In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: 255

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DECISION ON THE 27TH DAY OF JANUARY 2010 BY THE (ACTING) MINISTER OF CULTURE AND SOCIAL REHABILITATION NOT TO REFER THE HUMAN RIGHTS COMPLAINT OF SUSANN O. SMITH VS THE MINISTER OF THE ENVIRONMENT TO A BOARD OF INQUIRY PURSUANT TO THE PROVISIONS OF SECTION 18(1) (a) (ii) OF THE HUMAN RIGHTS ACT 1981

BETWEEN:

SUSANN O. SMITH

Applicant

-and-

THE MINISTER OF CULTURE AND SOCIAL REHABILITATION

Respondent

OMBUDSMAN FOR BERMUDA

Intervenor

JUDGMENT

(In Court)

Date of Hearing: February 4, 2011
Date of Judgment: February 14, 2011

The Applicant in Person

Mr. Melvin Douglas, Deputy Solicitor-General &
Ms. Wendy Greenidge, Attorney-General's Chambers,
for the Respondent

Mr. Narinder Hargun, Conyers Dill & Pearman,
for the Ombudsman

Introductory

1. The Applicant applied for leave to seek judicial review on August 2, 2010. The impugned decision was made by the Respondent on January 27, 2010 and refused to refer the Applicant's admittedly meritorious human rights complaint against the Minister for the Environment to a board of inquiry pursuant to the request of the Human Rights Commission ("HRC") on the grounds that (a) the HRC had initially dismissed her 2004 complaint but subsequently reopened it and determined it had merit, and (b) the HRC had no jurisdiction to reconsider its previous dismissal decision. She relied on three grounds:

    (1) The decision was irrational;
    (2) The decision involved a breach of the rules of natural justice because the Minister's refusal to refer the complaint against a fellow Minister gave rise to an appearance of bias;
    (3) The Minister exceeded his statutory function and acted unfairly by not endorsing the Minister's recommendation.

2. The relief sought included orders that (a) the decision be quashed; (b) the complaint be referred to a board of inquiry; and (c) a declaration that the powers conferred on the Minister by section 18 of the Human Rights Act 1981 were contrary to the public interest. The Applicant's Notice of Motion filed on August 12, 2010 was first heard on September 2, 2010. I directed that two general issues fell to be determined: (a) the legality of the Minister's decision as a matter of public law, and (b) the constitutionality of section 18 of the Act as read with section 6(8) of the Constitution. On December 9, 2010 I granted leave to the Bermuda Ombudsman to intervene in the proceedings to deal with any submissions which might be made as to the jurisdiction of the Ombudsman. This intervention was extremely propitious and assisted the Court significantly in adjudicating the legality of the Minister's decision as a matter of public law.

3. The Ombudsman's intervention arose in this way. On or about August 24, 2004, the Applicant filed a complaint with the HRC in respect of the Minister for the Environment's refusal from in and about March 1997 to license her to practise veterinary

medicine, allegedly on the grounds of national origin. She was told that she had to be certified according to a continuing policy in either Britain (or a European country with qualifications recognised by Britain), Canada or the United States. In particular, as she had a Doctor of Veterinary Medicine Degree from Tuskegee University, she was told she had to pass a US National Board Exam ("NBE"). This qualification was neither legislatively required[1] nor imposed on a Jamaican vet who had the same doctoral degree from Tuskegee, who had also not taken the NBE yet was still licensed to practise in Bermuda. The Applicant agreed to mediate the complaint without resolution between July 2005 and February, 2006. On or about March 1, 2006, the Applicant complained to the Ombudsman about the way in which the HRC had handled her complaint. Before the Ombudsman had first communicated with the HRC, it dismissed the Applicant's complaint on April 26, 2006.

4. On December 15, 2007, the Ombudsman forwarded her December 14, 2007 Report to the Applicant and to Mr. Ayo Johnson, Executive Officer of the HRC. The HRC Chairman, Ms. Venous Memari and the then Acting Permanent Secretary of the Ministry, Dr. Myra Virgil, were copied with this correspondence. The Ombudsman's Report[2] concluded that, *inter alia*, because the Applicant was not given a right to be heard on the question of whether the complaint should be dismissed, the dismissal of the Applicant's HRC complaint did not comply with section 15(8) of the Act, was invalid (paragraph 71) and accordingly "*remains extant*" (paragraph 61). Ms. Brock crucially (and lucidly) recommended as follows:

> "*74. As the complaint was not properly dismissed, a decision remains to be made on the disposition of the complaint: either to continue the investigation under revised terms of reference; or refer the matter to a board of inquiry; or dismiss lawfully after giving the Complainant an opportunity to be heard.*"

5. The Ombudsman's said recommendation was substantially accepted by the HRC on or about March 11, 2008 although the continued subsistence of the original complaint was not confirmed until in or about July, 2008. The Applicant filed an Amended Complaint dated December 29, 2008, which the respondent was invited to comment on by letter from the HRC dated February 5, 2009. The Attorney-General's Chambers forwarded a 'Preliminary Response' on behalf of the Minister of the Environment on June 8, 2009. By letter dated December 31, 2009, the HRC requested the Minister to refer the complaint to a board of inquiry under section 18 of the Act. The Chairman's letter advised the Minister that she and her Permanent Secretary were both in the respondent Ministry at the time of the initial HRC complaint. On January 11, 2010, the Director of Human Affairs forwarded the file in relation to the Applicant's complaint to the Acting Minister under cover of a Memo which indicated, *inter alia*:

   (1) That the Attorney-General's Chambers were acting on behalf of the respondent to the HRC complaint;

[1] By the Agriculture Act 1930.

