IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

PROCEEDING FOR JUDICIAL REVIEW

2017-HC-DEM-CIV-FDA-1874

BETWEEN:

MOHABIR ANIL NANDLALL

Applicant

-and-

THE MINISTER OF LEGAL AFFAIRS

Respondent

December 7, 12, 15, 2017; January 29, April 17, 24, May 28, 2018.

Mr. Mohabir Nandlall in person with Mr. Manoj Narayan & Mr. Rajendra Jaigobin for the applicant.

Ms. Kim Kyte-Thomas, Solicitor-General, Ms. O. Archer-Caulder, Ms. T. Marks, Ms. C. Liverpool for the respondent.

DECISION of GEORGE, R., CJ (ag)

Introduction

The applicant filed a Fixed Date Application on November 28, 2017, seeking an order or rule nisi of mandamus directed to the respondent to show cause why he should not be compelled to bring into operation, by a ministerial order, the **Judicial Review Act, Cap. 3:06**. By order dated December 15, 2017 and entered on December 19, 2017, an order or rule nisi was granted by me. The respondent filed an affidavit in defence on January 19, 2018, in response to which the applicant filed an affidavit in reply on February 5, 2018.

Background and synopsis of submissions

The Judicial Review Act (JRA), passed in the National Assembly on October 21, 2010, was assented to by the then President of Guyana, Mr. Bharrat Jagdeo on November 2, 2010 as Act No. 23 of 2010. It provides in section 1 as follows:

> "1. This Act may be cited as the Judicial Review Act 2010 and shall come into operation on a date appointed by order of the Minister.

The Act also provides in section 3(1) that -

> "An application to the Court for relief against an administrative act or omission shall be made by way of application for judicial review in accordance with this Act and with rules of court."

It was submitted by the applicant that the minister referred to in the Act is the Minister of Legal Affairs (MLA). It was also submitted that from the time the new Civil Proceedings Rules (CPR) took effect on February 6, 2017, that that should have been the date on which such ministerial order should have been made. The applicant stated that he wrote letters to the MLA on this issue and that the Guyana Bar Association had also done so, both after this date, but there has been no such order to bring the Act into operation.

The Respondent has not denied that the MLA is the relevant minister, but in contending that there is a discretion and not a duty in deciding when to operationalise the Act, disputes:

(i) that this Court has the power to compel the exercise of the power vested in the respondent, by the legislature, to bring the JRA into force; and
(ii) that the respondent has refused or is refusing to bring the JRA into force.

The Applicant, on the other hand, submits:

(i) that when the CPR came into force, the discretion that resided with the MLA became an obligatory duty, which bound him to bring the JRA into force with all convenient speed;
(ii) that the assertion by the respondent that the bringing of the JRA into force was not part of the legislative agenda of the current President was of no relevance to the duty imposed on the minister to bring the said Act into operation; and
(iii) that the Court has the supervisory power and authority to compel the minister to perform his duty or exercise his power or discretion should he fail to do so.

Issues

Given the above facts and submissions, the following issues arise for determination in this matter:

1. whether a duty has been imposed on the Minister to bring the JRA into operation;
2. if he does have such a duty, whether the political goal or legislative agenda of the Government, as well as other considerations, may permit delay in the exercise of that duty;
3. whether the court has the power to compel the minister to exercise his duty.

Is a duty imposed?

The Respondent has placed much reliance on the House of Lords case of ***R v Secretary of State for the Home Department, ex parte Fire Brigades Union and Others*** **[1995] 2 AC 513**, in which it was held that the Criminal Justice Act 1988 imposed a duty or a continuing obligation on the Secretary of State to consider whether to bring particular sections of that Act into force, but that it did not impose a legally enforceable duty on the Secretary of State to bring the sections into force at any particular time. The provision in s 171 of the Criminal Justice Act 1988 that was up for consideration by the court was as follows:

> "Subject to the following provisions of this section, *this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint ...* "

The Secretary of State having not issued the order, the applicants sought judicial review claiming a declaration that the Secretary of State, by failing or refusing to bring into force the relevant provisions of the Act, had acted unlawfully and in breach of his duty. Mandamus was sought to compel the Secretary of State to bring the provisions into force. Leave to apply for judicial review was granted but the orders sought were refused by the Divisional Court. On appeal, it was held inter alia that there was no duty to implement the statutory scheme though the reasoning was not unanimous. The Secretary of State appealed another issue that is not germane to this case, while the applicants cross-appealed the decision that no duty was imposed on the Secretary of State. Both the appeal and cross appeal were dismissed by the House of Lords, holding as outlined above.

