

**IN THE SUPREME COURT OF BELIZE, A.D. 2013**

**CLAIM NO: 391 of 2014**

**IN THE MATTER OF** an application for permission  
to apply for Judicial Review.

**AND**

**IN THE MATTER OF** a decision of the National Council  
for Education Arbitration Panel, Ministry of Education

**AND**

**IN THE MATTER OF** a Licence to operate a School  
pursuant to the Education and Training Act, No. 3 of 2010  
and Education Rules Statutory Instrument No. 87 of 2012,  
Laws of Belize

**BETWEEN**

**JAMES DUNCAN**

**CLAIMANT**

**AND**

**NATIONAL COUNCIL FOR EDUCATION  
ARBITRATION PANEL  
ATTORNEY GENNERAL**

**DEFENDANTS**

**Keywords:** Application for Permission to apply for Judicial Review; Part 56.3 of CPR  
2005; Part 56.5 of CPR 2005;

Education Act Chapter 36 Laws of Belize; Application for a Licence to  
Operate a Private School; Arbitration Panel to arbitrate/hear cases referred  
by National Council for Education;

Education and Training Act, 2010; Approval of Schools and Institutions;  
Education Rules; Approval or withholding of Licence; Appeal of refusal of a  
Licence.

**Before the Honourable Mr Justice Courtney A Abel in Open Court**

**Hearing Dates:** 15<sup>th</sup> January 2015

**Appearances:**

Mrs. Andrea McSweaney Mckoy for Claimant

Mr. Nigel Hawke, Deputy Solicitor General, and with him Ms. Agassi Finnegan, Crown Counsel, for the Defendants.

**WRITTEN DECISION  
Of an Oral Decision Delivered on the 15<sup>th</sup> January 2015**

**Introduction**

- [1] This case concerns an application for permission to apply for review of the decisions of a public authority or body, a statutory arbitration panel, established by way of any appeal under applicable education Acts<sup>1</sup>.
- [2] As has recently been noted, judicial review “describes the process by which the courts exercise a supervisory jurisdiction over the activities of public authorities in the field of public law<sup>2</sup>”.
- [3] On the 15<sup>th</sup> January 2015, after carefully reading the filed documents in the case, including the Amended Notice of Application for Permission to Apply for Judicial Review supported by the Affidavit of the Claimant, and the full written submissions by Counsel for the Defendants, and immediately after hearing Counsel for the Applicant, I gave an oral decision refusing permission for the Claimant to apply for judicial review.
- [4] I considered the Claimant had no arguable case for judicial review with any or any realistic prospect of success and I gave certain reasons for so finding. I also

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<sup>1</sup> Brought under Part 56.3 of the Supreme Court Rules 2005 which requires that the Claimant seek and obtain such permission before making any application for judicial review.

<sup>2</sup> See *Judicial Remedies in Public Law* by Clive Lewis QC., edn, para 2-001) quoted in *Froylan Gilharry Sr dba Gilharry's Bus Line v Transport Board & Chief Transport Officer & The Minister of Transport and The Attorney General*,

indicated that fuller written reasons would be given on a later occasion. These are now the full reasons.

### **Parties' Application, Issues and Oral Decision**

- [5] The Applicant is a pastor, Educator and a proprietor of the Tree House Christian Academy, a school for which an application was made, under applicable education legislation, for a licence to operate a private school in Belize. The application was refused by the relevant authorities; following which there was an unsuccessful appeal to a statutory arbitration or appeal body, namely the National Council for Education Arbitration Panel (“NATCEAP”).
- [6] The present application for permission to apply for judicial review was brought by the applicant against NATCEAP and the Attorney General as their legal representative.
- [7] The decisions which the applicant would like permission to judicially review are:
- (a) a decision of NATCEAP made on 26<sup>th</sup> April 2014 refusing to grant to the Claimant a licence to operate a School (the Tree House Christian Academy)<sup>3</sup>, and,
  - (b) ordering that the Claimant ceases immediately from operating the School.
- [8] The grounds on which the application for permission is made are that:
- (a) The applicant made two applications for licences to operate a school in the space of approximately 8 years between July 2000 and September 2008. both applications were appealed on 4 different occasions, but in relation to which, no appeal was held until 24<sup>th</sup> April 2014.
  - (b) At the appeal hearing on the 24<sup>th</sup> April 2014 the applicants were not given a fair hearing/due process and an opportunity to be heard.
  - (c) The appeals body failed to take into consideration relevant material namely the benefits of the school to the Belizean community.

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<sup>3</sup> Pursuant to the Education and Training Act, No. 3 of 2010, and the Education Rules, No. 87 of 2012.

(d) The decisions complained of are Wednesbury unreasonable in that it is alleged that no reasonable appeal body could arrive at such a decision and is unfair.

[9] The Defendants oppose the application on procedural and substantive grounds alleging that there is no basis for the application.

[10] In determining whether to grant to the Claimant permission to apply for judicial review, the sole question for determination is whether the Claimant has an arguable case for judicial review with any or any realistic prospect of success. This is a mixed question of law and fact and involves a consideration of the merits of the application and the prospect of the Claimant succeeding on his claim if he is allowed to proceed to make an application for judicial review. Also involved is arriving at a conclusion after weighing all of the factual and legal considerations which arise for determination based on the Claimant's case for judicial review.