[2] Pursuant to the Ombudsman request during the hearing, I direct that pages 44-54 of the Report be sealed to ensure compliance with the confidentiality obligations imposed by section 21 (3) of the Ombudsman Act 2004.

(2) That the Attorney-General's Chambers had made a number of submissions which "*may negate a referral to a Board of Inquiry*", in particular the points that:
    (a) the Ombudsman had no jurisdiction to review decisions of the Commission which was a quasi-judicial body;
    (b) the claim had no merit;
    (c) The claim was out of time; and
    (d) The HRC had no authority to review its own decisions.

(3) That the Department requested the Minister to review the file very carefully, particularly the advice of the Attorney-General's Chambers, before making his decision, and take note of the request made by Chambers to be permitted to make representations to the Minister before he exercised his discretion.

6. There is nothing in the evidence to suggest that the Acting Minister did receive further representations from the Attorney-General's Chambers on behalf of the Minister of the Environment, or that the HRC was afforded an opportunity (on behalf of itself and the Applicant) to respond to the legal arguments advanced on the respondents' behalf. Nor is it apparent whether the Acting Minister sought or obtained any independent legal advice. Be that as it may, the Acting Minister's January 27, 2010 decision reflects a reasoned consideration of most of the key points his Director invited him to consider. The Minister rejected two of the HRC complaint respondent's points (lack of merit and out of time), accepted one (the HRC had no jurisdiction to reconsider its own decisions), and did not explicitly deal with one point (the submission that the Ombudsman had no jurisdiction to investigate the HRC). However, the latter point was implicitly accepted. The crucial basis for the decision was as follows:

> "*However, as Minister, I do not refer this case because the HRC, having made the decision, cannot reverse itself or its own decision, while I find Dr. Smith's case has merit, and one which a court of law could entertain* [,] *a decision by me to refer the matter to a Board of Inquiry has the same effect of the 'HRC'…reversing its earlier decision.*"

7. On the face of it, the impugned decision did not purport to reflect the exercise of an administrative discretion; rather it was by its terms a quasi-judicial legal determination that the HRC in purporting to revive a previously dismissed complaint at the instigation of the Ombudsman was acting ultra vires its statutory powers. Unsurprisingly, the Ombudsman was concerned to seek clarification from this Court as to the scope of her own jurisdiction in relation to HRC matters. Bearing in mind that the Human Rights Act did not explicitly state that decisions by the HRC dismissing complaints were not subject to review, the application of the logic of the impugned decision to other statutory contexts could potentially curtail the Bermuda Ombudsman's remedial jurisdiction altogether.

8. The main focus of legal argument at the hearing of the Applicant's judicial review application where she was not herself legally represented thus became whether or not the HRC does have the legal power to re-open complaints it has dismissed. The original challenges to the legality of the Acting Minister's decision, both public law and constitutional, were not addressed by the Ombudsman's counsel.

9. Against the background of the Attorney-General's Chambers having previously acted for the respondent to the HRC complaint, in encouraging the Acting Minister to make the impugned decision, the appearance of the same Chambers on behalf of the Minister responsible for Human Affairs was at times somewhat unsettling. Were the arguments being advanced in furtherance of the policy dictates of the Department of Human Affairs or the policy interests of the respondent to the HRC complaint? It was also difficult to ignore the fact, albeit an irrelevancy, that the current Attorney-General is by happenstance the former Acting Minister. There is no question that the Acting Minister and the public officers involved have all used their best of their endeavours to act with complete propriety throughout. These matters are only recited here to illustrate why (a) the Applicant invited this Court to at the very least recommend an amendment to the Act to remove the role of the Minister as a filter between the HRC and the board of inquiry in the human rights process, and complained about an appearance of bias in the relevant decision-making process, and (b) this Court of its own motion directed consideration of the constitutionality of the Minister's statutory role under section 18(1) of the Act.

Legal Findings: can the HRC reconsider a previously dismissed complaint at the instance of the Ombudsman or otherwise?

Statutory provisions

10. Section 15 of the Human Rights Act 1981 provides as follows:

> "***Investigation of complaints***
> *15. (1) Subject to the following provisions of this Part where—*
>
> *(a)any person complains to the Commission upon grounds which appear to be genuine that he has suffered unlawful discrimination by reason of any alleged contravention of this Act; or*
>
> *(b)the Commission has reasonable grounds for believing that any person has contravened any provision of this Act,*
>
> *the Commission shall have power to investigate, and it shall be the duty of the Commission as soon as is reasonably possible to investigate and—*
>
> *(c)endeavour to settle the causes of the complaint; or*
>
> *(d)endeavour to cause the contravention to cease,*

as the case may be.

