IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2012: No. 178

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE EDUCATION ACT 1996

AND IN THE MATTER OF THE COMMISSIONER OF EDUCATION'S DECISIONS TO TRANSFER THE PRINCIPALS CURRENTLY EMPLOYED AT TN TATEM MIDDLE SCHOOL AND VICTOR SCOTT PRIMARY SCHOOL TO DIFFERENT EDUCATIONAL INSTITUTIONS ON 1 SEPTEMBER 2012

(1) QUINTON MING

(on behalf of himself the executive members and other members of the T N Tatem Middle School Parent Teacher Association)

(2) AZUHAA COLEMAN

(on behalf of herself the executive members and other members of the Victor Scott Primary School Parent Teacher Association)

Applicants

-v-

(1) THE COMMISSIONER OF EDUCATION

(2) THE MINISTER FOR EDUCATION

Respondents

JUDGMENT

(in Court)

Date of hearing: July 23, 2012
Date of Judgment: August 1, 2012

Mr. Eugene Johnston, J2 Chambers, for the Applicants
Mr. Martin Johnson, Attorney-General's Chambers, for the Respondents

Introductory

1. The primary relief which the 1st Applicant ("TNT PTA") and the 2nd Applicant ("VS PTA") seek in the present judicial review proceedings is an order of certiorari quashing the March 14, 2012 decisions of the 1st Respondent ("COE") involuntarily moving the principals of the respective schools with effect from September 1, 2012. The Applicants sought leave to seek judicial review by Notice dated May 16, 2012, having exhausted attempts to obtain redress for their grievances through extra-judicial means.

2. On May 22, 2012 at an ex-parte hearing, I granted leave to pursue the present application but refused to grant an interim stay of the decisions. Following an application for an interim stay at which Mr. Johnson very properly undertook on behalf of the Respondents not to rely upon any restructuring steps which occurred after May 22, 2012, the Court directed an expedited hearing of the present application so that the parties could know where they stood as far in advance of September 1, 2012 as possible. Those directions included a requirement to file and exchange skeleton arguments seven days before the hearing, directions which were honoured by the Respondents' counsel but which were blissfully ignored by the Applicants' counsel[1]. In the event, the skeleton argument produced was a model of cogency, clarity and proportionality.

3. What appeared to me to be the main ground of complaint advanced at the hearing was that the Applicants enjoyed as a matter of public law a legitimate expectation that they would be consulted by the COE before she decided to transfer the principals in question. This arose from the importance of the decisions in questions combined with the status of the PTAs as stakeholders in the educational system, by virtue of the scheme of the Education Act 1996 as read with recent educational policy pronouncements made by or on behalf of the Respondents[2]. Subsidiary grounds of complaint were that transferring the

[1] At my prompting, the Registrar contacted counsel over the weekend and obtained a copy of the Applicants' written submissions on Saturday afternoon preceding the hearing. See paragraph 48 where the possible costs consequences of this conduct are mentioned.

[2] It is doubtful whether it was strictly necessary to name the 1st Respondent, a public officer, as a respondent even though she formally made the impugned decisions. It would have sufficed to name the Minister, the titular and political head of the Ministry as sole respondent even though she had no evident personal involvement in the decisions. Public officers, save for those holding a few constitutional offices, ought generally to be shielded from being joined as parties to judicial review proceedings or any other proceedings against the Crown (i.e. the Executive branch of Government.

principals otherwise than because their schools were underperforming was unlawful and that the decisions were in any event irrational. It is common ground that no consultation took place.

4. The Applicants' case was based on colourfully elevated principles extracted from the Hopkins Report and the Educational Blueprint for 2010-2015, underpinned by modern notions of the democratic accountability owed by public institutions to citizens utilizing public services. The Respondents' case, in stark contrast, seemed to be more inspired by stifling defensive motivations rather than by any countervailing high-level public policy rationales. The central controversy was whether or not the legal and policy context gave rise to a legitimate expectation as a matter of public law that the Applicants would be consulted before the impugned decisions were made.

5. The present application requires attention to the context in which the decisions were taken, the legislative scheme, the promises or representations relied upon and the common law principles governing the doctrine of legitimate expectation.

