

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 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 Her Honour Madam Justice Eleanor J Donaldson-Honeywell

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

Mr. John Jeremie SC, Mr. Kerwyn Garcia and Ms Raisa Caesar Attorneys-at-Law for the
Respondent.

Delivered on October 30, 2017

Judgment

I. Introduction

1. The Applicant is a socially displaced/homeless person who has been living on the streets and sleeping in public spaces at nights since 1993 when he was deported from the United

States of America. He claims to be unemployed but also indicates that he supports himself by trading in scrap metal, cigarettes and occasionally doing manual labour. This income, he claims, is insufficient to afford him any private accommodation.

2. 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**.
3. The crux of the dispute lies in the Respondent’s action in erecting a fence around Tamarind Square and locking four out of the five entrances to the square. This led the Applicant to believe that the Respondent had decided to close off entry to the square completely by locking the fifth gate. The Applicant is currently a user of that square and he and other homeless persons sleep in the square during the night.
4. The Applicant’s application before this court is for judicial review of the Respondent’s decision to “place padlocks on the gates around Tamarind Square with the intention or objective of locking those gates in order to exclude members of the public, and more particularly the Claimant and other socially displaced persons”. . The Applicant claims that there is no reasonable alternative to the square in Port-of-Spain that meets the standards of human dignity as a place of refuge for the Applicant. Although the Applicant admits that there exists a Centre for Socially Displaced Persons (the “Centre”) at Riverside Car Park, he states that the poor conditions of the Centre make it impossible for him to take refuge there.
5. He says that he attempted to take up residence at the Centre and experienced very poor conditions including:
 - a. low ceilings and poor ventilation due to its prior use as a car park facility;
 - b. presence of all categories of homeless persons including medically ill, mentally challenged, drug addicts and deportees, without any regulation of the interaction among these groups; and
 - c. filthy restrooms and insect-infected mattresses not conducive to human health.

6. These conditions, he says, forced him to begin spending nights at Woodford Square, where he could sleep peacefully without fear of harassment or unhealthy conditions. However, approximately two years ago the Respondent began locking the gates of Woodford Square at night and the Applicant moved to Tamarind square, where he says he felt some degree of personal security. In around January 2016, however, the act of the Respondent in erecting the fence and locking four out of the five gates to Tamarind Square was taken by the Applicant as an indication that the Respondent intended to begin locking all gates to this square at nights as well.

7. 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.

8. There was no response to the said letter so 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.

9. The grounds as outlined following the Leave application are that the challenged decision to lock the gates 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.
10. 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.
11. Cross-examination of two of the Respondent's witnesses namely Ms. Stapleton-Seaforth CEO and Mr. Mahase Dass, Public Health Inspector I showed consistency with their affidavits. The Public Health Inspector testified that after Tamarind Square was fenced he noticed that "the homeless took over the Square and members of the public could not pass there." He recorded observations in his monthly reports about debris and unsanitary conditions at the square and photographs depicting same were attached to his Affidavit. Under cross-examination copies of his Reports were entered into evidence. The CEO was resolute in her testimony that no decision to lock the square at nights was taken. As such Counsel for the Respondent underscored in closing submissions that the Respondent does not intend to take any draconian measures that will adversely affect the Applicant's access to the Square to sleep at nights. The CEO's evidence corroborated that of another witness

for the Respondent Mr. Jason Lalla, City Engineer who had sworn in his April 29, 2016 Affidavit at the leave stage that “the Corporation has not taken or made any decision to close all of the gates to Tamarind Square.” It was also elicited from Ms. Stapleton-Seaforth that the Respondent’s action in fencing and locking four out of the five gates was not aimed at displacing the Applicant or other similarly circumstanced persons. The Applicant was not called for cross-examination.

