REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2018-03359**

IN THE MATTER OF THE JUDICIAL REVIEW ACT

BETWEEN

NATIONAL CARNIVAL BANDS ASSOCIATION OF TRINIDAD AND TOBAGO

Claimant

AND

DR. NYAN GADSBY-DOLLY, THE MINISTER OF COMMUNITY DEVELOPMENT, CULTURE AND THE ARTS

Defendant

AND

TRINIDAD AND TOBAGO CARNIVAL BANDS ASSOCIATION

Interested Party

<u>Before the Honourable Mr. Justice V. Kokaram</u>

Date of Delivery: Tuesday 30 April, 2019.

Appearances:
Mr. Anthony Vieira, Mr. Rikki Harnanan and Mr. Justin Phelps instructed by Ms. Elena Da Silva-Ottley, Attorneys at Law for the Claimant.
Ms. Karlene Seenath instructed by Ms. Amrita Ramsook, Attorneys at Law for the Defendant.
Mr. Shiv Sharma and Mr. Kiel Taklalsingh instructed by Jamie Amanda Maharaj, Attorneys at Law for the Interested Party.

JUDGMENT

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Introduction-"J'Ouvert"[1]

"Mas is not Carnival; Carnival is a central rite which includes mas. But mas is when you are always playing the Other. There are many different Others and you are making yourself like all the Others you have to deal with, for the purpose of lubricating society – for making relations easy. …. but the more intriguing thing is that mas also requires you play yourself in many different incarnations. So you are not only playing the Other you are playing yourself.(2001)"-Lloyd Best[2]

1. Mas in Trinidad and Tobago's Carnival is at once mask and truth. A cultural product described as a moving metaphor and a glimpse into our changing social order, the mas is also theatre and rebellion, integration and assimilation, independence and nationhood.

2. The Carnival band comprising masqueraders playing "themselves" and "the Other" is the cultural vehicle for the expression of the drama and spectacle that is the mas which is in its own state of evolution. The masquerade of the mas, with its 18th century roots, provide a complex social mechanism to deal with the milieu of relationships of our post-colonial society and complex questions that arise when merging the common paths for various publics in a multi-ethnic democracy such as ours. In like fashion, public officials must be sensitive to the relationships in which they are engaged in the discharge of their public function. Like the mas, the various roles they play are for the purpose of lubricating society with the hallmarks of good governance and administrative justice. Indeed, the complex question of the role to be played by the Minister[3] in her relationship with several Carnival band associations forms the backdrop to this judicial review claim.

3. This judicial review claim of the NCBA[4], a Carnival band organisation, concerns an important question in the administration of our mas. The decision under review is the Minister's decision to appoint a nominee of the TTCBA[5] as the organisation "most representative of

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[1] J'Ouvert, derived from the French patois means "daybreak." It marks the official start of the two day Carnival celebrations in Trinidad and Tobago, at dawn on the Monday preceding Lent.
[2] "'**Who ent dead, badly wounded': The everyday life of pretty and grotesque bodies in urban Trinidad" by Dylan Kerrigan**, page 9.
[3] The Minister of Community Development, Culture and the Arts, Dr. Nyan Gadsby-Dolly, the Defendant
[4] The National Carnival Bands Association of Trinidad and Tobago, the Claimant.
[5] The Trinidad and Tobago Carnival Bands Association, the Interested Party.

Carnival bands" pursuant to section 5(1) (b) of the National Carnival Commission Act Chapter 41:01 (the NCC Act) as a board member for the NCC, the statutory body responsible for co-ordinating our Carnival. For the NCBA, this decision represents a change in status, their nominee having been appointed by the Minister for several terms for the past twenty one (21) years as such an organisation most representative of Carnival bands.

4. Much like the masquerade itself, this dispute is itself a metaphor for social change. The legal challenge focuses intensely on the criteria and process by which representatives of Carnival band organisations can be nominated as a member of the NCC, reflecting the realities of the evolving cultural product of mas and Carnival bands. The NCBA has described itself as the pioneers and preservers of mas in its traditional form. The TTCBA perceived by the NCBA as the "bead and feather" fancy mas, the purveyors and destroyers of the traditional mas. There is no doubt a tension between history and change.

5. The NCBA, a self-proclaimed and historic institution that was the representative of mas complains of being relegated to the pavement while the TTCBA, if only temporarily, now reign the streets. NCBA contends that the Minister's decision was unfair, flawed and procedurally improper; that the Minister acted improperly and outside the scope of her powers and that it was irrational and unreasonable for the Minister to conclude that the TTCBA is the organisation that is most representative of Carnival bands in Trinidad and Tobago.

6. They see this appointment as a result of flawed logic, manifest unfairness or a decision simply outside the Minister's statutory remit. A main complaint has been the use by the Minister of a mas audit conducted by the NCC to determine which organisation is the most representative of Carnival bands. They complain that this mas audit was factually incorrect and its premise baseless. They also complain that they had a legitimate expectation to be consulted directly by the Minister before any change in their status as representative of Carnival bands could be effected.

7. The legal challenges raised are tinged with the beads of humanism: the issue of proper consultation, acting fairly, acting within the confines of logic, good sense, rationality, and

within the remit of statutory powers. These are all the masks and symbols of a public morality.

8. For the reasons set out in this judgment, in my assessment the process engaged by the Minister was rational, legal, fair and proportionate. There may have been different methods by which a representative could have been chosen. However, this by no means suggests that the process of utilising a mas audit was a flawed one. As this judgment explains, the NCBA had no vested right nor interest to be appointed as the nominee on the NCC board. The consultations engaged by the Minister with the stakeholders including NCBA were sufficient to bring the question of settling an objective method to determine the question of representation to the minds of those impacted by a mas audit. There was an open exchange of information of the criteria to be used in the mas audit. While the Minister did not have a one to one meeting with the NCBA, this is not a critical flaw in the process of determining the criteria for a mas audit to assist in her deliberations in making a section 5(1)(b) appointment. Much like designing the mas, the alleged imperfections of the process contended by the NCBA were insufficient from detracting from the overall picture of legality, regularity and procedural propriety of the Minister's actions.

9. This judgment analyses the Minister's decision to appoint the TTCBA under the traditional heads of judicial review of illegality, irrationality and procedural impropriety as well as the ground of proportionality. A proportionality review in this case will call for a close examination of the balancing exercise conducted by the Minister of the relevant competing factors in arriving at her decision. Recognising that the Minister must balance the interests of all the stakeholders in the Carnival band sector, her ultimate choice evenly held in the balance these competing interests of the separate groups.

10. However, I have gone further than just a legal analysis of this dispute. At my invitation, by consent with the parties, I explored with them their underlying motives, needs and concerns which underlie this dispute. They are simple and profound; the need for voice, the need to be treated with respect, the need to ensure good governance of the mas and Carnival. There may be larger issues which underlie this judicial review claim about the changing times for Carnival and mas. Is Carnival's mas dying? Are the days of the original

craftsman over? Is the development of our mas trapped in historical roots or liberated, free to evolve to meet the demands of the various publics? Is there an effective voice for mas in the organisation of our Carnival? Are all stakeholders treated with respect in the development of mas? Has the involvement of the State in the regulation of Carnival led to good governance? Are representatives of "Carnival bands" a suitable nominee for giving voice for the representation of the mas on the NCC?

11. This judgment leaves these questions unanswered. These questions no doubt are policy and legislative issues but clearly the controversy such as this one over selecting the organisation that is most representative of Carnival bands may detract from the larger needs of saving our mas and preserving a historical product which all parties should continue to collaborate. To this end, as I explained to the parties, committed to a process of finding peaceful resolutions and reconciliation for disputing parties through a therapeutic approach to judging, I have sought at the end of this judgment to offer to the parties a confidential non-binding guide on a way forward in resolving some of these pressing issues which fall outside of this legal dispute but which are important for the establishment of harmonious relationships between the stakeholders of our Carnival and mas and to pre-empt any further conflict.

Factual backdrop-"Entering the Mas Camp"

12. Mas[6] or Masquerade is the oldest of Carnival art forms in Trinidad. It can be traced to the French planter class who came to the islands accompanied by their slaves following the Cedula de Population edict of 1783, which offered new immigrants land grants, tax concessions and protection. It was brought to the streets following emancipation. From its European and African roots the mas as a product of expression, communication and rebellion for slaves, like all forms of cultural expression has evolved over time influenced by the changing socio political climate and international forces. But the common ethos of the mas is the attraction of playing "the Other", the mas and the mask, the assimilation of

[6] See "**Mas- A technical description**" prepared for The National Carnival Commission of Trinidad and Tobago, 9th May 2014.
See also **"Under the Mas: Resistance and Rebellion in the Trinidad Masquerade"** by Jeff Henry

different roles in a complex changing multi religious and multi ethnic society.[7]

13. Aspects of the French and Spanish influences can be found in traditional masquerade characters such as the "mulatress" the Dame Lorraine and revellers blackened with mud and oil evocative of field slaves. The Borokit masquerade and later English and American influences in the military-themed masquerades which became especially popular from the 1930s -1960s due to the two world wars and the stationing of United States troops in Trinidad during the 1940s and 1950s. Traditional mas characters have evolved over the years which bear their own cultural significance.[8] Contemporary masquerade is now dominated by what is described as "fantasy mas'" which are costumes adorned with beads, feathers and other decorative materials. The playing of mas is typified by parades of several sized bands from the early hours of Carnival Monday to the late evening of Carnival Tuesday. The highlight of revelry for most masqueraders range from the crossing of the stage, such as the famous Queen Park Savannah, dancing to the blaring of live or recorded music or dancing to the rhythm section drenched in mud, oil or paint on the streets while the sun rises on a Carnival Monday morning. For the purists, the fantasy mas is perceived as the death of traditional mas; for the millennials, a continuing evolution of their cultural expression of freedom and "playing yourself".

14. Masquerade bands were the first to develop their own special interest groups (SIGs) to address several concerns about the management of the festival. The Carnival Bands Union was established around 1942. This group was superseded by another group called the Carnival Bands Leaders Association in 1958. It was a group that was engaged in making recommendations to government bodies for the improved condition and facilities and prize

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[7] See the discussion in **Pan Trinbago Inc v The National Carnival Commission of Trinidad and Tobago** CV2017-00568, pages 6-7.

[8] **The Moko Jumbie**- The Moko Jumbie walks on long wooden legs and has a stately, floating presence.
The Jab Jab- The Jab Jab's weapon of choice is a whip of plaited hemp or other material which is loudly brandished and cracked to threaten and announce the Jab Jab's appearance.
Jab Molassie- A variety of devil mas. The Jab Molassie is smeared with soot, molasses, tar, grease or various dyes.
Dame Lorraine- Portrayed as a woman with a large boom and even larger backside who carries and umbrella.
The Baby Doll- She is depicted as a single youthful mother of African descent with an infant in her arms and is desperately searching for the father of her child.
The Midnight Robber-He wears a wide brimmed hat, a whistle to clear the path and a shirt of different colours. He also wears an oversized pants belted by crisscrossed straps that held one or two holsters.
See "Under the Mas: Resistance and Rebellion in the Trinidad Masquerade" by Jeff Henry.

money for Carnival mas bands. The membership widened to include designers, craftsmen, costume builders and other persons involved in Carnival activity. It became known as the National Carnival Band's Association then the National Carnival Bands Association of Trinidad and Tobago in 2001. The NCBA describes itself as the vanguard of Carnival activities, best known for hosting the Kings and Queens Preliminaries; Junior Kings and Queens Preliminaries; Junior Individuals in Age Groups and Categories; Senior Kings Semi-Finals and Junior Queen Finals; Conventional and Traditional Individuals; Senior Queens Semi-Finals and Junior King Finals; Junior Parade of the Bands; Nostalgia; J'Ouvert; and Parade of the Bands on Carnival Monday and Tuesday. It was a SIG that would represent Carnival bands in the management of Carnival by the NCC since 2007.

Chronology of events leading to the Minister's decision

15. The chronology of events leading up to the Minister's decision is not in dispute and can be conveniently summarised as follows:

- The Minister came into office on 11th September, 2015.
- On October 15th 2015, the Minister engaged the question of which organisation was most representative of Carnival bands. To accomplish this she requested the membership lists of the TTCBA, NCBA and NCDF[9] as the appointment of Commissioners to the board of the NCC was imminent and she needed to identify the organisation most representative of Carnival bands. Lists were submitted on October 2015.
- The new NCC board was appointed on 29th October 2015, however, the term of the representatives of the three SIGs were due to expire in December 2016. No new appointments were made to the NCC representing the SIGs with the intention that such appointments would be made at the end of the expiration of their current term of office in December 2016.
- Meanwhile judicial review proceedings in **David Lopez v Dr. Lincoln Douglas**

[9] The National Carnival Development Foundation

Minister of Arts and Multiculturalism CV2015-02080 was ongoing concerning the termination of the appointment of the NCBA representative for disciplinary reasons. The litigation ended with a decision ordering the reappointment of the representative of NCBA to the Board of NCC in December 2015.

- Between December 2015 and February 2016 NCC and representatives of NCDF, TTCBA and NCBA met with the Minister to discuss the way forward for Carnival 2016.
- In the face of the organisations different views on the state of their membership, in October 31st and 2nd December 2016, the Minister sought and received legal advice retained by the NCC and the Ministry's legal department on the issue of the interpretation of section 5(1) of the NCC Act and the process to be followed in determining whether NCBA, TTCBA or NCDF was most representative of Carnival bands. The Ministry was advised to propose a position to the stakeholders on the criteria to be used to determine the state of their membership and consult with the mas associations to finalise these. Once the criteria was established, a mas audit could be conducted.
- The Minister entered into consultations with the three groups commencing on 14th December 2016.
- The term of appointment of the SIGs on the NCC board ended on 3rd December 2016.
- On 16th January, 2017, the Minister appointed the existing SIG representatives including the NCBA to the board for a period co-terminus until 29th October 2017.
- The decision to re-appoint the representative of the NCBA was done notwithstanding that consultations were not yet completed on the mas audit, but to preserve the status quo until such time that the criteria for the mas audit could be established. The Minister expected that the exercise of consultations and conducting the mas audit would have been completed in time for the new appointments in October 2017.