The impugned decisions

6. By letter dated December 15, 2012, each Principal was advised of the "*possibility of being transferred to another school site*" based on the following criteria:

> "*1. For the purpose of promoting professional learning for continuous improvement;*
> *2. Site renewal; and*
> *3. To maximize instructional leadership to improve student achievement.*"

7. On March 14, 2012, each Principal was advised that "*the Commissioner of Education reserves the right to effect involuntary administrative transfers based on established criteria*" and confirmed transfers to new schools with effect from September 1, 2012. The reasons stated for the transfer decisions were as follows:

   (a) <u>TN Tatem Principal</u>:
   - *Built a strong community and made solid connections with corporate partners;*
   - *Made solid decisions about teaching and learning;*
   - *Have a deep understanding of Middle School;*

   (b) <u>Victor Scott Principal</u>:
   - *You will be joining a zone rich in success with strong instructional leadership-*
   - *You will be able to grow skills and contribute your strength of building community.*

8. The TNT PTA and the VS PTA were not consulted prior to these decisions being made and vigorously protested through petitions and a march before resorting to legal proceedings to challenge them.

The Education Act 1996 ("the Act")

9. The Act has no express provisions creating a role for PTAs in Bermuda's education system, unlike the position under the United Kingdom 1996 Act to which Mr. Johnson for the Respondents referred. Section 4 provides for an advisory Board of Education; section 5 provides that the Department of Education under the direction of the Minister, the supervision of the Permanent Secretary and headed by the Commissioner of Education shall, in effect, have operational control of the education system. Section 5(2B)(k) charges the Commissioner with negotiating with unions, lending some support to Mr. Johnson's submission that transfer issues were purely a contractual affair.

10. In addition it is noteworthy that section 3(1) of the Act, in defining the composition of the Education Board provides for:

> "*(e) 2 persons who are representatives of parents or the education community, appointed after consultation with any national parent-teacher associations.*"

11. However Mr. Johnston referred to, *inter alia*, the following provisions as signifying that, at a minimum, the legitimate expectation contended for was not inconsistent with the statutory scheme:

    (a) section 8(2)(ef) of the Act empowers the Minister to make rules "*with respect to the responsibilities of a parent in relation to the school at which a student is enrolled and in relation to the student*". Breach of such rules constitutes a summary offence (section 8(2B));

    (b) both schools are "*maintained*" schools under the Act. Although these provisions have not been implemented, section 18 (1) of the Act provides: "*There shall be a board of governors of every maintained school*." Schedule 2 paragraph 2(b) provides that such boards should be comprised of "*at least one...parent*";

    (c) Section 5(2B)(d) mandates that the Commissioner shall "*liaise with the boards of governors and facilitate communication and cooperation among them, and between them and the Department*";

    (d) section 19(1)(d) of the Act lists amongst the functions of such boards "*to consider and make recommendations in respect of the appointment of all teachers, including the principal, at the school*";

    (e) section 42(1) provides: "*It shall be the duty of the parent of every child of compulsory school age to cause him to receive suitable education...*" This was

contended to imply the need for interaction with the education authorities because the suitability of education for each child was a matter ultimately to be decided by the Minister under section 2(1).

12. The second main ground of the present application, which I indicated in the course of the hearing did not appear to me to be very plausible as a free-standing ground for invalidating the decisions, was based on section 25C(3) of the Act. What this provision clearly demonstrates is not that principals may only be compulsorily transferred if their schools are failing; rather, it merely highlights that this is the only ground for such a transfer which is expressly mentioned in the Act. The scheme of the Act to this extent supports in a general way the Applicants' central thesis that the decision to move apparently successful principals is a momentous decision as to which they as persons directly affected would reasonably expect to be consulted on in advance. Section 25C(3) provides:

> "***Low performing schools***
> *25C (1)The Commissioner of Education, in consultation with the Board, shall design and implement a procedure to identify low performing schools on an annual basis.*
>
> *(2)Where a school has been identified as a low performing school, the manager of the school, in consultation with the principal and teachers of the school, shall prepare and implement a plan for improvement of the school, and the plan shall be submitted to the Commissioner of Education for the Commissioner's approval.*
>
> *(3)Where a school has been identified as a low performing school for two consecutive school years, the Commissioner of Education shall take measures aimed at the improvement of student performance at the school. Measures may include provision of additional resources, adoption of new programs or changes in the principal or teaching staff.*
>
> *(4)For the purposes of this section, a "low performing school" in any school year is one that fails to meet the minimum performance standards or the expected level of growth referred to in section 25A(2), or one in which a majority of the students in the school perform below grade level according to the curriculum standards referred to in section 25F, in that school year.*"

