IN THE SENIOR COURTS OF BELIZE

CLAIM No. CV 614 of 2023

BETWEEN

KENDIS DUNCAN NEAL

Claimant/Respondent

AND

COMMANDER OF THE BELIZE DEFENCE FORCE

First Defendant/Applicant

SECURITY SERVICE COMMISSION

Second Defendant/Applicant

ATTORNEY GENERAL OF BELIZE

Third Defendant/Applicant

Appearances:

Mr. Darrell Bradley for the Claimant/ Respondent
Mr. Stanley Grinage for the Defendants/ Applicants

2023: December 19;

2024: May 07.

JUDGMENT

NOTICE OF APPLICATION TO STRIKE OUT FIXED DATE CLAIM FORM

[1] **Nabie J.**: This is an application filed by the defendants dated 28th November 2023 to strike out the fixed date claim form.

[2] I have considered the submissions of the parties and the fixed date claim form is struck out for being an abuse of process.

BACKGROUND

[3] By the fixed date claim form filed on 5th October 2023, the claimant filed for application for relief under the Constitution pursuant to **Part 56** of the **Supreme Court Civil Procedure Rules (CPR).**

[4] The following reliefs were sought:

1) A declaration that the First and Second Defendants breached the Claimant's right to equal protection under law and equal treatment of law, guaranteed by **Section 6** of the **Belize Constitution, Chapter 4** of the **Substantive Laws of Belize, Revised Edition 2020,** and acted unfairly, discriminatory and Wednesbury unreasonable, biased, considered irrelevant factors and failed to consider relevant factors and breached the Claimant's legitimate expectation to fair career advancement when the First and Second Defendants passed over the Claimant for promotion to fill the temporary vacancy of Commanding Officer of the Air Wing of the Belize Defence Force. Promoted or appointed a less senior officer, failed to consult the Claimant and failed to give the Claimant any opportunity to apply for or be considered for the temporary post of Commanding Officer of the Air Wing of the Belize Defence Force.

2) Damages for the First and Second Defendants' breach of the Claimant's constitutional rights, including the Claimant's right to equal protection under law and equal treatment of law and for acting unfairly and in a discriminatory and biased manner and breaching the Claimant's legitimate expectation to fair career advancement, including but not limited to, lost wages, being that the post of Commanding Officer of the Air Wing carries a promotion to the rank of Lieutenant Colonel and payment of an acting allowance at the rate of the difference between the Claimant's current salary and the rate of the Commanding Officer.

3) Interest in damages paid from the date of this claim and continuing at the rate of **six per cent (6%) per annum** pursuant to **Sections 175** and **176** of the **Senior Courts Act, Act No. 27 of 2022.**

4) Such further or other relief as this Honourable Court may deem just.

5) Costs.

[5] The fixed-date claim form was supported by an affidavit of the claimant.

[6] Written submissions were filed by the parties, the claimant filed on 11th December 2023, and the defendants filed on 19th December 2023.

FACTUAL MATRIX

[7] The claimant deposed that he has been a soldier in the Belize Defence Force for sixteen (16) years, holds the rank of Major assigned to the Belize Air Wing and is a pilot. The claimant sets out his training and progression through the service. He then states that he was assigned to the Air Wing of the Belize Defence Force in 2019 and was the second most senior officer up to the 6th of June 2023 by rank and years of service in the Air Wing.

[8] Prior to 6th June 2023, Major Kenroy Smith, the Commanding Officer of the Air Wing proceeded on extended study leave. There, therefore, arose an acting appointment in the office of Commanding Officer. The first and second defendants decided to appoint a junior officer, Francis Usher, to act as Air Wing Commander. The claimant and Major Jael Gonzalez are both senior to Captain Francis Usher. Captain Francis Usher's appointment to act as Air Wing Commanding Officer was published by the Force Routine Order (FRO) dated 6th June 2023. This Order was exhibited in the claimant's affidavit.