- However, her decision to appoint the NCBA was challenged by the TTCBA in **Trinidad and Tobago Carnival Bands Association v The Minister of Community Development, Culture and the Arts and The National Carnival Bands Association of Trinidad and Tobago** CV2017-01240. The TTCBA complained that the decision of the Minister to reappoint the representative of the NCBA to the Board of NCC was illegal, unlawful and ultra vires of the NCC Act since NCBA was not most representative of Carnival bands.
- The consultations were suspended pending the decision in that matter.
- The term of office of the NCBA on the NCC expired in October 2017. No new appointments were made by the Minister as the litigation was still on-going.
- Eventually, the decision in the said litigation was delivered by Justice Charles on 10th January 2018 dismissing the TTCBA's claim. Importantly, Justice Charles held that the Minister's decision to reappoint the NCBA's representative co-terminus until the criteria to conduct the mas audit was established, was reasonable and fair. Therefore, the maintenance of the status quo by the Minister was the only reasonable and rational course to be adopted. Justice Charles further commented that the mas audit which was being discussed should be finalised to inform the Minister's decision on the suitable nominee.[10]
- The TTCBA and the NCBA filed an appeal and cross appeal respectively of the said decision. The Court can take judicial notice that the hearing of that appeal is still outstanding and it is unlikely to be heard anytime this year[11].
- The consultations by the Minister with the Carnival band organisation resumed by letter dated 20th February 2018 inviting the groups to a meeting.
- A meeting was held on 9th March, 2018 and the NCBA attended.

[10] This decision is the subject of an appeal filed 21st February 2018 and a cross appeal by the NCBA filed 5th March 2018.
[11] The interested party submitted that the appeal is likely to be heard three years from the date of the judge's decision.

- The NCBA did not comment on the criteria for the mas audit but the TTCBA and NCDF did.
- On 16th March 2018, the Minister forwarded, via email, the amended proposed criteria dated 15th March 2018 to the Chairman of the NCC.
- The Minister received the NCBA's letter of 19th March 2018 indicating why it should be appointed to the board of NCC.[12] In that letter, they stated, among other things:

  "As you may be aware, NCBA's lawyers made detailed submissions about the meaning and intent of the phrase 'most representative of mas bands' under section 5(1)(b) of the National Carnival Commission of Trinidad and Tobago Act ('the Act') in the proceedings brought by TTCBA and they will be asking the Court of Appeal to rule on the issue in our cross-appeal in CA PO62 of 2018.

  ………..

  In summary, the NCBA maintains that unless and until the courts specifically hold otherwise the Act requires you, as Minister, to determine most representative taking into account (1) a proper construction of the Act; (2) a proper construction of the National Carnival Bands Association of Trinidad and Tobago Act; and (3) the NCBA's legitimate expectation based on settled practice and a clearly articulated policy confirmed by Cabinet on 14 August 1997.

  Further (4) there is no power under the Act enabling you, as Minister, to re-visit established practice or to prescribe new criteria regarding most representative; and (5) the comments and positions advanced by TTCBA and NCDF as to what most representative could or should mean woefully fall short of the mark and only serve to underscore their unsuitability and unfitness for the position."

  The letter went on to state that the Minister only had a duty to consult with the NCBA and not the TTCBA and NCDF:

  "The Act does not require you, as Minister, to consult with either the TTCBA or

[12] Exhibited D.L.14 in the Affidavit of David Lopez filed 19th September 2019

NCDF; there is no prescribed consultation process; and neither organization has a legal right or legitimate expectation that consultation should occur.

While one understands why these two bodies would crave the Honourable Minister's courtesy and indulgence for so-called consultations, in our respectful view, such meeting cannot and should not be elevated to that status. Indeed, doing so-as borne out in the recent litigation brought by TTCBA- is likely to create confusion and problems.

In fact, the only organization you, as Minister, are legally required to consult with is the NCBA given that a change in our status as *most representative* will affect our legal rights and interests. If a change of policy is under consideration- as appears to be the case- then, in those circumstances, the principles of natural justice and fairness require that the Association is so informed and afforded the opportunity to make representations for your consideration in the matter."

- The Minister formulated the criteria for "most representative of mas bands" based on the consultations, comments and advice she received.
- On 1st May 2018, the Minister held a meeting with the Chairman and CEO of the NCC where the proposed criteria was discussed.
- The NCC conducted the mas audit and submitted the results to the Minister based on the established criteria by letter dated 25th May 2018. NCC advised the parties that based on the 548 carnival bands in the survey conducted by the NCC, 61 was affiliated with NCBA, 72 to TTCBA and 24 to NCDF.
- By letter dated 29th May 2018, the Minister conveyed her decision to the mas organisations that based on NCC's records and a mas audit conducted by them, she would be recommending to Cabinet that TTCBA's nominee should be appointed to the board of the NCC for the balance of the life of the current board as the Carnival band representative.

The Decision under review

16. The Minster's said letter of 29th May 2018, indicating her intention to appoint the TTCBA based on the NCC's records and mas audit, confirmed the criteria for a mas band used in the 2018 mas audit as:

    - A band must comprise at least five (5) persons;
    - A band could be located anywhere in the Country;
    - A band must be registered with the NCC for Junior, Senior and Regional Mas, the San Fernando festivities, and the Tobago Festivals Committee for Carnival Celebrations in Tobago.

17. The criteria for a mas band for 2019 included the 2018 criteria and additionally:

    - J'Ouvert bands must register with the NCC.
    - While bands may belong to any Mas Association, for the purposes of the mas audit of the bands, they will only be allowed to register as belonging to one association.

18. It is important to note that based on NCC's mas audit a large number of Carnival bands (391) in the country is not associated with any Carnival organisation.

19. The letter also stated that from the Mas Audit conducted to determine the most representative Mas Association for 2018, the following was determined:

    a) National Carnival Bands Association (NCBA)- 61 bands

    b) Trinidad and Tobago Carnival Bands Association- 72 bands

    c) National Carnival Development Foundation (NCDF)- 24 bands

20. On 21st June 2018, the Minister's decision appointing Ms. Rosalind Gabriel, the nominee of TTCBA to the board of NCC as the organisation most representative of Carnival Bands was announced.

21. The decision made by the Minister was made pursuant to section 5(1)(b) the NCC Act which provides as follows:

“5. (1) The Commission shall be managed by a Board of Commissioners (hereinafter referred to as “the Board”) which shall consist of nine persons who have demonstrated an interest in the cultural or commercial aspects of Carnival and with experience or training in finance, management, government, international trade, law, export-oriented business, commerce, culture or the arts, appointed by instrument in writing by the Minister and which shall include—

(a) one nominee from the organisation that is most representative of the steelband movement;

(b) one nominee from the organisation that is most representative of carnival bands;

(c) one nominee from the organisation that is most representative of calypsonians;

(d) such other persons as the Minister may appoint.”

22. In essence, for the purpose of discharging her duties under the NCC Act, the Minister had now been faced since her appointment with a new relationship with three band associations. The legitimate question which arose when she is exercising her discretion to appoint a nomine pursuant to section 5(1) (b) is “Which of the three associations is the organisation most representative of Carnival bands.”

<u>The Characters</u>

23. By way of further context for the Minister’s decision, it would be helpful to understand the “characters” in this masquerade.

THE NCC

24. The NCC was served with these proceedings but declined to participate. No formal application was made to join them as a party to the dispute.

25. The NCC was established pursuant to the National Carnival Commission Act Chapter 41:01 (the NCC Act). Their main objects included among other things to provide the necessary managerial and organisational infrastructure for the efficient and effective presentation and

marketing of the cultural products of Carnival[13]. Importantly, one of its main object is to make Carnival a viable national, cultural and commercial enterprise.

26. The NCC is managed by a Board of Commissioners appointed by the Minister of Community Development, Culture and Arts. The Board comprises a mix of specialists and representatives of SIGs. The Minister appoints these members of the Board comprising specialists of nine persons who have demonstrated an interest in the cultural or commercial aspects of Carnival and with experience or training in finance, management, government, international trade, law, export-oriented business, commerce, culture or the arts. The Minister has a free hand so to speak to choose such a member with the expertise for six members and with regard to three the experts are nominees of SIGs: one each from the organisation that is most representative of the steel band movement; the organisation that is most representative of Carnival bands and the organisation that is most representative of calypsonians.[14] The nominee of the organisation most representative of Carnival bands is one of three SIGs in the festivities of Carnival whose expertise and experience would be harnessed in the overall development of the Carnival product, management of Carnival and execution of the work of the NCC.

27. While the NCBA was historically the only organisation over the years that was then appointed the organisation that most represented Carnival bands, of recent a number of organisations emerged representing Carnival bands and a genuine question arose: Which organisation most represents Carnival bands for the purposes of section 5(1)(b) of the NCC

[13] Section 4(b) of the NCC Act.

[14] Pursuant to section 5 (1) of NCC Act, the composition of the NCC is set out as follows:

> "5. (1) The Commission shall be managed by a Board of Commissioners (hereinafter referred to as "the Board") which shall consist of nine persons who have demonstrated an interest in the cultural or commercial aspects of Carnival and with experience or training in finance, management, government, international trade, law, export-oriented business, commerce, culture or the arts, appointed by instrument in writing by the Minister and which shall include—
>
> (a) one nominee from the organisation that is most representative of the steelband movement;
>
> (b) one nominee from the organisation that is most representative of carnival bands;
>
> (c) one nominee from the organisation that is most representative of calypsonians;
>
> (d) such other persons as the Minister may appoint."

Act, whether the NCBA, the TTCBA or the NCDF?

THE NCBA

28. The NCBA was incorporated by the National Carnival Bands Association of Trinidad and Tobago (Incorporation) Act of 2007 (the NCBA Act). It was previously known as the Carnival Band Leaders Association and dates back to 1958. For the past sixty (60) years, the NCBA contends that it has represented the interests of Carnival bands and the mas community. It concerned itself with the innovation and marketing of mas with a view to the development and sustainability of the mas as a cultural and commercial product.[15]

29. The NCBA was incorporated by statute long after the promulgation of the NCC Act. Its aims and objectives are to:

> "**4** (a) foster and promote for the benefit of its members, the development and best interests of Carnival, the expressions of Carnival and ancillary arts and activities (hereinafter collectively referred to as "Carnival");
>
> (b) protect and further the artistic, social, legal and other interests of the Association and its members in all matters relating to Carnival;
>
> (c) ensure the operation of the rights, including intellectual property rights, and liberties of the Association and its members so that each may be afforded equal facilities and equitable distributions of the benefits to be derived from Carnival;
>
> (d) represent the interests of the Association and its members in dealings with the State, the National Carnival Commission of Trinidad and Tobago, and other persons whether

[15] The NCBA's mission statement is

> "The NCBA will meet and exceed the needs and expectations of its members by relentlessly implementing critical initiatives in areas such as innovation, marketing, self — sustainability, Information & Communication Technology (ICT), and The Mas Academy in partnership with all stakeholders; especially in sustenance of traditional mas while achieving our vision in support of the national quest for Carnival - the Industry."

Its vision statement is:

> "To be the catalyst of Traditional Trinidad and Tobago Carnival especially in the re-creation and sustenance of the legacy and talents of original craftsmen in collaboration with our local and international stakeholders in the quest for Carnival -the Industry." See The Constitution of the NCBA.

public corporation, corporate or individual, whether in Trinidad and Tobago or overseas;

(e) promote policies and laws conducive to the attainment of the aims and objectives of the Association, and to resist and oppose anything which appears to be detrimental to the interests or welfare of the Association and its members by taking legal or other action;

(f) promote cordial relations, fellowship, collaboration and united action between the Association and its members and other persons or bodies involved in Carnival, whether in Trinidad and Tobago or overseas;

(g) liaise and collaborate with other bodies having similar objectives, whether in Trinidad and Tobago or overseas, and where appropriate, to seek affiliation with or membership in those bodies; and

(h) do all such things as are necessary or expedient for the efficient administration of its aims and objectives or furthering the interests of the Association and its members."[16]

30. The NCBA has commendably completed a number of projects in the development of Carnival and mas.[17] NCBA contends that they have been long recognized, locally, regionally and internationally as an established leader in the Mas Fraternity. They have also made contributions to copyright law by creating the intellectual property right known as "works of mas". They further contend that over the last sixty (60) years they have acquired and developed considerable experience and expertise regarding Trinidad and Tobago's unique Carnival events as it relates to the movement of bands; their routes; the registration

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[16] Section 4 of the National Carnival Bands Association Act

[17] Paragraph 12 of the affidavit of David Lopez provides at 19th September 2018

a)Computerization of the entire adjudication process for Carnival;

b)The creation of a suite of electronic systems for managing all aspects of mas;

c)The securing of an audible online, real-time access for planning and scoring information;

d)Establishment of the first online registration process (this culminated with a registration card for each participant- whether band or individual- much like a credit card, with registration fees being paid at a band and participants collecting their registration cards at the NCBA's office);

e)Establishing BIG Friday;

f)Expanded marketing of the country's Carnival products locally and internationally, including the use of social media such as Facebook in promoting mas events and the mas section; and

g)Worldwide live streaming of the NCBA's competitions and events, in particular the Parade of the Bands.

process; and adjudication. In addition to their expertise and experience, they contend that they also have the gravitas, support systems and technology to properly represent the mas community.

31. In 2016, NCC took over the mas element of Carnival including the Parade of the Bands and the Junior Carnival Competitions which has been a source of concern for the NCBA.