The promises relied upon to found a legitimate expectation of consultation

13. The May 2007 Report by David Hopkins et al, '*Review of Public Education in Bermuda*', provided the foundation for the Applicants' case on legitimate expectation. Key conclusions relied upon included the following:

> (a) "*49. School principals are the key to raising students' achievement in Bermuda. The link between school effectiveness and the quality of leadership*

is exceptionally well established through inspection findings and research in many different Countries...";

(b) "*51...our evidence suggests that principals are treated as operatives who are told, rather than consulted. They are employees, not partners in the educational enterprise...*";

(c) "*80. Parents and the community are important partners in the educational process...*";

(d) "*The Ministry...seeks to implement...initiatives not through brokerage but either by diktat or stealth. It has a cavalier approach to consultation...*";

(e) "***Recommendation 5: Introduce delegation and transparent accountability at levels***";

(f) "***Recommendation 10: Harness the power of parents, business and the community in the reform effort*** *...Stakeholders greater direct involvement in the management of schools...The Review favours the appointment of boards ...These school boards* [could] *have greater autonomy in the staffing of their schools and the deployment of resources as well as holding principals responsible for raising standards...*"

14. The '*Blueprint for Reform in Education (Bermuda Public School System Strategic Plan 2010-2015)*' was published by the Ministry of Education in or about 2009. Its stated objective was "*to operationalise the priorities recommended in the Hopkins Report (2007)*". Seven strategic priorities were identified including:

    (a) "*3) Strengthen and distribute leadership*";

    (b) "*4) Facilitate the improvement of standards via accountability and transparency*";

    (c) "*Maximize the contribution of parents and the community*".

15. The Blueprint was endorsed by the Minister, the Chairman of the Board and the Commissioner, who stated (at page 7): "*By working with the school leaders, teachers, and parents in a supportive way we will ensure that we meet our targeted student outcomes.*" In a September 2011 Press Release, the Minister gave a progress report on implementing the Blueprint which explicitly endorsed the Hopkins Report and the Blueprint and stated (at page 4):

    "*From September to December 2008, public consultation on cluster boards was held. The result was that Bermuda's population was deemed too small*

to allow for elected Boards as envisioned. Instead, the Board of Education agreed to consult and work with school PTAs."

16. This Ministerial statement made on September 16, 2012 must be viewed against the backdrop of the recent enactment with effect from February 18, 2011 of section 18 of the Education Act 1996 which provided: "*(1) There shall be a board of governors of every maintained school.*" Taking into account the narrow context of the Press Release itself and the wider context of the Blueprint and the legislative amendments designed to implement the Hopkins Report, the quoted statement appeared on its face to be an express promise to allow PTAs to perform the legislative function assigned to school boards.

17. Mr. Johnston was keen to point out that this sort of role for PTAs had been anticipated in the 1997 TNT PTA Constitution, which listed the body's objectives as including: "*(d) To strive through representation and negotiation with the appropriate education authorities to secure the highest advantage in physical, mental and spiritual education.*"

The Respondents' evidential response

18. The Permanent Secretary's evidence on behalf of the Respondents understandably dealt in part with the merits of the decisions which were criticised in the Applicants' own evidence. However, the reasons for the transfers were not meaningfully elaborated upon. Key elements of the response to the Applicants' primary case on consultation appeared to me to be as follows:

    (a) "*19. The process followed for Principal or teacher transfers is in accordance with the Collective Bargaining Agreement. The information is communicated publicly once the affected persons have been informed*";

    (b) "*44...A stay or decision to rescind the transfer of these principals will bring into question the entire process of moving staff to meet system needs...It will suggest that principal and teacher moves to fill vacancies through attrition are also able to be questioned by entities not directly related the impacts of the system or the management of the system....According to the tenets of Collective Bargaining, management has the right to manage....*";

    (c) "*45.1 While the Education Act mandates that the Ministry must consult with the Board of Education on decisions affecting schools, no such similar role exists for parents (or PTAs) in the decision-making process. There is no requirement in law for us to consult any PTA. The Ministry...consults with various bodies: BUT, the Education Board and ASP in accordance with law and agreement made between the various bodies which represent the interest of all....we do not believe that consultation with the various PTAs can be accommodated within the framework of the collective bargaining agreements upon which these decisions are based...*"

19. The Applicants' case, primarily based on the fluid and nimble common law doctrine of legitimate expectation and drawing upon the broad high-level principles the Respondents had seemingly agreed to adopt in endorsing the Hopkins Report, was met by a comparatively rigid and formulaic response. The response seemed to be more relevant to rebutting the Applicants' pre-litigation attacks on the merits of the impugned transfer decisions than to responding to their more nuanced judicial review challenge.

