provides for the Council's powers to authorise the erection or removal of monuments in public areas and S.132 provides for the maintenance

[17] Halsbury's Laws of England Judicial Review (Vol. 61 (2010)) [626]

[18] *R v Liverpool City Council, ex p Liverpool Taxi Fleet Operators' Association* [1975] 1 All ER 379 at 384

of trees. These functions appear to be exercisable without any special procedure to be followed. On the other hand, sections such as S.130 and S.134 require a special procedure to be followed to effect the function in question. S.130 requires approval from the Minister for Highways and S.134 specifies that the Council is authorised to make bye-laws for the purpose of limiting access to the public areas.

54. The context of "may" in that provision appears only to relate to the Council's discretion to exercise its power to limit access where it sees fit and does not suggest that there is a discretion to create bye-laws where those powers are to be exercised. Even more significant is that the bye-laws are to be subject to negative resolution of Parliament under S.134(3). This part of the provision shows that the Corporation in fact needs permission from the Parliament before passing such a bye-law, albeit by a negative resolution. This increases the significance of the procedure and therefore leads to an interpretation that the bye-laws are a mandatory pre-requisite to denying access to the park.

55. However, in the present case the actual limitation of the public's access to the Square has not yet taken place. Whether or not a decision was made to limit the public's access, it is clear that the Respondent had not yet executed any such decision and therefore could not be in violation of the provisions of the section that calls for bye-laws as a pre-requisite to denial of access.

56. In conclusion, the Respondent could not be considered to be acting ultra vires by virtue of a failure to create bye-laws where the decision has not been executed as yet and there still was time for the correct procedure to have been followed. Accordingly, this ground of *ultra vires* action raised by the Applicant also provides no basis for the grant of leave for judicial review.

Natural Justice

57. The final ground raised by the Applicant is that the Respondent's actions amounted to a breach of natural justice due to a failure to consider the Applicant's position as a person that would be affected by the decision. The Applicant submits that he and others similarly circumstanced who slept at Tamarind Square should have been consulted or that their unfortunate circumstances should have been borne in mind when making the decision.

58. The Respondent's response is that the Corporation would have been unaware of the circumstances of the displaced persons and could not have known of the conditions of CSDP until the letter was written. It further submits that there is a lack of evidence of the conditions experienced at CSDP as well as of the length of time the displaced persons have stayed at Tamarind Square overnight.
59. It seems unlikely that the Respondent would not have known of the displaced persons who stay in the Square and the period of time from which they began as it is charged with the maintenance of these parks throughout their Municipality. Despite this, they put the Applicant to proof and do not proffer their own account of the use of the park by displaced persons. The applicant has not however set out any basis on which the Respondent could have been aware of any inability of these persons to utilise the CSDP due to poor conditions or to be housed elsewhere.
60. As such the Respondent on observing the Applicant and others in the Square would have been faced with considerations such as whether their presence may have amounted to a criminal offence and or a circumstance potentially harmful to the interests of other members of the public. Accordingly, issues of possible criminal and/or civil liability would of necessity have been more immediate matters for consideration by the Respondent than the idea that there should be consultation with the Applicant before fencing the premises. There is no indication that the applicant or any other persons sought dialogue with the Respondent to be permitted to use the square. In all the circumstances, the basis upon which the Respondent would have been duty bound to consult the Applicant before closing gates to Tamarind Square at nights is not borne out in the Applicant's Application.
61. The judicial trend regarding natural justice breaches first examined whether or not the decision-maker was exercising a judicial function. The case law then moved towards an examination of whether the decision could be seen as a determination of rights or a determination of privileges[19]. The courts have moved away from these distinctions and now consider generally the concept of procedural fairness or a duty to act fairly in all the

[19] *R v Gaming Board for Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417 at 430, [1970] 2 All ER 528 at 533, CA

circumstances of each case[20]. However, those factors can be relevant in determining fairness.

62. In determining what constitutes fairness in an authority's process of decision-making several factors should be considered including good administration, speed and efficiency in decision-making and the level of injustice suffered by the individual. It cannot be that every decision the Respondent makes under the MCA must the subject of consultation with representatives of all parties affected.