12. The parties were directed to file closing submissions after the conclusion of the cross examination of the Respondent’s witnesses. Submissions were not however limited to those put in writing, as parties were then given an opportunity to make oral submissions in answer to questions posed by the Court. The questions and respective answers are summarised as follows:

a. Questions for the Applicant:

i. *What are the “standards that are necessary to respect his [Mr. Hugh Bernard’s] basic dignity as a human being”?*

1. *Are these standards to be found at Tamarind Square as depicted in photographs attached to the Respondent’s Affidavits, particularly in light of the evidence of the Health Inspector?*

2. *By what measure is the Court to determine whether Tamarind Square dwelling must be permitted as the best option that is available to meet those standards of human dignity and thereby uphold the right to life liberty and security of the person as argued by the Applicant?*

Answers to Question 1

In answer to these questions the Applicant submitted that this [i.e what are the applicable standards] was not a question that the court was required to answer in this matter. Counsel for the Applicant submits that the Applicant has a right to access the square and he considers that curtailment of this right would put him in a position where his human dignity is not respected.

The submission of Counsel for the Respondent on this point was that the question of the adequacy of the arrangements of the shelter for homeless persons is a question for the executive and not for the courts. There is no evidence before the Court as regards adequacy and the Court is not equipped to make assessments or to rule on the adequacy of and the arrangements that ought to be put in place for the shelter of the homeless.

ii. *In the Applicant's closing submissions, the case for breach of the right to life, liberty, security of the person and freedom of movement is premised on "the unavailability of acceptable accommodation or facilities for the homeless and socially displaced persons in Port of Spain." Are the elements of this premise established on the evidence before the Court?*

1. *In determining whether there is an unavailability of acceptable accommodation for Mr. Bernard (and others in his position of being 'homeless') must the Court have evidence or at least judicial notice of all other possible options e.g. - homeless shelters run by the State or Non-Governmental organisations, HDC housing applied for but not granted, private sector housing options at varying costs, family homes and the pros and cons of other possible accommodation options?*

2. *In determining whether there is an unavailability of facilities such that Tamarind Square is the best option to be upheld by the Court, must the Court consider only evidence regarding the CSDP and Tamarind Square or should possible availability of other facilities be considered such as: medical assessment, family counselling, drug rehabilitation, employment advisory services, skill training and other facilities geared to restoring persons from a position of social displacement?*

Answers to Question 2

The Applicant's oral submission in answer to this question was that the evidence of Mr. Salloum that the CSDP is designated as the official centre for homeless persons is unchallenged. He further contended that processes such as HDC applications for housing are not practical solutions given the character of the problem of homelessness.

The Respondent's submission on this question was that the Applicant's case of breach of the right to life liberty, security of the person freedom of movement is premised on "the unavailability of unacceptable accommodation or facilities for the homeless and socially displaced persons in Port of Spain" and there is no evidence before the Court on this. Therefore, the Court is not in a position to pass judgment on the availability of acceptable accommodation or facilities for the homeless and socially displaced in Port of Spain.

- iii. *Is the unchallenged evidence of Mr. Salloum regarding unsuitability of the CSDP sufficient in this regard as addressing all relevant considerations as outlined at 1 and 2 above? Is there sufficient evidence of his qualification as an expert witness in this regard?*

Answers to Question 3

Counsel for the Applicant responded to this question by stating that although Mr. Salloum is merely a witness of fact, he has a degree of expertise in the area given his active involvement with the homeless community.

Counsel for the Respondent counter-argued that the evidence given of the unsuitability of the Centre is insufficient to establish the Applicants Claim due to the lack of expert evidence on the factors raised such as the medical

illnesses of the persons residing at the centre and its contribution to the spread of disease.

- iv. *Are the first two questions outlined above more suited to and of urgent need to be attended to by the legislature and the executive? If so should the Applicant [and his supporters] not have approached the State [i.e. MPs and Government Ministries] to ensure that all aspects of immediate action are commenced to address the multi-faceted issues critical to affording the street dwellers a life in keeping with human dignity? In other words, is the recourse to the Court by an action against the City Corporation seeking permission to reside at Tamarind Square the appropriate means to uphold human dignity of the Applicant?*

Answer to Question 4

Counsel for the Applicant submits here that the executive and legislature have not done their part in rectifying this situation and so it falls to the court as the guardian of the constitution to guard against breaches of fundamental human rights.