[11] On the 15<sup>th</sup> January 2015, after reading full written submissions by the Defendants and immediately after hearing Counsel for the Applicant, I gave an oral decision refusing permission to the Claimant to apply for judicial review; as I then considered the Claimant had no such arguable case for judicial review with any or any realistic prospect of success. The reasons I gave were the following:

(1) The Claimant in the view of this Court has operated his school for many years contrary to the legal requirement to obtain a licence prior to opening the school and in the view of this Court therefore has no or little merit in its application.

(2) The Orders which the Claimant/Applicant seeks, even if granted, would not benefit the Claimant in any way as a mere quashing of the decision of NATCEAP dated 24<sup>th</sup> April 2014 would still result in the decision of the Ministry of Education dated 21<sup>st</sup> May 2009, (on the Claimant's application) standing and the subject school not being approved and being subject to closure in accordance with the latter decision.

- (3) The decision of the NATCEAP dated 26<sup>th</sup> April 2014 cannot be said to be Wednesbury unreasonable as this Court considers that in view of Claimant's conduct as set out in the Affidavit of James Duncan, filed herein on the 30<sup>th</sup> of July 2014, a case is presented on which a reasonable tribunal applying the proper legal principles could quite reasonably arrive at the decision at which the NATCEAP arrived.
- (4) This Court considered that the Claimant was given full and ample opportunity to be heard and in any event did make a fulsome case to the tribunal dealing with all possible objections, of which they had been notified, to the granting of the licence sought, and that the said affidavit of James Duncan makes this position abundantly clear.
- (5) The Claimant did not raise in his application for permission for Judicial Review, the issue of the Claimant having a legitimate expectation to be granted a licence to operate a school based on the Ministry's policy, and therefore in this Court's view, the Claimant is not in a position to rely on any such policy that would give an arguable case with a reasonable prospect of success in relation to the policy considerations which he, the Claimant, through his counsel, has sought to argue.
- (6) In any event this Court considers that the questions being raised in relation to Judicial Review are areas of Policy peculiarly within the remit of the Ministry of Education with which this Court should not interfere.

**[12]** I also then indicated that the Claimant does not require permission to raise constitutional objections to the decision of the tribunal, NATCEAP or the Ministry of Education and therefore this Court makes no order in relation to those.

**[13]** Upon fuller review of the application I must confess that I was not entirely happy with the information which was presented to me at the hearing of the application as I later found, when I came to fully consider and to write my decision, as all the relevant statutory provisions were not available and before me in the manner that I would have liked. As a result, I found myself in the unhappy and unsatisfactory

position of having to wholly reconsider the decision at which I had earlier arrived. This is now the result of my more full and careful consideration of the case.

### **Background**

- [14] The Claimant and his wife are members of a Mennonite Fellowship Church, Eagle's Wings Ministries, Inc, of Florida, United States of America, and began ministry in the rural communities of the Belize District, evangelizing and granting material assistance to students and schools in whatever way they were able.
- [15] The Claimant first applied for a licence to operate a private Eagles' Wings International Ministry private School in July 2000 to provide holistic education in Belize, but they did not receive a response to this application.
- [16] In January 2001 the Claimant then began the process of purchasing a 333 acres of land at 21 ½, Boston Village, and in order to do so submitted a development plan which included for a church, ranch, business park, residential area, FM radio station, camp ground and a school and training centre. In this process of applying to purchase this land, the Claimant specified that upon completion they intended to include a primary school, college (high school) and university to provide spiritual, academic and vocational training. The Claimant was allowed to purchase the land.
- [17] In around 2007, the Claimant conducted a survey and apparently obtained some community support for a Mennonite Community Mission School and, without a licence, he went ahead and opened the doors to such a school in September 2008 with about 30 students and six staff. The Claimant proceeded to open the school, he claimed, based on his "*understanding ... that Menononite schools were able to operate without school licences from the Ministry of Education.*"
- [18] During the first week of operation of the school, it was visited by the Belize District Education Council, which inquired about the school and provided them with an application form for a licence to operate a school and advised the Claimant to apply for a School Licence. The incorporation documents were produced and the Claimant applied for a school licence.

- [19] On the 29<sup>th</sup> September 2008, the Claimant received a written order to shut down the school along with letters to be delivered to the parents of the students advising them that the school was closed.
- [20] On the 30<sup>th</sup> September 2008 a group from the school met with the Chief Education Officer and were apparently verbally authorised to remain open for the remainder of the School year pending the decision on the licence.
- [21] In September of 2008 the Claimant applied for a teaching licence which application was acknowledged in November of 2009.
- [22] By letter dated 21<sup>st</sup> May 2009 the Ministry of Education advised the Claimant that the Ministry had declined to grant a licence to operate the school now known as “TreeHouse Academy” on grounds which included that there was no need for another primary school in the area. A stop order was issued by the Ministry.
- [23] In June 2009 the Claimant appealed the decision declining to grant a licence to operate the school which appeal was apparently never heard, but the school nevertheless remained open.
- [24] By letter dated 16<sup>th</sup> November 2010 the Claimant apparently then received an indication that the Ministry had decided to close the school with effect from 17<sup>th</sup> December 2010 along with an indication that the students should be relocated to another school.
- [25] By letter dated 16<sup>th</sup> December 2010 the Claimant appealed the decision of the Ministry which was supported by a number of persons.
- [26] The School continued to remain open despite all that had happened and by letter dated 28<sup>th</sup> September 2012 a further stop order was made by the Ministry to prevent the school from operating without a valid licence.
- [27] The Claimant made a further appeal to the National Council of Education claiming that the school was entitled to a licence.
- [28] Despite the stop order the school remained open and by letter dated 6<sup>th</sup> February 2014 the Ministry wrote a letter in which it stated as follows:

*“I am in receipt of a letter from you dated January 28, 2014 in which you state that TreeHouse Christian Academy is now in its sixth year of operation. The impunity of this statement is extremely disturbing, since, as you very well know, no licence to operate this school was issued and you were directed in writing to cease the illegal operation of the school.”*

[29] This letter outlined the relevant provisions of the Education Rules requiring a licence and of the Ministry’s intention to institute legal proceedings.