20. Be that as it may, the respective cases appear to a large extent to pass each other, like ships in the night.

Legal findings: the doctrine of legitimate expectation

The role of judicial review

21. Before considering the doctrine of legitimate expectation and the specific body of public law principles upon which the Applicants primarily rely, it may be helpful to step back and remind oneself of the role of this specialist field of Bermudian law. Its concern is not the determination of the merits of disputes between adversarial parties but to determine in the interests of protecting the rule of law whether or not a public body has misapplied an express or implied statutory power.

22. The notion of democratic governance and the separation of Government into three formal branches (Executive, Legislative and Judicial) was first coherently established by the Bermuda Constitution in 1968. The Administration of Justice (Prerogative Writs) Act 1978 lent the first statutory support for judicial review of administrative action. The legislative approach adopted was to apply English law to the scope of relief available. The 1978 Act was replaced with effect from July 7, 2009 with sections 64-68 of the Supreme Court Act 1905, with the Rules under the 1978 Act being replaced by Orders 53-54 of the Rules of the Supreme Court.

23. The 2009 amendments to the Supreme Court Act and Rules in substance confer upon this Court the same statutory jurisdiction to regulate administrative action as the High Court of England and Wales currently enjoys. This means that English case law in relation to judicial review enjoys a higher status than in most other areas of local law. This may present something of a challenge for local public authorities in that the roots of judicial regulation of the legality of governmental action are far deeper in England and Wales than they are in the Bermudian legal landscape. There, universal adult suffrage was introduced in 1928; here it was introduced in 1968. Nevertheless even in England, the dynamism of the field of judicial review has only grown exponentially since around 1970. The result is a body of principles which traverse the boundaries of law and policy and may well confound traditionally narrow notions of what the law 'is'.

24. Stephen Sedley, writing extra-judicially[3], explained the essence of judicial review as follows:

> "*…the achievement of modern public law has been to establish that the proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is…*
>
> *The court which upholds or strikes down a ministerial policy as unlawful is, it hopes and believes, acting on legal principle; but its perception both of the nature of the policy and of its own power to intervene, and often too its choice between competing legal principles, is fundamentally conditioned by the moment of history at which it sits; and these perceptions in turn determine what legal principle is or is not to be deployed….*"

25. The English principles which shape the judicial review of governmental action trace their roots back to Magna Carta and the evolution away from the absolute power of kings through to the modern challenges thrown up by the dilution of Parliamentary sovereignty attributed to a dramatic rise in a reinvented manifestation of Executive power. In the Bermudian context, our legal roots traverse the slavery and post-Emancipation eras, over 100 years of oligarchical government coupled with racial segregation through to the modern challenges thrown up by Parliamentary democracy under a comparatively recent written constitution which guarantees fundamental human rights. Bermudian public law cannot ignore Bermuda's own distinctive legal roots, which give rise to similar tensions between modern democratic and participatory aspirations on the part of civil society and Executive institutions not yet fully purged of older and more authoritarian notions of power. Rose-Marie Belle Antoine has suggested the need for an activist approach for judges in societies with histories similar to our own:

> "*Just as the study of the English common law must examine the historical evolution of that law, so too must the study of West Indian law appreciate the birth of our own law grounded in slavery and colonialism. The legal thought processes and institutions will only have meaning when the historical perspective is understood…Because of this historical function of the law…the Caribbean man and judge has an active role to play in re-interpreting the legal framework to build a more… just society.' The judge and legislator must perform the role of 'social engineer'.*"[4]

[3] '*Ashes and Sparks: Essays on Law and Justice*' (Cambridge University Press: Cambridge, 2001) at pages 80, 247.
[44] '*Commonwealth Caribbean Law and Legal Systems*' (Cavendish: London/Sydney, 1999), pages 12, 18.