Whether a provision creates an absolute discretion in relation to a power to act depends on the nature and effect of it. So in ***Singh v Secretary of State for the Home Department*** **[1992] 1 WLR 1052** at 1055-1056, as regards decisions on deportation, the relevant provision of the Immigration Act, 1971 provided that the Secretary of State "may by regulations provide – (a) a written notice to be given to a person of any such decision or action taken in respect of him as is appealable ... ." It was held by the House of Lords that the Secretary of State did not have a discretion as to whether or not to make regulations as it was required that persons who had rights of appeal should be able to exercise those rights. The Secretary of State was therefore required to make the regulations.

Ex parte Fire Brigardes does bear some similarity with that which is before this Court, but it can be distinguished especially because of the difference in the statutory provisions regarding

the time to exercise a particular power or duty as provided for in our **Interpretation and General Clauses Act, Chapter 2:01 (Interpretation Act)** more particularly **section 39.**

The Interpretation Act, 1978 of the United Kingdom (1978 UK Act) was referred to in ***ex parte Fire Brigades Union***, but Sir Thomas Bingham MR, in the Court of Appeal, found that it had no bearing on the question before the court. (See supra p 519.) Lord Nicholls of Birkenhead also referred to the Interpretation Act in his judgment, indicating that where a power is granted to a minister in legislation, there is a "duty to consider, in good faith, whether he should exercise the power [which] will continue to exist despite any change in the holders of office ... [for] the duty is to be performed by the holder for the time being of the office ... ." (See supra p. 575.) Section 26(2) of our Interpretation Act has a similar provision. Lord Nicholls concluded that if there is a failure to exercise that power so long as the statutory duty exists, then this would be "an abuse of power and subject to remedies afforded by judicial review." (See supra p. 576.)

The 1978 UK Act had no provision specifically imposing a duty to bring an Act into force by a particular time. A comparison was drawn by the House of Lords, however, between section 171 Act (quoted above) and section 5(2) the Domestic Violence and Matrimonial Proceedings Act 1976 (DVMPA), which had such a provision. Section 5(2) of the DVMPA provided that the Lord Chancellor shall make an order to bring into force any provisions of that Act not in force as at April 1, 1977.The House of Lords affirmed that this imposed a duty on the Lord Chancellor even though section 5(2) of the DVMPA did not identify a date on which or even by which the Lord Chancellor should have acted. It only gave a date on which he would have to ascertain whether any of the provisions had not yet been brought into force, and then he would have to specify when they would come into force.

Sections 15, 25 and **26** of our Interpretation Act provide for 'Publication and Commencement of Acts', 'Exercise of powers between passing and coming into operation of Act' and 'Construction of provisions as to exercise of functions' respectively. Our Act goes further in **section 39**, which deals with 'Provisions where no time prescribed'. This section provides that:

> "**39.** ***In any written law where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed, and as often as the prescribed occasion arises.***" (Emphasis added.)

This is not the same wording as section 5(2) of the UK DVMPA referred to above, but I have concluded that it has a similar effect in Guyana of imposing a duty to act in relation to provisions, in any written law, for which no time is prescribed for doing such act. Though as in section 5(2) above, no date is prescribed in the JRA by which it has to be brought into force, **section 39 of the Interpretation Act** fills that gap by stating that it **shall** be **done with all convenient speed**.

The questions that may arise in considering section 39 are: (i) Does this section apply to the JRA; (ii) Does the section allow for a discretion or choice, or a duty or an order; and (iii) Does the phrase 'all convenient speed' provide a sufficient guide to allow for the court to apply it in this case.