[30] The Claimant, through his Attorney, wrote a letter dated 4<sup>th</sup> March 2014 complaining of lack of due process in relation to his application to operate a school and requesting that a proper appeal hearing by way of a statutory arbitration panel be convened for determination of the application for such a licence.

[31] The Claimant was informed that an appeal hearing would take place on 24<sup>th</sup> April 2014.

[32] On the 24<sup>th</sup> April 2014, an appeal hearing was held at which the Claimant presented a pre-prepared written document in which they attempted to present their case, of which hearing complaint has since been made by the Claimant that he was not allowed to present their case and was not given a fair hearing and access to due process.

[33] By letter dated 26<sup>th</sup> April 2014 the Ministry wrote a letter to the Claimant stated:

*“Please be informed that the decision of the Arbitration Panel is that the denial of a licence to operate TreeHouse Christian Academy be upheld and that the said operation of the school cease with immediate effect.”*

[34] Also attached to the letter of the 26<sup>th</sup> April 2014 was a letter dated 24<sup>th</sup> April 2004 from the National Council for Education denying a licence and in which letter the following was pointed out:

- (a) The application should have been made 16 months prior to the opening of the school.
- (b) The application should have been in prescribed form.
- (c) A school could not operate without a licence.
- (d) In relation to the requirements for the granting of a licence to operate a school, a school must be in an appropriate location and environment, and the proprietor must be able to finance and sustain the operations of the school, and
- (e) The decision of the District Education Council refusing the Claimant a school operator's licence was upheld.

**[35]** The Tree House Christian Academy has eight buildings with 9 bathrooms which includes:

- (a) a 3000 square foot, 2 story building, which has administrative offices, a school shop, computer lab and housing for school staff;
- (b) a 3000 sq foot multipurpose building used as an auditorium and dining facility;
- (c) a 1500 sq. foot tree house used as a primary school assembly building and for special classes.
- (d) A 1200 sq. foot special education classroom building with individual private "office" for each student.
- (e) A school library, school office and phonics lab.
- (f) A building under construction which will include additional staff housing and music studio
- (g) 2000 sq. foot which provides maintenance staff housing
- (h) An Amish style Mennonite wood working shop which will provide woodworking classes for a vocational programme.

- [36] As at 24<sup>th</sup> April 2014 the school, which is privately funded, had twenty students enrolled.
- [37] The Claimant considers that the school indeed meets and furthers the Ministry's stated policy needs and concerns, and does bring significant benefits to Belize; and that the decision of the Ministry was unreasonable and denies him, and his religious group, religious freedom secured by the Belize Constitution to establish, to maintain and manage places of education and to provide religious instruction to person of its own community at their own cost; as well as denies him, the Claimant, the constitutional right to work in a profession of his own choosing.
- [38] The Claimant applied on the 30<sup>th</sup> July 2014 for permission to apply for judicial review of the decision of the Minister (then named as the 1<sup>st</sup> Defendant) supported by an Affidavit of the Claimant.
- [39] The reliefs or remedies sought, other than for declarations (whether certiorari, prohibition, mandamus, injunction, restitution, damages etc) were not stated<sup>4</sup> in the application and would have to be assumed by the court from the nature of the grounds of the application.
- [40] On the 10<sup>th</sup> November 2014 and the 1<sup>st</sup> December 2014 directions were given for the management of the application and the Claimant was permitted to amend his application (including the replacement of the Minister by the National Council for education Arbitration Panel as a Defendant) and the application for permission to apply for judicial review was further case managed on the 1<sup>st</sup> December 2014.
- [41] The Defendants have filed detailed written submissions which has assisted the court considerably.

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<sup>4</sup> As required by Part 56.3 (3) (b) of RSC 2005.

## **The Law**

### The Education Act<sup>5</sup>,

[42] The Education Act came into force from 24<sup>th</sup> April 1991 which provided for a national educational system under the Ministry of Education and subject to the direction of the Minister responsible for education which was supposed to be along with various organisations and bodies recognised by the Ministry for the sufficient and efficient provision of education in Belize.

[43] The Ministry was to establish and set goals, provide support and monitoring support service alongside and with the assistance of District Education Councils to be established (including the Belize District Education Council).

[44] The Ministry was to be headed by a specially appointed Chief Education Officer as the administrative head who was to provide advisory services in relation to education policy along with a specially appointed and constituted National Council for Education.

