

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2017-00072**

**IN THE MATTER OF THE JUDICIAL REVIEW ACT 2000**

**AND**

**IN THE MATTER OF PART 56 OF THE CIVIL PROCEEDINGS RULES 1998**

**AND**

**IN THE MATTER OF AN APPLICATION BY EDEN CHARLES FOR JUDICIAL  
REVIEW OF THE DECISION OF CABINET TO REVOKE THE APPOINTMENT OF  
AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY OF MR. EDEN  
CHARLES AND/OR AN ACTION OF CABINET TO FRUSTRATE THE LEGITIMATE  
EXPECTATION OF THE APPLICANT THAT HE WOULD RETAIN HIS POSITION  
AS AMBASSADOR EXTRAORDINARY AND PLENIPOTENTIARY**

**BETWEEN**

**EDEN CHARLES**

**APPLICANT**

**AND**

**DR. KEITH CHRISTOPHER ROWLEY PRIME MINISTER  
OF THE REPUBLIC OF TRINIDAD AND TOBAGO**

**THE CABINET OF THE REPUBLIC OF TRINIDAD AND TOBAGO**

**RESPONDENTS**

**Before The Honourable Mr. Justice Seepersad**

Appearances:

1. Ms. V. Marajh and Mr. D. Maharaj for the Applicant
2. Mr. R. Armour S.C., Ms. V. Gopaul, Ms. N. Nabie and Ms. S. Ramhit for the Respondents

**Dated: 11<sup>th</sup> July, 2017**

**DECISION**

1. Before the Court for its determination is the Applicant's application dated 5<sup>th</sup> January, 2017, for leave to apply for Judicial Review pursuant to s. 6 of the Judicial Review Act Chapter 7:087 (JRA) and Rule 56.3 of the Civil Proceedings Rules 1998 (the CPR) as amended.
2. In **Satnarine Sharma v. v. Brown-Antoine and Ors. (2006) UKPC 57** the Court stated:

*“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a*

*realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. Arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. The flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

3. In its determination of the issue as to whether or not leave should be granted, the Court has to consider the case as presented by the Applicant and determine whether the Applicant has an arguable case, and the said Applicant must satisfy the Court inter alia that:
  - a) He has sufficient interest in the matter;
  - b) He has exhausted all available alternative remedies or there exists no alternative remedies;
  - c) That there has been no delay in the institution of the application; and
  - d) That there exists an arguable ground for judicial review which has a realistic prospect of success.
4. Having reviewed all the information that is before it, the Court is of the view that the Claimant has demonstrated that he has sufficient interest in this matter insofar as he contends that he has been adversely affected by the decision to revoke his appointment as an Ambassador Extraordinary and Plenipotentiary and that such a decision could reasonably have occasioned upon him financial loss.
5. The Applicant is a public servant and there exists no mechanism so far, as is known to the Court, to appeal the decision to revoke his appointment under the umbrella of the provisions and processes that currently exist under the public service. The contention

before the Court is that the revocation was effected pursuant to s. 135 of the Constitution of Trinidad and Tobago (the Constitution).

6. The Applicant contends that he first became aware of the revocation of his appointment on the 6<sup>th</sup> October, 2016 when he received letter dated 30<sup>th</sup> September 2016 and the Instrument of Revocation dated 19<sup>th</sup> September 2016. The instant application was filed on the 5<sup>th</sup> January 2017 and the Applicant contends that the instant matter was instituted within a 3 month period as determined under Part 56.5(2) of the CPR. The Respondents stated however, at paragraph 12 of the affidavit of Veita Toussaint that the decision to revoke the Applicant's appointment was communicated to him via email on the 18<sup>th</sup> August 2016 and that the instant application has therefore been filed outside the required three month time period.
7. The Court is of the view that the contention that the revocation could not be occasioned by an email without the preparation of an Instrument of Revocation is one that is arguable. The Instrument was dated 19<sup>th</sup> September, 2016 almost one month after the email of August, 2016. While the said email stated that the Cabinet had decided to revoke the appointment, it is unlikely that any revocation could have been occasioned without the Instrument of Revocation. This document was brought to the Applicant's attention by the letter dated 30<sup>th</sup> September, 2016 which he contends he received on the 6<sup>th</sup> October, 2016. The wording of the email dated 18<sup>th</sup> August was as follows:

*“in keeping with a Cabinet directive, career civil servants who are appointed Ambassador will revert to their substantive position within the Civil Service at the end of their tour of duty overseas”.* Ms. Toussaint further stated *“Please note that it is proposed that you head the Treaties, International Agreements and Legal Division”.*