In respect of whether the section 39 applies to the JRA, the respondent has admitted in its affidavit of defence that the Act was made part of the laws of Guyana. This position is consistent with **Article 170(1)** of the **Constitution of Guyana, Cap. 1:01**, which provides that the power of Parliament to make laws shall be exercised by Bills passed by the National Assembly and assented to by the President (subject to **article 164** which provides the procedure for altering the Constitution). **Section 5(1)** of the Interpretation Act also indicates that 'written law' includes Acts of Parliament. It is clear, therefore, that **section 39** of the Interpretation Act applies to the JRA, which was passed and assented to.

Whether section 39 creates a discretion or choice, or a duty or an order is largely dependent on the interpretation of the word 'shall'. Lord Mustill in ***ex parte Fire Brigades Union*** highlighted the difference in usage between the words 'may' and 'shall' in the Criminal Justice Act and concluded that it was "*beyond doubt that in every one of these instances "may" invokes a choice and "shall" an order*" (See supra p 563). His lordship examined other uses of these words in that Act, particularly those in close proximity, to conclude that the draftsman intended to use the two words differently. In the Interpretation Act, the word 'may' is used in **section 38(3)**, which provides that the Minister with responsibility for legal matters may amend or modify an enactment for the purpose of giving effect to the provisions of the section. It is clear that this is a choice given to the Minister to be exercised if necessary. Other provisions evidenced in **sections 38(1)** and **40 of the Interpretation Act** establish their mandatory nature with the use of the word 'shall'. It is evident from these and other provisions in the Act that the word '**shall**' in **section 39** is intended not as an optional power to be utilised, but as an imperative or an order for such things to be done with all convenient speed. Therefore, I am of the view and hold that section 1 of the JRA together with section 39 of the Interpretation Act impose a duty on the MLA to bring the JRA into operation with all convenient speed.

The question that remains on this point, then, is the meaning and effect of the phrase 'all convenient speed'. Similar sections are included in the interpretation legislation of other Caribbean territories, including Barbados and Jamaica, as well as other Acts, such as section 90 of Guyana's **Customs Act, Cap. 82:01**. This phrase has appeared in cases brought before the courts of different territories and has been considered by the Caribbean Court of Justice in the Guyanese case of ***Stephen Edwards v the Attorney General et al*** **[2008] CCJ 10 (AJ)**, though the Court found that **section 39** of the Interpretation Act did not apply since the Constitution does not mandate the filing of constitutional proceedings. The CCJ nevertheless commented that the section was "a potent reminder... of the need for expedition in all matters of the Constitution." (See para 22.)

In ***Re Public Utilities Board Order Dated 2nd June, 1978*, BB 1978 HC 64**, the Barbados High Court found that the failure to publish an Order in the Gazette for five months when, applying section 39 (10) of their Interpretation Act, it was to be done with all convenient speed, meant that there was non-compliance with the provisions of the Act. That court thus held that the order was a nullity while noting that no explanation had been given for the delay in its publication. The Guyana Court of Appeal found in 2007 in ***Mingo v Guyana Stores Ltd*, Civ App No. 4/2002** that the purpose of **section 90 (2)** of the **Customs Act**, which provided that goods deposited in the State warehouse "shall with all convenient speed be sold in such manner as the comptroller may direct", was to facilitate expeditious disposal of such goods.

Similarly, the Antigua and Barbuda High Court held in 2009 in ***Michael et al v Attorney General et al*, AG 2009 HC 26** (para 105) that the failure of the Police to bring seized property before the court for over four months after seizure was longer than reasonable under the circumstances. Since section 44 (7) of the Interpretation Act required such things to be done with all convenient speed, the police were held to be in breach of the Magistrates Code of Procedure. The court found that misinterpretation of the meaning of the provision could not circumvent the duty to act with all convenient speed. More recently, in ***Econo Parts Ltd. v The Comptroller of Customs and Excise*, LC 2017 HC 20** the St. Lucia High Court applied section 32 (10) which is the equivalent of our section 39, in finding that the failure to institute condemnation proceedings, in relation to seized containers with auto parts, after three and a half years, constituted an unreasonable delay in the circumstances of the case.

Considering the above decisions it is clear that, though the phrase 'all convenient speed' does not impose a specific time limit, courts apply it by considering whether the acts or matters or issues to which it applies have been done expeditiously and without unreasonable delay in the particular circumstances.