[45] Any person wishing to operate a school of any type was required to obtain a licence to operate such a school from the Chief Education Officer under procedures and subject to criteria established by Rules duly passed under the Education Act. Section 12 of the Education Act specifically provided:

*“(1) Any person or body of persons wishing to operate a preschool, primary school, secondary school, post-secondary or other educational institution shall obtain a licence to operate such a school or institution from the Chief Education Officer<sup>6</sup>” .*

[46] Also all persons employed as a teacher were required to possess a valid licence to teach<sup>7</sup>.

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<sup>5</sup> Chapter 36, Revised Edition 200, Laws of Belize

<sup>6</sup> Section 12 of the Education Act.

<sup>7</sup> Section 17 of the Education Act.

[47] Any proprietor of a school who breached the mandatory provisions of the Education Act was liable to have the school closed down by the Chief Education Officer and to be found guilty of a criminal offence<sup>8</sup>.

[48] Specifically Section 46 of the Education Act provided as follows:

*“There shall be a panel appointed by Minister to arbitrate cases referred to it under section 16(e) and all other cases referred to it in accordance with rules made under this Act.”*

[49] An Arbitration Panel was established to arbitrate cases referred to it under the Education Act<sup>9</sup>.

[50] By section 48 of the Education Act any subsidiary legislation made under the previous Education Act was to continue in force until replaced by subsidiary legislation under the Education Act<sup>10</sup>.

#### The Education and Training Act, 2010<sup>11</sup>

[51] The Education and Training Act, 2010 (“the Act”) came into force from 17<sup>th</sup> April 2010 to make new and improved provisions for education and training in Belize by repealing and replacing the Education Act and the Belize Technical and Vocational Education and Training Act<sup>12</sup>. I am specifically concerned with the Act as it relates to applications schools and for a licence to operate a school.

[52] The role of the Ministry remained largely the same but were expanded in a number of ways including by setting standards, issuing licences to schools etc.<sup>13</sup>.

[53] The position of the specially appointed Chief Education Officer as the administrative head was changed from being advisory to that of appraising the Minister, the specially appointed and constituted National Council for Education<sup>14</sup>

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<sup>8</sup> Section 21 of the Education Act.

<sup>9</sup> Section 46 of the Education Act.

<sup>10</sup> I will assume that the application of the existing education rules would continue in force with all necessary modification to give it efficacy.

<sup>11</sup> No. 3 of 2010.

<sup>12</sup> See Section 73 of the Act.

<sup>13</sup> See Section 3 of the Act.

<sup>14</sup> See Section 7-10 of the Act and its First Schedule (which contained its Constitution).

and a specially appointed and constituted National Council for Technical and Vocational Education and Training (TVET Council)<sup>15</sup> on recommendations and proposals for education and training policy and for the discharge of the functions of the Ministry under this Act and Rules made thereunder<sup>16</sup>.

[54] A new specially appointed and constituted Teaching Service Commission was established<sup>17</sup> along with a Teaching Service Appeals Tribunal to hear appeals from managing authorities to transfer, dismiss or take other disciplinary action against teachers and also to hear appeals against decisions or determinations of the Commission and other specified appeals<sup>18</sup>.

[55] A specially appointed and constituted Belize Board of Teacher Education was also established for the purpose of assuring the quality of teacher education in Belize<sup>19</sup>.

[56] A system for establishing, management and monitoring of schools was set up and the Chief Education Officer in joint consultation with the Education Council and TVET Council with the prior approval of the Minister was given the power to determine the number location and closure of schools in consultation with the Proprietors etc of such schools with due regard to the reasonable wishes of those effected<sup>20</sup>.

[57] Section 36(1) of the Act provides:

*“A person or body of persons wishing to operate a preschool, primary school, secondary school, tertiary, TVET or other educational institution shall apply to the Chief Education Officer for a licence to operate such a school or institution, provided that the Proprietor of such an institution or school already in existence at the date of commencement of this Act and who has already received the approval*

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<sup>15</sup> See Section 11-14 of the Act.

<sup>16</sup> See Section 4 of the Act.

<sup>17</sup> See Section 15-18 of the Act.

<sup>18</sup> See Section 19-22 of the Act.

<sup>19</sup> See Section 23-26 of the Act.

<sup>20</sup> See Section 35 of the Act.

*of the Ministry to operate such an institution or school shall, upon application be granted a licence under this Act.”*

- [58] The procedure and criteria for obtaining a licence to operate such a school was to be provided for in the Rules<sup>21</sup>.
- [59] The Chief Education Officer in consultation with the Director of Health Services, and the approval of the Minister, was authorised to make regulations to govern the health conditions to be observed in schools and the Chief Education Officer or his/her nominee to enter any school premises to discharge duties imposed by the Act. Provision was also made for schooling generally including admission to schools discipline, courses of study, worship and religious instruction, textbooks, assessment and certification and accreditation, attendance at school etc.
- [60] Section 71 of the Act also provided for the establishment of an Arbitration Panel as follows:

*“The Minister may by Rules established under this Act establish an Arbitration Panel to arbitrate matters not falling within the jurisdiction of the Tribunal.”*

#### The Education Rules

- [61] The applicable Education Rules existing under the Education Act first came into force on the 1<sup>st</sup> June 1991 (“the Rules”) and was later amended on the 6<sup>th</sup> October 2012 (“the Amended Rules”).
- [62] The Rules provided detailed regulations for the powers and duties of the Ministry, National Council for Education, for the ownership licencing, management, facilities and health conditions of schools and of their Managing Authorities and Boards. The Rules also made provision for and the employment of professional staff, for school records, inspection of schools, school financing and for curriculum, instruction and certification, for the school year, fees scholarships and bursaries and general regulation of Arbitration Panels and appeals etc.