(1A)A complaint made pursuant to subsection (1) need not be in writing, but, when made otherwise than in writing, shall be reduced to writing by the officer of the Commission to whom it is made, and signed by him.

(2)The Commission shall, before commencing an investigation under subsection (1), comply with the requirements of subsections (3), (4) and (5).

(3)The Commission shall give notice in writing of the complaint or belief, as the case may be, to the person or organization against whom the complaint was made or in relation to whom the belief arose, and the notice shall state that the Commission intends to investigate the complaint or the belief.

(4)Where pursuant to subsection (3) the Commission gives notice to any person or organization that it believes that that person or organization has contravened any provision of the Act, the notice shall specify the grounds for that belief.

(5)The Commission shall determine the terms of reference for any investigation carried out pursuant to this section.

(6)Where the terms of reference of the investigation relate to the activities of persons named in them or to the activities of any employer or organization under Part II of this Act, the Commission shall offer such person, employer or organization so named an opportunity of making oral or written representations with regard to it (or both oral and written representations if it thinks fit); and a person, employer or organization so named who avails himself of an opportunity under this subsection of making oral or written representations may be represented—

(a)by a barrister and attorney; or

(b)by some other person of his choice, not being a person to whom the Commission objects on the ground that he is unsuitable.

(6)The Commission may, if it thinks fit

(a)from time to time revise the terms of reference of an investigation; or

(b)unless a person affected by a complaint objects, consolidate two or more complaints;

and, when the Commission exercises a power that it has under this subsection, subsections(1) to (5) shall have effect in relation to the case mutatis mutandis.

(7)A complaint made pursuant to subsection (1) must be made within six months after the alleged contravention took place:

Provided that the Commission may entertain a complaint up to two years after an alleged contravention if it is satisfied that there are good reasons for the delay and that no one will be prejudiced by the delay.

(8)If, in the opinion of the Commission, a complaint is without merit, the Commission may dismiss the complaint at any stage of the proceedings after it has given the complainant an opportunity to be heard.

(9)In any case where it is made to appear to the Commission that a complaint which it is investigating is also under active investigation by some other department or agency of the Government, the Commission may suspend or discontinue its own investigation into that complaint."

[emphasis added]

11. Under section 16 of the Act, the HRC is given extensive powers to obtain documents and records including the power to apply to a court for an order authorizing one of its officers to enter premises for the purposes of an investigation. If the Commission does not dismiss a complaint, it may either (a) seek to settle a case (section 18(1)(c)), (b) in serious cases, refer the complaint for possible criminal prosecution (section 23), or (c) refer the matter to the Minister with a view to reference to a board of inquiry (section 18(1)). The HRC's primary role is to investigate complaints and to refer those with merit which it cannot settle for adjudication elsewhere; only unmeritorious complaints are dismissed. The role of the HRC is clearly not a judicial one.

12. The office of the Ombudsman for Bermuda is established by section 93A of the Constitution, although the powers of the office are delineated by ordinary legislation, the Ombudsman Act 2004. The scope of the 2004 Act is defined as follows:

"*3 This Act applies to the following authorities –*

(a) government departments;

(b) public authorities;

(c) Government boards; and

(d) any other corporation or body –

(i) which is established by Act of the Legislature or in any other manner by a Minister; or

(ii) whose revenues derive directly from money provided by the Legislature or a fee or charge of any other description authorised by the Legislature."

13. The jurisdiction of the Ombudsman is defined in the 2004 Act as follows:

"*5 (1) The functions of the Ombudsman are −*

(a) to investigate any administrative action of an authority for the purpose of deciding whether there is evidence of maladministration on the part of the authority;

(b) pursuant to an investigation, to make recommendations to the authority concerning any administrative action that formed the subject of the investigation and, generally, about ways of improving its administrative practices and procedures; and

(c) to perform such other functions as may be conferred on him under this or any other Act.

(2) Subject to this Act, the Ombudsman may investigate any administrative action taken by or on behalf of an authority −

(a) where a complaint is made to him by a person who claims to have been treated unjustly as a result of maladministration arising from or in connection with the administrative action taken by the authority; or

(b) on his own motion, notwithstanding that no complaint has been made to him, where he is satisfied that there are reasonable grounds to carry out an investigation in the public interest.

(3) The Ombudsman may conduct an investigation notwithstanding a provision in any enactment to the effect that −

(a) any decision, recommendation or act of an authority shall be final;

(b) no appeal shall lie in respect thereof; or

(c) no proceeding of an authority shall be challenged, reviewed, quashed or called in question.

(4) If a question arises about the Ombudsman's jurisdiction to investigate a case, the Ombudsman or complainant may apply to the Court for an order declaratory of the Ombudsman's jurisdiction."