8. In response to same the Applicant issued an email dated 19<sup>th</sup> August, 2016 by virtue of which particulars of the Cabinet directive were sought and his evidence is that no response to the said email was received.
9. In the circumstances, the Court is of the view that the Applicants contention that there was no unreasonable delay prior to the making of the instant application is one that is not devoid of merit and no evidence has been adduced so as to lead the Court to conclude that substantial hardship or prejudice could be occasioned to the Respondents if the Court elects to grant leave nor does the factual matrix establish that such an order would be detrimental to good administration.
10. The next issue which the Court considered, as against the test of whether there is an arguable ground for Judicial Review which has a realistic prospect of success, was the issue as to whether the decision of the Respondents is in fact open to Judicial Review.
11. The constitutional provisions relating to the appointment and removal of Ambassadors/High Commissioners are set out in s.135 of the Constitution of Trinidad and Tobago. These are as follows:

*“135. (1) The President acting in accordance with the advice of the Prime Minister shall have power to appoint persons to the offices to which this section applies and to remove persons from any such office.*

*(2) Before tendering any advice for the purposes of this section in relation to any person who holds or is acting in any public office other than an office to which this section applies, the Prime Minister shall consult the appropriate Service Commission.*

*(3) This section applies to the office of—*

*(a) Ambassador or High Commissioner; and*

*(b) any principal representative of Trinidad and Tobago in any other country.”*

12. There is an issue as to whether the Prime Minister is cloaked with a prerogative power as it relates to the appointment and/or revocation of appointment of an Ambassador and whether, once such power is established to the Court's satisfaction, it can properly inquire into the propriety of such an exercise as was expounded in **AG v. De Keyser's Royal Hotel Ltd. (1920) AC 508 at 526.**

13. The justiciability of a prerogative power depends on the subject matter of the claim.

14. In **Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75, 101** Lord Reid said:

*“The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute”.*

15. **Section 6 of the Constitution** provides that :

*“(1) Where under any existing law any prerogative or privilege is vested in Her Majesty the Queen or the Crown in respect of Trinidad and Tobago, that prerogative or privilege shall, on the appointed day, vest in the State and, subject to the Constitution and any other law, the President shall have power to do all things necessary for the exercise thereof.*

*(2) Where under any existing law any rights, powers, privileges, duties or functions are vested in or imposed on the Governor-General, those rights, powers, privileges, duties and functions shall, on the appointed day, vest in and be exercisable by the President.”*

16. The Applicant contends that by virtue of Section 135 of the Constitution, the appointment and/or revocation as an Ambassador is actuated by His Excellency the President on the advice of the Prime Minister and therefore any prior prerogative on this issue has been extinguished as no prerogative power could exist parallel to a constitutional provision.

17. In **R v Secretary of State for the Home Department, ex parte Fire Brigades Union and Others [1995] 2 WLR 464**, Lord Browne-Wilkinson stated at p.552D-F:

*“... it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme ... It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. ...”.*

18. The Court is of the view that the Applicant’s argument that the Prime Minister does not possess a prerogative power in relation to the appointment and removal of an Ambassador, having regard to the existence of s. 135 of the Constitution, is an argument that is not devoid of merit and is one which the Court considers to be arguable and has a realistic prospect of success. At the trial however, the court would have to carefully consider the position advanced by the Respondents with respect to the proper construction of s. 135(2) and the effect of s. 135(3) of the Constitution.
19. The Applicant has outlined the grounds upon which the instant application has been premised and has raised inter alia issues of illegality, natural justice, legitimate expectation, unreasonableness and bad faith. The Court considered these grounds as against the test of arguability and with a view of determining whether each contention has a realistic prospect of success.
20. The Applicant contends that by the revocation his appointment he has been treated differently and less favourably than other persons similarly circumstanced and that his rights under Sections 4 a, b and d of the Constitution have been compromised.

21. In **Anissa Webster and Others v The Attorney General, Civil Appeal No. 86 of 2008,**

Bereaux J.A. stated:

*“It is accepted that in order to prove discrimination under sections 4(b) and (d) of the Constitution, an applicant for constitutional relief must show that he was similarly circumstanced to other persons but was treated differently. Similarity of circumstances does not mean that there should be no differences between relevant comparators. It will be sufficient that there are no material differences”.*

22. In **Sam Maharaj v The Prime Minister of Trinidad and Tobago [2016] UKPC 37,** Lord Kerr quoted the case of **The Maya Leader Alliance v The Attorney General of Belize [2015] CCJ 15** which stated:

*“The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, “adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.” The right to protection of the law may, in appropriate cases, require the relevant organ of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the*

*citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be the appropriate remedy”.*