THE TTCBA

32. The TTCBA was incorporated on 2nd January 2013 as a non-profit company under Part V of the Companies Act Chapter 81:01. Its aims and objectives include the promotion, enhancement and development of the Mas component of Carnival and the cultural related art form and activities in Trinidad and Tobago as well as internationally.[18]

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[18] The TTCBA bye laws are:

a)"To promote, enhance and develop the Mas component of Carnival and the cultural related art form and activities in Trinidad and Tobago as well as internationally;
b)To promote transparency, accountability and fairness in the conduct of the affairs of the Association;
c)To represent, express and give effect to the views and opinions of our members and to assist in determining and outlining the goal of the Mas fraternity;
d)To improve the image of the Carnival;
e)To represent our members in dealing with the National Carnival Commission, the Government, other Associations, the Media Broadcasters, Sponsors and others;
f)To enter in agreements with other similar Associations or bodies for the advances of and the protection of our Association as it relates to Carnival interest and activities;
g)To subscribe to and promote the aims and objects of any society or association having similar objects to all or any of the objects of the association and to encourage and support any society association or movement for the improvement of Carnival;
h)To print and publish any newspapers, periodicals, books or leaflets that the Association may think desirable for the promotion of its objects;
To develop, promote and protect the works of art, the cultural heritage and the image of Trinidad and Tobago Carnival;
i)To assist through negotiations and dispute resolution systems the settlement of differences, disputes and controversies between our members and between our members and others;
j)To assist in the organization and running of Carnival, and Carnival related activities including competitions, shows, pageants, performances and ancillary events;
k)To develop and manage the formation of a Carnival Academy which will provide educational offerings including workshops, training programmes, motivational sessions, lectures and conferences for its members;
l)To ensuring that the funds of the Association are effectively managed in the best interest of the members and that there are systems of accountability with respect to the realization and expenditure of these funds;
m)To consider, promote and support improvements in the law which appears to be conductive to the attainment of the objectives of the association, and to resist and oppose anything which appears to be detrimental to the interest or welfare of any of its members by taking legal action or otherwise;

33. The TTCBA supported NCC's decision to take over the running of mas from the NCBA. Though incorporated in 2013, the TTCBA contends that the organisation is comprised of several experienced and knowledgeable persons in Carnival. These persons include Mr. Dune Ali, long-time producer of Junior Carnival bands who has also produced night mas bands for many years and served on the Parade of the Bands Committee; Mr. Roland St. George (now deceased) who played King of Carnival for forty years, was a bandleader and was a member of the NCBA for many years; Mr. Gerry Weekes who play king under the Minshall banner and MacFarlane banner and is a bandleader; Mr. David Cameron who served on the Board of the NCBA for many years while being a bandleader; Ms. Jacqueline

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n)To promote a friendly atmosphere, uplifting fellowship and a united front amongst its members through the following:

a. Promotion of activities, stimulation of professionalism and social interaction;

b. Honouring persons and organizations for outstanding accomplishments or contributions to Carnival;

c. Arranging and providing for or participating in the holding of conventions, symposia, consultations and meetings;

d. Providing opportunities for recreation, social intercourse and refreshment.

o)To liaise and collaborate with any institution, Association or body, national or international having similar interest and where appropriate, to seek affiliation or membership in such bodies;

p)To do all things that are necessary or expedient for the efficient administration of its objectives and functions or furthering of its interest or the interest of its members;

q)To faithfully represent the Mas fraternity in all issues related to intellectual property rights."

Under the Articles of Incorporation of the TTCBA, Schedule A- Item 4, the restrictions on the undertakings that the company may carry on are set out as:

"The undertaking of the company is restricted to planning and implementing programs and activities for the development of Carnival in Trinidad and Tobago including:

a. Organizing, managing and the marketing of Carnival Shows, Parades and Competitions.

b. Representing the Mas Fraternity in an effort to promote fairness, fellowship, camaraderie and support for the development of local culture and also to foster and promote the expressions of Carnival Interest Groups through education and legal support.

c. Protecting the image of Trinidad and Tobago through the improvement and development of the Carnival annually.

d. The formation of a Carnival Academy which will provide educational training and work shops in the Carnival arts, along with motivational sessions and lectures.

e. The sourcing of related mas materials as used in the Carnival Industry in order to reduce the present exorbitant cost of playing mas;

f. To faithfully represent the Mas Fraternity in all matters concerning intellectual property rights and in dealing with the Government of Trinidad and Tobago, the National Carnival Commission and the public in general.

g. Ensuring the funs of the Company are effectively realized and expended for the benefit of Carnival and Carnival related activities, and that there are appropriate systems of accountability with respect to the realization and expenditure of such funds."

Burgess who has been involved in the Women's Movement for thirty eight years; Mr. Balnarine Benny known for his King of Carnival presentations and Mr. Kenny Attai, a management consultant who is on loan to the TTCBA from Mr. Dean Ackin and the Tribe Group of Bands. Mr Rosalind Gabriel, the President of the TTCBA, the nominee appointed by the Minister is herself an experienced artist and has demonstrated her interest in the cultural aspects of Carnival with experience in this art form. She is the only bandleader in Children's Carnival to produce a Trilogy honouring Calypsonians (Tempo in 1998), the great Bandleaders (Carnival Time Again in 1999) and the Steelband Movement (Panorama in 2000). She also received an award for the innovation in mas from the Carnival Institute of Trinidad and Tobago in 2006 and the Hummingbird Medal (Bronze) for Culture in 2007. It should be noted that the main challenge of NCBA is not of Ms. Gabriel herself being a suitable nominee for lack of experience required for a section 5(1)(b) appointment but of the TTCBA being found by the Minister as the organisation most representative of Carnival bands.

The NCDF

34. The National Carnival Development Foundation (NCDF) is a Non-Governmental Organization incorporated under the Companies Act, 1995 of Trinidad and Tobago on 12th June, 2003. The NCDF "contributes to the advancement of the national, regional and international community by providing the opportunity to develop the leadership skills, social and cultural responsibility and fellowship necessary to create positive change through mas and Carnival"[19]. The functions of the NCDF include the development of an awareness and acceptance of the responsibilities of citizenship through mas and Carnival.[20]

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[19] The National Carnival Development Foundation http://www.ncdftt.com/about-us/ncdf-background

[20] The functions of the NCDF include:

- Organization of seminars, workshops and conferences on all aspects of carnival
- Promotion of economic development among its membership.
- Undertaking activities designed to bring together persons involved in the Carnival and Mas fraternity.
- Establishment and maintenance of friendly relations with regional and international carnival associations.
- To represent and promote the cultural, economic, social and legal interests of its members in carnival locally and overseas.
- To control, administer, exercise and enforce on behalf of members of the NCDF who are Producers,

35. The NCDF's sees itself as becoming the premier global industry in the design, production, marketing and distribution of the Trinidad and Tobago Masquerade that would assure their sustained contribution to the economy of Trinidad and Tobago[21].

36. These two organisations, NCBA and TTCBA are of themselves no strangers to litigation. In the preceding litigation **CV2017-01240**[22], TTCBA had challenged the Minister's decision to reappoint the representative from the NCBA to the Board of the NCC. NCBA was the Second Defendant in that matter. They had submitted that there had been consultation with the Minister for over one (1) year and that the Minister had engaged in a consultative process to determine the most representative band. However, the process could not be completed since the criteria to determine the issue had not been settled as at the date of the appointment, therefore the Minister exercised her discretion and reappointed the NCBA representative in order to maintain the status quo. In this present litigation the NCBA has adopted a different approach complaining about the quality of the consultations and the said criteria used in the mas audit.

<u>The Legal Challenge-"Parade of the Bands"</u>

37. The NCBA seeks several declaratory relief challenging the Minister's decision on several grounds. I conveniently summarize the NCBA's grounds under the traditional heads of review of irrationality, procedural impropriety and illegality. See **Council of Civil Service Unions v Minister for the Civil Service** 3 All ER 935. NCBA contends that the Minister's decision was unreasonable or irrational in failing to consider relevant information,

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Owners and Designers all their rights and remedies in respect of the exploitation or use of their works including reproduction by any method.

- To collect and to appoint agents to recover and collect all royalties, fees and other monies due to Members, Producers, Owners and Designers by reason of the enforcement of their rights and to distribute such royalties and fees and other monies in accordance with agreed principles.
- To recognize the contribution of and grant awards for outstanding contribution to carnival and Mas bands.

See The National Carnival Development Foundation <u>http://www.ncdftt.com/about-us/ncdf-background</u>

[21] The NCDF's mission statement is:

"To contribute to the advancement of the Masquerade sector by providing the opportunity to develop the leadership skills, social and cultural responsibility and fellowship necessary to create positive change through Mas and Carnival."

[22] **Trinidad and Tobago Carnival Bands Association v The Minister of Community Development, Culture and the Arts and The National Carnival Bands Association of Trinidad and Tobago** CV2017-01240

misdirecting herself as to the correct facts and acting on mistaken and flawed assumptions.

38. They also contend the criteria used by the Minister in arriving at the decision was poor, procedurally improper and unfair; that the Minister failed to consult meaningfully with or to have regard for the NCBA's legitimate expectations; that the appointment departs from and conflicts with settled practice and established policy; and that the process used in making the appointment was in excess of the Minister's authority and given powers.

39. They contend that TTCBA is a poor choice of nominee not having any established experience in organisation of mas and with an inherent conflict of interest in serving the needs of the TTCBA rather than the mas fraternity. By contrast, the NCBA's membership has prominent commercial bands and includes other aspects of mas such as craftsmen; folklorists; wire-benders; artisans; costume builders; kings, queens and designers of Carnival. Critically, the NCBA complain that these individual members were not considered in determining the organisation that was most representative of Carnival bands. The NCC only counted bands registered in national parades over the last two (2) years and bands registered with the police to go on the road in its mas audit. This, the NCBA contends is flawed, inaccurate and misleading in that it overlooks bands that did not participate in national parades and who did not register with the police to go on the road. Registration for competitions should not have been the criterion for ascertaining which organisation has the most members.

40. NCBA further contends that the figures in the mas audit are misleading because among other things Junior bands were included in mas bands. The reduction of the size of bands to five (5) persons was unreasonable, unfair and unexpected since it is a longstanding practice that small bands have always comprised between eleven (11) to fifty (50) persons. The mas audit ignored individual members and the system of verification was flawed.

41. NCBA does not dispute that the Minister scheduled a number of meetings with the three Carnival band organisations for the purpose of establishing criteria for the appointment of a nominee of the organisation that is most representative. The NCBA declined to participate in the consultations on the ground that their participation could be interpreted as acquiescence to an undertaking which they contend was beyond the scope for the

Minister's jurisdiction. Instead, NCBA requested to meet with the Minister on a one-on-one basis to consult with the NCBA since a change in the status quo would affect their legal rights and interests. However, it is their contention that while the Minister indicated that she would meet with them, she never did meet with them on a one to one basis.

42. The Defendant and the Interested Party both submitted that there was no flaw in the use of the criteria established by the Minister and that the NCBA was afforded a fair process of being involved in the consultation to establish the criteria for the mas audit. The Minister must, in the exercise of her wide discretion, take steps to inform herself of the objective method to make a determination of which organisation is most representative of Carnival bands.

The Issues for Determination

43. I have summarised the issues that fall for determination as follows:

44. **The irrationality issue:**

   (i) Whether the Minister's decision was improper or unreasonable.

   (ii) Whether the Minister took into account irrelevant considerations.

45. **The procedural propriety issue**:

   (i) Whether the Minister adopted a fair procedure in making her decision.

   (ii) Whether the NCBA was entitled to a right to be consulted by the Minister before making the decision and the right to make representations.

   (iii) Whether the NCBA had a legitimate expectation to be consulted on a one to one basis before there was a change in an alleged "settled practice" of being the section 5(1)(b) representative.

46. **The legality issue:**

   (i) Whether the Minister's decision conflicts with the legislative purpose and any settled practice and policy.

   (ii) Whether the Minister acted in excess of jurisdiction in prescribing new or additional

criteria to determine what is the most representative body for the purpose of section 5(1)(b) of the NCC Act.

47. **The proportionality issue:**

(i) Whether proportionality should be recognised as a separate ground of review in this jurisdiction.

(ii) Whether the Minister's decision can be impugned on a proportionality analysis.

The Irrationality Issue

48. The NCBA contends that the mas audit is fraught with flawed data, factually incorrect information and irrelevant considerations. In the NCBA's written submissions, the factual matters taken into account by the Minister which they contend are flawed are:

(i) That reduction in the minimum size of a Carnival band from eleven (11) persons and to five (5).

(ii) J'Ouvert bands ought not to be considered as bands in the counting exercise.

(iii) The inclusion of Junior bands.

(iv) The mas audit was based on Carnival bands registered for competition in national parades for the last two years and those registered with the police "to go on the road" and not based upon the actual lists of membership of the Carnival bands.

(v) Individuals were excluded from the Minister's count.

49. It is important to note that the complaint made by the NCBA against the Minister can only be with respect to the criteria which she formulated to guide the "counting exercise" or mas audit and not the actual counting exercise involved in the mas audit. That counting exercise was not done by the Minister but by the NCC.

50. In the Claimant's written submission no reliance was placed on any legal submission of the standard of review when adjudicating upon the irrationality or unreasonableness ground of review. However, it is uncontroversial that the traditional standard is the Wednesbury unreasonable standard: a decision which is so outrageous in its defiance of logic or of

accepted moral standards that no sensible person who had applied their mind to the question could have arrived at the decision. See **Council of Civil Service Unions v Minister for the Civil Service** 3 All ER 935 at 950-951 where Lord Diplock observed:

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'......It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

51. See also **Reynold Beddeau v Public Service Commission** CV2006-00254 and **Felix James v The Attorney General of Trinidad and Tobago** CV2008-00513. In **Felix James** Madame Justice Dean-Armorer stated at paragraphs 2-4:

> "2.The definition of the unreasonable decision continues to be the classic Wednesbury definition that an unreasonable decision is one which no reasonable decision-maker would make.
>
> 3. Lord Diplock in **CCSU v Minister for the Civil Service** defined an irrational decision to be one which was so "outrageous in its defiance of logic" and accepted moral standards that no sensible person who had applied his mind to it could have arrived at it. The CCSU test has been applied in recent cases of high authority and is therefore, the appropriate test to be applied in considering the ground of irrationality.
>
> 4. The Court notes further, that irrationality as a ground has been notoriously difficult to establish. The decision must amount to one which is perverse or that the decision-maker, in making the irrational decision took leave of his senses."