14. Section 5(3) empowers the Ombudsman to investigate administrative decisions even where they are expressed by statute to be final and not subject to any appeal or other review. Under section 6, however, it is provided that where decisions are subject to appeal rights, no investigation shall be commenced until appeal rights have been exhausted. The most significant powers for present purpose are those conferred on the Ombudsman for use upon the completion of an investigation. Section 15 provides as follows:

"*(4) Without restricting subsection (3),* ***the Ombudsman may recommend that*** **–**

(a) a matter should be referred to an appropriate authority for further consideration*;*

(b) an omission or a delay should be rectified;

(c) a decision or recommendation should be cancelled or altered*;*

(d) reasons should be given;

(e) a practice, procedure or course of conduct should be altered; or

(f) an enactment should be reviewed." [emphasis added]

15. There is a clear conflict between interpreting the powers of the HRC under the 1981 Act to dismiss complaints as not capable of being reviewed by the HRC and the powers conferred on the Ombudsman with respect to even final administrative decisions by sections 5(3) and 15(4)(a), (b) of the 2004 Act. On their face, the latter provisions appear to express the common law rules for construing clauses purporting to oust the jurisdiction of the courts to review as not excluding the right to grant judicial review of legally flawed decisions in statutory terms. Section 15(3) makes the exercise of the recommendatory powers under section 15(4) conditional upon a finding that maladministration has occurred. Section 2(1) of the Ombudsman Act defines maladministration as follows:

> ""maladministration" means inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes –
>
> *(a)* unreasonable delay in dealing with the subject matter of an investigation;
>
> *(b) abuse of any power (including any discretionary power); or*
>
> *(c) administrative action that was –*
> *(i) contrary to law;*
> *(ii) unfair, oppressive or improperly discriminatory or based on procedures that are unfair, oppressive or improperly discriminatory;*
> *(iii) based wholly or partly on a mistake of law or fact or irrelevant grounds;*
> *(iv) related to the application of arbitrary or unreasonable procedures; or*
>
> (d) *negligent…*"

16. The 2004 Act empowers the Ombudsman to recommend a review of decisions which involve maladministration. Maladministration may or may not involve breaches of the law which render the relevant decision a nullity. The Act clearly assumes that most administrative decisions can be reviewed by the decision-maker. It perhaps implies that

where a decision is expressed by statute to be a final one, it can only be reviewed where it is contrary to law. It is on this basis that judicial review of decisions expressed by statute to be final takes place. It would be surprising if administrative decisions could be reopened pursuant to a recommendation from the Ombudsman more liberally than pursuant to an order of a court.

Authorities

17. A review of the authorities cited by counsel makes it readily apparent that although in practice administrative decisions are ordinarily only set aside by way of court order, the true legal position is that administrative bodies can generally reconsider their decisions should they wish to do so. The principle of *functus officio*, the rule that a body which has discharged its statutory functions in respect of a particular decision has no jurisdiction to further consider the matter having rendered its decision (unless the decision is set aside by a higher court or tribunal), only applies in relation to judicial or quasi-judicial tribunals.

18. The reason why this point is somewhat obscure was aptly explained in a text authority cited by the Ombudsman's counsel. Michael Zacks in '*Administrative Fairness in the Investigative Process*' noted:

> "*The ability of an authority to reconsider its own decision is based on differences between administrative and judicial functions. Very simply put, administrative functions are continuous and not subject to the principle of functus officio, whereas judicial or quasi-judicial functions are…categorizing functions is an an extremely difficult process and contrary to the rationale behind the development of administrative fairness…the jurisdiction of the ombudsman has been established on a foundation that rejects the traditional differences between administrative and quasi-judicial functions…*
>
> *There are few court cases which explore an authority's power to reconsider a decision previously made in the face of the principle of functus officio or a finality clause in its enabling statute. The reason for this paucity of jurisprudence is that tribunals generally believe they have acted correctly, considering it to be the function of the courts to review their decision and correct errors that they have made. Even if a tribunal thinks it has made a mistake, it may believe it does not have the power to reopen its process and reconsider the matter. As well, lawyers will generally seek judicial review to quash the decision and have the court send the matter back to the tribunal to reopen. However, a tribunal that violates the principles of administrative fairness may reconsider its own decision* [even if it is quasi-judicial or

"final"] *if the violation renders the decision a nullity, or void at first instance.*"[3]

19. Is the power to dismiss a complaint a purely administrative or a quasi-judicial power? Mr. Hargun contended, rightly, that the HRC is a purely administrative body. Mr. Douglas contended, rightly, that there are quasi-judicial elements to its powers. As regards the power to dismiss complaints, I agree that the importation of the right of the complainant to be heard before dismissal occurs does import a quasi-judicial element to a decision under section 15(8) of the Human Rights Act 1981. But this for present purposes is an arid enquiry[4]. The HRC reopened the Applicant's complaint on the basis that a non-compliance with section 15(8) which made the original dismissal a nullity had occurred. The conclusion reached by the Ombudsman in this regard was (a) accepted by the HRC, and (b) neither disputed by the Acting Minister nor by the Respondent in the present proceedings. Nor indeed does it appear from the Director of Human Affairs' January 11, 2010 Memo to the Acting Minister that the respondent to the HRC complaint- via the Attorney-General's Chambers- challenged the finding that the dismissal of the complaint occurred without complying with section 15(8). The broad submission appears to have been made without any detailed analysis-and accepted by the Acting Minister- that the HRC could not reconsider its initial decision.