[9] The claimant contends that he was not consulted or able to apply for promotion to the post of Acting Commander, Air Wing. He alleges breaches of equal protection under law and equal treatment of law and that the first and second defendants acted unfairly, discriminatory, and biased. He also alleges a breach of legitimate expectation of career advancement. Additionally, the claimant claims pecuniary loss including loss of career advancement and loss of wages.

DEFENDANTS' ARGUMENTS

[10] The defendants submit that the Caribbean Court of Justice (CCJ) and the High Court of Belize have frowned on the practice of disguising ordinary claims as constitutional motions. They argue that the value of the constitutional motion would be diminished if the courts were to allow constitutional motions as a general substitute for the normal procedure for invoking judicial control of administrative actions. Reliance was placed on the matters of **Cunha v Belize Defence Force and the Attorney General**[1] and the CCJ decision of **Lucas and Carillo v the Chief Education Officer et al.**[2]

[11] It is the defendants' submission that the claim amounts to an abuse of process and should have been brought by way of an application for permission for judicial review and further that judicial review was an adequate parallel remedy. The defendants contend that the Claimant is really seeking to impugn the decision to appoint Major Francis Usher to act as Commander of the Air Wing.

[12] The defendants also argued that the relief sought, a declaration, is also available in judicial review proceedings. Further, the declaration sought, whilst free-standing, would serve no useful purpose since it is a discretionary remedy, and the Claimant is not seeking any consequential relief to give effect to the declaration.

[13] Lastly, the defendants submit that that the claimant delayed in filing his claim and for this reason, he would have been shut out in an application for permission to apply for judicial review due to the time limit of three (3) months. The decision of the first and second defendants was issued on 6th June 2023, but the fixed-date claim form for constitutional relief was not filed until 5th October 2023. Thus, they submitted that the claimant's use of the constitutional motion was to avoid the

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[1] Claim no. 175 of 2020
[2] [2015] CCJ 10

consequences of filing the judicial review claim outside of the prescribed time for seeking permission to apply for judicial review.

CLAIMANT'S ARGUMENTS

[14] The claimant argued that the power to strike out should be used sparingly and as a last resort. The court was urged not to exercise its striking out power as it should only be used in the most obvious cases where the claim is plainly an abuse of process.

[15] The claimant's position is that in accordance with **CPR 56.1(3),** judicial review is a claim for one of the prerogative orders namely certiorari, prohibition and mandamus and it does not include a claim for a declaration. The claimant argues that **CPR 56.1 (c)** allows a litigant to seek a declaration and damages as one of the four distinct applications for administrative orders.

[16] The claimant also contends that upon an examination of the pleadings, the claim is obviously not one of judicial review, as it seeks a declaration and damages and there is no prayer for any of the prerogative orders. It was stated that the claimant does not seek to strike down the decision to appoint Captain Francis Usher, just a declaratory order in terms of breaches of his constitutional rights, accordingly the claim cannot be vindicated through the judicial review process.

[17] **ISSUES:**

(i) Whether the fixed date claim form was filed pursuant to **CPR 56.1(b)** or **CPR 56.1(c)** ?

(ii) Whether a constitutional motion is an abuse of process in the circumstances?

(iii) Whether the claim ought to have been by way of an application for judicial review?

ABUSE OF PROCESS/ADMINISTRATIVE ORDER

[18] The claimant posited that he is seeking an administrative order for a declaration and damages pursuant to **CPR 56.1(c).** The defendants have however filed this application to strike out the fixed date claim form based on their view that the Claimant's application for an administrative order was made pursuant to **CPR 56.1 (b),** one for constitutional redress.

[19] **CPR 56** provides as follows:

> "56.1 (1) This Part deals with applications -
>
> (a) for judicial review;
>
> (b) for relief under the Constitution;
>
> (c) for a declaration in which a party is the Crown, a court, a tribunal or any other public body;
>
> and
>
> d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a Minister or Government Department or any action on the part of a Minister or Government Department.
>
> (2) In this Part such applications are referred to generally as "applications for an administrative order".
>
> (3) "Judicial Review" includes the remedies (whether by way of writ or order) of –
>
> (a) certiorari, for quashing unlawful acts;
>
> (b) prohibition, for prohibiting unlawful acts; and
>
> (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.