52. Further, a consideration will be irrelevant where no reasonable public body could consider it as part of a rational assessment of the matter to be decided. See **Secretary of State for the Environment, ex parte Kingston upon Hull City Council** [1996] Env LR 248.

53. The modern reformulation of the broad irrationality test is whether the decision fell within the range of reasonable responses. See **R (on the application of Ala) v Secretary of State**

for the Home Department [2003] EWHC 521 at paragraphs [44]- [45].[23]

54. To determine rationality or reasonableness, however, there is a sliding scale of intrusiveness into the actual merits of the decision. This sliding scale in fact creates a tension between the purpose of judicial review to examine process by which a decision is made as distinct from the merits of the decision. The orthodox view of course is that judicial review is not an appeal of the decision under review but a process review. However, the increasing area of inquisition by Courts into the reasonableness of a decision has lead controversially to pushing the boundaries of the actual purpose of judicial review and indeed the separation of powers. The tension is more palpable when a proportionality analysis is used to either determine the reasonableness of a decision or as a separate ground of review. In these types of review the inquiry becomes more merit based.

55. I have in previous judgments explained that this Wednesbury ground of review involves a sliding scale from a hard edged to soft review with intense judicial scrutiny on one end of the spectrum to judicial deference on the other[24].

> "Hard edged questions represent an important exception to the rule against the forbidden substitutionary approach. They can be thought of as questions which the public body has to decide but is not permitted to get wrong. In reviewing such questions, the Court does precisely what is forbidden on soft review: it does substitute

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[23] **R (on the application of Ala) v Secretary of State for the Home Department** [2003] EWHC 521 it was observed at paragraphs [44]- [45].

> "44. It is the Convention itself and, in particular, the concept of proportionality which confers upon the decision maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision-maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is out with the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant's Article 8 rights by concluding that he should be removed. (Emphasis mine)
> 45. So to conclude is not to categorise the adjudicator's appellate function as limited to review. It merely recognises that the decision of the Secretary of State in relation to Article 8 cannot be said to have infringed the claimant's rights merely because a different view as to where the balance should fairly be struck might have been reached."

[24] **Pan Trinbago Inc v The National Carnival Commission of Trinidad and Tobago** CV2017-00568

its own view. That is because the role of the reviewing Court here is to ensure objective 'correctness'."[25]

56. I should add here that judicial deference is an unfortunate expression which may give the wrong impression of the task and role of the public law Court. The Court should always seek to uphold the rule of law, protect constitutional rights and reinforce the principles of administrative justice. Deference by no means should convey the impression of being subservient to the Executive or Legislature or decision makers or show blind reverence to their interpretations or superficially conduct a rationality review. Deference rather conveys the meaning of judicial restraint in certain cases respecting the limits and boundaries of judicial power which underpins the "sliding scale of review."[26]

57. For a rationality review, the issue of a "sliding scale of review" was discussed in the case of **Office of Fair Trading and others v IBA Healthcare** Ltd [2004] EWCA Civ 142 referred to the Court by the Interest Party, TTCBA:

> "91. Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially on political judgment' (de Smith para 13-056-7). Examples are R v Secretary of State, Ex p Nottinghamshire County Council [1986] AC 240, and R v Secretary of State, Ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' ([1991] 1 AC, per Lord Bridge of Harwich, at pp 596-597). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:
>
> > "Review is stricter and the courts ask the question posed by the majority in Brind, namely, 'whether a reasonable Secretary of State, on the material before him, could conclude that the interference with freedom of expression was justifiable.' (de Smith para 13-060, citing Ex p Brind [1991] 1 AC 696, 751, per Lord Ackner)."

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[25] See **Judicial Review Handbook 6th Edition by Michael Fordham QC** paragraph 16.1

[26] See **Dunsmuir v New Brunswick** [2008] 1 SCR 190

58. In this case, no question of a breach of fundamental human rights has been articulated by NCBA. Indeed, the decision of appointing a representative of Carnival bands set against the backdrop of the organisation of mas explained earlier in this judgment may well fall within a socio-political judgment made by the Minister calling for a lower intensity of review. The submissions of the Defendant and the Interested Party in my view are correct, this dispute is not the type of case which calls for a lower threshold of unreasonableness. In other words, so long as the decision is not perverse nor absurd nor fall outside the range of reasonable responses, it should not be impeached.

59. It is clear that the legislation conferred upon the Minister a wide power of appointment with no express identification of any relevant considerations save for determining the following (a) an organisation (b) which is most representative of (c) Carnival bands. The nominee of that organisation of course having the required expertise described in the section. From this legislative edict the Minister must examine the state of the industry to inform herself of the various organisations and determine a method by which she can say which organisation is most representative of "Carnival bands". Implicit in the exercise is to identify the "cell" or "unit" called a "Carnival band."

60. So long therefore that the methodology adopted by the Minister was not illogical nor unreasonable, it is a permissible consideration in making her determination: [27]

> "**14.31** Often the legislation conferring a decision-making function will be silent as to the considerations that a public body is entitled to take into account (or such relevant or permissible considerations as are identified will not be exhaustive). Unless the legislation expressly or implicitly excludes consideration of a particular matter (or it would be irrational to consider a particular matter), a public body is entitled to have regard to all permissible considerations when taking a decision, regardless of whether those considerations are expressly or implicitly identified by the relevant legislation.
>
> **14.32** In this context, a consideration will be a permissible consideration unless it is a relevant consideration or an irrelevant consideration. Accordingly, if a consideration is

[27] **Judicial Review, Principles and Procedure by Jonathan Auburn, Jonathan Moffett and Andrew Sharland,** Paragraphs 14.31-14.32.

not expressly or implicitly excluded by legislation, and it is one which the public body is reasonably entitled to take into account, it will be a permissible consideration. Such considerations are likely to include those which a public body cannot be expected to know or discover for itself unless the subject of a decision draws them to the public body's attention. The more 'high level' a decision-making function, the broader range of considerations that the public body is likely to be entitled to take into account. For example, when exercising a discretion as to the provision of development aid to other countries, the Secretary of State was entitled to have regard to political and economic considerations such as the promotion of regional stability, good government, human rights, and British commercial interests."

See also **AXA General Insurance Limited and others v The Lord Advocate** [2011] UKSC 46 and **R v Secretary of State for Foreign Affairs ex parte The World Development Movement Ltd** [1995] 1 WLR 386.

61. I turn to the two aspects of the Claimant's irrationality challenge: first, the legitimacy of conducting a mas audit and second, the alleged irrelevant considerations in that audit.

<u>Rationality of the mas audit</u>

62. NCBA argues that the Minister overstepped her legislative edict in conducting a mas audit. Although this is also articulated by NCBA as the Minister acting illegally and inconsistent with the legislation, it is appropriate to first deal with it here as the NCBA contends generally that the mas audit is an invalid consideration in making a section 5(1)(b) determination. However, this argument is a nonstarter.

63. The starting point in this analysis is of course an examination of the Minister's power. I am mindful that determining the scope of the Minister's power involves an interpretation of the text of section 5(1) (b) of the NCC Act. Usefully, in the recent authority of **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No. P 075 of 2018, Jamadar JA provided the following useful general comments on statutory interpretation to discover the purpose and meaning of a statute. The Courts deploy several forms of legal argumentation:

- First, a textual analysis looking to the actual language and structure used in the statute or consider the statute as a whole, considering structure, context and the impact of different parts of the statute on the provisions that fall to be interpreted and applied. The hallowed 'canons of construction' that have evolved over time.
- Second, the intention of the makers of the statute.
- Third, judicial precedents which have considered, interpreted and applied the same or similar provisions, may be relevant.
- Fourth, policy considerations may at times be deployed and determinative.[28]

64. A textual analysis of the section is sufficient in this instance to understand the authority of the Minister and the underlying logic for carrying out a mas audit of the membership of Carnival band organisations. Section 5(1)(b) of the NCC Act provides simply that the Minister must make a decision appointing the nominee of an organisation that is most representative of Carnival bands as a SIG to serve on the board of NCC. In the face of the uncontroverted fact that at the time that the question of the appointment arose there were at least three organisations that represented Carnival bands, the legitimate question must arise for the Minister's determination "which one of the three is most representative of Carnival bands?" and "what process should be used to make that determination?" As NCBA admits in its submissions it was not entitled to be considered the most representative ad infinitum. The Minister is only obliged in law to exercise her discretion in determining which is most representative rationally, legally and procedurally properly.

65. Another matter the Minister would have to determine in this statutory provision is the question of "Carnival bands"; what comprises or what defines a "Carnival band". While the NCC Act provides no guidance, a "band" literally means "an organized company of people having a common purpose; a company of people in movement.[29] "A band" is defined in the NCBA act as:

[28] **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago Mr. Justice Ivor Archie O.R.T.T** Civil Appeal No. P 075 of 2018 paragraphs 4-6
[29] The New Shorter Oxford English Dictionary, Volume 1.

"Bands" means a number of persons bound together under a band-leader for the common purpose of creating a spectacle or depicting a theme or concept, to be performed on stage, platform, street or other venue."

66. Historically, the concept of a Carnival band has a deep rooted meaning. Indeed, a band is the expression of the democracy of the people in mas. "Look de band coming", "mash up de stage", "parlance", these iterations in popular dialogue and Carnival verse evokes the significance of the numbers of people parading, masquerading and expressing themselves on the streets. The "Parade of the Bands" and the "Reign of the Merry Monarch" are symbolic of the synergy between masquerade and band. The collective expression of a band creates the spectacle and theatre; it also suggests the element of camaraderie and cultural expression necessary for the masquerade. At a minimum, therefore, a band must be a collection of persons. The quantification of the size, however, is a matter which fits into a macro socio political context of the changing face of Carnival, "the spectacle".

67. A band of one is therefore a misnomer and it is logical not to take into account individuals who are members of the organisation and rather to examine how many bands are represented by the organisation. The Minister must find a suitable starting point to quantify the minimum size of the collection of persons to be called "a band". After all, it is common knowledge that an important aspect of the competitive nature between bands is the rivalry among small, large and medium bands.

68. The question of what organisation "most represents the Carnival bands" may leave open several rational options available to the Minister to make such a determination. I could think of a few reasonable ones or at least options which are not absurd: asking the Carnival bands to conduct an open electoral process amongst themselves to determine which one organisation is most representative; ask the organisations to consider sitting on a rotational basis; asking the organisations to meet and agree on which group will be considered most representative or conduct an objective exercise to quantify the membership of each organisation such as an audit of the organisations membership. It is important that in the statutory remit of determining "**most** representative" is the democratic principle of representation, a question of quantity and not quality. Indeed, the framers of the NCC Act

did not use the phrase the organisation that "best represents" Carnival bands. The term "best" in that context is more qualitative than quantitative and certainly other subjective considerations would arise, such as quality of representations, command and authority.

69. It is legitimate and reasonable therefore for the Minister to adopt a quantitative approach to determine the question of which organisation is most representative of and the concept of a Carnival band. It satisfies the literal and contextual meanings of the section. From a historical perspective, this also is a reasonable approach where the playing of mas is a collective expression of persons in a band.

70. The question therefore of embarking upon a process of a mas audit to objectively and quantitatively assess the membership of bands in the three organisations fits within the interpretative context of her section 5(1)(b) power. Furthermore, conducting a mas audit satisfies her **Tameside**[30] duty to inform herself of the relevant facts.

71. As the Interested Party correctly points out, there was a duty on the Minister to inform herself and to make inquires before taking her decision under section 5(2). In complying with a **Tameside** duty, it was important for the Minister to inform herself of the membership of organisations and to determine which is most representative of Carnival bands.

72. In **The Law Association of Trinidad and Tobago v The Honourable The Chief Justice of Trinidad and Tobago** CA. Civ P075/2018, Mendonca JA reaffirmed the **Tameside** duty of public bodies. It is for the Court to determine whether the Minister asked herself the right question and took reasonable steps to acquaint herself with the relevant information to enable her to answer it correctly.

73. The **Tameside** duty comports to the following general principles[31]:

    - The authority must ask itself the right question and take reasonable steps to acquaint itself with relevant information to answer the question correctly;

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[30] **Secretary of State for Education for Science v Tameside Metropolitan Borough Council** [1977] AC 1014

[31] **Primnath Geelal and Rupnarine Geelal v The Chairman, Aldermen, Councillors and Electors of the Region of San Juan/Laventille** Claim No. CV2017-04558, paragraph 117

- The obligation is a corollary to the duty to make an informed decision;
- Having decided to resolve certain factual issues it must carry out investigations in that regard in a thorough and balanced way;
- The authority must take reasonable steps to answer the question it poses correctly;
- The wider the discretion imposed on the authority the more important it is to obtain all the relevant information before making a decision;
- Unless the Tameside duty is complied with the decision is unlawful.

74. The choice of conducting a mas audit was reasonable as it was a legitimate way in which the Minister could inform herself of what organisation is most representative to discharge her **Tameside** duty. Consistent with the **Tameside** duty, with such a wide discretion, it was important to obtain all relevant information on the status of the organisations. Importantly, the Minister requested membership lists and because there were diverse views by the organisations on membership, she had to establish independent and objective criteria to make this determination through the vehicle of the mas audit.