Considerations regarding non-operationalisation of the JRA

This issue requires a consideration of what factors are to be considered in carrying out the duty in this case expeditiously and whether the delay of the respondent is reasonable in these circumstances.

In this case, the applicant and respondent, then a Member of Parliament, were both involved in the discussion and passing of the JRA by the National Assembly. The applicant submits that the Act had not been brought into operation by the previous administration because it was being delayed to coincide with the implementation of the new CPR, which make provision for judicial review. The respondent contends that, while the intent of the Act was to make its implementation and operation more efficient by the use of the new rules, the Act could have come into force utilising the 1955 Rules of the High Court. Despite this submission, the respondent did not bring the Act into force during the pendency of the 1995 Rules. Then it seems that this submission was contradicted when it was further advanced that the 1955 Rules of the High Court were silent on

the practice and procedure in respect of applications for prerogative writs which, until recently, were the mode of challenging decisions of public authorities. The respondent cited several cases which indicate that the rules that governed such applications were the English Crown Office Rules of 1906. It is evident that though the Crown Office Rules governed our procedure for prerogative writs, they do not make provision for judicial review and could not therefore have been contemplated by **section 3(1)** of the JRA, which provides that an application for judicial review shall be made in accordance with the Act and with rules of Court. Therefore, owing to the absence of provisions for judicial review, the 1955 Rules of the High Court would not have provided a satisfactory framework for the operation of the Act, which lends credence to the applicant's submission on this point.

Secondly, the applicant has attached to his affidavit in reply a copy of the Hansard, the official transcript of the debate in the National Assembly, covering the second reading of the Judicial Review Bill prior to it being enacted. This reveals that the Bill received unanimous support from all sides. Important, however, are the comments made by then Minster of Legal Affairs, Mr. Charles Ramson S.C., who piloted the bill. The former Minister indicated that -

> *"To compliment [sic] this bit of legislation we intend to lay over the new High Court rules very shortly."*

He then highlighted that clause 3 of the Bill (now **section 3** of the Act) which he said provided that -

> *"an application to the Court for relief against an administrative act or omission shall be made by way of an application for judicial review in accordance with this Act...**and the Rules of Court.**"* (emphasis added.)

The former Minister then, in drawing a parallel with the rules and statutory legislative procedures in England after 1981 said that the current approach was "*embodied in **both** this Act **and the new Rules of Court***". (Emphasis added.)

The presentation by the former Minister of Legal Affairs, therefore, indicates the intention of the Government in bringing the Bill before Parliament. Mrs Clarissa Riehl, then Deputy Speaker of the House and Member of Parliament of the main Opposition Party at the time, followed the former Minister in making reference to the importance of the new rules to the Act. She expressed the view that:

> *"Today, judicial review has come to Guyana and it is a watershed moment. My only question is what took the government so long. ... Just like in the English system the rules of court have been softened or relaxed, or will be because we have heard the Hon. Attorney General say they are soon going to lay these new rules of the High Court...Just*

like the English system the rules of Court have been relaxed to accommodate judicial review."

The applicant in this case, in his turn to speak as a Member of Parliament, also expressed similar sentiments in discussing the Crown Office Rules of 1906, saying that:

> *"England has long abolished the Crown Office Rules and revamped its entire system. It has what we are now promulgating and has had that since 1938. We are now doing it."*

This supports the suggestion that the old rules were never intended to be used for the implementation of the JRA, which was to work hand-in-hand with new rules of the High Court. Mr. Khemraj Ramjattan, another Opposition Member of Parliament at the time, also spoke to the insufficiency of the Crown Office Rules, saying that:

> *"The Crown Office Rules and all those High Court Rules which allowed us to utilise the prerogative writ procedure did not, in any way, provide for that. This now is going to help us plenty."*

The respondent, then also an Opposition Member of Parliament, after stating emphatically: "*Let me say at the outset, ab initio, that I wish to congratulate the Hon. Attorney General for bringing this Bill to this Hon. House*" further noted that *"[a]s a practitioner of long standing, I wish to posit that this Bill is a practitioner-friendly Bill."* He also expounded on the limitations of the old remedies, saying that:

> *"What we have found from practicing is that the prerogative remedies were all we had to deal with errant government officials. Those were all we had, but they were limited. ... As practitioners we are very happy about this, because if we went for prerogative remedy we could not get a declaration, an injunction and the like. That affected us greatly."*

The respondent also voiced strong approval for the provisions of the Act that spoke to delay by decision makers, saying that:

> *"It is also laudable that the Bill puts a stricture on the decision makers to come up with the decisions without undue delay.In our jurisdiction, this question of undue delay in rendering decisions is a problem.... . We really need this kind of legislation."*

The totality of the above statements by the Members of Parliament who participated in enacting the JRA strongly suggest that Parliament both intended that the JRA come into operation very soon, and that new rules of the High Court (the CPR now in force) were intended to be used along with the Act in respect of the judicial process.

The statement of the respondent, quoted above, also suggests that bringing this Act into operation should have been a priority. In fact, the submissions on behalf of the respondent in this

case emphasised that a government, in pursuing their goals in relation to the making of laws, "*would try to pass those laws that are most beneficial to the people and that are urgently needed*". If it is that we "*really need this kind of legislation*", as the respondent said in Parliament in reference to the JRA, then his submissions suggest that the Government should fully implement it.

In considering whether there has been reasonable delay by the Minister in bringing the JRA into operation, there may be factors that make the bringing of an Act into operation inconvenient, consequentially making the delay of such action reasonable and rational. In the submissions, the respondent sought to highlight what were considered to be such factors. It was advanced that time was needed for the legal and wider community to understand and prepare for changes in the law so that concomitantly the public needed to be given fair warning about the new legislation, that time was also needed for government departments and other bodies to prepare or change their systems and processes to administer the new law, that the date set for commencement had to be in accordance with the legislative agenda of the government as approved by Cabinet, which agenda is presented by the President at the opening of every session of Parliament, the achieving of a political goal, as well as the awaiting of events.

I will first consider "awaiting of events", though the respondent was not specific as to what events were being awaited. It is apparent from the submissions of the applicant and the portion of the Hansard exhibited that the 'event', if any, that was being awaited is the advent of the new rules, the CPR, which came into force on February 6, 2017. The respondent submitted that the CPR is still new and is being tested with a number of amendments and practice directions still to be done. This submission must be rejected, however, particularly in light of the recent decision of the Caribbean Court of Justice ('CCJ') in ***The Medical Council of Guyana v Jose Ocampo Trueba*** **[2018] CCJ 08 (AJ) (Ocampo)**. In that case, the CCJ held that the CPR shall apply to claims for judicial review 'by analogy', in accordance with Part **2.02(3)** of the CPR. It was held that *the CPR is to apply "to claims brought under the Judicial Review Act, whenever that Act comes into operation, so it is only consistent that the Rules should apply, by analogy, to claims for judicial review, brought before the Act commences.*" (See para 21) This decision means that, regardless of how 'new' the CPR may be, these Rules will now apply to applications for judicial review, even before any amendments or practice directions are made. Any claim that the JRA cannot come into force because the CPR has not been tested will now be illogical, since, applying ***Ocampo,*** it is the CPR that will now be used and is currently being used for such applications.

The time for any adjustments by government departments, other bodies and the legal and wider community is here, since the procedure provided for in the CPR will henceforth be applied owing to the decision in ***Ocampo*** by which this court is bound. The Act, by its long title, provides for an application to the High Court for relief by way of judicial review and other related matters. The comments of the various Members of Parliament who extolled its virtues in

Parliament indicate that it makes the entire process easier. The respondent referred to it then as a 'practitioner-friendly Bill', and one which will especially help young practitioners and prevent them from falling into error in bringing such actions. He had also indicated that experienced practitioners will be and are happy with the Bill, that it was "*such a good Bill*" and his party had "*no difficulty in supporting this Bill to finality*". (Emphasis added). The fact that applications for judicial review are being filed indicates that the public has not only been informed about the Act but that it is to their benefit. There is nothing in the Act requiring any body or entity to make any systematic changes. The respondent has not suggested any examples of what changes of systems and processes may be necessary for government departments to implement, and it is difficult to see what changes may be suggested that could operate to delay the coming into operation of the Act.