20. The only question for substantive determination is whether, however one characterizes the HRC's statutory dismissal of complaints power, the 1981 Act excludes the power to reconsider such decisions where the initial decision was admittedly made in breach of the rules of natural justice as incorporated into the relevant statutory power. Mr. Hargun relied principally on a passage from the speech of Lord Reid in the seminal judicial review case of *Ridge-v-Baldwin*[1964] A.C.40 at 79, which has been cited in subsequent judicial and text authorities:

> "*I do not doubt that if an officer or a body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid.*"

21. This statement has been approved, albeit in a different context, by the Judicial Committee of the Privy Council (*Grant-v-Teachers Appeal Tribunal* [2006] UKPC 59 at paragraph 30) and by the Supreme Court of Canada (*Posluns-v- Toronto Stock Exchange et al* [1968] S.C. R. 330; 1968 S.C.R. LEXIS 50, transcript pages 6-7). However the Ombudsman's submissions did not rely upon such broad statements of principle alone. Very pertinent reliance was placed on the decision of the British Columbian Court of

[3] Linda C. Reif (ed.), '*The International Ombudsman Anthology*' (Kluwer Law International: The Hague-Boston-London, 1999).

[4] If I were required to decide this issue, I would hold that an investigative body such as the HRC must be able to reconsider complaints it has dismissed without having to determine that the initial decision was a nullity, for good cause, for instance where fresh information comes to light which casts doubt on its original decision. Fairness to the respondent may have to be taken into account, of course.

Appeal construing a similar Human Rights Act complaint dismissal power that "*when properly construed, s.15 does not contain any express or implied impediment to the ability of the Council to reconsider its decision to discontinue Zutter's complaints pursuant to section 14(1)(a) of the Act*": *Zutter-v- Council of Human Rights (B.C.)* 1995 B.C.A.C. LEXIS 4282, transcript page 5.

22. Wood JA in the latter case cited with approval the following passage from the Supreme Court of Canada's decision in *Robichaud-v-Canada* [1987] 2 S.C.R. 84, which is particularly persuasive as Bermuda's 1981 Act is substantially based on similar Ontario legislation. La Forest J (giving the Judgment of the entire Court) explained the correct approach to interpreting the Canadian Human Rights Act as follows:

> "*8.The purpose of the Act is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination on the ground of sex. As McIntyre J., speaking for this Court, recently explained in Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, the Act must be so interpreted as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which he described as "not quite constitutional"; see also Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, per Lamer J., at pp. 157-58. By this expression, it is not suggested, of course, that the Act is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J. in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission) (the Action Travail des Femmes case), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the Act must be given full recognition and effect consistent with the dictates of the Interpretation Act that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.*"

23. I find that the same principles ought to be followed in construing the provisions of the Bermudian Human Rights Act 1981. After all, the Preamble to the Act provides as follows:

> "*WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the World and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations:*
>
> *AND WHEREAS the European Convention on Human Rights applies to Bermuda:*

AND WHEREAS the Constitution of Bermuda enshrines the fundamental rights and freedoms of every person whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedom of others and for the public interest:

AND WHEREAS these rights and freedoms have been confirmed by a number of enactments of the Legislature:

AND WHEREAS it is expedient to make better provision to affirm these rights and freedoms and to protect the rights of all members of the Community..."

24. Having regard to these interpretative principles, the tacit concession that the HRC's initial decision was vitiated by procedural invalidity and the fact that the section 15(8) dismissal power is not even expressed to be final and not subject to review, it was difficult to understand the public policy interest which the Respondent's opposition to the present application was designed to advance. Although the picture was admittedly blurred by the fact that the Respondent was represented in the present proceedings by the same Chambers which previously acted for the respondent to the HRC complaint, the Respondent's involvement was based on the Ministry's responsibility for human rights. It was difficult to apprehend how the policy objectives of the Act could be advanced by contending for a construction of its provisions which both (a) restricted the scope of relief the HRC could provide in respect of a meritorious complaint, and (b) rendered nugatory the important constitutionally-derived role of the Bermuda Ombudsman.

25. Mr. Douglas did not seek to meet these compelling arguments head on. He nevertheless did seek to support the impugned decision with reference to judicial authority to the effect that even invalid decisions are effective until set aside by a court order. None of these authorities were cases where the decision-maker had agreed to reconsider his previous decision. *Smith-v- East Elloe Rural District Council* [1956] 1 All E.R.855 (HL) was a decision which preceded *Ridge-v-Baldwin* (and in which Lord Reid dissented) where the majority primarily held that the jurisdiction of the Court to review the validity of a compulsory purchase order had been validly ousted by the relevant legislation. That decision holds little persuasive force today. It is true that the *dictum* of Lord Radcliffe relied upon by counsel ("*The plain fact is that, even if such a decision as this is 'void' or a 'nullity', it remains in being unless and until some steps are taken before the courts to have it declared void*"[5]) is an accurate statement of general principle which has been since been cited with approval: *Lovelock-v-Minister of Transport* (1980) 40 P.& C.R. 336 at 345 (per Lord Denning MR). But this principle has seemingly always been articulated in contexts in which the relevant decision-maker has not agreed to reconsider his own initial decision. There may also be certain contexts, where property rights are involved, where finality may have a heightened statutory significance.