26. The final sentence of the quoted explicitly rhetorical remarks help to illuminate the fact that the role of the Court in dealing with legislation designed to promote social change, such as the Education Act 1996 (as amended in the wake of the Hopkins Report), is one of partnership with Parliament, not one of opposition to it. In this vein, the Bermudian courts have recognised and granted relief in public law cases based on legitimate expectations in several cases in recent years[5]. In *Commissioner of Police-v- Allen* [2011] Bda LR 52, Scott Baker JA giving the judgment of the Court of Appeal for Bermuda neatly distilled the governing principles as follows:

> "*A legitimate expectation may arise from an express promise given on behalf of a public authority (see* Council of Civil Service Unions v Minister for the Civil Service*[1985] AC 374, 401B). As is said in the 6th Edition of De Smith's Judicial Review 12-016, an obvious example is where an express undertaking is given which induces expectation of a specific benefit or advantage. That is what happened here. The form of the express representation is unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow.*"

Legitimate expectation

27. No controversy appeared to me to turn on the legal parameters of the doctrine of legitimate expectation, the essential elements of which are relatively clear. Of the authorities relied upon by the Applicants' counsel, I found passages in the English Court of Appeal case of *R (Bhatt Murphy)-v- Independent Assessor* [2008] EWCA Civ 755 most helpful. Firstly, the following passages in the judgment of Laws LJ help to set the scene and explain the two main categories of legitimate expectation which may entitle an applicant to obtain judicial review:

> "*26.The appellants' arguments are all based on the doctrine, or doctrines, of legitimate expectations. I hope it will make for clarity if I describe the relevant law (and where it is contentious or uncertain, my view of it) before I address Mr Singh's distinct submissions.*
>
> *27. Legitimate expectation is now a well-known public law headline. But its reach in practice is still being explored. In one of the leading cases, Ex p Coughlan [2001] QB 213, Lord Woolf MR as he then was, giving the judgment of the court, described it as "still a developing field of law" (paragraph 59). The cases show that put broadly (there are refinements) it encompasses two kinds. There is procedural legitimate expectation, and there is substantive legitimate expectation. But in certain types of case these terms are more elusive*

[5] Examples include: *Barnes and Barnes-v-Minister of the Environment* [1994] Bda LR 61 (Court of Appeal); *Simons and Hill Top Corporation-v- Accountant General* [1999] Bda LR 43; *Junos-v-Minister of Transport and Tourism* [2009] Bda LR 26; *Evans-v- Minister of Education* [2006] Bda LR 52; and *Commissioner of Police-v- Allen* [2011] Bda LR 14 (Court of Appeal).

than they appear. These appeals therefore call for some account of the material principles, however well trodden the ground. I acknowledge that much of the ground is at the foothills. But the path falters a little further up.

28. Legitimate expectation of either kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power: see for example Ex p Coughlan paragraphs 67 ff, Ex p Begbie [2000] 1 WLR 1115, 1129F – H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception: see in particular Ex p Guinness Plc [1990] 1 QB 146. Unfairness and abuse of power march together: see (in addition to Coughlan and Begbie) Preston [1985] AC 835, Ex p Unilever [1996] STC 681, 695 and Rashid [2005] INRL 550 paragraph 34. But these are ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case. The excoriation of these vices no doubt shows that the law's heart is in the right place, but it provides little guidance for the resolution of specific instances.

Procedural Legitimate Expectation

29. There is a paradigm case of procedural legitimate expectation, and this at least is in my opinion clear enough, whatever the problems lurking not far away. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see CCSU [1985] AC 374 at 408G – H (Lord Diplock's category (b)(ii)), Ex p Baker [1995] 1 AER 73 at 89 (Simon Brown LJ's category 4, acknowledged by him to equate with Lord Diplock's category (b)(ii): see p. 90), Ex p Coughlan at paragraph 57, p.242A – C: Lord Woolf's category (b)). I need not for present purposes set out these taxonomies.

30. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in CCSU). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because good administration ("by which public bodies ought to deal straightforwardly and consistently with the public": paragraph 68 of my

judgment in Ex p Nadarajah [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision-making on which the courts insist. I note with respect the observations of Peter Gibson LJ on the importance of reliance in Ex p Begbie at 1124B – D; but that was a case (or a putative case) of substantive legitimate expectation, where different considerations may arise.