(4) In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant –

a) an injunction;
b) restitution or damages; or
c) an order for the return of any property, real or personal.

56.3 (1) A person wishing to apply for judicial review must first obtain permission.

[20] The fixed date claim form speaks of an application for constitutional redress namely "Application for Relief under the Constitution, pursuant to Part 56 of the Supreme Court Civil Procedure Rules". The claimant does not specify in the claim form under which rule he is seeking the administrative orders. The claimant also does not use the words "Originating Motion" as required by the **CPR**. This issue was not addressed by the defendants in their written submissions. The defendants' position is simply the claimant is challenging the decision of the first and second defendants that being a judicial review claim which is disguised in the clothes of a claim for constitutional redress. This is clear from their arguments but quite apart from that the claimant in oral and written submissions clearly advocated that the claim is one for a declaration and damages under **CPR 56.1 (c).**

[21] When filing for administrative orders the CPR provides as follows:

"CPR 56.7 (1) An application for an administrative order must be made by a fixed date claim in Form 2 identifying whether the application is –

(a) for judicial review;
(b) for relief under the Constitution;
(c) for a declaration; or
(d) for some other administrative order (naming it) and must identify the nature of any relief sought.

56.7 (2) The claim form in an application under the Constitution requiring an application to be made by originating motion should be headed 'Originating Motion'."

[22] As aforesaid, the claimant's fixed date claim form is headed as an application for constitutional relief, this would be an application under **CPR 56.1(b).** Yet his arguments are fashioned around a claim for declaration and damages under **CPR 56.1 (c).** Therefore, while the authorities support that the claimant may have proceeded under that avenue created by **CPR 56.1 (c)** such as an authority cited by the claimant, **Belize Bank Ltd. v. Association of Concerned Belizean Citizens and Ors**[3] .This was also held more recently in the Privy Council decision in the Antiguan case of **Attorney General et al v. Isaac**[4]. However, having reviewed the fixed date claim separately and apart from the oral and written submissions filed in response to the application to strike out, I find that the claimant has not filed his fixed date claim form under **CPR 56.1 (c)** but rather, in so doing, **CPR 56.1 (b)** provides for applications for constitutional relief. Accordingly, I will have to consider whether the use of the application for constitutional redress was an adequate procedure in the circumstances of this matter. There is much authority on the abuse of the court's process by the use of the constitutional motion in place of invoking the procedure for the review of administrative action.

[23] In the Privy Council decision of **Kemrajh Harrikissoon vs The Attorney General**[5], Lord Diplock considered that the value of constitutional motions would be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In that case, the Court determined that the Appellant, a teacher who was aggrieved by the Commission's decision to transfer him, had available to him relevant redress but however chose to institute a constitutional motion. Lord Diplock stated as follows:

> "The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

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[3] Civil Appeal No. 18 of 2007
[4] [2018] UKPC 11
[5] Privy Council Appeal No. 4 of 1997

[24] Later, in another decision from the Judicial Committee, **Jaroo vs The Attorney General of Trinidad and Tobago**[6], the Board stated:

> "29. Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy."
>
> "36. Their Lordships wish to emphasise that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. As Lord Mustill indicated in Boodram v Attorney General of Trinidad and Tobago [1996] AC 842, 854, in the context of a complaint that adverse publicity would prejudice the applicant's right to a fair trial, the question whether the applicant's complaint that the police were detaining his vehicle was well founded was a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution. But instead of amending his pleadings to enable him to pursue the common law remedy that had always been available to him, the applicant chose to adhere to what had now become an unsuitable and inappropriate procedure."