[5] At 871G-I

26. The question of whether the HRC could reconsider a complaint it had previously "dismissed" was canvassed by counsel for the appellant in *Bank of Bermuda Ltd.-v-Minister of Community Affairs and Sport* [2005] Bda L.R. 42; however the Court of Appeal agreed with the judge that on the facts this question did not arise as no dismissal ever took place. Moreover, it is clear that both Mr. Jeffrey Jowell QC for the Minister and Ms. Cherie Booth QC for the Affected Party agreed that the principle of finality had no application "*in the case of an unlawful or ultra vires decision*" (per Evans JA at page 9). Simmons J, whose first instance decision [2004] Bda. L.R.36 was affirmed by the Court of Appeal, admittedly did not have to consider the specific question of whether or not the HRC could reopen a dismissed complaint without a court order. However, in my judgment the spirit of the observations she made on the specific question which was before her are more supportive of a broad than a narrow construction of the HRC's jurisdiction to reopen a complaint:

> "*Accordingly I cannot agree with Mr. Elkinson's view that the complaint had been dismissed. Nor can I agree with his contention that the HRC could not by consent reopen the complaint. The consent order was made in an application which sought by order of mandamus the due processing of the complaint by the HRC. It stands to reason that if the court could order the HRC to deal with the complaint according to law, then the parties could enter into an agreement with the same effect by consent embodied in a duly executed order of the court.*"[6]

Finding

27. For the above reasons I find that the Acting Minister erred in law when he refused on January 27, 2010 to refer the Applicant's complaint to a board of inquiry as requested by the HRC on the recommendation of the Ombudsman. This decision based on the purported grounds that the HRC had no jurisdiction to reconsider a complaint which it had purportedly previously dismissed was wrong, having regard to an analysis of the applicable legal principles, which do not previously appear to have been judicially considered as a matter of Bermuda law.

28. In fairness to the Respondent and her counsel, this issue was not initially identified by either the Applicant or the Court prior to the intervention of the Ombudsman. Nevertheless, its resolution in favour of the Applicant is sufficient to entitle her to an order of certiorari quashing the January 27, 2010 decision and remitting it to the Minister to be dealt with according to law. In fairness to the Acting Minister who made the impugned decision, he acted in accordance with the advice of the appropriate public officer. The decision was further made in circumstances where the Attorney-General's Chambers appear to have been unable to provide him (or the Director of Human Affairs) with independent advice as Chambers was acting for another Minister who was the respondent to the relevant HRC complaint.

[6] At page 7.

Legal findings: was the impugned refusal to refer the Applicant's complaint to a board of inquiry unlawful on the grounds of irrationality?

29. This ground of complaint need not be fully considered in light of my primary finding above. The Acting Minister's decision would not be liable to be quashed on the grounds of irrationality if he was lawfully entitled to conclude that there was no valid and subsisting complaint which he could properly refer to a board of inquiry under section 18(1) of the Act. The decision was a carefully reasoned one and was based not on a perverse view of the facts but on an interpretation of a somewhat obscure aspect of the law which has since been held by this Court, for the first time, to be wrong.

Legal findings: was the impugned refusal to refer the Applicant's complaint to a board of inquiry unlawful on the grounds of an appearance of bias?

30. The Applicant understandably complained that a decision that her HRC complaint against one Government Minister could not be referred to a board of inquiry for adjudication, made by another Government Minister, was tainted by bias. Mr. Douglas argued that because of the statutory role prescribed for the Minister by section 18 of the Act, it was impermissible to complain about a breach of the common law role that no man may be a judge in his own cause. In any event, he submitted, the Minister's role was purely administrative so the rule against bias did not apply: *Bank of Bermuda-v-Minister of Community Affairs and Sport* [2005] Bda LR 42 at page 12.

31. I accept that no complaint can properly lie about the Minister performing acts which he is required by statute to perform as a matter of public law. That begs the question of whether the Minister's decision may fairly be characterised as a purely administrative one. In the *Bank of Bermuda* case, the Court of Appeal provided some insights into the sorts of matters which the Minister might lawfully take into account in the exercise of his discretion under section 18(1) of the Act:

> "*The Minister's role in the statutory scheme is clearly stated in section 18(1) of the Act. In the stated circumstances, the Commission "shall" refer the complaint to him, and he "may, in his discretion" refer it to a board of inquiry which he appoints under section 18(2).*
>
> *We consider that the extent of the discretion which the Minister is required to exercise can be defined, in part, in negative terms. He does not perform an adjudicative role; the purpose of the reference is to enable a Board of Inquiry to decide on the merits of a complaint which the Commission has been unable to settle (and in which no criminal proceedings have been instituted). We think that he is required to do more than merely "steer" the complaint towards a board (Mr Jowell's word). He must be entitled to consider, at least, whether the statutory scheme has been complied with and the complaint has been properly referred to him. He must also be entitled, indeed must be required, to take the "public*

interest" into account. We do not think that we should speculate as to what factual matters in particular cases this might involve."