In respect of the achieving of a political goal (which was not explained) and conformation with the government's legislative agenda, it is clear that the duty imposed by **section 1** of the JRA and **section 39** of the Interpretation Act makes no room for such a factor in determining how to exercise that duty. **Section 39** requires that implementation must be 'with all convenient speed', not that it must be convenient to the political goal or legislative agenda of the government. The House of Lords in ***ex parte Fire Brigades Union***, as discussed above, did indicate that the duty must be exercised in accordance with the intention of Parliament. However, it is what Parliament intended when it passed the Act, not what the current Parliament *may* intend. And it is clear from the exhibited portion of the Hansard that Parliament was unanimous in its intention to have this Act come into operation very quickly. Mainly due to the lack of the new High Court Rules, that intention has not been fulfilled for over seven years. But the fact remains that the JRA has already been enacted and so neither a political goal nor the legislative agenda of this government is relevant.

The respondent also submitted that no question of delay can be attributed to the current Government for an Act that was enacted in 2010. While it is true that for over four years after the passage of this Act, before the election of this Government, it was not brought into operation, the current Government, and more specifically the respondent, has had the power to do so for almost three years. Further, this Court finds it very persuasive that the Act was intended to be used along with the CPR, which came into force under the current government and under the watch of the respondent, and has been in operation for over one year now. It cannot, therefore, be denied that the respondent is at least partly responsible for the delay in bringing the Act into operation. Finally, on this point, neither the JRA nor the Interpretation Act makes any distinction between ministers of different government administrations. The JRA says that the minister is to appoint the date for the Act to come into operation, while the Interpretation Act provides that he shall do so with all convenient speed. This applies to the relevant Minister, in this case the Minister of Legal Affairs, regardless of which government is in office or which person holds that office. (See again section 26 of the Interpretation Act and the dicta of Lord Nicholls of Birkenhead at p. 575 cited earlier.)

The respondent further submitted that, unlike in ***ex parte Fire Brigades Union***, he has not refused to bring the Act into force. It must be noted, however, that both Lord Browne-Wilkinson and Lord Mustill highlighted in this case that Parliament cannot have intended that the minister could simply ignore the power. (See supra pp. 551 and 561 respectively.) The portion of the Hansard exhibited certainly seems to buttress this assertion. In explaining the sections of the JRA, the former Minister of Legal Affairs, Mr. Ramson, said that the acts referred to in respect of which judicial review may be brought include, *inter alia*, omissions of a minister or any other person failing to exercise any public power or duty conferred or imposed on him or her by any written law. As mentioned earlier, even the respondent had spoken about the need for legislation to specifically address the delay of decision makers in exercising their powers. As noted by the author Rajendra Ramlogan in his text *Judicial Review in the Commonwealth Caribbean (2006)* at para 2.21 on p 105: *"An unreasonable delay on the part of a public body in making a decision may, in certain circumstances, lead to a successful judicial review action by the person affected by the delay."*

The fact that the respondent has not expressly refused to bring the JRA into operation cannot prevent this court from finding that the respondent has breached his duty to bring the Act into operation with all convenient speed. The fact remains that the respondent has had the power to do so for almost three years. Further, as just noted, more than one year has elapsed since the CPR, which I find are the rules intended to be used along with the JRA, were brought into operation. During that time, the respondent has not exercised this power, nor has he provided any reason for not doing so. In fact, it appears that the respondent has completely ignored the existence of that duty, until the proceedings currently before this court by virtue of this application. And in these proceedings, the respondent has advanced no reasonable explanation for not bringing the JRA into force during that time. The respondent has not even demonstrated that he carried out the duty to keep the implementation of the JRA under consideration as held in ***Ex parte Fire Brigades*** on which he relies. There is nothing before this Court, therefore, to allow for any of the considerations advanced by the respondent to permit a conclusion that the delay in bringing the JRA into operation has been reasonable such as to negate the application of **section 39** of the **Interpretation Act**.

In all the circumstances, therefore, the delay by the respondent in bringing the JRA into force is unreasonable, and he is thus in breach of his statutory duty to issue the commencement order with all convenient speed.