63. The governing statute makes no mention of such a duty; however, this of itself would not rule out an implied requirement to consult. On this point the Applicant relies on the decision in ***Ulric "Buggy" Haynes Coaching School v Minister of Planning and Sustainable Development*** CV2013-05227. This case, according to the Applicant, lends some support to the contention of a duty to consult or a duty to exercise the discretion with the Applicant's interests in mind. The court in that case found that there was a duty on the Minister to consult persons who would be directly affected by a decision to grant permission to develop lands even though the statutory code did not require the Minister to do so. The Court placed heavy reliance on section 20 of the **Judicial Review Act.** The decision also turned on the fact that the Applicant's longstanding access to use of the Orange Grove Savannah for sport and recreation would be affected by the grant of development planning approval to build a Sporting Complex on the land, which was in issue in that case.

64. The circumstances based on which the determination in **Ulric "Buggy" Haynes** was made are clearly distinguishable from the circumstances in the instant application. In fact the Hon Mr. Justice Rahim made clear in his Judgment at paragraph 82 that his decision that consultation with the residents was required was limited to the circumstances of that case. He said:

> *"The court wishes in so doing to be pellucid in stating that* ***the finding of the court is not that there exists a general duty to consult when the Minister is considering whether to grant permission to develop land*** *but that in this case,* ***in these circumstances, having regard to all the factors identified,*** *including but not limited*

[20] *Re HK (An Infant)* [1967] 2 QB 617; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560

to the fact that it appears on the evidence that ***the Ministry was aware of the public objections*** *and the fact that the* ***Claimants were deprived of the opportunity granted to them by statute in relation to objections and representations permitted when updating the national plan*** *and* ***the extent of the effect that the sporting complex would have on the daily activities of these Claimants****, there was a duty on the Minister to act fairly when considering the application for planning permission. In so saying it is the finding of the court that that duty encompassed the grant of an opportunity to the Claimants to engage in genuine consultation on at least on one occasion. It was not the duty of the Minister to consult with each and every user of the savannah but merely to provide a general opportunity to those users who wish to avail themselves of that opportunity."* [Emphasis added]

65. The determination in that case was based on a review of cases in which the courts have considered what is required to ensure fairness in public decision making to meet natural justice standards. Lord Mustill in **R v. Secretary of State for the Hone Department, Ex Parte Doody (1994)1AC531** demystified this consideration by stating that it is "essentially a matter of intuitive judgment". Among a number of matters he noted as being relevant to the consideration were that:

    "*4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.* 5. *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both*."

66. From this it can be underscored that though often required, representation or consultation is not always a necessary prerequisite to decision making that accords with natural justice. The case of **Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39** sheds further light on the type of circumstances where such representation would be expected even though the governing statute does not specifically provide for same. The decision challenged in that case was one with extremely severe implications. It had to do with the restriction of the Claimant Bank's access to the United Kingdom financial markets on

account of its alleged connections with Iran's nuclear weapons programmes. Lord Sumpton opined,

> *"29. The duty to give advance notice and an opportunity to be heard to a person against whom* ***a draconian statutory power is to be exercised*** *is one of the oldest principles of what would now be called public law. In Cooper v Board of Works for the Wandsworth District (1863) 14 CB (NS) 180 143 ER 414, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with* ***power to affect the property of one Her Majesty's subjects*** *is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application and founded upon the plainest principles of justice. ……….*
>
> *…………………Unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact* ***a targeted measure directed at two specific companies****, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was* ***intended to have, a serious effect on their business, which might well be irreversible*** *at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were* ***no practical difficulties in the way of an effective consultation exercise****. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat,"*

67. It was by applying these considerations to the facts before him that Rahim J concluded as he did in the ***Ulric "Buggy" Haynes case.*** The circumstances here are clearly distinguishable in that there is no indication of similar facts based on which the need for consultation to meet the requirement of fairness can be gleaned. It cannot be contended that the nightly closing of the gates to a non-residential public Square by the authority responsible for same is a draconian measure. The alleged decision to keep the park closed at night so as to deny the Applicant access, if it was made, is not one that affects the property of the Applicant or any other person.
68. The measure of closing the gate cannot be characterised as a targeted measure directed at the Applicant as there is no indication in the Application as to how the Respondent would have been aware specifically of his presence in the Square at nights. Furthermore the decision if made would affect not only street dwellers but also other members of the public with an interest in accessing the square for legal purposes.
69. The closing of the gates is not the type of decision that can have a serious irreversible effect on the Applicant since the decision by its nature is one that lacks a sense of permanence. The gate could be locked or opened at a moment's notice.
70. The serious loss of property, loss of business opportunities or even the permanence of the potential loss of access to a park by neighbouring property owners evident in the cases reviewed by Rahim J and in his own decision are factors not mirrored in the circumstances of this case such that the need for consultation with the applicant could arise.
71. Finally, unlike the circumstances in these other cases it cannot be said that there would be no practical difficulties in the way of an effective consultation exercise. The number and location of persons to be consulted, including the Applicant and other street dwellers would be unascertainable. In all the circumstances the decision in **Ulric "Buggy" Haynes** is of no relevance to the instant case in supporting the Applicant's contention that compliance with the Natural Justice mandate at Section 20 of the JRA required that the Applicant be consulted before the Square was fenced.