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<sup>21</sup> See Section 35(2) of the Act.

**[63]** In particular and relevantly Section 11 of the Rules<sup>22</sup> provides:

*(1) “Any person or body of persons wishing to operate a pre-school centre, primary school or secondary level educational institution shall apply for a licence to the Chief Education Officer at least sixteen months prior to the proposed opening of the school.*

*(2) The application referred to in sub-rule (1) of this Rule shall be made on the form prescribed for this purpose. A copy of the form shall be included in the Handbook of Policies and Procedures for School Services.*

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*(4) Subject to sub-rule (3) of this Rule, the Chief Education Officer shall require any school found to be operating without a valid licence to cease operations within a month or as soon as possible thereafter as he deems expedient”*

**[64]** Section 11 of the Rules was never amended by the Amended Rules.

**[65]** The relevant Rules at all times also makes provision for the effect of any application for a licence to operate a school (that it constitutes an agreement by the proprietor of the school to comply with the provisions of the Education Act, and the Rules and the directives of the Ministry of Education), as well as prescribing what is to take place upon receipt of an application for a licence to operate such a school as well as the process which should then be followed. In particular where the Chief Education Officer is not satisfied with the particulars and plans for the school the statutory process includes inviting the applicant to rectify the deficiencies within a specified period<sup>23</sup> and only where the applicant is unable to rectify any deficiencies or fails to comply with the requirements to the satisfaction of the Chief Education Officer s/he is then obliged to refuse a licence to operate the school<sup>24</sup>.

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<sup>22</sup> No.87 of 2012.

<sup>23</sup> Regulation 14(2) of the Education Regulation.

<sup>24</sup> Regulation 14(4) of the Education Regulation.

**[66]** Section 18 of the Rules<sup>25</sup> provides:

*“(1) Any person who is aggrieved by the refusal of the Chief Education Officer to issue a licence to operate a school, or by the suspension or cancellation of a licence granted under these Rules may, within thirty days of receipt of notification of such refusal, suspension or cancellation, make an appeal to the Arbitration Panel through the Council on the form prescribed for such a purpose. A copy of the prescribed form shall be included in the Handbook of Policies and Procedures for School Services.*

*(2) The Council shall, within seven days of the filing of an appeal, refer the matter to the Arbitration Panel, for its determination on the matter. Such determination shall be made within thirty days of receipt of said appeal.*

*(3) A fee to be determined by the Council shall be payable by the appellant prior to consideration of the case.”*

**[67]** Section 149 of the Rules provides:

*“(1) The Council shall, at the request of the Minister, establish an Arbitration Panel in accordance with section 41 of the Act.*

*(2) The Arbitration Panel shall consider appeals in accordance with section 16 of the Act and in accordance with these Rules.*

*(3) The Arbitration Panel shall consist of five members and shall include:*

*(a) the Labour Commissioner or his representative;*

*(b) a personnel manager from a private sector or quasi-governmental organisation;*

*(c) a representative of the Ministry of Public Service; and*

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<sup>25</sup> No.87 of 2012.

*(d) two persons selected from the Committee for Teaching Services of the Council.*

*(4) The Arbitration Panel shall be chaired by one of the representatives of the Committee for Teaching Services of the Council. An officer of the Ministry of Education shall be designated by the Chief Education Officer to act as Secretary to the Panel.”*

**[68]** Section 150 of the Rules deals with the handling of appeals and applications by school proprietors and provided as follows:

*“(1) A Regional Council shall submit applications for a licence to operate a school referred to it by the Chief Education officer in accordance with these Rules to the relevant Schools Services committee for consideration.*

*(2) The Council shall submit appeal by proprietors against refusal of the Chief Education Officer to issue a licence to operate a school or suspension or cancellation of a licence to operate school to the Arbitration Panel for final determination.”*

**[69]** A person so operates a school when there is not in force a licence granted to him by the Chief Education Officer to operate a school is liable to be found guilty of a summary offence punishable by fine or imprisonment<sup>26</sup>.

The Law relating to applications for permission to apply for judicial review.

**[70]** A claim for judicial review includes a claim to review the lawfulness of a decision of a body performing public duties or functions including duties under a statute or subordinate legislation.

**[71]** The lawfulness of the decision of the body or person being challenged by judicial review would include the unlawful exercise of a public power or unlawful failures to perform public duties including such policies of a public body.

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<sup>26</sup> Regulation 19 of the Education Regulation.

[72] Such a ground may be found to have been established, and therefore lie, where the claim is made that a public authority, or a body exercising appeal functions, may have made an error in law in exercising its powers or performing its duties. Or where it is claimed that there has been a breach of natural justice or procedural fairness (such as a fair hearing or due process) before a decision is taken.

[73] The court, hearing any application for judicial review, is obviously concerned to ensure that public and appeal bodies do not abuse their powers i.e. by ensuring that they exercise their powers in order to further the statutory purpose(s) for which the powers were conferred and do not act for an improper or ulterior purpose.

Part 56(3) of the Rules of the Supreme Court – Applications for Permission to Apply for Judicial Review.

[74] Under Part 2.2(2) of the Civil Procedure Rules “Civil Proceedings” is defined to include “applications for judicial review”.