Can the Court compel the exercise of such a duty?

Given the above conclusion, the final question to be determined is whether the Court has the power to compel the respondent to exercise the duty imposed on him by a combination of **section 1** of the **JRA** and **section 39** of the **Interpretation Act**. In addressing this issue, the respondent has referred to passages from several texts that emphasise the importance of the

separation of powers doctrine. The respondent submits that, in accordance with **section 15** of the Interpretation Act, "*Every Act...shall come into operation on the date of publication unless it is provided in that Act...that it shall come into operation on some other date*". The Respondent says that this provision, along with **section 1** of the JRA, which says that it "*shall come into operation on a date appointed by order of the Minister*", vest in the minister the power to bring the Act into force on a day within his discretion. It is the respondent's submission that, in respect of this power, there is no remedy for the minister's failure to bring the law into force, and that it is not within the power of the court to compel the Minister to bring the Act into force. The respondent justifies this view by advancing that because a ministerial order to bring the JRA into operation is part of the legislative process, it is not within the jurisdiction of the court to review or question.

In support of this argument, the respondent has quoted the text '**Fundamentals of Caribbean Constitutional Law**, by Robinson, Bulkan and Saunders J (2015) at p. 196, where the learned authors said that courts should not interfere with the legislative process unless there is a threat to constitutional principles. The respondent has also cited the example used by the learned authors' citation of the Bahamian case of ***Bahamas Methodist Church v Symonette* (2000) 59 WIR 1**, which addressed irregularities in Parliament's proceedings and held that those were matters for Parliament itself since the Constitution gives each House the power to regulate its own affairs. However, the point being made by the learned authors in the above text is that Parliament, in the exercise of its functions, is entitled to regulate its own proceedings by rules made for that purpose. It is in these circumstances that the Court cannot interfere with the internal proceedings of Parliament. The case before this court, however, has nothing to do with Parliamentary proceedings. Instead, Parliament has delegated and vested in the executive branch, through the minister, the power to bring the Act into force. And, I have found, the application of the Interpretation Act indicates that Parliament did not only give the Minister the power to do so, but imposed a duty upon him as well. When Parliament has, in an Act of Parliament passed and assented to, assigned to the Minister the responsibility to bring that Act into operation, that is now a duty to be exercised by the executive with all convenient speed and is not part of parliamentary procedure.

A similar argument was raised in ***ex parte Fire Brigades Union***, where the Lord Advocate had submitted that to grant the relief requested would be an intrusion by the courts into the legislative field. In rejecting this argument, Lord Lloyd of Berwick said at p. 572 that –

> "*Finally, it is said that to grant the applicants relief in a case such as this would be an intrusion by the courts into the legislative field, and a usurpation of the function of Parliament. If the Home Secretary has trespassed, it is for Parliament to correct him. It is most unlikely, so the argument goes, that Parliament intended to confer on the courts the power to declare that the Home Secretary had acted unlawfully.*

I find this argument difficult to understand. The duty of the court to review executive action does not depend on some power granted by Parliament in a particular case. It is part of the court's ordinary function in the day to day administration of justice. If a minister's action is challenged by an applicant with sufficient locus standi, then it is the court's duty to determine whether the minister acted lawfully, that is to say, whether he has acted within the powers conferred on him by Parliament. If the minister has exceeded or abused his power, then it is the ordinary function of the Divisional Court to grant appropriate discretionary relief. In granting such relief the court is not acting in opposition to the legislature, or treading on Parliamentary toes. On the contrary: it is ensuring that the powers conferred by Parliament are exercised within the limits, and for the purposes, which Parliament intended. I am unable to see the difference in this connection between a power to bring legislation into force, and any other power.

Nor, with respect, can I understand the concept, or relevance, of a duty owed to Parliament, as distinct from a duty owed to the public at large. Some cases are more likely to attract Parliamentary attention than others. But the availability of judicial review is unaffected."

