REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal P271/2017

CV 2017-00072

BETWEEN

KEITH ROWLEY, THE PRIME MINISTER OF TRINIDAD AND TOBAGO AND THE CABINET OF TRINIDAD AND TOBAGO

APPELLANT

AND

EDEN CHARLES

RESPONDENT

PANEL: **A. Mendonca, J.A.**
P. Moosai, J.A.
J. Jones, J.A.

APPEARANCES: **Mr. R. Armor SC, Ms. V. Gopaul, Ms. N. Nabie, Mr. A. Cole, instructed by Mr. V. Jardine appeared on behalf of the Appellant**

Mr. D. Maharaj and Mr. W. Louis appeared on behalf of the Respondent

DATE OF DELIVERY: WEDNESDAY 31st July, 2019

I have read the Judgment of Jones J.A. and I agree with it.

Mendonca, J.A
Justice of Appeal

I too agree

Moosai, J.A.
Justice of Appeal

JUDGMENT

1. On January 5 2017 the Respondent, Eden Charles (Charles), sought leave to apply for judicial review of the decision of the Second Appellant, the Cabinet of the Republic of Trinidad and Tobago (the Cabinet), to revoke his appointment as Ambassador. At that time the only respondent to the application was "Dr. Keith Christopher Rowley Prime Minister and Head of Cabinet" (the Prime Minister). By an amendment made on January 31 2017 Charles included the Cabinet as a respondent.

2. By his amended application for leave Charles challenges two decisions: (i) the decision of the Prime Minister to revoke his appointment as an Ambassador and (ii) the decision of the Cabinet contained in Cabinet Minute 470 dated April 7th 2016 that all Ambassadors or High Commissioners holding a substantive office in the public service would revert to their public service post when recalled to headquarters in Trinidad and Tobago and continue to serve in the public service under the terms and conditions commensurate with the public service position.

3. The Judge granted Charles leave to apply for judicial review 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, 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 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 Application'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.

4. The relevant facts are as follows. Charles, at that time a Foreign Officer III in the Public Service, was appointed an Ambassador Extraordinary and Plenipotentiary of the Republic of Trinidad and Tobago in March 2012. It is not in dispute that the post of Ambassador is not a public service post. During the period May 2014 to August 2016 Charles served as the Charge d'Affaires to the Permanent Mission of Trinidad and Tobago to the United Nations in New York.

5. In September 2015 there was a change of Government. By a letter dated July 25 2016 Charles was advised by the Ministry of Foreign and Caricom Affairs (the Ministry) of his transfer to headquarters in Trinidad and Tobago. Enclosed in the letter was his Instrument of Transfer signed by

the Prime Minister acting pursuant to section 121 of the Constitution. The transfer was to take place with effect from his assumption of duty to the post. Charles has not challenged the decision of the Prime Minister to transfer him to headquarters. This transfer effectively ended Charles' tour of duty overseas.

6. By an email from the Acting Deputy Permanent Secretary in the Ministry dated August 18 2016 Charles was told of a directive from the Cabinet that career civil servants appointed Ambassadors would revert to their substantive positions at the end of their tour of duty overseas. The email advised that he would be required to head the Treaties, International Agreements and Legal Division of the Ministry. By return email dated August 19 2016 Charles acknowledged receipt of the email of 18 August and requested further particulars of the Cabinet decision.

7. Charles did not bring these two emails to the Court's attention. These emails were introduced into evidence by the Appellants. Charles, however, has not denied the existence of these emails. In his written submissions before the Judge he accepted that he became aware of the Cabinet directive when he received the email of August 18.

8. By that time, September 12 2016, Charles had acquired one hundred and fifty-two days' vacation leave in the post of Ambassador. He returned to Trinidad and Tobago on September 17 2016 and from September 18 2016 proceeded on the vacation leave acquired in the post of Ambassador.

9. Charles' Instrument of Revocation of his appointment as an Ambassador, dated September 19 2016, was brought to his attention by a letter dated September 30 2016 from the Permanent Secretary of the Ministry and received by him on October 6 2016. The letter enclosed his Instrument of Revocation under the hand of the President. The Instrument of Revocation advised that in accordance with section 135 of the Constitution the President had been advised by the Prime Minister to

revoke his appointment. According to the Instrument of Revocation it was to take effect from the receipt of the Instrument.