75. I am of the view therefore that the Minister did not act unreasonably in deciding to conduct a mas audit as a method for making a determination of which organisation is most representative of Carnival bands. It was a legitimate method of discharging her statutory duty as well as satisfies her **Tameside** duty.

76. As to the second challenge that the mas audit was conducted based on illegitimate criteria or irrelevant considerations, I also am of the view that she did not act unreasonably in settling the criteria and did not take into account irrelevant considerations nor am I satisfied that the information taken into account in the mas audit was so fundamentally flawed to skew the decision that TTCBA was the organisation that was "most representative of Carnival bands".

Rationality of the mas audit criteria

77. From my analysis, the mas audit was rationally and satisfactorily conducted both in terms of

(a) her approach, (b) her analysis and (c) the context.

<u>The approach in settling the mas audit criteria</u>

78. Upon her appointment in September 2015, the Minister was alive to the need to establish a procedure to guide her in appointing persons to the Board.

79. According to her evidence she had sensibly engaged the NCC on the question of representation of Carnival bands and sought and obtained legal advice when she received the diverse views of the organisations of their memberships. The Minister conducted meetings with the organisations, the stakeholders, on the issue of representation.

80. The approach of using a mas audit was not sprung on anyone by the Minister but was suggested based upon legal advice and was a topic of discussion among all the organisations from as early as December 2016. The Minister consulted the organisations and more importantly, the NCC and NCBA on the use of the mas audit to determine which organisation would be most representative.

81. Indeed as early as October 2015, in TTCBA's letter in response to the Minister's request for its membership list, TTCBA informed the Minister that their list was restricted to "member bands" that participated in the recognised Parade of the Bands competition over the past three (3) years and does not include members who are mas practitioners. In any event, NCBA conceded in their written submissions that they were consulted on the criteria for conducting such a mas audit[32]. In its letter dated 20th February 2018 the Minister invited discussions on the issue of the mas audit and submitted proposed criteria for the conduct of the mas audit to the organisations for their comment and review which included a summary of the views of the organisations received at that time.

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[32] Paragraph 10 of the Claimant's written submissions states:

> "It is not disputed that the Minister embarked upon a process of consultation with the 3 carnival band organisations '*to establish criteria for the appointment of a nominee of the organisation that is most representative of carnival bands to the National Carnival Commission'* (the Criteria Consultations). See letter dated 20 February 2018 from the Minister to David Lopez and also the Ministry's proposed criteria in the 'Discussion on Representation of Carnival Bands', both at Claimant's Exhibit DL16. And it is not disputed that NCBA declined to participate in the Criteria Consultations on the ground that doing so could be interpreted as acquiescence or giving approval and consent to an undertaking which was beyond the scope of the Minister's jurisdiction.

82. By 9th March 2018 the Minister was moving into its third round of consultations with the parties. It is not disputed that the NCBA did not provide feedback to the Minister on the proposed criteria. Importantly, on 19th March 2018 the Claimant submitted its own views on the conduct of the mas audit.

83. That letter came on the heels of a meeting that the NCBA had with the Minister's team on 26th February 2018. No details have been provided to the Court on this meeting. The NCBA's March 2018 letter, however, made no significant contribution to addressing the various criteria for the proposed mas audit. It explained NCBA's own interpretation of the phrase "most representative of Carnival bands" which should give voice to the "mas" sector:

> "As a matter of interest, the phrase *most representative of mas bands* is a misnomer. The intention behind Section 5(1)(b) is to give voice to the organisation which best represents the mas section- just as TUCO represents the calypso sector and Pan Trinbago represents the pan section. Organisations which speak only on behalf of a certain type of mas band i.e of the beads and bikini variety- while playing an important role in the mas section- should not be allowed to predominate, eclipse or limit the richness and diversity of the full sector which comprises the carnival and mas arts; including, kings; queens; individuals; designers; craftsmen; wire-benders; artisans; and costume builders. TTCBA and NCDF have between themselves cobbled together several bits of scaffolding to support their fantasy but the structure is unsound and their pieces don't fit. NCBA, on the other hand, is familiar with the issues facing the sector, is the organisation with the broadest reach, and has demonstrated stability and resilience. NCBA is the only organisation which genuinely encompasses and represents all of the various interests in the spectrum which comprises the mas sector."[33]

84. It set out the NCBA's case that it should be considered most representative, not based upon a mas audit but upon other considerations such as historical considerations, the distinction between "bands" and "mas", its international reach and organisational competence. While

[33] NCBA's letter to the Minister "Why NCBA is 'most representative of the mas sector' and the *status quo* should be maintained" dated 19th March 2018 and exhibited as "D.L.15" of the affidavit of David Lopez filed 19th September 2018.

these may be convenient heads under which the issue of representation can be adjudged, it does not detract from the legitimacy of the Minister's quantitative approach to determining representation. In most process review cases in judicial review as is this one, the rationality question does not engage the Court in determining what is the correct approach but rather what is a reasonable approach.

85. Accepting for the moment that NCBA's view as to representation is a reasonable approach, in the context of two competing legitimate approaches, a quantitative assessment as proposed in an audit and a qualitative assessment as suggested by NCBA in its letter, how is the Wednesbury analysis of assistance? The Wednesbury or rationality challenge simply examines the underlying logic of the approach adopted by the Minister. Any further intrusion to determine the legitimacy of that choice is best determined in a proportionality challenge, discussed later in this judgment. In any event, I have proceeded to examine the underlying logic of the mas audit process to determine whether it passes the test of rationality when applying a more intrusive merit based approach.

86. The question of the mas audit was therefore the result of a reasoned process in obtaining legal advice (it was not plucked out of the air), after satisfying herself that a process must be devised to make her determination, and through a process of engagement with the stakeholders rather than a unilateral imposition or declaration. The mas audit was conceived to conduct a quantitative assessment of "most representative" and the concept of what is a band, both legitimate objects under the legislation. I turn to the criteria established by the Minister which were in themselves rational with an underlying logic relevant to the statutory object of determining which organisation is "most representative of Carnival bands".

The analysis

87. The mas audit sought to engage the question of "a band" by means of the following criteria: composition of band; location in the country; nature of the band as an expression of cultural significance. It also sought to engage the question of quantification by affiliation to organisations; legitimacy, credibility or authentication of the band (a process of

verification). It also sought to engage on the question of methodology in the conduct of the mas audit. Each of these issues of composition, authentication and methodology are the product of a reasoned, logical and methodical approach to the conduct of the mas audit. I deal with each of these matters in the Minister's analysis of the mas audit to demonstrate the inherent logic and manifest reasonableness of her decision.

88. Composition: There were of course rivalling contentions by the organisations on this question of what will be considered a band. A band of eleven persons, five, thousands? There must be a minimum criteria. The determination of a membership of five (5) is reasonable or cannot be absurd for the following reasons: It was a recommendation of the NCC[34]. It preserved the flexibility of the composition of bands from at least five (5) members to larger bands. It in fact was a method by which traditional mas bands could be preserved and given voice. It encourages rather than discourages participation in Carnival. The smaller the number of the composition of a band in fact further democratises the process allowing more bands to be involved in Carnival and affiliated with organisations. It allows for better regulation of the mas so that these small bands are taken into account rather than left on the fringes of competition and representations. The inclusion of J'Ouvert bands is not only sensible but manifestly reasonable and commendable.

89. There can be no question that bands from both Trinidad and Tobago should be taken into account. To do otherwise is the antitheses of the historical development of mas. This was in fact the submission of the NCBA:

> "*Most Representative* cannot be limited to the city of Port of Spain, whether as contended by TTCBA or otherwise. NCBA's membership covers the length and breadth of our twin island Republic including: Port of Spain and environs; San Fernando; Arima; Tunapuna; Sangre Grande; Princes Town; and Tobago."[35]

90. Junior Bands: In NCC's letter to the Minister dated 25th May 2018, the Minister was warned

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[34] NCC's letter dated 25th May 2018, exhibited at "N.G.D.5" of the affidavit of Dr. Nyan-Gadsby-Dolly filed 24th January 2019.

[35] NCBA's letter to the Minister "Why NCBA is 'most representative of the mas sector' and the *status quo* should be maintained" dated 19th March 2018 and exhibited as "D.L.15" of the affidavit of David Lopez filed 19th September 2018

"Further Minister, we believe you ought to be made aware of the possibility of a challenge by one or more of the Associations with respect to the inclusion of Junior bands as mas bands for the purpose of this exercise." NCBA further contends that the figures in the mas audit are misleading because junior bands were included in mas bands. With regard to Junior bands they contend that Junior bands are populated by minors and require permission from parents/guardians to compete; junior bands are automatically excluded from membership in the TTCBA since Article 4.1 of the TTCBA's by laws provide that every member of the association must be over 18 years of age; there is no class of membership for Junior bands in the TTCBA; junior bands formed no part of the deliberations on 9th and 15th March 2018; given that TTCBA's governing documents do not cater for Junior bands, TTCBA's member comprises 96 members upon excluding the 54 junior bands; the inclusion of Junior bands in the mas audit gave and afforded an unfair advantage to TTCBA since Ms. Gabriel has a strong association with Kiddies Carnival.

91. I fail to see the inherent lack of logic in including Junior Carnival bands as part of the count of Carnival bands in a mas audit. The question of most representative of Carnival bands including Junior bands encourages the participation and voice of children and youth into the Carnival. It preserves longevity of a cultural art form. Indeed for those interested in the passing on of an art form in most cases undocumented and for creating interest in the generations to come, a policy of inclusion which no doubt is met by including Junior bands is to be encouraged.

92. Furthermore, it is consistent with administrators' duty to give effect to the best interest of the child principle in making and arriving at decisions. In the **Convention on the Rights of the Child 1989** provides at Article 31:

> "Article 31
>
> 1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
>
> 2. States Parties shall respect and promote the right of the child to participate fully in

cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity."

93. The Minister in her affidavit made it clear that Junior bands are Carnival bands and should be afforded representation in any or all deliberations before the NCC. They form an integral part of the festivities and an entire day is earmarked for Kiddies Carnival which is a popular showcase for the youth.

94. Authentication: How is one to determine if a band is genuinely and legitimately engaged in the production of mas activity and not some convenient grouping conveniently organised to further the interests of an organisation? Authentication in other words is important to prevent the "padding" of an organisation's membership. Various methods of authentication was examined by the Minister; registration in competitions; registration with the police; source documentation from the NCC; and declaration of affiliation to one association for those with multiple allegiances to different associations. Neither of these methods can be described as absurd or illogical.

95. Methodology: The Minister sought information from the NCC, considered membership lists, considered source documents, the choice of the organisation with numerically the greater amount of Carnival bands as part of its membership. Notably, the NCC conducted its audit with a two tiered approach.[36] It is important on this issue that although the membership lists for the NCBA and TTCBA showed 263 and 153 members respectively, the mas audit revealed that the bands which were represented by these organisations were 61 and 72 respectively. It is not the purpose of this judicial review to examine in minutiae who are the 61 or 72. Such a fine interrogation is outside the purpose of this judicial review and in any event, the Minister herself did not conduct the mas audit or counting exercise. It is only sufficient to establish the logic in the approach. Conceptually, the difference in actual members and those that qualified for the mas audit demonstrates that even the self-declared membership lists of the organisations were not swallowed wholescale by the Minister but were subjected to careful analysis and study.

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[36] See NCC's letter dated 25th May 2018

The Context

96. I agree with the Interested Party and the Defendant that context is important. Certainly, the context demonstrates that the Minister's approach in conducting and utilising a mas audit exercise was legitimate, rational and reasonable. There are three main factors I consider important as part of the context:

    (a) The legitimacy in adopting the mas audit exercise through judicial encouragement by Justice Charles in **Trinidad and Tobago Carnival Bands Association v The Minister of Community Development, Culture and the Arts and The National Carnival Bands Association of Trinidad and Tobago** CV2017-01240. Justice Charles opined at paragraph 42:

        "42] I am also of the view that the mass audit, already underway, should be completed in the shortest possible time and criteria for determining the most representative carnival band be established after consultation with stakeholders as soon as possible, so that a nominee from carnival bands can take his/her place on the NCC Board. The efficient and smooth operation of this important national event demands no less from the Minister and all stakeholders."

    (b) The governing body's opinion: NCC's letter to the Minister 25th May 2018 is quite instructive: it recognised the problem with the existence of three organisations and the need for clarification on the process to select a nominee, the fact that the NCC was alive to the litigation surrounding the matter of the appointment of a nominee.

    (c) Finally, an important part of the context is that the mas audit and the determination of the criteria was the result of a collaborative and consultative approach by the Minister.

97. Furthermore, on 13th June 2018, NCBA requested certain information under the Freedom of Information Act. The Minister acknowledged receipt of the request on 25th June 2018 and the information was provided by the Permanent Secretary in the Ministry of Community Development, Culture and the Arts in a letter dated 17th July, 2018. This letter reveals a number of logical features for the Minister's decisions. It explains for example:

(i) NCC's letter of 25th May 2018 informed her decision to define 'bands' as comprising atleast five (5) persons;

(ii) The new criteria for 'bands' pertain to persons coming together for the purpose of competition on both Carnival Monday and Tuesday.

(iii) While bands may belong to any mas association, bands must be registered with the NCC or with the Police stations as evidence of registration in order to compete or participate in the Parade of Bands or Junior Carnival;

(iv) There was no agreement from the three main Carnival bands forthcoming on mas practitioners being included as valid members of the mas associations;

(v) NCC's records upon which the mas audit was conducted was not held by the Ministry;

(vi) The documentation on who comprised the Committee at NCC that conducted the mas audit was not held by the Ministry;

(vii) While bands may belong to any mas association, for the purposes of the mas audit of the bands, they will be only allowed to register as belonging to one association.

(viii) A band could be located anywhere in the country but must be registered with the NCC or the Police stations and evidence of registration must be producible. Bands must have registered for and participated in national parades for the past two (2) years as substantiated by NCC records. The purposes of the first audit, NCC as well as police records must be considered.