The Respondent refuted this argument submitting that the adequacy of shelter for the homeless is a question to be answered by the legislature as it is based upon broad economic policies and priorities which go beyond the ambit of the Court's jurisdiction. Even further, this question cannot be answered based upon the limited evidence presented in this case, particularly noting the diminished weight to be given to the non-expert evidence of Mr. Salloum on inter alia, persons with medical illnesses residing at the Centre.

b. Question For the Respondent:

- i. *At para. 57 of the Respondent's submissions, it is suggested that "the Applicant and other homeless persons are breaking the law by placing*

various materials in the Square to provide themselves with shelter to sleep while they seek refuge in the Square”. Is there any evidence of this in the present case?

Answers to Question for the Respondent

The Respondent submits here that this evidence is contained in a photograph, exhibit “MD1” to paragraph 5 of the affidavit of Mahase Dass filed on 17 February, 2017 which shows materials used by socially displaced persons on the pathways and grassy areas of the Square.

The Applicant submitted in response that the photographs attached were taken in June, 2017, a date after the filing of this Claim. He contends that it was only after the Square was fenced that the socially displaced commenced placing materials on pathways.

II. Issues

13. The issues that arise for the Court’s determination are whether the Respondent’s actions in relation to Tamarind Square:
- a. Infringed the Constitutional rights of the Applicant and/or other socially displaced persons who spend their nights in Tamarind Square;
 - b. Were ultra vires the Municipal Corporations Act;
 - c. Were made in a manner that failed to conform with the principles of natural justice and/or fairness; or
 - d. Were made in a manner that failed to take into account all relevant considerations and/or in a manner that took into account irrelevant considerations and/or were otherwise “irrational” in a public law sense.

III. Law and Analysis

Fundamental Rights

14. The Applicant submits that the Respondent as a public authority has exercised a power that it has been given in a manner that contravenes the supreme law i.e. the Constitution. In particular, he submits that his rights to “life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law” and to “freedom of movement” have been infringed by the Respondent’s decisions and actions.

15. It is important at the outset to clearly define what decisions of the Respondent have been proven by the evidence. The major decision complained of by the Applicant is the decision to exclude members of the public from Tamarind Square, in particular homeless and socially displaced persons such as the Applicant.

16. The evidence presented by the Applicant of this decision is his own observation of the fencing and locking of four out of the five gates around the square. The Respondent has disclosed no documents relating to such a decision, explaining in the affidavits of both Mr. Jason Lalla and Mrs. Stapleton Seaforth that the Respondent has not in fact taken any such decision. In fact, under cross-examination, Mrs. Stapleton Seaforth vehemently denied that any decision to close the square at nights has been made and stated further that the Respondent has no intention to do so. The Applicant has attempted to shed doubt on the veracity of this evidence, submitting that there would be no other reason for the fencing of the park and that this action was directed at persons in similar circumstances as the Applicant. However, the evidence of the Respondent is accepted as truthful given that the reasons for fencing of the Square were clearly stated in evidence such reasons included facilitating maintenance and protection of public property as well as health and safety but did not include an intention to close the Square at night thereby keeping out the applicant. Accordingly there is no evidence that such a decision was made.

17. The only decision actually made, therefore, is the decision to fence the square and lock four out of the five gates. The Applicant's fundamental rights to life, liberty and security of the person and the right to freedom of movement cannot be said to have been infringed upon by the locking of the four gates. There has been no exclusion of the Applicant from the square and consequently no deprivation or interference with his use of the square. On the contrary the evidence of the Health Inspector is that after the Square was fenced he noticed the homeless moved into the Square.
18. In fact, even if the decision to exclude the Applicant and other similarly circumstanced persons from the square was made by the Respondent, the Applicant would have failed to prove an infringement of his rights due to a dearth of evidence in this case. The Applicant's submission that his fundamental rights have been infringed is reliant on factors such as the lack of availability of suitable alternative accommodation at the CSDP or in other public places. Despite the Applicant's position that his evidence and that of Mr. Salloum was unchallenged, it is my finding that there is no evidence of sufficient weight regarding the conditions of the Centre. In particular, there has been no expert evidence called to give testimony on the alleged risk of contracting diseases, the lack of safety and sanitary conditions at the centre or on the standards of care appropriate for housing of the homeless in general. The Applicant's witness Mr. Anthony Salloum, although highlighting his many interactions with socially displaced persons, is not an expert witness and his testimony on these subjects, without more, carries little weight. Further it has not been proven that there is no other public space available to the Applicant where he can feel a "degree of personal security" at night. In fact, on a balance of probabilities it is unlikely that this is the case.
19. Further on the issue of alleged Constitutional breach, Counsel for the Respondent makes the important submission, relying on the decision of **Tanudjaja v Canada (Attorney General) 2014 CarswellOnt 16752**, that it is not within the province of the Court to embark upon an inquiry into the suitability of housing for the homeless in Port of Spain. Despite the Applicant's submission to the contrary, a determination of the unconstitutionality of the alleged decision of the Respondent necessitates such an inquiry as his contention is reliant upon the lack of *adequate alternatives*.