31. Aside from these possible refinements, the paradigm case of procedural legitimate expectations is as I have said clear enough. But as I shall show, there is another class of procedural expectation which wants careful attention, and is relied on in these appeals. It is convenient first to turn to substantive legitimate expectation.

Substantive Legitimate Expectation

32. A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it. Thus it is to be distinguished from a merely procedural right. It is expressed by Simon Brown LJ as he then was in Ex p Baker as category 1:

> *'1. Sometimes the phrase [sc. legitimate expectation] is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him... [Various] authorities show that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel.'*

33. And it formed category (c) in the judgment of the court delivered by Lord Woolf in Ex p Coughlan at paragraph 57 (242C):

> *'(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any*

overriding interest relied upon for the change of policy."

28. Sedley LJ added the following instructive remarks:

> "*69…As can be seen from the cases cited by Lord Justice Laws, the concept of a policy – which is of course a form of public promise – giving rise to a substantive expectation which the courts will not allow to be unjustly frustrated, far from being heretical, is today entirely orthodox.*
>
> *70. It is, moreover, a class of case which is not confined to requiring consultation before change but may result, as it did in Coughlan, in inhibiting the change itself. More typically, however, it will not be the making of a policy change but the terms on which it is done which are capable of frustrating a legitimate substantive expectation…*"

Impediments to judicial review relief

29. There are an infinite variety of reasons why judicial review may be refused. It is true as Mr. Johnson submitted that where an applicant for judicial review is complaining in substance about purely contractual matters, no public law remedy may be granted. An illustrative authority for this proposition which deals with teachers is *Vidyodaya University of Ceylon and Others-v-Silva* [1964] 3 AC 865 (PC). The Respondents' counsel also aptly cited *R (on the application of Tucker) –v- Director General of the National Crime Squad* [2003] EWCA Civ 2, which concerned a transfer, to fortify this submission. In that case Scott Baker LJ concluded as follows:

> "*37. The fact that the NCS is a public body and that the decision to return the Appellant was taken against the background of Operation Lancelot and the arrest of other officers does not turn what was essentially a managerial decision in relation to the Appellant into one with a sufficient public law element to trigger the jurisdiction of the Administrative Court. It is true this is not a case in which the Appellant can invoke a private law remedy. That is a factor, but not in this case determinative. What is critical is whether the dispute has a sufficient public law element. See R v Lord Chancellor's Department ex parte Nangle [1992] 1 All E.R 897, 908B.*

38. In my judgment the decision impugned in the present case does not have a sufficient element of public law to be subject to judicial review. It was of purely domestic nature."

30. It is also true that a judicial review applicant must have sufficient interest in the matter of which complaint is made to properly seek relief. Order 53 rule 3(7) provides:

> "*(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*"

31. If an applicant lacks sufficient interest, the proper time for this point to be raised by a respondent is strictly on an application to set aside leave. The modern approach in any event is to take a liberal approach to standing assuming an arguable case for obtaining public law relief can be made out on the merits of the case. As Lord Diplock, one of the founding fathers of modern judicial review, opined in *Inland Revenue Commissioners-v-National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 All ER 93 at 107:

> "*It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. 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.*
>
> *I would allow this appeal upon the ground upon which, in my view, the Divisional Court should have dismissed it when the application came to be heard, instead of singling out the lack of a sufficient interest on the part of the Federation, viz. that the Federation completely failed to show any conduct by the Board that was ultra vires or unlawful.*"

32. I accept Mr. Johnson's submission that it is generally impossible to validly assert a legitimate expectation that is inconsistent with the statutory duties of the public body concerned: *Hall of Arts and Sciences –v- Albert Court Residents' Association et al* [2011] LGR 616 Civ 430.

33. It also probably correct that the Court is generally reluctant to interfere with operational decisions. Scott Baker JA's *dictum* to this effect in relation to the Police (*Allen et al-v-Commissioner of Police* [2011] Bda LR 13 at paragraph 31) likely has wider application. For reasons that I will shortly come to, this principle has no application to a situation where an applicant asserts a substantive legitimate expectation that they would be entitled to participate in such operational affairs.

Legal findings: did the Applicants have a legitimate expectation of being consulted prior to the impugned decisions to transfer the Principals being made?