23. In **Sam Maharaj** (supra) at paragraph 31 the Board went on to say:

*“Section 4(b) of the Constitution confirms the right of the individual to the protection of the law which protection includes the right to natural justice. In somewhat similar vein, section 5(2)(e) of the Constitution provides that , subject to certain exceptions Parliament may not deprive a person of the right to a hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. It is now accepted that the rights embodied in section 5 of the Constitution particularise in some greater detail what is included in the words “the due process of the law” and “the protection of the law” found in section 4 of the Constitution. Insofar as these proceedings are concerned both the claimant and the defendant do not dispute that what both sections provide is ‘constitutional protection to the right to procedural fairness’.”*

24. Whenever a claim of inequality of treatment arises, the person who asserts such a violation must adduce cogent evidence so as to demonstrate that he has been treated in a manner that is different to the manner in which an actual or hypothetical comparator or similarly circumstanced persons have been treated. It is not necessary to specifically identify or name any such similarly circumstanced individual but evidence as to the circumstances or situations which mirror the Claimant's predicament vis-à-vis another individual or class of persons, must be adduced.

25. Where an Applicant has adduced cogent evidence so as to establish an allegation of discrimination, a shifting of the burden is activated and the public authority must then adduce evidence so as to establish that the decision it effected was reasonable and justified in the prevailing circumstances.

26. At paragraph 46 of his primary affidavit the Applicant deposed as follows:

*“In the past, upon returning to Headquarters, previous Ambassadors such as Mr. Dennis Francis and Ms. Sandra Honore retained their title as Ambassador and were paid according to the Salaries Review Commission, receiving the same salary at headquarters as they did abroad”*

27. In the Affidavit of Mr. Gerald Thompson at paragraphs 22, 23, 24 and 25, Mr. Thompson outlined the practice with respect to the treatment of career Ambassadors and stated that career Ambassadors usually retained their rank at post until retirement, when they were recalled to Headquarters. He provided a list of such persons which included Harrison Major, Ravi Permanand, George McKenzie, Lingston Cumberbatch, Trevor Spencer, Yvonne Gittens-Joseph, Nathan Hazel, David Edghill, Pearl Wilson, Maragaret Rousseau, Babooram Rambissoon, Manniram Rambissoon, Learie Rousseau, Bernard Weston, Colin Granderson, Phillip Sealy and Marina Valere.

28. In the Affidavit of Mr. Dennis Francis, Mr. Francis, at paragraphs 7 and 8, stated that upon his return to Headquarters after being recalled to Headquarters, he served, in the capacity of Director, Multilateral Relations Division while retaining his rank as Ambassador until his retirement.

29. By Supplemental Affidavit filed on the 31<sup>st</sup> January 2017, at paragraphs 13 and 14, the Applicant outlined the emoluments he was entitled to while still holding his post as Ambassador.

30. At paragraph 12 of Mr. Francis’ affidavit, the deponent referred to the emoluments to which a Non-Resident Ambassador is entitled.

31. At paragraph 7 and 8 of the Dumas Affidavit filed on behalf of the Respondents, Mr. Dumas disputes the existence of any such practice as outlined by Mr. Thompson.

32. The Applicant has placed evidence before the Court, which, if accepted at trial, can establish that no career Ambassador whose appointment was revoked without cause and who was recalled to Headquarters was ever made to revert to his/her substantive civil service post but the Respondents have, in the Dumas affidavit denied this assertion.
33. The Applicant's argument in relation to illegality and the issue as to whether the Cabinet directive in relation the revocation of his appointment departed from a longstanding diplomatic practice thereby amounting to a violation of his constitutional rights, is an argument which is not devoid of merit and is a contention that passes the requisite test of arguability as outlined in **Sharma v Browne (supra)**.
34. The Court is also of the view that the Applicant's contention that by virtue of s. 135 of the Constitution, the Cabinet cannot arrogate into itself the power to declare that a career Ambassador would have to revert to his substantive Civil Service post if recalled to Headquarters as such a power is not consistent with the powers vested in the Cabinet under s. 75 of the Constitution, is also arguable and has a realistic prospect of success.
35. In the case of the **Permanent Secretary, Ministry of Foreign Affairs and Prime Minister Patrick Manning v. Feroza Ramjohn (2011) UKPC 20** the Court confirmed that in the exercise of the varied powers a Prime Minister must act in a manner that is fair and which accords with the principles of natural justice and the assessment of what is fair is case and fact specific.
36. If the Court ultimately finds that there exists a long standing practice that career Ambassadors would not, without justification, be deprived of the title and benefits enjoyed, then any departure from such a pre-existing policy should require that an opportunity be extended to the affected Ambassador to be heard and to proffer arguments in opposition to the intended course of action. The nature and gravity of the issues raised in this matter are serious and can have an impact on the way in which all career Ambassadors are treated and

the Applicant's contention that he had a legitimate expectation that he would have been consulted and or provided with the reasons for the decision to revoke his appointment before the decision was actually taken, is not devoid of merit and is arguable. The issuing of reasons would be even more critical, if the course adopted altered a longstanding policy with respect to the treatment of Career Ambassadors when they are recalled to Headquarters. The Applicant's assertion that in the interest of natural justice the Prime Minister ought to have informed him of the various allegations made against him, is in the Court's view, covered with the cloak of arguability and is a ground which has a realistic prospect of success.