In support of the above conclusions, also at p 572 Lord Lloyd referred to Professor Sir William Wade in **Wade and Forsyth, Administrative Law, 7th ed. (1994),** who pointed out at p. 34 that "ministerial responsibility is no substitute for judicial review." He then cited a passage (at supra p. 573) from Lord Diplock in ***R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.*** **[1982] A.C. 617,** who had this to say at p. 644:

"*It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.*"

This is not a case whereby it can be said that the court is usurping the authority or function of the minister which position was considered in ***R v Secretary of State for Trade & Industry ex parte Lonrho plc*** **[1989] 1 WLR 525** where it was stated that:

"There is a danger of judges wrongly though unconsciously substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion. The question is not whether the Secretary of State came to a correct solution or to a conclusion which meets with the court's approval but whether the discretion was properly exercised."

In this regard, I also note the judgment of Saunders J, as he then was, in ***Benjamin et al v Ministry of Information et al*, HCt Anguilla, Suit 56/1997 (Unrep),** cited by the respondent, where in referring to the three pillars of government - the legislature, the executive and the judiciary – he stated: "*The judiciary has to be careful that it too does not stray from its function and usurp the authority and role reserved for the other two pillars.*"

However, the position in ***Lonrho*** can be distinguished since I have determined that section 39 of the Interpretation Act creates a duty on the Minister that must be heeded, and that it is not a discretion that may be exercised. It is incumbent on the court to ensure that the legislative powers provided for are carried out, thereby ensuring adherence to the rule of law. It is in this context that a court can consider an application such as this for judicial review of what can only be described as the MLA's decision not to act pursuant to the legislative provisions.

I find that the learning referred to sufficiently answers the issues raised in the submissions for the respondent in respect of the court's intrusion as regards the implementation of JRA. Therefore, the court can make an order compelling the minister in this case to bring the JRA into force.

Having found that the Court can make an order against the minister in respect of his failure thus far to bring the JRA into operation, the final question is what type of order can be made by this Court. In ***R v Secretary of State for the Home Department, ex p Jeyeanthan* [2000] 1 WLR 354**, Lord Woolf MR stated that the important question is what the legislator should be judged to have intended as the consequence for the particular non-compliance. When the consequences of non-compliance may be such as to frustrate the policy and objects of an Act, it has been held that the Court is entitled to interfere, including the making of an order directing that a minister carry out a particular duty (***Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997**).

Though it has been suggested that, before such a mandatory order is made, a formal demand to act should be made of the relevant public body, such a requirement may be satisfied by the sending of a letter before claim in accordance with a pre-action protocol (**Judicial Review *Principles and Procedure* (Oxford University Press, 2013), para 30.75**). The applicant stated that he wrote the respondent to officially request that he bring the JRA into operation, a claim admitted by the respondent. In all the circumstances, therefore, I have concluded that a mandatory order compelling the Respondent to bring the JRA into operation, with all convenient speed, is appropriate in order to give effect to the intention of Parliament when it enacted this important piece of legislation.

Conclusion

It is clear from the facts that Parliament intended the JRA to be brought into operation so as to enable the more efficient functioning of the judicial review process. This was the policy of the JRA that resulted in unanimous support in Parliament for enacting it. It is also evident that the CPR was intended to complement the JRA. Indeed, **Part 56(1)(a)** of the CPR makes provision for applications for judicial review to be brought pursuant to the JRA. With the Act not yet in

operation, this entire part of the CPR was inoperable until the ***Ocampo*** decision which the CCJ stated was meant to fill the gap until the JRA is brought into operation. Indeed, given this CCJ decision, the reluctance to issue the implementation order becomes fallacious.

This Court, therefore, finds that a duty has been imposed by Parliament on the respondent in his capacity as Minister of Legal Affairs, to bring the JRA into operation with all convenient speed. The delay in bringing the Act into operation, particularly for more than one year after the CPR was brought into operation is held to be unreasonable and is a breach of the aforementioned duty imposed on the respondent.

This Court therefore orders that the Order or Rule Nisi of Mandamus, granted on December 15, 2017, be made absolute. It is further ordered that the order to enforce the JRA should be signed with all convenient speed which in this court's estimation should not be delayed past July 31, 2018.

Judgment accordingly with costs to the applicant in the sum of $100,000.

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Roxane George CJ (ag)
May, 28, 2018