(ix) The Minister approached the 'bands' to obtain the information in coming to her decision through consultations and meetings with the NCC, the Executive of the Ministry of Community Development, Culture and the Arts and the three main Carnival bands associations on discussions on representation of Carnival bands and the proposed criteria for consideration.

(x) The reason for the change in decision to appoint a mas representative to the NCC

board even though her earlier position was to await the outcome of the matter pending the Court of Appeal was, as a consequence of the Court's ruling and the commitment to the fair, transparent and proper appointment of the nominee that is most representative of Carnival bands, the NCC advised the Ministry of Community Development Culture and Arts that from the results of the survey of mas bands, the TTCBA represented the majority of Carnival bands.

98. For these reasons it is clear that the Minister did not act irrationally. Even adopting a very technical pernickety review of the mas audit and the Minister's approach, I can find no basis on the ground of irrationality to disturb the Minister's decision. I have considered her approach above on consultation to be a special feature of the legitimacy of the mas audit. It would be a convenient stage to examine the quality of this consultative process as this also falls within a separate ground of challenge both as a matter of fair process and the question of legitimate expectations.

Procedural Propriety: Consultation and the Duty of Fairness

99. This is a fitting case to spend some time exploring the concept of consultation in public law. I consider it important as the lack of consultation creates dissatisfaction with decision making not so much with the decision itself but with the feeling of discontent, disrespect and lack of involvement in a matter which is in the public domain. It is important in any democracy that persons feel they are included in important decisions. For this reason, even in the absence of a statutory duty to consult, an approach of consultation and collaboration with known persons, groups or organisations affected by a decision is a feature of administrative justice if not administrative best practice.

100. As explained earlier in this judgment, the new NCC board was appointed on 29th October 2015. The term of appointment of the representatives of the three organisations in section 5(1) of the NCC Act SIGs had not expired and were due to expire in December 2016.

101. Subsequent to the reinstatement of the NCBA representative, the Minister, NCC and representatives of NCDF, TTCBA and NCBA met on several occasions during December 2015 and February 2016 to discuss the way forward for Carnival 2016. The Minister received

advice from lawyers retained by NCC and the Ministry's legal department on the issue of the interpretation of section 5(1) of the NCC Act and the process to be followed with respect to determining whether the NCDF, TTCBA or NCBA was the most representative of Carnival bands after meetings were held to clarify the issues involved and review the positions of the various mas associations regarding their membership submissions of October 2015. The Ministry was advised that it should propose a position on the criteria to be used and consult with the mas association to finalise the criteria. Once the criteria was established a mas audit could be done on that basis.

102. Consultation began on 14th December 2016. NCBA was present for all the Minister's consultation on the criteria to be established to conduct this objective exercise of determining which organisation is most representative. The proposed criteria was very brief since it was intended as a platform for discussion by the associations who were being consulted.

103. The term of appointment of the SIGs on the NCC Board ended on 3rd December 2016 before the final legal advice was received. The legal opinions received by the Ministry indicated that without the establishment of a criteria, the status quo should be maintained and NCBA should continue to sit on the board of NCC until it could be established that they were not the most representative body.

104. In 16th January 2017, based on the legal advice she received, the Minister decided to appoint the existing SIGs representatives for a period co-terminus until 29th October 2017 during which time the consultative process could be finalised and the determination process completed.

105. The Minister held her third consultation with the parties during the period December 2016 to March 2018. The proposed criteria for consideration in interpreting the clause "most representative of mas bands" was always discussed at the formative and evolving stages. The associations were invited to comment. TTCBA and NCDF provided feedback to same. NCBA's representative consistently failed to provide feedback on this objective exercise.

106. After receiving the letter of NCBA in March 2018, the Minister formed the view from the results of the survey as well as her consultations with the three main Carnival organisations that TTCBA should be appointed to the Board of NCC as the mas representative.

107. There is no general duty on decision-makers to consult before they take their decisions. In **R (Hillingdon London Borough Council) v Lord Chancellor** [2008] EWHC 2683 (Admin) [2009] 1 FCR 1 Dyson LJ stated at paragraph 48 "It is not the law that authorities must necessarily consult those who are liable to be disadvantaged by a proposed decision before they can make the decision." However, an obligation to consult might arise by way of an express or implied statutory duty or consultation might be required in order to give effect to a legitimate expectation of consultation.[37] In this case there is no statutory duty to consult.[38] Notwithstanding this, I commend the Minister's attorney in her submission in accepting that while the NCC Act places no duty on the Minister to engage in consultations with the stakeholders before making an appointment of the nominee of an organisation that is most representative of Carnival bands to the NCC board, that the basic requirements of natural justice and procedural fairness necessitates consultation with stakeholders before coming to a decision as important as who would be their representative in this field of expertise and operation. See **R v Secretary of State for the Home Department ex p Doody** [1993] 3 All ER 92 at 106.

108. The common law duty to consult is an aspect of the common law duty to act fairly. In **R v Devon County Council ex p Baker** [1995] 1 All ER 73 CA, Dillion LJ observed at 77:

> "It was accepted by the councils that they owed the residents a duty to act fairly in making the decision to close a home, and it was submitted for the applicants that the duty to consult was an aspect of the duty to act fairly; see generally the observations of Lord Bridge of Harwich in *Lloyd v McMahon* [1987] **1 All ER** 1118 at 1161, [1987] AC 625 at 702–703. "

[37] **Judicial Review Principles and Procedure, Jonathan Auburn, Jonathan Moffett and Andrew Sharland**, paragraph 7.03 page 185

[38] **Judicial Review Principles and Procedure, Jonathan Auburn, Jonathan Moffett and Andrew Sharland**, paragraph 7.09 page 186

109. Indeed, this duty to consult as a general aspect of fairness is a responsible feature of open transparency, governance and democracy in action. In **R (on the application of Moseley) v London Borough of Haringey** [2014] UKSC 46, the Supreme Court of the UK provided guidance on how to conduct a fair public consultation process. Lord Wilson explained that, regardless of the origin of the duty to consult, the starting point was the common law duty of procedural fairness, which would inform the manner in which consultations should be conducted. He considered there to be three purposes for conducting fair consultations, stating that what fairness required in a given case was linked to the purpose of the consultation in question (para 24). First, a fair consultation "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested". Secondly, it will avoid "the sense of injustice which the person who is the subject of the decision will otherwise feel". Finally, fair consultations should reflect "the democratic principle at the heart of our society". The court endorsed, as a "prescription of fairness", the "***Sedley criteria***" in **R v Brent London Borough Council ex parte Gunning**.

110. In **The Public Services Association of Trinidad and Tobago v the Permanent Secretary Ministry of Energy and Energy Industries** CV2017-02934 this Court observed when the duty to consult may arise as culled from the relevant authorities:

> " 1. There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. **Harrow Community Support Ltd) v Secretary of State for Defence** [2012] EWHC 1921 (Admin) at para 29, [1993] 3 All ER 92, [1993] 3 WLR 154, per Haddon-Cave J).
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> 2. There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (R (Cheshire East Borough Council) v Secretary of State for Environment, Food and Rural Affairs [2011]

EWHC 1975 (Admin) at paras 68 – 82, especially at 72).

3. The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) **((R Bhatt Murphy) v Independent Assessor** [2008] EWCA Civ 755, at paras 41 and 48, per Laws LJ).

4. A duty to consult, ie in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures **(R (BAPIO Ltd) v Secretary of State for the Home Department** [2007] EWCA Civ 1139 at paras 43- 44, per Sedley LJ).

5. The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator **(R (BAPIO Ltd)** (supra) at para 47, per Sedley LJ).

6. The courts should not add a burden of consultation which the democratically elected body decided not to impose (**R(London Borough of Hillingdon) v The Lord Chancellor** [2008] EWHC 2683 (Admin), [2009] LGR 554, [2009] 1 FCR 1).

7. The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, eg in sparse Victoria statutes (**Board of Education v Rice** [1911] AC 179, at p 182, 9 LGR 652, 75 JP 393, per Lord Loreburn LC) (see further above).

8. Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (**Attorney-General for Hong Kong v Ng Yuen Shiu** [1983] 2 AC 629, [1983] 2 All ER 346, [1983] 2 WLR 735, especially at p 638G).

9. The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of

consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (**In Re Westminster City Council** [1986] AC 668, at 692, [1986] 2 All ER 278, 84 LGR 665, (HL), per Lord Bridge).

10. A legitimate expectation may be created by an express representation that there will be consultation (**R (Nadarajah) v Secretary of State for the Home Department** [2003] EWCA Civ 1768), or a practice of the requisite clarity, unequivocality and unconditionality (R (Davies) v HMRC [2011] UKSC 47, [2012] 1 All ER 1048, [2011] 1 WLR 2625 at paras 49 and 58, per Lord Wilson).

11. Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (**R(Coughlan) v North and East Devon Health Authority** [2001] QB 213 at para 89, [2000] 3 All ER 850, 97 LGR 703 per Lord Woolf MR)."

111. In this case, NCBA seems to suggest that the duty to consult arises out of the general principles of fairness. While it accepts that there were consultations, its complaint is really of the quality of the consultations in not having the personal one to one interaction with the Minister, of given the chance to make further comments on the mas audit after the results were received.

112. Where a decision maker conducts a consultation exercise voluntarily (despite not being subject to a duty to engage in consultation) the consultation process must be carried out properly. The proposition in **R v North and East Devon HA ex p Coughlan** [2001] QB 213, is that even though a body is under no duty of consult, if that body embarks on a process of consultation, it will then be taken to be subject to a duty to comply with the full requirements of lawful consultation:

"108 It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those

consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168."

113. The "Gunning requirements" are a useful summary of some key features of a lawful consultation process. See **R v Brent LBC ex p Gunning [**1985] 84 LRG 168, QBD:

(i) Consultation is undertaken at a time when the relevant proposal is still at a formative stage;

(ii) Adequate information is provided to consultees to enable them properly to respond to the consultation exercise;

(iii) Consultees are afforded adequate time in which to respond; and

(iv) The decision-maker gives conscientious consideration to consultee's responses.

114. The Supreme Court in **Haringey** also held that held that fairness may require that interested persons are consulted "not only upon the preferred option, but also upon arguable yet discarded alternative options". Even where the statutory obligation only extends to consulting on the preferred option, as in Haringey's case, fairness may nevertheless require passing reference to be made to alternative options.[39]

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[39] The law was usefully set out in **Haringey**:

> "[23] A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in **R v Devon CC, ex p Baker, R v Durham CC, ex p Curtis** [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
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> [24] Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In **Osborn v Parole Board, Booth v Parole Board, Re Reilly's application for Judicial Review (Northern Ireland)** [2013] UKSC 61, [2014] 1 All ER 369, [2014] AC 1115, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras [67] and [68] of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is

liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' (see [67]). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (see [68]). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'

[25] In **R v Brent London BC, ex p Gunning (1985) 84 LGR 168** Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said (at 189):

> 'Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.'

Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the Baker case, cited above (see 91 and 87), and then in **R v North and East Devon Health Authority, ex p Coughlan** (Secretary of State for Health intervening) [2000] 3 All ER 850 at 887, [2001] QB 213 at 258 (para 108). In the Coughlan case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated ([2000] 3 All ER 850 at 887–888, [2001] QB 213 at 259 (para 112)):

> 'It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.'

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in **R (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts** [2012] EWCA Civ 472, (2012) 126 BMLR 134 (at [9]), 'a prescription for fairness'.

[26] Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the government's proposed designation of Stevenage as a 'new town' (Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496 at 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged. Second, in the words of Simon Brown LJ in the Baker case, at 91, 'the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit'.

[27] Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. For example, in **R (on the application of Medway Council) v Secretary of State for Transport** [2002] EWHC 2516 (Admin), [2002] All ER (D) 385 (Nov), [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the government had acted unlawfully in consulting upon possible development only at

115. Importantly, the standards of fairness are not immutable. What fairness demands is dependent on the context of the decision. While an essential feature of the context is the statute which creates the discretion, 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/her 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.

116. However, in this case there was no question of the "removal" of the NCBA as some form of punishment or penalty which requires some case to be put to them for their answer. There was no material evidence advanced by the NCBA of any adverse impact on it by a loss of representative status. There is no infringement of any human right. At best, the Minister was engaged in a fresh exercise of the Minister's decision to determine which of three organisations should be appointed. If the Minister was to devise a method of making this determination her decision to collaborate, meet and consult with all three organisations fulfilled her general duty of fairness.

117. The Interested Party also pointed out the comprehensive consultation process that was engaged as set out in the uncontroverted evidence.[40] Furthermore, the Claimant does not dispute that the Minister embarked upon a process of consultation to establish the criteria

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Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also R (on the application of Montpeliers and Trevors Association) v Westminster City Council [2005] EWHC 16 (Admin), [2006] LGR 304 (at [29]).

[28] But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In **Nichol v Gateshead Metropolitan BC** (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see 455, 456 and 462. In the Royal Brompton case, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at [10], cited the Gateshead case as authority for the proposition that 'a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are'. It held, at [95], that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton."

[40] See pages 18-23 of the TTCBA's written submissions filed 18th March 2019.

for the appointment of a nominee. The Claimant's real submission is that the Minister had a duty to consult with the NCBA as the body who stood to be affected by a change in status[41]. From its submission it appears that they expected to be consulted on a one to one basis and even after settling the criteria, to be allowed to comment on the new approved criteria. The difficulty with this proposition is that the NCBA can point to no express promise nor representation made to them that they will always be the incumbents. In fact, it was admitted that the NCBA had no legitimate expectation to be re-appointed. Accordingly, the NCBA like any other nominee's expectation would be to hold the office of nominee for the term of their appointment and not otherwise. At the end of the term the Minister must exercise a fresh decision and give a nominee a new mandate. There is nothing in the NCC Act nor in the Minister's dealings with the NCBA that can give rise to a right or legitimate expectation to be consulted on a one to one basis or to be allowed to comment on the settled criteria.