[75] Part 56. 2 of the Civil Procedure Rules of Belize provides that:

*“an application for judicial review may be made by any person, group, or body which has sufficient interest in the subject matter of the application. This includes but is not limited to, any person who has been adversely affected by the decision, which is the subject of the application”*

[76] Under Part 56(3) of the Rules of the Supreme Court:

- (a) Permission must first be obtained to apply for judicial review.<sup>27</sup> This is a “measure intended to filter out groundless or unmeritorious claims<sup>28</sup>”.
- (b) *“An application for permission to apply 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*

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<sup>27</sup> Part 56.3(1) of the Supreme Court Rules.

<sup>28</sup> See Lord Diplock in *O’Reilly v Mackman* [1982] 2 All ER 1124, 1131);

*reason for extending the period within which the application shall be made*<sup>29</sup>.

- (c) The “*judge may refuse permission to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application*”<sup>30</sup> and may consider whether the granting of permission would be likely to “*cause substantial hardship to, or substantial prejudice, the rights of any person*”<sup>31</sup>; or “*be detrimental to good administration*”<sup>32</sup>.
- (d) The application must state whether any time limit for making the application has been exceeded and if so why<sup>33</sup>.
- (e) The judge may grant permission on such conditions or terms as he considers just<sup>34</sup>.
- (f) Where the application is for an order (or writ) of prohibition or certiorari the judge must direct whether or not the grant of permission operates as a stay of the proceedings to which the application relates<sup>35</sup>.
- (g) The judge may grant such interim relief as appears just<sup>36</sup>.
- (h) On granting permission, the judge must direct when the first hearing or, in the case of urgency, the full hearing of the claim for a judicial review should take place<sup>37</sup>.
- (i) Permission must be conditional on the applicant making a claim for judicial review within 14 days of the receipt of the order granting permission<sup>38</sup>.

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<sup>29</sup> Part 56.5(3) of the Supreme Court Rules.

<sup>30</sup> Part 56.5(1) of the Supreme Court Rules.

<sup>31</sup> Part 56.5(2)(a) of the Supreme Court Rules.

<sup>32</sup> Part 56.5(2)(b) of the Supreme Court Rules.

<sup>33</sup> Part 56.3(3)(g) of the Supreme Court Rules

<sup>34</sup> Part 56.4(7) of the Supreme Court Rules.

<sup>35</sup> Part 56.4(8) of the Supreme Court Rules.

<sup>36</sup> Part 56.4(9) of the Supreme Court Rules.

<sup>37</sup> Part 56.4(10) of the Supreme Court Rules.

<sup>38</sup> Part 56.4(11) of the Supreme Court Rules.

[77] As I have had cause to express in a recent application for permission to apply for judicial review<sup>39</sup>, the Court of Appeal of Belize in its decision of **Froylan Gilharry Sr dba Gilharry’s Bus Line v Transport Board & Chief Transport Officer & The Minister of Transport and The Attorney General**, very usefully and fully sets out many of the relevant and applicable provisions contained in Part 56 of CPR 2005 including the above provisions relating to applications for permission to apply for judicial review.

[78] I also noted that this court in dealing with an application for permission to apply for judicial review is required to perform a ‘gate-keeping function’ to eliminate at an early stage, claims which are hopeless, frivolous or vexatious and to ensure that only such claims proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration<sup>40</sup>.

[79] The Judicial Committee of the Privy Council in the case of **Sharma v Browne-Antoine et al**<sup>41</sup> in the joint judgment of Lord Bingham of Cornhill and Lord Walker of Gestinhorpe, authoritatively delivering the decision of the Committee in relation to the test to be applied on an application for permission for apply for judicial review when they stated:

*“...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.... But arguability cannot be judge without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application*

.....

*It is not enough that a case is potentially arguable: an applicant cannot plea potential arguability to “justify the grant of leave to issue*

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<sup>39</sup> See Claim No 689 of 2013 Dr. Abigail McKay v the University of Belize et al, see paragraph 34 & 57- 63.

<sup>40</sup> Ibid paragraph 38 & 40.

<sup>41</sup> [2006] UKPC 57 at page 787 paragraph E

*proceedings upon a speculative basis which it is hope the interlocutory processes of the court may strengthen”*: *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712. 733<sup>42</sup>”

- [80] As such, this court ought to grant permission, only if satisfied that the papers disclose 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, which merits full investigation at a full oral hearing with all the parties and all the relevant evidence.
- [81] In exercising its gate-keeping function it is clear that this court has a discretion, and therefore may refuse permission to argue certain grounds because a particular ground or challenge does not raise to the level of being arguable with a realistic prospect of success, and may therefore grant limited permission: to hear one or more of the grounds while refusing permission in respect of others.
- [82] As judicial review is concerned not with the merit of a decision by a public body but the lawfulness of the decision making process itself, at the point of considering an application for permission to apply for judicial review, this court will be concerned with identifying whether or not one or more grounds of judicial review may be established.

### **The Objections of the Defendants**

- [83] Counsel for the Defendants made a number of legal and procedural preliminary objections to the application for permission to apply for judicial review; the first of which is the central or principle one, namely:
- (a) The National Council for Education Arbitration followed the Rules flowing from the Education Act and afforded the Claimant/Applicant the right of appeal, allowed for the presentation of the Claimant/Applicant’s case, heard the case and furnished reasons within a reasonable time as to why the licence was denied as well as the ordering of the closure of the school.