[25] In the Privy Council decision of **Hon. Attorney General and another v Isaac**[7], which I have quoted below is instructive, and for the avoidance of doubt, if the application had been made under **CPR 56.1 (c),** I am of the view that the position on abuse of process would be the same where the declarations sought are for constitutional breaches. Ms. Isaac had been suspended and upon the end of the period she was denied access to her office. She brought an action for declaratory relief regarding the unlawfulness of the suspension and damages, but no quashing order. The following excerpts from **Isaac** are notable. They state:

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[6] Privy Council Appeal No. 54 of 2000

[7] Honourable Attorney General and another (Appellants) v Isaac (Respondent) Antigua and Barbuda) [2018] UKPC 11

"(19) In the High Court, Henry J took the view that there are four types of application which fall within the ambit of administrative law. They are set out in CPR 56.1(1) and include an application for a declaration against a public body (CPR 56.1(1)(b)) and an application for judicial review (CPR 56.1(1)(c)). It seems that the debate focussed upon which of those two types of administrative order application Ms Isaac was making here.

(20) Henry J decided that the application was not an application for judicial review. In her view, applications for judicial review are identified by the remedies sought in the application. She appears to have proceeded upon the basis (para 12 of her judgment) that judicial review applications "are claims for the prerogative orders of certiorari, mandamus and prohibition", although acknowledging that a claim for judicial review may also include a prayer for declaratory or other relief. She considered that an in-depth analysis of the nature of the claim is not necessary for the purposes of identifying whether a claim is one for judicial review or not, as an examination of the remedies sought will provide the answer. Given that the relief sought in this case does not include any of the prerogative orders, being limited to declarations and damages, she decided that Ms Isaac was not making a claim for judicial review and did not need leave (para 13 ibid). It was for that reason that she denied the application for the claim form to be struck out.

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(22) Blenman JA, with whom the other members of the court concurred, examined the issues joined between the parties and had no hesitation in classifying them all as public law issues (para 48 of her judgment), commenting that Ms Isaac was "seeking to obtain relief based on alleged public law infractions by Cabinet" (para 46 ibid). It was "incontrovertible that a claim for a declaration was a specie of administrative order as provided in CPR 56.1(1)" (para 68). In Blenman JA's view, whilst a claimant seeking judicial review could also seek declarations in that application, there was nothing to prevent an applicant from simply filing an application for a declaration coupled with a claim for damages (para 70), an application for a declaration being distinct from an application for judicial review in the scheme of **CPR 56.1(1)** and **(2)** (para 71).

[26] The Privy Council in their discussion in **Hon. A.G. and another v Issac** which references the **Belize Bank** case further stated as follows:

"(30) There is little decided case law to help determine the issue that is before the Board. Although some cases were cited to the Court of Appeal, that court referred in its discussion and

conclusion only to the English case of O'Reilly v Mackman (supra), and then only to distinguish it because the law has developed differently in England and Wales from the position in Antigua and Barbuda.

.....

(33) It is necessary first to consider what the distinguishing features of an application for judicial review within Part 56 are. It may not harm to start that consideration with a fairly obvious point. Part 56 of the CPR 2000 is concerned with administrative law, as its heading identifies. Four distinct categories of applications for an administrative order are recognised, in CPR 56.1(1), judicial review being merely one of the four. Each of the four categories of application concerns relief falling within the public law sphere, so it is clear that the mere fact that a claim is of a public law type cannot be sufficient to make it a claim for judicial review. Something else must distinguish it as an application for judicial review within CPR 56.1(1)(c), rather than an application for relief under the Constitution within CPR 56.1(1)(a), for a declaration within CPR 56.1(1)(b), or for the quashing of an order etc. within CPR 56.1(1)(d).