118. In effect, the challenge of the NCBA is essentially that the quality of the consultation in this case fell below the standard required of the Minister having regard to the background of the NCBA and its lengthy representation on the board of NCC. Even this is an absurd proposition when they admit to attending meetings on this question of the Minister's proposal of conducting a mas audit to discharge her section 5(9) duty and they simply sat silent.

119. The NCBA's challenge on the quality of the consultation process therefore fails on two significant features in this case. First, there is an accepted state of affairs of detailed consultations with the stakeholders on the question of an audit and the criteria. It is accepted that the question of the mas audit was first discussed with all stakeholders when the proposal was in its infancy. It was an opportunity for the stakeholders to provide their views on any aspect of the selection process. The NCBA failed to avail themselves of this opportunity, failed to suggest alternatives and failed to point out to the Minister their own view on the criteria that can be workable for conducting an objective exercise of determining which organisation is most representative. Their approach was unfortunately

[41] Paragraph 11 of the Claimant's written submissions.

one based on the mistaken premise of an entitlement to office which they have conceded in this case they do not have.

120. Secondly, by letter dated 19th March 2018 the NCBA did make written representations on why they should remain as the nominee for the NCC directly to the Minister. It provided an alternative view to the question of most representative. While the Minister did not meet with them on that letter she was equally not obliged to respond to this representation but to take it into account. There is no evidence or allegation to suggest that she did not consider it.

121. I agree that consultation in this case was important as it fosters transparency and accountability, it humanises the approach by public institutions and engenders an ethic of care. Listening is an important part of the concept of involvement. No doubt many decisions have been the source of litigation in this jurisdiction simply from that feeling of being “left out” “disregarded” and “disrespected”. Having voice in public affairs does not mean there is an obligation to give effect to that view but at the minimum to listen, to appreciate, to be sensitive to those concerns.

122. Conversely, like in most matters, the question of consultation is a two way street. Offers of consultation must be treated seriously and taken seriously. If a group is engaged for the purposes of consultation full advantage must be made of that opportunity to express views and seek to influence. It is perhaps a vicious cycle in this jurisdiction that little attention is placed on consultation as the public body has over time developed a feeling that the public does not take the opportunity of consultation seriously. Conversely, the public may not engage the public body due to a lack of trust that any of its views would be considered, a feeling of a lack of interest. While window dressing consultations must be condemned, genuine attempts to reach out to the public or groups as shown in this case by the Minister should be encouraged as are contrite expression from members of the public to public officials should give cause to think to adjust and to incorporate dissenting views. Only then, in my view, can a platform for true collaboration through consultation can be engendered, developed and lead to national development.

123. In my view, the quality and nature of the consultation process engaged by the Minister was reasonable and sufficient to characterise her process as manifestly fair and satisfactory and met the requirement of proper collaboration to further the interest of the mas industry.

124. I have examined the issue of consultation as a matter of fair process generally. I now examine consultation as a feature of legitimate expectations as argued by the NCBA.

Legitimate Expectation

125. The NCBA is ambivalent in pegging the duty to consult on the doctrine of legitimate expectations. Where there is a legitimate expectation that a decision maker will consult before taking a decision, it will be required to act in accordance with that legitimate expectation unless there are good reasons not to do so. Such a legitimate expectation may arise out of an express representation that there will be consultation, an implicit representation by way of a past practice of consultation or the fact that the individual or individuals concerned have an interest in a benefit that might be affected by the relevant decision which is sufficient to found a legitimate expectation of consultation.[42] There was no express representation made in this case by the Minister that it will consult with the NCBA alone before it decided to adopt a process of conducting a mas audit.

126. NCBA claimed they had a legitimate expectation to be consulted on a one to one basis. They concede that the Minister engaged them on the question of the mas audit, however, they contend that the Minister should have acceded to their request to meet with them to discuss how any change will impact on them. In particular, in its submissions in reply the Claimant appears to make the argument that certain proprietary interests were at stake.

127. There arguments deserve repeating:

> "1. TTCBA conveniently misses the point when it reduces NCBA's claims regarding legitimate expectation solely to that of being re-appointed to the board of NCC. As the stakeholder representative for mas on NCC's board since inception of the NCC Act in

[42] **Judicial Review Principles and Procedure, Jonathan Auburn, Jonathan Moffett and Andrew Sharland**, paragraph 7.10, page 186

1991 (over 28 years ago), a number of arrangements came into effect, for example, regarding subventions and rent for NCBA's head office at 1 Picton Street in Woodbrook.

2. Then, in 2016 NCC took over responsibility and control of NCBA's Parade of the Bands and NCBA's Junior Carnival Competitions- NCBA's main ways of earning money- so the NCBA was understandably very concerned about how a change in status would impact long-standing arrangements and that is why they wanted a consultation with the Minister to see what (if anything) could be done to mitigate against potential negative fallout.

3. As such, NCBA's 'legitimate expectation' relates to legal rights and interests; in particular, deprivation of their rights and entitlements to administer the mas component of carnival; failure of the part of the powers-that-be in dispensing the necessary and appropriate funding for the Association to discharge their functions and duties; and concerns whether a change in status as most representative would negatively impact their recurring expenditure." [43]

128. There is, however, no evidence deposed to by Mr. Lopez of any proprietary loss or any impact on the operations of NCBA as a result of a change in status or one that was known by the Minister. Furthermore, Mr. Lopez has not made it clear that any such interest will be affected, indeed the NCBA's arguments are speculative and not based on any real loss[44].

129. The NCBA has not pointed to any promise made by the Minister to consult with it before "changing" their status, nor of any representation that they will be privately consulted. Further, there is no promise that they will remain the representative ad infinitum, a fact which they readily conceded. There could therefore be no case of legitimate expectations of a procedural benefit or worse of a substantive benefit.

130. The Privy Council recently in **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17 summarised the modern view on the law

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[43] Paragraphs 1-3 of the Claimant's submission in reply filed 25th March 2019

[44] See paragraph 82 and exhibit "D.L.17" of the affidavit of David Lopez filed 19th September, 2018.

of legitimate expectations.[45] Lord Carnwarth summarised the modern authority in favour of a narrow interpretation of the **Coughlan**[46] principle which he states as:

> "Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a "macro-economic" or "macropolitical" kind."[47]

131. In **Paponette v The Attorney General of Trinidad and Tobago** [2010] UKPC 32, which dealt with substantive legitimate expectation, Dyson SCJ observed:

> "28. In a case where the legitimate expectation is based on a promise or representation, a useful summary of the relevant principles was given by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453, at para 60:

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[45] **Jonathan Auburn, Jonathan Moffett and Andrew Sharland in Judicial Review Principles and Procedure** summarizes the categories identified by Simon Brown LJ in ex p Baker as :

(i) Procedural legitimate expectation in the form of:

  (a) A procedural entitlement, such as to consultation or a hearing, arising out of an express or implied representation by a public body that a particular procedure, not otherwise required by law, will be followed by it. This has since been referred to as the 'paradigm case' of procedural legitimate expectation;

  (b) A procedural entitlement, such a to consultation or a hearing, arising out of an interest in an ultimate substantive benefit which an individual hopes to retain or attain, where the interest is such that it is protected by the requirements of procedural fairness and it cannot be withdrawn by the public body without the individual having had the opportunity to comment. This has since been referred to as the 'secondary case' of procedural legitimate expectation.

(ii) Substantive legitimate expectations, in the form of a substantive entitlement arising out of a representation by a public body as to how it will exercise its decision-making function.

[46] **R v North and East Devon Health Authority, Ex p Coughlan** [2001] QB 213

[47] **United Policy Holders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, paragraph 121

> ""It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131.""
>
> ……………………………………….

34. The more difficult question is whether the government was entitled to frustrate the legitimate expectation that had been created by its representations. In recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation. Some of it was referred to by Warner JA in her judgment. The leading case is R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. "

132. The NCBA cannot even rely on a settled practice by the Minister as a promise that they will be consulted or that they will enjoy this benefit of representation. First, the NCC Act is

clear that the term of the appointment is for two (2) years and no more. At the end of each term the Minister must exercise a fresh discretion in the circumstances that prevail at the time. NCBA could not legitimately expect in the face of the statute that they were entitled to be the nominee in perpetuity. At best, they can only lay claim to convincing the Minister that they are the most representative of Carnival bands, a matter which was decided in the objective exercise of the mas audit and which will continuously arise every time the decision has to be made.

133. Secondly, the Cabinet Note referred to by Mr. Lopez is of no assistance to the NCBA. It is relied upon by Mr. Lopez as some evidence of a settled practice of representation on the NCC board. It does no such thing. It simply sets out some operational arrangements of Carnival for which NCBA was entrusted.[48] It identifies no promise that the NCBA will remain the nominee of Carnival bands to sit on the NCC. The document is incomplete without the actual note itself. In any event it is clear on its face and admitted as such by Counsel for the NCBA, that the note only refers to operational matters for the development of mas which does not impact upon the decision to be made by the Minister as to which organisation is most representative of mas bands. There is no evidence of a settled practice based on this note that the NCBA is to be considered the organisation that is most representative of Carnival bands. There is nothing inconsistent for example in appointing the TTCBA as the

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[48] The Cabinet Minute No. 2007 of 7th August 1997 provided:
Cabinet agreed:
(a) that in order to improve Carnival in Trinidad and Tobago in 1998 and beyond, each Carnival body/organisation be administratively responsible for its own area of production of Carnival as indicated hereunder:
…………………………………
<u>Role of the National Carnival Bands Association</u>

- Street Parades in Port of Spain and environs on Carnival Monday and Tuesday, the parade route to be extended to the environs of the Savannah
- Junior Carnival
- Kings and Queens shows- preliminaries, semi-finals and finals
- Traditional Carnival shows
- Pre-Carnival Mas shows
- The production of Pre-Carnival packages
- Judging of parade of bands, the judging of each band to be on one day only, the day to be determined by the drawing of lots
- Participating in decisions concerning accreditation, sponsorships, copyrights, donations
- Marketing (local)
- Ticket sales for related activities.

nominee yet continuing the operational arrangements set out in the Cabinet Note.

134. The NCBA's expectation is devoid of any legitimacy. At best it can only expect that the Minister will comport with the general principles of fairness and reasonableness, a matter which has been analysed and discussed above.

135. NCBA contended that they were surprised by this determination as the Minister had previously asserted that she would make no appointment of a mas representative to the Board of the NCC until the completion of the judicial review proceedings. The decision of Justice Charles was by February the subject of an appeal. In her letter of 20th March 2018 to the NCBA she had letter stated that "the issue of the appointment of a representative for mass bands on the Board of the National Carnival Commission remains before the Court and I await the outcome of same before taking any further action in that regard." [49] To the extent that the NCBA seeks to rely on that representation to prevent the Minister from making her decision, the argument is also flawed. How long should the Minister wait until she legitimately carries out her statutory duty to make her appointment? After having the benefit of the decision at first instance, it is not unreasonable to proceed rather than wait approximately three years for the outcome of an appeal and worse a further period of time awaiting a decision from the Privy Council if the litigation meandered its way to our final Court. To say the NCBA was appointed for period of a few months from January 2017 to October 2017 to preserve the status quo is reasonable in the circumstances. To say it should remain on the board for a further six years as a status quo measure is absurd.

136. Equally, the alleged change in position by the Minister argued by the NCBA is of no moment. The Minister acted consistently with her statutory duties and did so in conformity with the common law principles of fairness.

Legality

137. The Claimant contends that the NCC Act does not give the Minister the power or discretion to prescribe new or additional criteria to determine the most representative body. The Defendant's contention is that the Minister is given the power to appoint

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[49] Exhibited "D.L.3." in the affidavit of David Lopez filed 19th September 2018

members to the Board of NCC pursuant to section 5(1) of the NCC Act. The NCC Act is silent as to any restrictions in the exercise of the Minister's discretion or whether there are any considerations which the Minister should take into account in appointing SIGs in section 5(1) (a) (b) and (c) of the NCC Act.

138. It therefore must flow, based on my analysis above, that the Minister acted intra vires, consistent with the objects of the NCC Act and legitimately exercised her power. The Minister complied with the statutory requirement to appoint a nomine of an organisation most representative of Carnival bands. She utilised criteria which was legitimate and objectively met the requirement of reasonableness and logic. The methodology of the mas audit as explained above met and satisfied the objects of the NCC Act.

139. Further, with respect to the argument by NCBA that the Minister's decision failed to take into account the NCBA Act, I fail to understand how this assists the NCBA save as the factual backdrop to the importance of NCBA as one out of three organisations who must demonstrate to the Minister that it is most representative of Carnival bands. If NCBA is correct that the NCBA Act somehow elevates their status to a perpetual seat on the NCC board then section 5 of the NCC Act would have plainly said so. It does not and further Counsel for the NCBA quite properly recognises that it can lay no claim to such a seat.

140. Unusually in the Claimant's submissions in reply[50] it now seeks to abandon its reliefs "d" and "e" in its Fixed Date Claim Form[51]. However, this is an important pillar for their entire case and it is unfortunate this was not brought to the Court's attention at the leave stage or further submissions made to demonstrate what is the real complaint of the NCBA.

141. The Claimant's claim therefore fails on its challenge of illegality, irrationality and procedural impropriety.

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[50] Claimant's submission dated 18th April 2019

[51] Reliefs (d) and (e) in the Fixed Date Claim Form are:

(d) A declaration that the Minister's Decision conflicts with the legislative purpose, settled practice and policy in particular: the Cabinet Note and the NCBA Act which incorporated the Claimant for the purpose of represent mas bands and the mas sector.