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<sup>42</sup> Ibid.

- (b) The decision of the National Council for Education Arbitration was made fairly, constitutionally and reasonably in accordance with the prescribed rules for such.
- (c) The Claimant/Applicant's conduct is tainted with illegality and as such should act as a bar to leave to judicial review. Granting judicial review despite the illegality would be contrary to the overriding objective noted in rule 1.1(1) of the Civil Procedure Rules (CPR) and the principles of equity governing discretionary remedies.
- (d) The decision the Claimant/Applicant seeks to review is one of policy and therefore not justiciable.
- (e) The Claimant/Applicant's claim is an abuse of the Court's process as it presents both a claim for a common law relief by way of judicial review and a claim for constitutional relief.

#### **The Case by the Claimant for Permission**

**[84]** The Claimant, by his Counsel, has submitted that the decision of the NATCEAP dated 26<sup>th</sup> April 2014 is Wednesbury unreasonable, being a decision on which a reasonable tribunal applying the proper legal principles could reasonably arrive.

**[85]** The Claimant also submitted that the decision was arrived at contrary to natural justice, in that, he was not given a full and ample opportunity to be heard and to present and make a fulsome case to the tribunal on the 24<sup>th</sup> April 2014 so that he could deal with all possible objections, of which they had been notified, to the granting of the license sought, and the said affidavit of James Duncan makes this position abundantly clear.

**[86]** The Claimant did not, however raise in his application for permission for Judicial Review a challenge by way of judicial review of the decision of the 21<sup>st</sup> May 2009 of the Chief Education Officer or allege that they (the Claimant) have a legitimate expectation to be granted a licence to operate a school based on the Ministry's policy. Also, the Claimant did not allege that the decision of the Chief Education Officer was within the area of policy which this court could legally judicially review

and not areas of Policy peculiarly within the remit of the Ministry of Education, with which this Court should not interfere.

### **Consideration of the merits of the application**

#### Findings of Facts

[87] I generally considered that the Claimant likely had significant factual merits to his claim at this stage, based on the essentially one-sided presentation of the uncontested facts as presented by the Claimant.

[88] On the whole I am satisfied that in their dealing with the Claimant that there may not have been full compliance by the education authorities with the applicable primary and subordinate education legislation in relation to the Claimant's various applications for a licence to operate a private school and for him to have a teaching licence. Specifically, I felt that there may have been the following triable issues:

- (a) Whether the application by the Claimant for a licence in July 2000 was responded to in an appropriate manner mandated by applicable legislative provisions?
- (b) Whether the relevant educational authorities acquiesced or may have double-signalled the Claimant in his non-compliance with the requirement to operate a private school with all appropriate statutory licences?
- (c) Whether the appropriate appeal procedures in relation to the Claimant's various appeals against the decision not to grant a licence to operate a school and decisions to close the Claimant's school were followed?

[89] I must say that on the evidence before me, that on balance, it is not clear that the relevant educational authorities complied with the statutory process of inviting the applicant to rectify any perceived or claimed deficiencies within a specified period. Nor did they give the Claimant an opportunity to rectify any deficiencies. Nor did they give the Claimant a reasonable or any opportunity to comply with any requirement which the authorities imposed on the Claimant, with a view to satisfying the Chief Education Officer with regard to any deficiency or requirement before refusing a licence to operate the school. All of such things the education

authorities were required by statute to do if not satisfied with the particulars and plans for the school proposed by the Claimant.

- [90] But by the same token, upon careful review, I also considered that the period under review, namely July 2000 – 26<sup>th</sup> April 2014, appeared to have spanned a period of transition of the laws and regulation relating to the Education matters in question. Specifically, this transitional period may have concerned the issues with which this application is concerned (whether the Claimant ought to have been issued a licence to operate a private School in Boston Village, Belize District?), all with the result that there may have understandably been some bureaucratic hesitancy and/or uncertainty involved in the application of the operative laws and rules, which may have created some difficulty for the education administration.
- [91] However, in attempting to resolve the merits of the present application I considered there was one very crucial piece of evidence which stood out over and above all the other facts and circumstances of the case with a brooding and dominating presence: namely the completely mistaken belief by the Claimant of the laws of Belize that he could open a Mennonite school without a licence from the Ministry of Education to operate such a school. But that this mistaken belief did not extend to the Claimant not being required to have a teaching licence - as apparently the Claimant applied for a teaching licence since 2000.
- [92] It is therefore abundantly clear to me that there does not exist, indeed it has not been shown to me by the Claimant, that there exists any such basis for his mistaken belief. Nor indeed that there exists any such provision that Mennonite or any particular school, whether relevant to the Claimant's application or not, were exempt from operating without a school licence from the Ministry of Education. On the contrary, it appears to me that the law at all times was clear that the Claimant was absolutely required to obtain a licence to operate its proposed private school in advance of the opening of the school.
- [93] If the principal Acts were not abundantly clear that the licence to operate the school prior to the opening of the school, which I believe it was, the subsidiary legislation by the Rules made it pellucidly clear that the Claimant was absolutely required to,

not only obtain the licence in advance of the school opening, but expressly stipulated a time period in advance of the opening that the licence had to have been obtained., namely: “*at least sixteen months prior to the proposed opening of the school*”.