32. Mr. Douglas sought to rely on the statement by Evans JA that the Minister "*must be entitled to consider, at least, whether the statutory scheme has been complied with and the complaint has been properly referred to him*" to support the analytical conclusion that the Minister's decision was a wholly administrative and not in any sense an adjudicative one. This is in effect to allow the tail to wag the dog, as it were. The dominant part of the Court of Appeal's reasoning was that the Minister's role is not an adjudicative one. Evans JA went on, strictly *obiter*, to give helpful judicial guidance by suggesting the range of non-adjudicative matters the Minister might be able to take into account in the exercise of his discretion. He concluded with the following cautionary words: "*We do not think that we should speculate as to what factual matters in particular cases this might involve.*" The mere fact that one of Evans JA's sample of permissible matters is taken into account by the Minister when making a referral decision cannot, without considering the substance of the relevant decision, result in its automatic categorization as purely administrative in character.

33. In the present case the HRC referred a dispute which was arguable to the Minister for onward referral to a board of inquiry in his discretion. The Respondent to the complaint, a fellow Minister, made submissions through the Attorney-General's Chambers to the effect that the complaint had not been properly referred on legal grounds. The Minister was entitled to take these submissions into account. As a purely administrative matter, he could have sought independent legal advice as to the merits of the respondent's submissions. Depending on the nature of that advice, the Minister could also (avoiding the impermissible assumption of a quasi-judicial or adjudicative role) have either (a) applied to the Court for declaratory relief or judicial review of the HRC's referral, or (b) referred the complaint to a board of inquiry, after informing the respondent that he could raise the validity of the complaint before the board of inquiry. What the Minister could not lawfully do was to make a legal determination of the issue of whether or not the Applicant's complaint was a valid subsisting complaint. This in my judgment was an adjudicative matter, beyond the scope of the Minister's administrative powers, and accordingly a decision which fully engaged the rules of natural justice.

34. In deciding whether the January 27, 2010 decision is vitiated by an appearance of bias, it is necessary to have regard to the history of the HRC complaint and the undeniable fact that the identity of a Government Minister as respondent to the complaint must attract a heightened degree of scrutiny. The complaint was originally made in 2004; it was peremptorily dismissed in 2006, shortly after the Applicant withdrew from mediation and complained to the Ombudsman; it was reopened in 2008 on the recommendation of the Ombudsman who prepared a comprehensive Report. At the end of 2009, the HRC formally requested the Minister to refer the complaint to a board of inquiry. It is true that, in an attempt to mitigate a most obvious appearance of bias, the same individual who was in 2004 the Minister of the Environment and in 2009-2010 the Minister for Culture and Social Responsibility, did not make the operative decision. But when the Acting Minister,

accepting legal submissions advanced on behalf of the Minister for the Environment, unwittingly made an adjudicative decision as to the validity of the 2004 complaint in early 2010, this decision was both (a) ultra vires, and (b) gave rise to an appearance of bias. The distinct impression was created that the Acting Minister was making a quasi-judicial decision in favour of Ministerial colleague with a view to thwarting not merely the attempts of the Applicant but also the Ombudsman and HRC to have a nearly seven year old complaint finally heard on its merits. This appearance was undoubtedly created even though the terms of relevant decision make it clear that the Minister was conscious that the Applicant would still have a last-ditch remedy by way of a civil action in the courts pursuant to section 20A of the Act.

35. On these alternative grounds, I would hold that the impugned decision was unlawful and liable to be quashed. No need to consider the more general complaint of unfairness arises.

36. Again, it cannot be over-emphasised, that I have no doubt that the various public actors were acting in good faith and using their best endeavours to act in accordance with law. Because of the statutory role of the Minister, a departure from the Ontario model incorporated into the Bermuda legislative scheme at a comparatively early stage in Bermuda's democratic development, both the Minister and the Director who briefed him were seemingly deprived of access to independent legal advice. The Attorney-General's Chambers were obviously conflicted, because they had previously been retained by the Ministerial respondent to the HRC complaint. The same Chambers would ordinarily- absent an extraordinary decision to engage private counsel- advise the Minister responsible for Human Affairs. Because the submissions advanced by Chambers were not obviously partisan ones and were consistent with the apparently accepted view that the HRC's decisions to dismiss a complaint could only be reopened through a court order, it is not entirely surprising that neither the Acting Minister nor the Director saw fit to delay matters further by seeking independent legal advice. This would have entailed either setting up some form of "Chinese wall" within the Attorney-General's Chambers, or incurring the expense of obtaining private legal advice.

37. This is the sort of institutionalised confusion that the provisions of section 18(1), which interpose a politician between the HRC and the board of inquiry, inject into the bloodstream of the Bermudian human rights process. It will always be difficult to delineate the purely administrative from the quasi-judicial consideration. And the appearance of bias will always potentially arise when a Government Ministry or Department is the respondent to the complaint. In addition where legal issues need to be assessed, it will be difficult if not impossible for the Human Rights Act Minister and the respondent to the complaint to both obtain free "in-house" legal advice from the Law Officers of the Crown.

38. There is merit to the Applicant's contention that consideration ought to be given by Parliament to abolishing the role of the Minister in the referral of complaints found by the HRC to be arguable to a board of inquiry.