10. The letter also advised of Cabinet Minute 470 dated April 7 2016 by which the Cabinet conveyed its decision that Ambassadors / High Commissioners who hold substantive positions in the Public Service shall revert to the applicable Public Service positions when recalled to headquarters/ Trinidad and Tobago and that the officer, so recalled, was to continue to serve in the Public Service under the terms and conditions commensurate with the Public Service position.

11. On January 5 2017, while still on vacation leave, Charles filed his application for leave to seek judicial review of a decision of the Prime Minister. At that time he complained of not being in receipt of allowances due to him as an Ambassador since September 2016. In response to this complaint the Ministry advised that it was awaiting a determination by the Solicitor General on whether allowances are payable to former Heads of Mission for vacation leave earned while serving overseas. On January 2017 Charles amended the application for leave. It is this amended application that engaged the attention of the Judge.

12. Before the Judge, and before us, the Appellants challenged the grant of leave on two grounds: (i) that the Prime Minister's decision (the decision to revoke) was non-justiciable and (ii) that there was delay in applying to review the Cabinet's decision (the decision to revert). The position taken by the Appellants before the Judge was that the question of whether Charles had an arguable case on the merits with a realistic prospect of success would not arise until the Court determined these two issues.

13. The Judge did not treat with the Appellants' submission that the justiciability of the decision to revoke was a preliminary issue to be dealt with before any determination on the merits of the case. Rather the Judge was of the opinion that to obtain leave Charles was required to satisfy him

that (a) he had a sufficient interest in the matter; (b) he had exhausted all available alternative remedies or that none existed; (c) there had been no delay in the institution of the application and (d) there existed an arguable ground for judicial review which had a realistic prospect of success.

14. The Judge determined that Charles had a sufficient interest in the case; that the case presented by him was one that was not devoid of merit, was arguable and had a realistic prospect of success and that there was no alternative remedy. With respect to delay he was of the opinion that Charles' contention that there was no unreasonable delay prior to making the application was one that "was not devoid of merit".

15. For our determination on this appeal are the following issues: (i) is the question of the justiciability of the decision challenged to be decided at the leave stage and, if so, was the decision to revoke justiciable; and (iii) did the discretionary bar of delay operate to prevent the grant of leave to challenge the decision to revoke. The resolution of these two issues will determine whether the Judge was correct in granting leave to Charles to pursue the relief as ordered by him.

Is the question of justiciablity to be determined at the leave stage, and if so, is the decision to revoke justiciable

16. The Appellants contend that the Judge failed to determine the question of whether the decision to revoke was justiciable, wrongly treated the question as an issue relevant to the merits of the case and failed to properly construe section 135 of the Constitution. Charles, on the other hand, contends that the justiciability of the decision to revoke is not a matter for the consideration of the Court at the leave stage. In any event he submits that as a career ambassador, unlike political appointees, he did not serve at the pleasure of the Prime Minister but remained a public servant and in accordance with section 135 of the Constitution the Prime

Minister is required to consult with the appropriate Service Commission before revoking such an appointment.

17. The Judge treated the question of whether the decision to revoke was justiciable as a question relevant to the merits of the case. According to the Judge the issue here was:

> "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 a power is established to the Court's satisfaction it can properly enquire into the propriety of such an exercise as was expounded in the case of AG v Keyser 's Royal Hotel Ltd. (1920) AC 508 at 526."

18. He was of the opinion that Charles' argument that the non-justiciability of the decision to revoke was based on the purported exercise by the Prime Minister of a prerogative power and that any prerogative that had existed prior to the Constitution had been extinguished by section 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."

19. In arriving at this conclusion the Judge referred to sections 135 and 6 of the Constitution and considered the cases of **Burmah Oil Co.(Burmah Trading) Ltd v Lord Advocate [1965] AC 75** and **R v Secretary of State for the Home Department ex p Fire Brigades Union and others [1995] 2 WLR 464.** The cases considered by the Judge and section 6 of the Constitution all deal with the exercise of prerogative powers.

20. In coming to his conclusion the Judge was wrong on two counts. First he failed to appreciate that he was required to consider whether the decision to revoke was justiciable before determining whether Charles had presented an arguable case with respect to the decision to revoke. What the judge had to do at the leave stage was to determine whether it was open to him to question the decision of the Prime Minister to revoke the

appointment of Charles as Ambassador. If it was not open to him to do so, in other words, if the decision was non-justiciable, then the grant of leave to challenge the decision to revoke was pointless.