[94] If the Claimant was therefore advised that he was not required to obtain a licence to operate a Menononite school, then that advice was clearly erroneous; and any such advisor would have to take responsibility for any such advice. If no such advice was obtained then the Claimant was negligent for arriving at such a position without having obtained legal advice; and the Claimant therefore has to take full responsibility for the consequence of such failure.

[95] These crucial related facts shifted, in my view, from the Claimant to the Defendants, any merits which existed in the Claimant’s claim., that he was being put to great expense and/or that he has unfairly suffered, financially or otherwise, by reason of the actions of the education authorities, whether as a result of the action of the Ministry of Education, the Chief Education Officer, the National Council of Education, the Belize District Education Council or the Arbitration Panel.

[96] Further, the fact of the Claimant’s non-compliance with the relevant education legislation taints the Claimant’s conduct with an odour of wrongdoing and illegality such that the Claimant ought reasonably not to expect this court to entertain any application for permission to apply for judicial review or to aid him in any application for a discretionary remedy; unless and until, that is, the Claimant has taken such steps to remedy his non-compliance.

#### **Determination of the Issue**

[97] The Claimant in the view of this Court has operated its school for many years contrary to, and in clear violation of the legal requirement to obtain a licence prior to opening the school; and in the view of this Court by its presumptuousness has no or little merit in its present application.

[98] I have formed the clear impression that such wanton, or apparently high-handed behaviour by the Claimant, in not applying for a licence prior to opening the school; and of operating it despite various attempts to close it down, in no small measure

likely motivated or prejudiced the Claimant's application against him - for which the Claimant has only himself to blame. Certainly ignorance of the law cannot be prayed in aid by him to support his case in this crucial matter; and frankly given his wanton behaviour in this regard, his approach to the education authorities, in my view, in the facts and circumstances of the present case ought to have been more circumspect and measured, and less demanding. I apprehend that if an alternate approach had been adopted such may have yielded a more responsive approach from them and indeed the arbitration panel – and even this court.

**[99]** In any event the Orders which the Claimant/Applicant seeks, even if granted, which for the reasons already given, the Court considers does not present an arguable case which has any likelihood of succeeding. Success in this present application would not benefit the Claimant in any way, as a mere quashing of the decision of the NATCEAP of 24<sup>th</sup> April 2014, which incidentally has not been specifically applied for as required by the applicable provisions for permission to apply for judicial review, would still result in the Claimant's application in the decision of the Ministry of Education dated 21<sup>st</sup> May 2009 standing – with the result that the subject school therefore would still not be approved. This is so as an application was not made to also quash the decision of the Ministry of Education's decision in relation to the school and in the event of success before the Arbitration Panel the school would still be subject to closure in accordance with the latter decision.

**[100]** Further the decision of the NATCEAP dated 26<sup>th</sup> April 2014 cannot, in my view, be said to be Wednesbury unreasonable. For the reason that this Court considers that in view of the Claimant's conduct, as set out in the Claimant's Affidavit, and therefore on the evidence of the case before me, a case is indeed presented on which a reasonable tribunal applying the proper legal principles could quite reasonably have arrived at the decision at which it did arrive.

**[101]** This Court considers that the Claimant was given full and ample opportunity to be heard and in any event did make a fulsome case to the tribunal dealing with all possible objections, of which they had been notified, to the granting of the licence sought. All of this is made abundantly clear in the affidavit of James Duncan.

- [102] In addition in the view of this court the Claimant did not challenge the policy of the Ministry by seeking the appropriate administrative law relief raise in his application for permission for Judicial Review. For instance the question of the Claimant having a legitimate expectation to be granted a licence to operate a school based on such Ministry's policy, does not arise in claim for judicial review and therefore in this Court's view, the Claimant is not in a position to rely on any such policy that would give him an arguable case with a reasonable prospect of succeeding in relation to the policy considerations of which he, the Claimant, through his counsel, has sought to argue.
- [103] In any event this Court considers that the questions being raised in relation to Judicial Review are areas of Policy peculiarly within the remit of the Ministry of Education with which this Court ought not or should not interfere.
- [104] I must confess that in my view, overall, this application must fail because in any event it failed to satisfy the basic technical requirements for any application of this nature because it failed to address and did not seek to attend to the detailed requirements of such applications.
- [105] Finally given that the application was only expressly for a declaration and not expressly for any of the judicial review remedies (of certiorari, prohibition, or mandamus) this court does not see that, in any event, permission was needed to apply for such an application (being not an application for judicial review). It is the view of this court that applications for declarations may not require permission from this court not being applications for judicial review.
- [106] In my view also permission in any event, is not needed to apply for any of the claimed reliefs under the Constitution; and it is indeed very improbable that it was necessary to apply for permission to apply for a declaration in the present case as a Defendant, being a party, is clearly the Crown, a tribunal (an arbitration panel) and or a public body<sup>43</sup>.

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<sup>43</sup> Part 56.(1)(c) RSC 2005.

**Costs**

[107] As the Claimant has been wholly unsuccessful and the application is in my view wholly misplaced and without merit the Claimant shall pay the Defendants Costs of this application in the sum of \$1,000.00.

**Disposition**

[108] Permission is denied to the Claimant under Part 56.3 of the Supreme Court Rules 2005, to apply for judicial review and the application is therefore dismissed with cost in the sum of \$1000.00 to be paid by the Claimant to the Defendants.

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**Hon Mr. Justice Courtney A. Abel**

**Dated: 28<sup>th</sup> September 2015**