(34) CPR 56.1(3) is the only guide in the rules to what constitutes an application for judicial review. It focuses on prerogative remedies, and there can be no doubt that the presence or absence of a claim for a prerogative remedy will always be an important, and potentially determinative, consideration in deciding whether or not an application is for judicial review. But it is important to recognise that CPR 56.1(3) does not purport to provide an exhaustive definition of judicial review. It does not say that the question whether an application is for judicial review can be definitively determined by simply looking to see whether one of the prerogative remedies there listed is sought. It only says that "the term 'judicial review' includes" (my emphasis) certiorari, mandamus and prohibition. As the Court of Appeal observed, remedies which are not on the list, can be sought in a judicial review application. An allowance also has to be made for the possibility that an application which says nothing at all about prerogative remedies is, in fact, an application for judicial review, although that will, of course, depend on the particular circumstances of the case. Plainly, CPR 56 cannot be interpreted so narrowly as to permit a claimant to avoid the leave requirement in CPR 56.3 simply by formulating his or her claim for relief in declaratory terms, when the application is in fact for judicial review. The Board therefore accepts the appellants' argument that in some cases it may be necessary to look

carefully at the substance of the application, rather than the form in which it is cast.

(35) Having said that, the Court of Appeal must be right in saying that an in-depth analysis of the nature of the claim will not normally be necessary, because generally, the nature of the remedies sought will identify whether the application is for judicial review. Furthermore, in those cases where more rigorous scrutiny is required, going behind the form of the application and probing its substance, an analysis of what remedies the claimant is, in reality, pursuing will still play an important part in the exercise. The court will have to approach its task having firmly in mind the list set out in CPR 56.1(3), because that list of the principal judicial review remedies serves to indicate the shape of the concept of judicial review within CPR 56, and there is, in truth, little else to assist in the quest.

.....

(39) The Belize Bank case came to light during oral submissions to the Board and is worth mentioning here, not least because it shows a similar approach in the Court of Appeal of Belize to that taken by the Court of Appeal in the instant case. The Belizean Supreme Court Rules are identical in all material respects to the Eastern Caribbean Supreme Court Rules applicable in the present case, save as to some numbering of subparagraphs.....

(40) It is interesting to note the following comment in the conclusion of Carey JA, with whose judgment Sosa JA and Morrison JA agreed, the latter also adding reasoning of his own. Responding to a suggestion that unless the declaration remedy was limited to private rights, the judicial review process would become redundant, Carey JA said:

"As [counsel for the claimants] observed in her skeleton argument, the aspect of judicial review which no other remedy possesses is, that the decision can be questioned, and the claimant not left to depend on the goodwill of the public authority to respect the court's declaration."

(41) It can be seen from para 7 of Carey JA's judgment and para 30 of Morrison JA's that the submission made by counsel for the claimants differentiated between cases in which the claimants sought to have a decision or action quashed (which would require judicial review) and cases where, like her clients, the claimants are content merely to obtain a declaration of the illegality of government action, in which case a declaratory judgment could be sought. Carey JA's apparent endorsement of

> the boundary that counsel drew supports the notion (see para 35 above) that, when scrutinising the substance of an application to see whether it is properly classed as a judicial review application, it will be of central importance to consider whether relief in the form of any of the orders listed in CPR 56.1(3) is sought."

[27] The Court of Appeal and Privy Council decision in **Isaac,** therefore, gives further guidance in distinguishing whether a claim is for or should be for permission for Judicial Review. Clearly, it should not be just the relief being sought, but additionally the substance of the application and not be limited to observance of the form of application. In this circumstance, I re-iterate that I hold the view that the claim is one for relief under the Constitution. Furthermore, if it could be seen as a claim under **56.1 (c)** a declaration of constitutional rights. The count is entitled to consider whether or not it was an abuse of process as the Claimant is still in effect, seeking constitutional relief. This was a similar position taken by Awich J. (as he then was) in **Sewell and Sewell v. Minister of Foreign Affairs and the Attorney General** [8] where he stated in paragraph 23:

> "In my view, rule 56.1 authorises that a claim under public law may now be made by any of the proceedings in (b) to (d), as well as by judicial review proceedings, without the claim and proceedings being necessarily branded an abuse of process. But it is still possible to show instances of abuse of process on the grounds that, the claimant intended to avoid the three months limitation period, or obtaining permission, or any other grounds."