21. The question for the judge was whether the decision of the Prime Minister under challenge was one of those decisions traditionally recognized as not being amenable to judicial review or as Fordham puts it was "beyond the Courts' supervisory reach": **Fordham: Judicial Review Handbook 5th ED. paragraph 35.1**. Of necessity therefore this was a question that was required to be determined at the leave stage.

22. Before us Charles submits that the role of the court in proceedings for leave is to control and prevent trivial and unmeritorious applications from coming before it. He submits that, in the circumstances, at the leave stage it is not the exercise of the court to review whether a decision is justiciable. In this regard Charles relies on the statement of Lord Bingham and Lord Walker in **Sharma v Brown-Antoine [2007] 1 WLR 780** that:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless it is 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…."

23. There is no doubt that the statement in **Sharma** referred to above is a correct statement of the law applicable in this jurisdiction. However in this instance the statement is taken out of context. The purpose of an application for leave is to weed out unsustainable claims. Such unsustainable claims would include challenges to decisions not susceptible to judicial review. Before applying the ordinary rule referred to in the **Sharma** decision therefore a judge first has to determine whether the decision challenged was one that is amenable to judicial review.

24. This was the position taken in the case of **R (on the application of the Campaign for Nuclear Disarmament) v Prime Minister and others [2002] EWHC 2777** relied on by the Appellants. There the question of whether the Court had the jurisdiction to declare the true interpretation of an international instrument not incorporated into domestic law was considered. The court in the Nuclear Disarmament case treated the question as a preliminary issue in the same manner as it treated with the questions of prematurity and standing.

25. The second error made by the Judge is that he failed to appreciate that the Appellant's case on the non-justiciability of the decision to revoke was not based on the exercise of a prerogative power by the Prime Minister but pursuant to section 135 of the Constitution. The argument of Charles that the Prime Minister does not possess a prerogative power in relation to the appointment and removal of an Ambassador having regard to section 135 therefore missed the point. In making the decision to revoke the Prime Minister purported to act pursuant to section 135. The question for the Judge's determination was whether the Prime Minister properly exercised the power given to him pursuant to section 135 of the Constitution and, if so, was the exercise of that power justiciable.

26. **Sections 135** to **137** of the Constitution deal with special offices. **Section 135** specifically deals with Ambassadors, High Commissioners and principal representatives of Trinidad and Tobago in any other country. The section is made applicable to these offices by section 135(3).

27. **Section 136** deals with the security of tenure of the holders of special offices. By virtue of **section 136 subsections (1), (12), (13), (14), (15) and (16)** section 136 does not apply to the offices identified at section 135(3). These are the offices of Ambassadors, High Commissioners and principal representatives of Trinidad and Tobago in any other country (the subsection (3) offices). No other section in the Constitution deals with the security of tenure that attaches to these offices. The position with

respect to the tenure of these offices is therefore to be found within the four corners of section 135 of the Constitution.

28. **Section 135** states:

> " (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 persons 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."

29. Section 135 (1) gives the Prime Minister the authority to advise the President to appoint persons to the subsection (3) offices. It also gives the Prime Minister the authority to advise the President to remove persons holding such offices. Where the person proposed by the Prime Minister for any of the subsection (3) offices is a public officer or is acting in a public office subsection (2) requires the Prime Minister to consult with the appropriate Service Commission before tendering any advice to the President with respect to the appointment of that person. The rationale for this requirement is clear. By the Constitution it is the appropriate Service Commission that is responsible for the appointment and placement of that public officer and the human resource management of the particular Service.

30. The subsection however does not require the Prime Minister to consult the appropriate Service Commission where the Prime Minister's advice to the President is for the removal of a person from a subsection (3) office. The words "other than an office to which this section applies" in the subsection clearly makes the section inapplicable to persons who have already been appointed to such office.

31. The effect of **section 135** therefore is to vest in the Prime Minister the power to advise the President to appoint Ambassadors, subject only to consultation with the appropriate Service Commission where such person is a public officer or is acting as a public officer. It also vests in the Prime Minister the power to advise that such person be removed from the office. No distinction is made by the Constitution between career ambassadors and political appointees to the post with respect to the removal from office of an Ambassador. And the power to remove is not by the Constitution subject to any limitation. With respect to the revocation of the appointment of Charles as an Ambassador therefore the Prime Minister acted in accordance with section 135 of the Constitution.