(e) A declaration that, as there is no power under the NCC Act which enables the Minister to revisit established practice or prescribe new, additional, or different criteria regarding most representative, the process used and the resulting Decision was in excess of the Minister's jurisdiction, authority and given powers.

Proportionality

142. Proportionality as a ground of review was not pleaded but the parties filed their further submissions on 18th April, 2019 on their views on proportionality. The Claimant submitted that proportionality entails greater judicial attention of administrative autonomy than the traditional approach. It is a more rigorous, objective and intrusive test than Wednesbury test. They submitted that proportionality would urge that since the Court's primary role is to protect citizens against executive abuse, the Court should not abdicate its role because of judicial deference and therefore the Court should not be blind to the rights, entitlements and interests of the Claimant. The Defendant submitted that even though the present case was not one in which a fundamental right is being infringed, it does not bar the Court from conducting a proportionality review. The Interested Party submitted that the present case was not one that justified the Court's use of proportionality since on the Claimant's pleaded cases there is insufficient material on the evidence to engage the concept.

143. In **Primnath Geelal and Rupnarine Geelal v The Chairman, Aldermen, Councillors and Electors of the Region of San Juan/Laventille** Claim No. CV2017-04558 I raised the question whether proportionality should be recognised as a separate ground of review in this jurisdiction rather than as an extension of the rationality ground of review or a hard edged Wednesbury unreasonableness. I had opined that "in suitable cases, our Courts can recognise proportionality as a separate ground of review. There is no reason in principle why such a ground cannot be applicable in our jurisdiction as a tool by which the Court can analyse the actions of the Executive. In this case, when fundamental property rights are at stake it is appropriate to consider whether the decisions made are proportionate, whether a suitable balance was struck by the decision maker and whether all the circumstances were evenly weighed and balanced before arriving at a decision. Such an enquiry raises the profile of administrative justice and provides for the citizen a greater guarantee that decisions made are humane if it was subjected to a process that was fundamentally fair"[52].

144. I pointed out in that case the reasons why a proportionality analysis would be desirable:

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[52] **Primnath Geelal and Rupnarine Geelal v The Chairman, Aldermen, Councillors and Electors of the Region of San Juan/Laventille** Claim No. CV2017-04558, paragraph 76

> "First, our Judicial Review Act Chapter 7:08 in setting out the heads of review certainly did not create an exhaustive list. Second, it is a much more appropriate test to apply to administrative decision making in 21st century Trinidad and Tobago in light of our growing judicial review jurisprudence. As Justice of Appeal W. Kangaloo observed, our judicial review is developing beyond a galloping pace. The reasons lie in a growing demand by our citizens for transparency, accountability and good governance. The jurisprudence of the FOIA is but a reflection of this growing sensitivity to the transparency of decision making. Third, such a test would, rather than stymie decision making, create the environment for enlightened decision making. Finally, such demands for a measure of balance in decision making may infuse a humanism which will instil respect for the rule of law. Proportionality may well develop into not only steps taken to weigh competing interests but steps taken to avoid conflict and engage mediation or ADR. When described in this way we may well foster a new breed of responsible and humane administrators condemning the "bull in the China shop" style of decision making to the archaic days of the plantations in the 1900s."[53]

145. In this case, I asked the parties to address me on whether the proportionality ground should be recognised in this jurisdiction and if so whether the Ministers decision can be subjected to this analysis. Commendably to the credit of the Minister she agrees that her decision must comport to the principles of proportionality, that proportionality is an adequate ground of review to enhance the level of administrative justice and that in the context and circumstances of this case she has satisfied the proportionality test. However, I also agree with the Interested Party that on a proportionality ground of review much more evidence is required and that ground of review should be properly articulated in the claim to afford the Defendant a fair opportunity to assist the Court on that challenge.

146. The proportionality ground of review is summarised in the following manners in **P Craig, Administrative law 6th Edn (2008),** at **pages 627-628:**

[53] **Primnath Geelal and Rupnarine Geelal v The Chairman, Aldermen, Councillors and Electors of the Region of San Juan/Laventille** Claim No. CV2017-04558, paragraph 175

"It is important at the outset to ascertain the place of proportionality within the general scheme of review and its relationship with other existing methods of control. It is clear, as a matter of principle, that to talk of proportionality at all assumes that the public body was entitled to pursue its desired objective. The presumption is therefore, that the general objective was a legitimate one, and that the public body was not seeking to achieve an improper purpose. If the purpose was improper then the exercise of discretion should be struck down upon the ground, without any investigation as to whether it was disproportionate. Proportionality should then only be considered once the controls [represented by the existing heads of illegality review]… have been satisfied.

Let us turn now to the meaning of the concept itself. It is obvious that at a general level proportionality involves some idea of balance between competing interests or objectives and that it embodies some sense of an appropriate relationship between means and ends. We must therefore identify the relevant interests and ascribe some weight to them. A decision must then be made as to whether the public body's decision was indeed proportionate or not, in light of the preceding considerations. The most common formulation is a three part analysis. The court considers:

(i) Whether the measure was suitable to achieve the desired objective.

(ii) Whether the measure was necessary for achieving the desired objective,

(iii) Whether it nonetheless imposes excessive burdens on the individual. The last part of this inquiry is often termed proportionality *stricto sensu* [in a strict sense]

It will be apparent from the subsequent analysis that the court will have to decide how intensively to apply these criteria. It should also be recognised that the criteria may require the court to consider alternative strategies for attaining the desired end. This follows from the fact that the court will, in

fundamental rights cases, consider whether there was a less restrictive measure for attaining the desired objective….”

147. In **Judicial Review Principles and Procedure, Auburn, Moffett, Sharland,** the learned authors highlighted a number of differences between proportionality review and review on the ground of irrationality:

“First, proportionality review usually involves the application of a more intense approach than review on ground of irrationality. Secondly, proportionality review requires a more structured and sophisticated approach than irrationality review. Thirdly, proportionality review requires the reviewing court to assess for itself the balance that the public body has struck rather than merely consider whether the balance struck is rational or reasonable. In particular, it may require the court to consider the relative weight accorded to competing factors.

It has been suggested that proportionality review has two advantages over irrationality review. First, it enables a greater understanding of the exercise that a court undertakes because it requires the court to articulate more precisely why a particular decision is unlawful and, secondly, it promotes improved decision-making by public bodies by encouraging them to consider alternatives and to focus on the relationship between the aims that they are trying to achieve and the means being used to achieve those aims.”[54]

148. In **R v Secretary of State for the Home Department ex p Brind** [1990] 1 All ER 469, Lord Donaldson of Lymington MR commenting on proportionality had this to say:

“Even at that time, the principle that administrative action could be quashed if it was disproportionate to the mischief at which it was aimed had been accepted by the courts, albeit not as a classified ground for judicial review: see *R v Barnsley Metropolitan BC, ex p Hook* [1976] 3 All ER 452 at 456, 461, [1976] 1 WLR 1052 at 1057, 1063.

………………………………..

For my part, I think that Lord Diplock's speech in the *Council of Civil Service Unions* case

[54] **Judicial Review Principles and Procedure, Auburn, Moffett, Sharland paragraphs 18:04-18:05**

has been misunderstood. He was providing three chapter headings for a review of the grounds on which, in the reported cases, judicial review had been granted. He was not, as I think, suggesting that there were three separate grounds. Rather he was saying that in due time, and under the influence of European law and lawyers, there might be enough cases in which decisions had been quashed on the ground that the administrative action was disproportionate to the mischief at which it was aimed for this to be treated as a separate chapter."[55]

149. In **Daly v Secretary of State for the Home Department [2001] 2 WLR 1622** Lord Steyn referred to proportionality principles as more precise and more sophisticated than the traditional grounds of review:[56]

"**27.** The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review………………

The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few

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[55] **R v Secretary of State for the Home Department ex p Brind** [1990] 1 All ER 469 at 480-481
[56] **Daly v Secretary of State for the Home Department [2001] 2 WLR 1622** paragraph 27

generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights."

150. In the Caribbean proportionality as a separate ground of review is gaining credence. See **Geelal, Wesk Limited v Saint Christopher Air and Sea Ports Authority** CLAIM NO. SKBHCV2017/0241**, The Northern Jamaica Conservation Association et al v The Natural Resources Conservation Authority et al** (Claim No. HCV 2005/3022 where Skyes J noted at paragraph 15:

"Proportionality is a more refined technique of **judicial review** that enables the court to examine executive action in a more comprehensive manner without trespassing on the domain of the executive. I would have thought that was a good thing."

151. In **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04 Sykes CJ proffered a four stage test in proportionality review (albeit in constitutional law proceedings) at paragraph 108:

"a) the law must be directed at a proper purpose that is sufficiently important to warrant overriding fundamental rights or freedoms;

b) the measures adopted must be carefully designed to achieve the objective in question, that is to say rationally connected to the objective which means that the measures are capable of realising the objective. If they are not so capable then they are arbitrary, unfair or based on irrational considerations;

c) the means used to achieve the objective must violate the right as little as possible;

d) there must be proportionality between the effects of the measures limiting the right and the objective that has been identified as sufficiently important, that is to say, the benefit arising from the violation must be greater than the harm to the right."

152. At the core of a proportionality review is to examine the justification offered by the decision maker and to determine the quality of the reasons advanced. It moves from the notion whether the decision is a reasonable one to almost the notion whether it is the correct one in the circumstances.

153. The test that is applicable under a proportionality review is as follows:

a) Is the measure in question appropriate and necessary in order to achieve the objectives legitimately pursued;

b) Where there is a choice between several appropriate measures, was recourse made to the one that was the least onerous;

c) Were the disadvantages caused by the measure disproportionate to the aims pursued.

154. In such a review the question of due deference is almost eliminated as historical legal orthodoxy. The Court, of course, will not legislate nor will it set policy but certainly it can and must indicate to legislature and executive alike that better choices can be made in the circumstances of the case to give effect to the rule of law, administrative justice and ensure harmony between competing interests. There can be no "window dressing" in this ground of review; it is a merits based approach. Matters of justice, fairness, morality, propriety are equally matters which fall for judicial scrutiny and comment in upholding the rule of law and the fundamental pillars of our constitutional democracy. Human rights therefore need not be articulated to give rise to a proportionality review as this is a quintessential interrogation into the transparency and accountability of administrative decision making. Any attempt to restrain the limits of proportionality review in not having regard to the merits would be to unjustly stultify the development of this area of the law and muddle it with the concept of proportionality under the reasonableness or rationality review. For this reason the Australian Courts have been reluctant to embrace the principle of proportionality in judicial

review. Spigelman CJ in **The Honourable Justice Bruce V The Honourable Cole And Ors** Bc9802406 (1998) 45 NSWLR 163 correctly commented at 40 "The concept of proportionality is plainly more susceptible of permitting a court to trammel upon the merits of a decision than Wednesbury unreasonableness."

155. In my view, releasing proportionality from the shackles of the rationality/Wednesbury unreasonableness ground of review is significant. It no longer is to be viewed as a review which gives "due deference" to the administrative decision makers nor to preserve decision making which may be unreasonable but not perverse or decisions which were reasonable but incorrect. In short preserving decisions which is but one of the many reasonable options available without further investigation and inquiry into the thought process of the actual decision made may sacrifice administrative justice, transparency and accountability on the altar of due deference.

156. In this case, I agree with the submissions of the Minister. The objective legitimately pursued was to choose among several organisations which was the most representative of Carnival bands. The measure adopted was the use of an audit. It was appropriate and necessary to achieve the objective. There could have been the choice of obtaining an agreement or asking the group to nominate their nominee, neither of them are superior to the measure of determining by mas audit the state of the membership of each organisation. The disadvantage, of course, is that one group will no longer be the nominee. However, there is no inherent right to sit. The term expires after two years. There is no evidence of any proprietary interest affected by the fact that one is a nominee on the board. In any event, the nominee pursues the work of NCC and not that of the organisation. The fact that an organisation is not a nominee on the board of NCC does not by itself mean they no longer can be involved in the organisation and development of mas.

Conclusion-"Band of the Year"

157. Mas is an iconic and visceral cultural expression for our people. At the end of the "Reign of the Merry Monarch" of our masquerade, a winner of the Carnival bands is announced. It is a highly anticipated affair, if not sometimes controversial, an electric movement. Which

band has best represented the theatre and spectacle of mas? Which one is the people's choice? Which one captured our imagination? Equally, in this litigation, there is a winner to this contest. I would hesitate to say there is a loser. In most judicial review challenges in my view, the Court's focus should always be on ultimately ensuring that the rule of law prevails. Each dispute such as this is an opportunity to re-examine basic tenets in the "public morality" which is our public law. It is unfortunate that the mas has been mired in this controversy. However, the silver lining is the certainty with which the Minister should carry out her job of appointing a section 5(1)(b) nominee. The Minister's decision, in my view, for the reasons I have explained, has satisfactorily complied with the pillars of legality, rationality, procedural propriety and proportionality, all symbols of good administrative governance.

158. After this Carnival is over, there will remain on the shoulders of the Minister and anyone occupying that seat on the NCC as the section 5(1)(b) nominee a heavy responsibility in collaboration with the fellow board members. The principles of public law in their collaborative exercise will remain symbols of a public morality. The roles that they play are under the larger banner of the survival and development of our mas which is a unique indigenous cultural product with historical significance and vast potential for the future development of our nationhood and the character of our people. The mas after all is and represents us all, it is all inclusive, formless and seamless, a moving canvass which defies strictures, rebels against limitations.

"Mas is a vehicle for the expression of human energy…….
Flesh and blood powers the mas . . . The energy passes from performer to spectator like an electrical charge . . . a moment that cannot, will not last — it passes quickly, leaving the mind singed . . . Our aesthetic is performance, the living now."- Peter Minshall[57]

Vasheist Kokaram
Judge

[57] Masman: Peter Minshall | Caribbean Beat Magazine https://www.caribbean-beat.com/issue-79/masman-peter-minshall#ixzz5mV50QjdO.