[28] Litigants are therefore required to consider the real substance of the claim and whether some other procedure, common-law based or statutorily based might more conveniently be invoked as opposed to filing for constitutional redress. The cases establish that a litigant seeking constitutional redress must do so in exceptional circumstances when there is a parallel remedy. This was echoed more recently in the Privy Council decision of **Brandt v Commissioner of Police et al**[9]. The appellant, Brandt challenged the search of cell phones by an application for

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[8] Claim No. 291 of 2007
[9] [2021] UKPC 12

an administrative order under the Constitution of Montserrat. It was found by the trial judge and upheld by the appellate courts that the application for administrative order was an abuse of process. Firstly, the judge at first instance held that to resort to a constitutional motion was wholly inappropriate and to expect the court to trespass upon the criminal jurisdiction was wrong. Secondly, the judge also held that the appellant in raising the matter at a late stage was another delay tactic intending to delay the criminal trial.

[29] Further, at paragraph 39 of the **Jaroo** decision the Board went on to say:

> "39. Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."

[30] I have read the evidence examined the relief sought, it is a declaration for equal protection and equality of treatment, however, the claimant relies on grounds of judicial review to buttress his claim such as "Wednesbury unreasonableness"', "bias" "irrelevant considerations" and "legitimate expectation". It is clear that the true nature of the claim is a challenge to the decision of the first and second defendants. The decision being to appoint Francis Usher to act as Air Wing Commander.

[31] The arguments that the claimant is not seeking any of the prerogative orders, namely mandamus, certiorari and prohibition and thus this takes the claim outside the realm of judicial review is misleading and without merit. In fact, the claimant's arguments are unclear and conflict with his claim. The claimant's position, as

aforesaid, is that his claim for an administrative order for a declaration and that declarations are not available in judicial review and thus, a judicial review application would be inappropriate in the circumstances. The fixed-date claim form clearly indicates that the claim is for relief under the Constitution. The claimant alleges a breach of the equality and protection of the law provisions. As aforesaid, I find that the fixed date claim form is not for an administrative order for a declaration under CPR 56.1 (1) (c). I disagree that a declaration is not available in judicial review (see CPR 56.13(3)). I will discuss this later on.

[32] This claim is fundamentally a challenge to a decision of the first and second defendants not to appoint the claimant to act as Commander of the Air Wing. The nature of the claim falls squarely in the realm of a judicial review application. The claimant's fixed date claim does not reveal any special feature that can justify an action that warrants the use of the constitutional motion. While he seeks constitutional relief in his claim, the evidence is lacking or insufficient regarding the allegations of breaches of constitutional rights such as equal protection under the law and equal treatment of the law.

[33] I would refer to the CCJ decision in **Lucas** where it was stated in para 133:

> ".....Courts will frown on the filing of a constitutional motion in lieu of a judicial review action when the latter is perfectly capable of yielding all the relief the litigant requires. Proceeding by constitutional motion may well be an impermissible strategy either for unfairly jumping the litigation queue or evading the scrutiny of the judicial review judge charged with filtering out grounds or hopeless cases. A similar principle is applied where the litigant has adequate recourse in private law but chooses to proceed by way of constitutional motion. In those instances, the courts will entertain a constitutional action only if the circumstances disclose some 'special feature' that justifies going beyond private law remedies and invoking the constitution."

[34] In the circumstances, I find that the proper avenue would have been for the claimant to seek vindication of his complaint by applying for permission for judicial review of the decision of the first and second defendants to appoint Francis Usher to act as Air Wing Commander. It is an abuse of the court's process to use a

procedure to seek constitutional relief in the circumstances. This is also a breach of the provisions of **CPR 56** which provides for review of administrative action.

DELAY

[35] The defendants submitted that the claimant sought constitutional redress as they delayed in bringing the claim outside of the three (3) month limit prescribed for applying for permission for judicial review. In the case of the Privy Council decision of **Durity vs The Attorney General of Trinidad and Tobago**[10], the Board considered that it is an abuse of the process of the court to make an application for redress under the constitutional provisions as a means of avoiding the necessity of applying for the appropriate judicial remedy for an unlawful administrative action. In particular, the Court determined that where there has been a delay in instituting the claim, the Court can consider whether there was an adequate parallel remedy available.