Legal Findings: constitutionality of the Minister's role under section 18(1) of the Act

39. Mr. Douglas submitted that if the Minister's role under section 18(1) is purely administrative, his role does not engage section 6(8) of the Constitution at all. Section 6(8) provides as follows:

> "*Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*"

40. I accept this submission. As long as the Minister does not adjudicate the "*existence or extent of any civil right or obligation*", no breach of or conflict with section 6(8) will arise. There generally will be adequate means of redress under public law should the Minister stray beyond the boundaries of her proper administrative remit, as the findings on the natural justice limb of the present application demonstrate. No question of constitutional relief thus arises for the purposes of the present application. However, the potential for a conflict between the *misapplication* of the Minister's section 18(1) of the Human Rights Act powers and section 6(8) of the Constitution nevertheless exists.

Relief

41. In my judgment the only relief to which the Applicant is entitled is an order of certiorari quashing the January 27, 2010 decision and remitting it to the Minister to be dealt with according to law. No conceivable reason why the Applicant's HRC complaint should not be referred to a board of inquiry on discretionary grounds was canvassed in argument.

42. For the reasons submitted by Ms. Greenidge who appeared with the Solicitor-General, I agree that this Court has no jurisdiction to itself refer the complaint to a board of inquiry. The statute vests this power in the Minister alone. Only if it became clear that the Minister was not willing to carry out his statutory function could the Court grant relief by way of a mandamus, directing him to make the requisite reference.

Summary

43. The Applicant's application for judicial review of the Minister responsible for Human Rights' refusal to refer her HRC complaint to a board of inquiry under section 18(1)(a) of the Act, on legal grounds, is granted. She is entitled to an order of certiorari quashing the impugned decision and remitting the matter to the Minister to be dealt with according to law.

44. The primary ground on which this relief is granted flows from the intervention of the Ombudsman and the submissions advanced on her behalf. Unless the Ombudsman's statutory jurisdiction under the Ombudsman Act 2004 to investigate complaints of maladministration and recommend that offending public authorities reconsider inappropriate administrative decisions is to be materially impaired, the Act must be construed as empowering the HRC to reconsider complaints which it has previously dismissed, especially where it appears that the original decision was invalid. This principle, which has never before been considered as a matter of Bermudian law, is of general application and is likely to apply to administrative decisions made by public authorities generally. The Court is indebted to the Ombudsman and her counsel for the light they have shed on an important area of public law.

45. Further and alternatively, the Acting Minister's decision which purportedly adjudicated the legal question of whether or not the HRC could validly reopen a complaint purportedly dismissed under section 15(8) of the Act was invalid on the following grounds. The Minister is only empowered to make administrative determinations under section 18(1)(a) of the Act. In straying beyond the boundaries of his statutory powers into quasi-judicial decision-making in the context of blocking the progress of a 2004 complaint against a fellow Minister which the HRC had restored on the recommendation of the Ombudsman, the Acting Minister's decision was vitiated by an excess of jurisdiction coupled with an appearance of bias.

46. Ironically the Acting Minister's involvement was seemingly triggered by a commendable attempt to avoid a far more obvious appearance of bias. This might perhaps be viewed as a rather bizarre case where there were two "elephants in the room" and only one was spotted. The Minister responsible for Human Affairs was the same individual who held the post of Minister of the Environment and was the respondent to the HRC complaint itself. However the fact that another Government Minister was the respondent to the complaint resulted in the Director of Human Affairs and the Acting Minister having no recourse to the Attorney-General's Chambers for independent advice. The only "advice" apparently tendered by Chambers took the form of submissions on behalf of the Minister of the Environment as to why the Minister should thwart the Applicant and the HRC and not refer the complaint to a board of inquiry. As the substance of the advice conformed to the seemingly established Bermudian view that administrative decisions of the HRC could only be reopened by Court order, it is perhaps understandable that neither the Acting Minister nor the Director saw any need to incur the expense of seeking independent private legal advice.

47. Rather than seeing the present case as a "flash in the pan" which is never likely to be repeated, it may be viewed as demonstrating how the Minister's role as a filter (or buffer) between the Commission and a board of inquiry contributes to delay and, where another Government Ministry is the respondent to the complaint, creates a legal minefield as well. Bearing in mind that the Ontario legislation on which the Human Rights Act 1981 is substantially based permits the Ontario Commission to refer meritorious complaints directly to an independent tribunal for hearing, the utility of the Minister's section

18(1)(a) role merits policy reconsideration. The body of the 1981 Act as a whole is arguably incompatible with this transplanted Ministerial role. However, the Deputy-Solicitor-General did ably demonstrate that there is no inherent incompatibility with section 6(8) of the Constitution as regards the Minister exercising administrative –and not quasi-judicial- functions under the statute.

48. I will hear counsel as to costs. However, there is no obvious reason why the Applicant should not have her costs to be taxed, if not agreed, following the principles applicable to litigants in person helpfully explained by Bell J in *Re Elcome Trust* [2010] SC (Bda) 3 Civ (18 January 2010). As the costs of the Ombudsman and the Respondent are both payable out of the Consolidated Fund, my provisional view is that I should make no order as to those costs.

Dated this 14th day of February, 2011, _____

KAWALEY J