32. This interpretation accords with the recommendations contained in the **Report of the Constitution Commission** (1974) headed by then Chief Justice Wooding. According to the Commission:

> "290. We recommend that the Prime Minister retain control over the appointment of the Government's principal representatives abroad. They should be appointed by the President acting in accordance with the advice of the Prime Minister. It was argued that these persons represented not only the Government but the country, so there should be consultation with the Leader of the Opposition before advice is tendered. We do not agree. Ambassadors, High Commissioners and other principal representatives abroad hold office for the purpose of advising the Government generally on matters of foreign policy and implementing policies which have been decided upon. They must

be persons in whom the Government has ample confidence and this can best be ensured by placing the power of appointment in the hands of the Prime Minister. The corollary of this is that such persons should, when a new Prime Minister takes office, tender their resignations to him so that he may have a free hand either to re-appoint or to make new appointments."

33. Of course having determined that by the Constitution the power to remove an Ambassador lies solely in the discretion of the Prime Minister the question still remains whether the power vested in the Prime Minister by section 135 is justiciable. The case of **CCSU v Minister for the Civil Service [1984] 3 All ER 935** provides some insight into the manner in which courts have dealt with questions of non-justiciability. Among the questions for the Court's determination in that case was whether the Court could review the exercise of a prerogative power. At issue there was the whether delegated powers emanating from a prerogative power were immune from judicial review.

34. After reviewing the cases on the exercise of prerogative power and the ability of the court to review decisions made pursuant to such power, including those referred to by the Judge in the instant appeal, the House of Lords concluded that the controlling factor in determining whether the exercise of the power was subject to judicial review was the justiciability of the subject matter rather than the source of the power. It was therefore not enough to merely assert that the action was taken pursuant to a prerogative power the decisive factor was the subject matter over which the power was exercised.

35. In the **CSSU** case the subject- matter was national security. The Court determined that the question of whether the decision or action was necessitated by the requirements of national security was non-justiciable since the executive was the sole arbiter of what national security required. Once the Minister produced evidence that the decision was

taken for reasons of National Security that overrode any right to have the decision judicially reviewed.

36. In coming to the conclusion that what was relevant was the subject-matter of the decision rather than the source of the power at pages 955-956 Lord Roskill states:

> "……. the right of the executive to do a lawful act affecting the rights of the citizen, whether adversely or beneficially, is founded on the giving to the executive of a power enabling it to do that act. The giving of such power usually carries with it legal sanctions to enable that power if necessary to be enforced by the courts. In most cases that power is derived from statute though in some cases, as indeed in the present case, it may still be derived from the prerogative. In other cases, as the decisions show, the two powers may coexist or the statutory power may by necessary implication have replaced the former prerogative power. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under art 4 of the 1982 Order in Council so as to affect the rights of the citizens, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries……
>
> But I do not think that that right of challenge can be unqualified. It must, I think, depend on the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative

> powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

37. While the decision in **CSSU** is not binding on us it is highly persuasive. The decision, insofar as it has made inroads in the area of legitimate expectation, has been accepted as correctly stating the law applicable in this jurisdiction. I see no reason for a similar position not to be taken with respect to the conclusions of the Law Lords on the inability of the court to review decisions on certain subjects. Such a decision accords with the common law and good sense.

38. It is clear therefore that whatever the source of the power, statutory, prerogative or both, there are some matters which are not amenable to judicial review because of their nature and subject-matter. The list given by Lord Roskill is not exhaustive. In determining these matters what is important is not the source of the power but the subject matter. The fact that the source of the Prime Minister's power is not prerogative but rather statutory did not of itself mean that the decision was one that was subject to the oversight of the court. What determines the justiciability of the decision is the nature of the power and the subject matter of the decision.

39. In this appeal the subject matter of the decision was the representation of the Government abroad. Adopting the words of the Constitution Commission, Ambassadors hold office "for the purpose of advising the Government generally on matters of foreign policy and implementing policies which have been decided upon." In this regard they are akin to a

Minister of Government whose responsibility it is to implement government policy locally. Like a Minister of Government a decision to revoke the appointment of an Ambassador is not one susceptible to judicial review.

40. Insofar as the Judge considered the justiciablity of the decision it was in this manner:

> "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 Ambassadors 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 that 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 would 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 [case] therefore is not one which the Court feels has a realistic prospect of success."