72. The powers conferred by the MCA give the Respondent a wide discretion in maintenance of the streets and parks. It has been held that the conferring of a wide discretionary power exercisable in the public interest may be indicative of the absence of an obligation to hear the representations of the parties affected[21].

73. The Respondent has indicated that there were several important considerations which would have impacted on a decision to close the gates (if there was such a decision which is denied). Firstly, the Respondent Corporation is neither charged with, nor does it have the power to provide housing or facilities for homeless persons and it can only act within its jurisdiction. Further, allowing the displaced persons to build structures in the Square could possibly cause injury to other users of the Square and the Respondent would bear the liability for such injury. Finally, according to the Respondent some displaced persons are violent and are afflicted by infectious diseases. This poses a danger to the public and also a possible liability for the Respondent.

74. The Applicant has not made a sufficiently convincing case for the contention that the failure of the Respondent to invite consultation by the displaced persons before making a decision to limit their access is unfair in all the circumstances. The Respondent may have been aware that these persons used the parks but there is no indication in the Application as to how it could have been aware of the alleged unsuitability of the CSDP for habitation. There is no basis in the Application to support a contention that it was unreasonable for the Respondent, having fairly assessed the risks posed, to make a decision within its remit to close the gates.

75. On the evidence the alleged breach of Natural Justice is not an arguable ground for judicial review that would have a realistic prospect of success.

V. Conclusion

76. In summary, the Applicant has, in bringing his application for leave, succeeded in proving that he has *locus standi* and he has not been guilty of inordinate delay. However, he has failed to show that judicial review is the appropriate remedy for the alleged breaches of

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[21] Halsbury's Laws of England Vol. 1, 4th Edn [85]; *R v Brixton Prison (Governor), Ex parte Soblen* [1962] 3 All ER 641; *Schmidt and Another v Home Office* [1968] 3 All ER 795

constitutional rights and it is clear that a constitutional motion is a sufficient alternative remedy to this action.

77. He has also failed to prove that his case is founded on arguable grounds with a realistic prospect of success in the substantive application for judicial review. The Respondent has not taken any action which violates s.134 MCA as submitted by the Applicant and they cannot therefore be considered to have acted *ultra vires*. The Applicant has failed to prove sufficiently a legitimate expectation on the part of himself and other displaced persons that the park would remain open to them. Finally, the Applicant has failed to show that there was a breach of natural justice by the Respondent in their failure to consult with him and other displaced persons prior to making a decision to limit access to the Square.

78. In conclusion, the Applicant must be denied leave to apply for judicial review as he has not met the threshold required for leave to be granted. Although the determination herein is that Judicial Review is not an appropriate measure to be used to address the serious concern for society as a whole, faced with the unacceptable conditions of socially displaced persons, the Applicant and his supporters are to be commended if in any way the filing of the application has brought the need for scrutiny to the forefront of public awareness. The reasons for the plight of the persons reduced to living in such circumstances are many and varied. However, what is certain is that in a society as small as ours these persons are connected perhaps by less than six degrees of separation from each of us. Accordingly, this issue of street dwelling is a matter that requires urgent attention and it is a concern from which no member of society can feel absolved of responsibility. A nation's greatness, according to Mahatma Ghandi is measured by how it treats its weakest members. This Application, though having failed on the merits, serves as a clarion call for urgent action to be taken by the nation to address the issues of the socially displaced.

VI. Decision

The Application for leave to Claim Judicial Review is dismissed with no order as to costs.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely

Judicial Research Counsel I