37. The Applicant has joined issue with the 'reasonableness' of the intended Respondent's action insofar as he contends that there is a longstanding practice as it pertains to career diplomats retaining their title as Ambassador once recalled to Headquarters. His assertion is that the decision taken in relation to him, defies logic and is outrageous insofar as no sensible person who applied his mind to the issue at hand could have possibly arrived at the decision which was taken. The Applicant complains that the Prime Minister ought to have taken into account that he was in the middle of negotiations for the BBNJ Agreement, and there were letters of support by foreign states about the Applicant being allowed to continue with the negotiations. If the Applicant is correct in his submissions, it will mean that the court can direct the representation of the Government (of the day) on international matters and the question of representation on international matters is quintessentially a matter of political judgment and not within the remit of the court. This aspect of the Applicant's therefore is not one which the Court feels has a realistic prospect of success.

38. As a basic duty, public bodies and public officials ought to exercise their functions in good faith. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it and it must act in good faith (**Westminster Corporation v London and North Western Railway Company [1905] AC 426**). There is a presumption of regularity in the acts of public officials and it is therefore to be presumed that public officials will discharge their

duties honestly and in accordance with the law (**The Attorney General v K.C. Confectionery Ltd (1985) 34 WIR 387**).

39. Bad faith may be expressed or *may be implied from the overt acts of public officials*. Once it can be demonstrated by evidence that the act of the public official or organ was a hostile act, or an intentional and irresponsible act, this would be sufficient to rebut the presumption of regularity so as to infer mala fides (**Justice of Appeal C. Bernard in Attorney General v K.C. Confectionery Ltd Civil. Appeal No. 75/1983**).

40. The Applicant's submission that the Prime Minister and his Cabinet had a basic duty to act in good faith and to act in a manner which did not amount to an abuse of power and the assertion that, based on the evidence adduced, there exists facts upon which the Court can at a trial conclude that the acts of the Respondent was actuated by bad faith, when one considers the alleged statements made by the Prime Minister on the 15<sup>th</sup> November, 2016, is one that is arguable.

41. In the circumstances, the Applicant has articulated grounds which are arguable and which have a realist prospect of success and none of the discretionary bars seem applicable. Accordingly, the Court hereby grants leave to the Applicant to proceed to institute a claim for judicial review and to seek the following relief:

- a. A declaration that the decision and/or the Respondent's processes in arriving at the decision to revoke the Applicant's appointment as Ambassador Extraordinary and Plenipotentiary is illegal and/or unfair and/or made in bad faith and/or is contrary to the fundamental human rights provided for under the Constitution of Trinidad and Tobago, name S. 4(a) providing for the right of the individual to enjoyment of property, S. 4(b) providing for the right of the individual to equality before the law and the protection of the law and S. 4(d) providing for the right of the individual to

equality of treatment from any public authority in the exercise of any functions and is null, void and of no legal effect;

- b. A declaration that the Applicant had a legitimate expectation to maintain his rank and position as Ambassador Extraordinary and Plenipotentiary upon returning to Headquarters in Trinidad and Tobago and therefore the decision of the Respondent to revoke the Applicant's appointment as Ambassador is a deprivation of the Applicant's legitimate expectation that he would have retained his position;
- c. An order quashing the illegal and/or unfair decision on the basis that the Respondent failed to provide reasons and that the processes and deliberation of the Respondent to which the decision was arrived at was not transparent and was defective and flawed;
- d. An order of mandamus compelling the Respondent to consider the Fundamental Human Rights provided for under the S. 4 of the Constitution, namely S. 4(a) providing for the right of the individual to enjoyment of property, S. 4(b) providing for the right of the individual to equality before the law and the protection of the law and S. 4(d) providing for the right of the individual to equality of treatment from any public authority in the exercise of any functions.;
- e. An order directing the reappointment of Eden Charles as Ambassador Extraordinary Plenipotentiary;
- f. An order made pursuant to the Judicial Review Act that upon the said decision being reconsidered and re-determined that transparent, cogent and adequate reasons for the Respondent's decision thereto be furnished to the parties;

- g. Damages including damages for the contravention of the Applicant's rights under S. 4 and S. 5 of the Constitution;
  - h. Costs; and
  - i. Pursuant to Section 8 of the Judicial Review Act, any further orders, directions or writs as the Court consider just as the circumstances warrant.
42. Further directions so as to advance the matter shall now be issued.

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**FRANK SEEPERSAD**

**JUDGE**