41. This in essence was a finding with respect to the justiciability of the decision to revoke and accords with the decision of the Law Lords in the **CSSU** case. Insofar as the Judge made such a determination he was correct. Despite the grant of leave therefore it is clear that the Judge was of the view that the representation of the Government on international matters was a matter of political judgment and not subject to interference by the Court. This is a determination that has not been challenged by

Charles. Having come to the conclusion that the representation of the government of the day on international matters was quintessentially a matter of political judgment and not within the remit of the court the logical next step ought to have been that in those circumstances the challenge to the Prime Minister's decision to remove Charles as Ambassador was not one amenable to judicial review and in the circumstances non-justiciable.

42. Insofar as he failed to come to that conclusion despite his finding that the representation of the Government of the day on international matters was one of political judgment and not subject to interference by the Court the Judge erred. The decision to revoke was validly made in accordance with section 135 of the Constitution. It was a decision that was non-justiciable and not subject to review by the Court.

Did the discretionary bar of delay operate to prevent the grant of leave to challenge the decision to revert

43. **Section 11 of the Judicial Review Act Chap 7:01** and **Rule 56.5 of the CPR** deal with delay in applying for judicial review.

44. **Section 11** states:

> **"11.** (1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the applicant became aware of the making of the decision, and may have regard to such other matters as it considers relevant.

(4) Where the relief sought is an order of *certiorari* in respect of a judgment, order, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision."

45. **Part 56.5** states:

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

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

3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
   (a) cause substantial hardship to or substantially prejudice the rights of any person; or
   (b) be detrimental to good administration.

46. The position on delay in this jurisdiction and the co-relation between section 11 of the Act and Rule 56.5 of the CPR has now been definitively stated by the Privy Council in the case of **Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5.** This was not a decision available to the Judge at the time of his decision. For the purpose of this appeal, like in Maharaj, I adopt the term "prejudice" to refer to

substantial hardship or prejudice to the rights of any person: **rule 56.5 (3)(a)** and "detriment" to refer to detriment to good administration: **rule 56.5(3)(b)**.

47. According to the Court in **Maharaj**:

> "37…….In considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that will likely to be caused by delay.
>
> 38. In the same way, questions of prejudice or detriment will often be highly relevant when determining, whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for the delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration and the public interest…….where relevant, they are all matters to which the court is required to have regard.": **per Lord LLoyd-Jones at paragraphs 37 and 38**.

48. The Appellants contend that, with respect to delay, the Judge wrongly conflated the two decisions in relation to the nature and the dates of the decisions and failed to apply the correct legal test for an extension of time for an application for leave for judicial review.

49. Before us the position taken by Charles is that there should be no distinction between the decision to revert and the instrument of revocation since by citing the Cabinet decision in the letter of September

30 enclosing the Instrument of Revocation both are inextricably fused. He submits that these circumstances the Judge was correct in his findings on delay.

50. Insofar as the Appellants contend that the Judge impermissibly conflated the two decisions they are correct. In his reasoning the Judge seemed to be of the view that the decision to revoke was made by the Cabinet. This was the premise of the first application. The amended application however challenged two decisions: the decision to revert made by the Cabinet and the decision to revoke made by the Prime Minister.

51. According to the Judge the email of August 18 "stated that the Cabinet had decided to revoke the appointment and this could not have been occasioned without the Instrument of Revocation." He concluded that Charles' "contention that there was no unreasonable delay prior to the making of the instant application is one that is not devoid of merit. He was of the view that no evidence had been adduced to lead him to conclude that substantial hardship or prejudice could be occasioned to the Appellants if he granted leave "nor did the factual matrix establish that such an order would be detrimental to good administration."

52. There is no merit in Charles' submission before us that the fact that the two decisions became fused by virtue of the letter of September 30 citing the decision to revert as the reason for the decision to revoke. In the first place the letter does not give the decision to revert as the reason for the revocation. The letter merely encloses the Instrument of Revocation and refers to the Cabinet decision. There is nothing in the letter that specifically links the two decisions. Indeed, even if there was something linking the two, given the particular facts this would be of no consequence.

53. In any event the case presented in the application for leave is that there were two distinct decisions made by different persons at different times:

the decision to revert made by the Cabinet in April 2016 and the decision to revoke made by the Prime Minister evidenced by the Instrument of Revocation dated September 19 2016. At the end of the day what is being challenged are two different decisions made by two separate bodies. In treating the question of delay as relating to the Cabinet decision to revoke the Judge misunderstood the case presented by Charles.