34. When the relevant and uncontroversial evidence is reviewed in light of the applicable legal principles, it is ultimately clear that the Applicants had a legitimate expectation of being consulted by the Respondents before decisions to transfer the principals were finally made. That expectation consisted of the following two elements:

(a) a substantive legitimate expectation that the PTAs would be involved in the running of schools based on an express and unambiguous Ministerial promise made on September 16, 2011 that the statutory role envisaged for school governing boards in the running of maintained schools would be played by PTAs instead. It is true that the promise in terms referred to the "Board of Education" working with PTAs, but the operative part of the promise was that the statutory role of boards of governors would be abandoned and instead devolved upon PTAs on an ad hoc non-statutory basis. The promise was made against the background of:

(i) the Education Blueprint promising increased parental involvement based on the Hopkins Report's call for increased parental and community involvement through school boards "*that are given real powers and responsibilities*", and

(ii) the enactment of section 19(1)(d) of the Act empowering boards of governors (required to include at least one parent), *inter alia*, "*to consider and make recommendations in respect of the appointment of all teachers, including the principal, at the school*";

(b) a procedural expectation that the Respondents would adopt and follow a procedure that was fair to enable the PTAs to play the role in the management of their children's schools which it was promised they would be allowed to play in place of boards of governors. Boards contemplated by, *inter alia*, sections 18 and 19 of the Act. In the context of a proposal to change the principals, fairness required at a minimum that the Respondents should have been consulted before the March 14, 2012 decisions were made by somebody acting on behalf of the Respondents and responsible for making the proposed

transfer decision. Consultation means simply that. It does not mean that the relevant decision could not have been made over the PTAs objections or that the PTAs had to become formally involved in any contractual collective bargaining procedures. Rather, it required them to be involved in the decision-making process in some way which was consistent with their promised role as part of the collective team responsible for managing the relevant schools.

35. It was conceded that if the legitimate expectation contended for was found to exist then it could not be disputed that it had been breached.

Legal findings: were the impugned decisions unlawful because no valid grounds for making the transfers existed?

36. I accept the Respondents submissions that the power to transfer principals and other staff under the Act is sufficiently broad and flexible to accommodate the circumstances of this case. The Applicants' argument based on a breach of section 25C(3) of the Act is rejected.

Legal findings: irrationality

37. While the reasons for the impugned transfers are somewhat obtuse and have been expressed in the documents without much specificity, I reject the irrationality ground as a free-standing alternative basis for invalidating the decisions. If I had not accepted the legitimate expectation argument, I would have concluded that the Applicants lacked sufficient interest to complain of irrationality based on the inadequacy of reasons for the decisions.

38. Based on my finding that consultation ought to have occurred, it seems to me that the reasons for the transfers, possibly involving management judgments of some sensitivity about the strengths and weaknesses of the professionals concerned, would have been fleshed out orally in the consultation process. No need to consider the reasonableness of the decisions on their merits arises. Furthermore, the decisions involved matters of technical expertise and policy as to which this Court is unqualified to second-guess the professional judgment of the technical experts involved.

Findings: are there any discretionary grounds for refusing the order of certiorari sought to quash the decisions?

39. While the Applicants have clearly demonstrated that the impugned decisions breached their legitimate expectations, the question of whether or not the relief they seek ought to be refused on discretionary grounds is a more difficult question. The Respondents complain that quashing the transfers will cause considerable administrative inconvenience because of the interlocking nature of :

(a) the transfers of principals in and out of the two schools in question; and

(b) related transfers at the deputy principal level.

40. The Court was also invited to take into account the delay in commencing the proceedings and the fact that the principals themselves were the more logical applicants. These two arguments can shortly be rejected. The Applicants responded promptly when first apprised of the decisions and sought to resolve their concerns through dialogue and protest before commencing the present proceedings barely two months after the decisions were made. As Mr Johnston correctly submitted, the courts will not ordinarily penalize litigants for this sort of delay: Fordham, '*Judicial Review Handbook*', 5th Edition (Hart Publishing: Oxford-Portland Oregon, 2008) at paragraph 26.3.7. The public law grievance they have asserted cannot sensibly be viewed as capable of assertion by any other person, let alone the principals themselves. This misses the entire basis of the PTAs' complaint.