[36] At paragraph 35 of the **Durity** judgment Lord Nicholls of Birkenhead stated:

> "In this context the Board considers it may be helpful if it makes certain general observations. When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been a delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this, it is sufficient to refer to the much-repeated cautionary words of Lord Diplock in Harrikissoon v A-G (1979) 31 WIR 348. An application made under s 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."

[10] Privy Council Appeal No. 52 of 2000

[37] **CPR 56.5** sets out the procedure to deal with the delay in seeking to review administrative action. In this case, the filing of the fixed date claim form on the 5th of October 2023 was some four (4) months after the impugned decision on the 6th of June 2023. The claimant would have had to show a good reason to extend the time for the application for judicial review as he was out of the three (3) month limit as prescribed. I find that there has been a delay in filing proceedings in this matter and it was filed to avoid the procedure to apply for judicial review of administrative action. It is therefore an abuse of process to apply to the court pursuant to **Section 20** of the **Constitution** to seek redress. The claimant ought to have made a timely application for permission for judicial review.

JUDICIAL REVIEW vis a vis CONSTITUTIONAL MOTION

[38] Albert Fiadjoe in **Commonwealth Caribbean Public Law** (3rd edn) p.16 defines judicial review as "the jurisdiction of the superior courts to review laws, decisions, acts, and omissions of public authorities in order to ensure that they act within their given powers." By utilizing the mechanism of judicial review, the judiciary assumes the constitutional responsibility of curbing abuses of executive power. Judicial Review seeks to control the powers and duties of the government, protect citizens against the immense power of the State, deal with issues at the intersection of law and politics and hold the government's feet to the fire of the rule of law.

[39] Constitutional law is the "meeting place of government and law" and constitutions are enabling instruments that "provide a continuing framework for the legitimate exercise of governmental power". They also structure relationships between people and institutions of government and mediate relationships between people through "basic shared terms" for governance and living (see para 1-002, Robinson, Bulkan and Saunders, **Fundamentals of Caribbean Constitutional Law**.)

[40] The Constitution is the supreme law of the land and provides a framework under which all laws of the State operate. There is an inherent overlap between constitutional motions and judicial review proceedings; they both deal with public law issues. These two branches serve the mutual purpose of holding public

authorities accountable for their actions against the wider citizenry. Constitutional law seeks to establish the principal institutions of government and the allocation of power between them, allocate specific functions to public bodies and protect the fundamental rights of the individual.

[41] **The Caribbean Civil Court Practice 2011** at [34.1] sets out a brief history of judicial review and constitutional reliefs in the Commonwealth Caribbean thus:

> "Judicial review, generally, is the procedure by which the Supreme Court ensures that inferior courts and administrators act lawfully and within their powers. Courts in the Commonwealth Caribbean have the power, indeed the obligation to supervise such bodies and to review their determinations, acts, decisions and omissions. The source of this power was initially one that was inherited from the English Court of King's Bench which had historically assumed the right to review the manner in which public authorities carried out their functions. To this end that court issued the prerogative writs of certiorari, mandamus and prohibition. Before independence, the colonial courts of the Caribbean claimed and exercised a similar right. The other method of challenging the decisions and omission of public authorities during the colonial era was by way of seeking a declaration against the Attorney General, a measure specifically sanctioned by the English Court of Appeal in Dyson v The Attorney General.
>
> Independence from Britain, bringing with it written Constitutions, has given a new dimension to judicial review. The respective Constitutions of independent Caribbean States now provide a principal source of the power of judicial review. Each Constitution contains, inter alia, a supremacy clause, a Bill of Rights enforceable by the judiciary and a redress clause granting the court a wide discretion to afford appropriate relief to any person whose fundamental rights under the Constitution have been infringed.
>
> The citizen is therefore assured the right to redress for breaches of the guarantees contained in the Constitution. Constitutional applications for judicial review are particularly advantageous to the citizen as they afford the court the flexibility of providing appropriate remedies, protect the citizen against threatened breaches, can be used to enforce both procedural and substantive rights and can be combined with applications for prerogative orders."