20. The Applicant's claim that the acts of the Respondent infringed his fundamental rights to life, liberty and security of the person as well as freedom of movement, therefore fails for these reasons.

Ultra vires

21. The Applicant's second ground of review is that the Respondent made a decision which limited the applicant's use of the Square and such a decision should have been preceded by Bylaws permitting the action. Counsel for the Applicant argues that **S.134 of the MCA** mandates bylaws for any decision to "limit the use" of any street, including a square. S.134 provides as follows:

"(1) Subject to the provisions on 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..."

22. "Street" is defined in S.124 as follows:

*"the whole or any part of any highway or road and any public bridge, lane, footway, square, court, alley or passage **whether a thoroughfare or not** and includes any side drains appurtenant thereto"*[Emphasis added]

23. The Applicant argues that even the decision to lock four out of the five gates to the square amounts to a limitation of use as stated in the section. Likening it to a decision to block one end of a street, the Applicant argues that blocking access to one end of the square has similar effects on users of the square as a thoroughfare as it would affect drivers and business owners along a street. However, it is of note that S.124 includes squares in the definition of street "whether a thoroughfare or not". This demonstrates that there may be different uses for squares contemplated in the MCA. There is, however, a lack of evidence in this regard. There is no evidence that this square was regularly used as a thoroughfare

by the Applicant or any other persons. In fact the applicant's case is that he and other socially displaced persons used the Square to sleep in at night. There is no evidence that closing four gates limited that use. On the contrary the evidence is that Respondent's Health Inspector noticed after the fencing of the Square that the homeless had moved in causing other persons not to enter the Square.

24. The only evidence of the use of the square presented to the Court is as a place of refuge at nights for the Applicant. Such use has clearly not been limited by the locking of four of the five gates as the Applicant still has access to the square through the last gate and continues to sleep there at nights.

25. The Respondent has not declared and limited the use by the public of Tamarind Square, either as to the time of such public use or as to the character of traffic in the Square. At its highest, what the Respondent has done (by locking four of the five gates), is arguably to limit the means of access of Tamarind Square, but there is no evidence that this has limited the use of Tamarind Square.

26. As a result, the Applicant has not sufficiently proved that the locking of the four gates amounted to a limitation on the use of the square as would be required to be implemented through bylaws by the MCA. Again the uncontroverted evidence is that there is no decision to lock the fifth gate. Therefore, no action by the Respondent as it relates to fencing and locks on gates at Tamarind Square can be considered *ultra vires*.

Natural Justice

27. The Applicant, citing **S.20 of the Judicial Review Act, Chap. 7:08**, submits that the failure of the Respondent to consult with the Applicant and other socially displaced persons prior to making the decision was contrary to the rules of natural justice. As outlined above, there is no evidence of a decision being made to lock the square at night and therefore this effectively disposes of this ground of review.