41. Whether or not to grant relief which a judicial review applicant is *prima facie* entitled to "*depends on the circumstances of the particular case*": Supreme Court Practice 1999, paragraph 53/14/32. However, there is strong presumption in favour of the grant of relief. As Oliver LJ (as he then was) observed in *R-v- Attorney General ex parte ICI* (1987) 1 CMLR 72 at 109:

> "*It does seem to me that it must be wrong in principle, when a litigant has succeeded in making good his case and has done nothing to disentitle himself from relief to deny him any remedy unless, at any rate, there are extremely strong reasons in public policy for doing so.*"

42. The Respondents effectively undertook through their counsel on June 7, 2012 to maintain the status quo in terms of the transfer arrangements until the determination of the present application. Mr Johnson agreed that the Respondents could not rely upon any action taken after the grant of leave to pursue the present application on May 22, 2012 as a basis for inviting this Court to refuse relief on discretionary grounds. There is no suggestion in the evidence that between March 14 and May 22, 2012, such extensive steps were taken in the transfer process as would cast the education system into complete confusion if the impugned transfers were to be quashed. Since May 22, 2012 the process ought to have been on hold insofar as it relates to the two schools concerned with the present case. Nor can any weight be attached to the suggestion that quashing the decisions will require the Respondents to breach contractual obligations to the transferees concerned. No employee can complain about an employer's failure to do what she is not lawfully entitled to do. I find no strong reasons of public policy for refusing the relief sought. Nevertheless, an attempt has been made to minimize any further inconvenience by delivering this judgment on an expedited basis.

43. On the other hand strong public policy grounds mitigate in favour of granting the relief sought. The promise to engage parents and the community in the running of public schools is based on a commitment to make a paradigm shift in the management culture of

Bermuda's public education system and to make it more democratic and participatory and less authoritarian and paternalistic. The promise does not simply derive from the Hopkins Report. It has been adopted by the Education Board, the Department and the Minister in the Education Blueprint, given legislative force by Parliament and reaffirmed by the Minister. Institutional cultural shifts are notoriously difficult to implement and change can never be effected without some bumps and lumps along the way. There is an inevitable tension between the impulse to move from point A to point B as quickly as possible in concrete terms and the need to ensure that less tangible but no less important objectives are also achieved along the way.

44. In granting the order of certiorari sought, the Court is giving effect to the Applicants' legitimate expectation that the Respondents should not be permitted to abuse their statutory powers by departing from the public law commitments by which they are bound. This may mean that for another school year at least, the transfer plans are put on hold. It is only through granting the relief sought, however, that there is any realistic possibility that the Respondents may be stirred to honour the public law commitment which they have assumed to recognise the PTAs as partners not just in debating high policy (as Mr. Johnson suggested should be the limitation of their involvement) but in the process of making important managerial decisions about the schools which their children attend as well. Precisely what form this heightened involvement takes will have to be worked out in the future. But the parental right to such participation cannot lawfully be denied unless it is proposed to recast the existing legislative scheme altogether. The participatory elements of the modern statutory scheme are not designed to undermine the primary leadership role of educators over educational institutions. Such participation is designed to reshape state-run schools, at a time when roughly half the island's parents have opted for customer-friendly private schools, into institutions operating in a manner which is more respectful of the aspirations and needs of those citizens served by the schools. The crucial statutory provisions are ultimately designed to enhance the quality of education in aided and maintained schools.

Conclusion

45. For the above reasons, the Applicants are entitled to an Order of Certiorari quashing the purported decisions of the 1st Respondent on March 14, 2012 relating to the transfer of the principals of TN Tatem Middle School and Victor Scott Primary School with effect from September 1, 2012.

46. In summary, they are entitled to this relief because they have a substantive legitimate expectation based on an express promise made by the Minister that PTAs would be utilized in place of the boards of governors contemplated by section 18 of the Education Act, as read with other related Education Ministry representations. Flowing from this the Applicants had, in relation to the impugned transfer decisions, a procedural legitimate expectation that they would be consulted before any momentous decision (such as the transfer of the Principals) was made by the Respondents.

47. The promise relied upon is so fundamental a part of the proper exercise of the Respondents' statutory powers in relation to managing maintained schools that it constituted an abuse of power to depart from it without notice.

48. I will hear counsel as to costs although, subject to one qualification, there is no obvious reason why costs ought not to follow the event. The qualification is that in view of the Applicants' non-compliance with the direction that skeleton arguments be filed seven days in advance of the hearing, my provisional view is that they ought not to be entitled to recover any costs attributable to preparing the skeleton.

Dated this 1st day of August, 2012 _____

IAN RC KAWALEY CJ