[42] Similarly, Michael de la Bastide in '**Judicial Supervision of Executive Action in the Commonwealth Caribbean**' Commonwealth Law Bulletin, 33:2, 177-189, highlights that:

> "The Independence Constitutions introduced a new and very important weapon for challenging executive acts and decisions in the form of the constitutional motion... This form of challenge has been used extensively, sometimes in tandem with applications for judicial review, where for instance, there has been a denial of natural justice: see for example Rees and Crane [1994] 1 All ER 833 where a judge's challenge of the disciplinary proceedings initiated against him was pursued both by judicial review proceedings and by a constitutional motion."

[43] Had the claimant filed for judicial review and had the claimant's evidence been more substantial, the claimant could have sought constitutional relief in his fixed-date claim form. There is no bar to mixed claims where a party can seek both constitutional and judicial review relief in one claim. This is provided that the requirements for judicial review have been met and permission has been duly granted. In many respects, this approach furthers the overriding objective by avoiding a multiplicity of proceedings which would reduce time allocated by the court. It would also be in the best interests of justice that matters that involve the same facts should be subsumed and ventilated in the same claim. This is supported by **CPR 56.8** where it is provided that there can be a joinder of claims for other relief.

DECLARATIONS

[44] The claimant contends that declarations are not available in judicial review. As aforesaid, I disagree. The claimant has failed to establish that a declaration is not available in judicial review proceedings. This has been dealt with in the claimant's authority in the Court of Appeal decision in **Belize Bank** (supra).

[45] The remedies awarded in judicial review proceedings at present fill a lacuna whereby aggrieved persons can now seek effective relief therein which they

previously could not. One such relief is that of a declaration. The claimant's arguments are that he is merely seeking a declaration and damages thus judicial review is an inadequate procedure is fallacious. As I have stated earlier, the matter is an application for relief under the Constitution, accordingly, given the crux of the claimant's case, judicial review is the most appropriate procedure. Declarations are indeed available in judicial review proceedings.

[46] Declaratory relief in judicial review proceedings is a remedy devoid of coercive force. However, it should be noted that such a declaration in and of itself is not devoid of all practical significance. As noted in **Supperstone's Judicial Review Third Edition** at paragraph 16.16.1:

> "This does not mean that a declaration is pointless: public law defendants can generally be expected to proceed on the footing that the law is as the court has declared it to be. If there is a good reason to doubt that the defendant will do so, then a mandatory order or an injunction may be sought. When granting a declaration, the court may also grant liberty to apply so that either party may bring back the matter before the court (without initiating fresh proceedings) lest there be any need for a coercive order or any doubt about what is required in the light of the court's judgement."

CONCLUSION

[47] It was important to establish initially which avenue for administrative order under **CPR 56**, the claimant had really used since his documents and submissions appeared in conflict. I find that this matter is an application for constitutional relief under **56.1 (b)** and not for a declaration and damages under **CPR 56.1(c).** The substance of the claimant's grievance is about a decision to appoint Major Francis Usher to act as Air Wing Commander. The declaration sought concerns in the decision of the first and second defendants and the claimant brings into the relief of terminology such as Wednesbury, unreasonableness, 'bias', and legitimate expectation. Upon consideration of the application by the claimant, there is no evidence surrounding the allegation of inequality, discrimination, and protection of

the law. These are just mere allegations. I am of the view that the claimant's application for relief under the Constitution for administrative orders was done to avoid the normal process for applying for permission for a review of administrative action – judicial review in light of the delay in coming to court. In the circumstances, the fixed date claim form is an abuse of the court's process, and the court avails itself of its powers under **CPR 26.3(1)(b).** Given the facts of this matter I am not inclined to award costs, obviously the claimant because of his seniority felt aggrieved by the circumstances.

DISPOSITION

[48] It is hereby ordered as follows:

1. The Fixed Date Claim form is struck out.
2. No order as to costs.

NADINE NABIE
High Court Judge