28. However, there are several other reasons this ground must fail. As highlighted by the Respondent, the case of **R. v Secretary of State for Education and Employment Ex p. Morris [1996] E.L.R. 162** the English Court of Appeal considered the duty of consultation in an administrative law context:

“Consultation too is not in this context an absolute and inflexible concept. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service spoke only of communicating to the person enjoying the benefit ‘some rational grounds for withdrawing it on which he has been given an opportunity to comment’. A mechanistic approach to the requirements of consultation should be avoided. The nature, the scale, the period may all vary. (3) Prominent amongst the considerations relevant to determining the precise demands of consultation in a given case will be: • (a) Whether the obligation is statutory and absolute or implied in common fairness. If the former, then plainly the process must satisfy in full measure all four of the requirements identified and approved in R v Devon County Council ex parte Baker and Another; R v Durham County Council ex parte Curtis and another at p 91. If, however, the obligation is merely implied, its scope may well be reduced. It may have to be tailored to the practicalities of the situation. • (b) The urgency with which it is necessary to reach a decision. This may impose constraints lest the very process of consultation itself causes delay such as to preempt a particular proposal or other possibly appropriate decisions. • (c) The extent to which during earlier discussions or consultative processes opportunities have been afforded (and, indeed, taken) for views to be expressed by interested, and in particular opposing, parties and the likelihood, therefore, of material and informed additional views or information emerging upon further consultation. This consideration, of course, is only relevant provided that views and information earlier elicited are available to the eventual decision-taker. • (4) It must be recognised that ‘judicial review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure ... to discharge [the] duty to act fairly’ – see Dillon LJ’s judgment in R v Devon County Council ex parte Baker and Another; R v Durham County Council ex parte Curtis and another at p 85...”

29. There is no express statutory duty to consult imposed upon the Respondent in the present circumstances. What is outlined by the Applicant is the general duty of all public bodies to consult as fairness requires. There is therefore, as contemplated by **Ex p. Morris**, a reduced scope for required consultation.
30. In the decision at the leave stage of this matter this Court observed that there were practical difficulties in conducting such a consultation and that the Respondent would have had no indication that the Applicant was a stakeholder in this matter prior to the commencement of this litigation. The Applicant argues that the pre-action letter sent by his attorneys-at-law to the Respondent signified his intention to seek dialogue with the Respondent. However, as the Respondent submits, the pre-action correspondence between the attorneys-at-law for the Appellant and attorneys-at-law for the Respondent, is not evidence that the Appellant or any other person sought dialogue with the Respondent to be permitted to use Tamarind Square.
31. In the instant circumstances it is clear that the Respondent has limited jurisdiction due to its status as a creature of statute. It therefore does not have the authority to consider matters such as the adequacy of alternative housing for the Applicant. Further, there are no standards for assessing whether the admittedly available accommodations at the CSDP are adequate. There is no judicially discoverable and manageable standard for assessing in general whether housing policy and or housing is adequate or whether insufficient priority has been given in general to the needs of the homeless. Consultation with the Applicant and a consequent decision to allow him to remain in the park would raise several issues that the Respondent would then be forced to confront including considerations of health and safety for all users of the park as well as whether such consultation would in effect condone criminal law breaches such as placement of obstructive materials in the Square. As a result, the Respondent could not have been required to consider such matters prior to the making of any decision.
32. The Applicant has therefore failed on this ground.

Failure to take into Account Relevant Considerations and/or Taking into account Irrelevant Considerations and/or Irrational Action

33. The Applicant submits that due to the Respondent's failure to disclose details of discussions leading up to the making of the alleged decision to close all gates so as to exclude the Applicant from the Square, it is obvious that there was not full consideration of the relevant factors by the Respondent.
34. At [52] of his submissions, counsel for the Applicant argues that the Respondent has not disclosed any material that would show the Court:
- a. Whether the Respondent had given any (and, if so, what) consideration of the factual basis for its decisions or actions;
 - b. Whether the Respondent had given any (and, if so, what) consideration to the extent to which its actions were required to meet a pressing social need;
 - c. Whether the Respondent had given any (and, if so, what) consideration to whether the means to be employed is capable of contributing systematically to the desired objective;
 - d. Whether the Respondent had given any (and, if so, what) consideration to whether some less onerous alternative was available.
35. The Applicant's submission on this point is also quickly disposed of by the finding that there was no decision made by the Respondent. Further, the factors outlined by the Applicant in his submissions (See [61] and [62]) that he argues should have been considered by the Respondent have not been borne out by the evidence in this case.
36. The Applicant also argues under this point that the contention by the Respondent that sleeping in the square is illegal per se is unsustainable as a matter of law. **S.45 of the Summary Offences Act, Chap. 11:02** provides:

“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—

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

37. He argues that being homeless is a “good account of himself” as contemplated by the section. The onus of proof of a good account of himself would be on the person found in a public place and this would therefore apply to the Applicant. He has, however, not presented any evidence to prove that his presence there was solely due to homelessness and did not involve any unlawful act of loitering.
38. Further, the Respondent points to other potential infractions committed by the homeless persons who are users of the square. There is evidence in the affidavit of Mahase Dass at [6], [11] and [12] of homeless persons using wooden pallets and other materials for sleeping and the placement of these objects in public areas to the obstruction, annoyance or danger of passers-by are prohibited offences under S.64(j) and (a) of the Summary Offences Act. The Applicant argues that the objects were not placed on any pathways until the locking of the gates. However, the section does not require the materials to be placed on designated pathways in order to constitute an offence. There may still be obstruction to other users of the square as a whole.
39. Overall, the possibility of these offences being committed is present and the Applicant has not challenged the statute itself. The prosecution of these offences and the possible defences would be left to the discretion of the police. In the present case however, there is insufficient evidence from the Applicant to rule out this potential criminality and therefore it is a relevant factor for the Respondent to have taken into consideration.

40. As a result of there being no decision as well as the Applicant's failure to prove that there have been any irrelevant considerations taken into account or failure to take into account relevant considerations, this ground of review also fails.

Legitimate Expectation

41. The Applicant submits on this final point that he has a legitimate expectation of being allowed to stay in the square overnight due to the conduct of the Respondent over the past 50 years of allowing similarly circumstanced persons to seek refuge in the square overnight. The Applicant states that since the leave stage no further evidence has been presented to contradict that of his witness Mr. Salloum's "unchallenged" testimony. Counsel for the Respondent contends however the Court is not bound to accept evidence solely on the basis that it is unchallenged. The merit and weight must also be considered.

42. The Respondent's submission that the court is not bound to accept unchallenged evidence with which it is not satisfied is accepted. In the present case the Applicant himself has failed to show a settled practice of being among a group making their home at Tamarind Square. The 50-year span that his witness Mr. Salloum describes is admitted by the Applicant himself to have been interrupted by actions of the Respondent that contradict such a practice. The Applicant admits that he once spent nights at Woodford Square until the Respondent exercised its powers to close that and other squares at nights. Furthermore, the Applicant's personal experience at Tamarind Square only began two years prior to the commencement of this action.

43. There is also the very important consideration that the Respondent can only act within the scope of the powers outlined in the MCA. The Respondent has no jurisdiction to provide accommodation or facilities to displaced persons. Such provision would be ultra vires and incapable of becoming a legitimate expectation - **PHI Americas Limited v The Trinidad and Tobago Civil Aviation Authority CV2016-00715; Rainbow Insurance Co. Ltd. v Financial Services Commission of Mauritius 2015 UKPC 15.**

IV. Conclusion

44. For all of the foregoing reasons, the Applicant has failed to satisfy the Court that the Respondent made a decision that should be reviewed. This conclusion is largely based upon the strength of the evidence from the Respondent's witnesses that no decision to lock the gates to the square at night had been made as well as the opposing dearth of evidence in support of the Applicant's contentions. The Respondent therefore has not been found to have limited the use by the public of Tamarind Square in a manner that is unlawful in public law, and there is no such decision to be declared in breach of the law.

45. Although the Respondent strongly maintained that it intends no draconian measure to keep the Applicant and other homeless persons out of the Square there is no admission by the Respondent that the Applicant has a right to reside or sleep there. The Respondent's submission that no such right exists in law and on the facts of this case has been upheld in this Judgment. As a result the Claim for tents and portable toilets to be placed by the Respondent in the Square also fails. This is so because neither the right of the Applicant to sleep in the Square nor the duty of the Respondent to provide accommodation in the Square has been proven. As such the Court will not to grant the reliefs sought by the Applicant and the claim is dismissed.

46. The Respondent is awarded costs fit for senior and junior counsel to be assessed by a master if not agreed.

.....
Eleanor Joye Donaldson-Honeywell
Judge

Assisted by: Christie Borely JRCI