54. Further, in accordance with the decision in **Sharma**, the Judge was required to be "satisfied that there was an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy". By determining that Charles' argument on delay was not devoid of merit the Judge seems to apply the test of an arguable ground to the question of delay. In doing so he erred. What he was required to do was to determine whether there was delay and whether the delay was such so as to prevent leave being granted to challenge the decision.

55. The decision to revert was made on April 7 2016. Charles was not informed of the decision until August 18 2016. The application for leave was not made until January 5 2017 and the amended application challenging the decision to revert was not made until January 31 2017. More than three months had therefore passed from the date of the decision by the time Charles sought leave to challenge the decision to revert.

56. The Judge did not consider whether it was in the circumstances appropriate to extend the time for bringing the application. In the circumstances it falls to us to do so. No reasons are given by Charles for the delay nor does he seek an extension of time to make the application. Indeed the position taken by him in his amended claim was that no time limit had been exceeded and the claim had been made promptly. Nonetheless in accordance with **Maharaj** we are required to consider whether the application was prompt and whether there is good reason

for extending the time. If the application was not prompt and there is no good reason for extending the time then the delay was undue or unreasonable and leave to challenge the decision will be refused.

57. In accordance with **Maharaj** this exercise is not limited to whether there is a good reason for the delay. The reason for the delay is only one of the factors to be considered. The fact that no reason for the delay is given by Charles is therefore not necessarily fatal to the grant of leave. A consideration of this question involves consideration of the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration and the public interest.

58. Insofar as the Judge determined that there was no evidence of hardship, prejudice, or detriment to good administration he was correct. In this appeal the question of whether there is good reason to extend the time for the application turns on the importance or relevance of the issue in the context of this case.

59. Ultimately Charles is challenging decisions that he claims had the effect of removing him from his post as Ambassador. In this regard he seeks his re-instatement to the post of Ambassador Extraordinary and Plenipotentiary and orders, including damages, consequential to this relief. The judge was of the opinion that Charles had a legitimate expectation that he would retain his rank and position as Ambassador on his return to Trinidad and Tobago. In the context of this case however this was not relevant to the decision to revoke but rather to the decision to revert.

60. Charles' case on legitimate expectation arose from what he claimed was a practice that when recalled to headquarters Ambassadors retained their position as Ambassadors. In the absence of the subsequent decision of the Prime Minister to revoke his appointment Charles clearly had an arguable case. The difficulty faced by Charles is that, given the non-justiciability of the decision to revoke, his claim of a legitimate expectation is limited to

any claim that he may have had to be treated as an Ambassador between his return to headquarters on September 18 2016 and October 6 2016 when the revocation took effect.

61. This was the period when he was on vacation leave earned while in the post of Ambassador. On his evidence the only loss to him at that time was the failure of Ministry to pay him his allowances as an Ambassador. He has not challenged the reason given by the Ministry for this failure. The reason given by the Ministry is not attributable to their failure to treat him as an Ambassador during that period but rather based on the fact that they were at the time awaiting legal advice from the Solicitor General on whether allowances are payable to former Heads of Mission for vacation leave earned while serving overseas.

62. We have not been told of the outcome of this issue. In any event on the evidence there is nothing to suggest any loss to Charles as a result of the decision to revert. In these circumstances, even if an extension of time were granted to Charles to pursue his challenge to the decision to revert on the basis of his legitimate expectation, that would serve no useful purpose. In the circumstances there can be no good reason for extending the time for Charles to seek leave to pursue his challenge to the decision to revert made by the Cabinet.

63. Accordingly (i) the decision by the Prime Minister to revoke Charles' appointment as an Ambassador is not a decision that is open to judicial review and (ii) the discretionary bar of delay operates to deny Charles leave to challenge the decision of Cabinet contained in Cabinet Minute 470 dated April 7th 2016 that all Ambassadors or High Commissioners holding a substantive office in the public service would revert to their public service post when recalled to headquarters in Trinidad and Tobago and continue to serve in the public service under the terms and conditions commensurate with the public service position.

64. The appeal is therefore allowed. The decision of the Judge is set aside and the application for leave to apply for judicial review of the decisions is dismissed.

Judith Jones
Justice of Appeal