Administrative Law

The Procedure of Judicial Review

Judicial Review

- **The legality of acts and decisions of public bodies may be challenged by recourse to the supervisory jurisdiction of the Supreme Court by showing for instance that a decision is wrong for being ultra vires.**

The Supervisory Jurisdiction of the Supreme Court

- **The Supreme Court has supervisory jurisdiction similar to that of the High Court of England and it can exercise control over Public bodies.**

Pre and Post 1968 Jurisdiction

- Following independence, the Constitution made specific provision for the preservation of the power of the Supreme Court to review of the decision of some of the creatures of the Constitution (like the Public Service Commission) before the Supreme Court – **see section 119 of the Constitution**.

Section 119 Constitution

- Yerriah v PSC 1974 MR 22
- Unnuth v PSC 1982 MR 232
- **But see Lagesse v Commissioner of Income Tax**

- It is clear that the procedure pertaining to judicial review shall equally apply to review of the PSC decision under section 119.

Practice and Procedure

- It is clear that the procedure pertaining to judicial review shall equally apply to review of the PSC decision under section 119.

- *Vallet V Ramgoolam 1973 MR 29* that the Supreme Court has not only the similar Supervisory Jurisdiction as the High Court but it would also follow English Practice

- In 1974 the Supreme Court in *CEB V Forget* reaffirmed its

- Supervisory Jurisdiction and went further and held that the same practice was applicable and the same rules (*CEB V Forget 1974 MR 299)*

But to what extent will our court follow English Practice?

- *Murdaye v Commissioner of Police 1984 MR 118*
- Held: the Supreme Court was not bound by the rigours of the time limits applicable to English Courts under Ordinance 53 but nevertheless application must be made promptly.

- *Berenger v Goburdhun 1985 MR 209*
- The Supreme Court will not blindly apply English rules.

But to what extent will our court follow English Practice?

- Hurnam v Supreme court
- Emtel v Telecom Authority
- Domah v Judicial & Legal Services Commission

Nature and Scope of Judicial Review

- The remedy of Judicial Review is concerned with reviewing, not the merits of the decision in respect of which the application for Judicial Review is made, but the decision - making process itself

The nature and scope of Judicial Review

Chief Constable of N.W Police v. Evans 1982 1 WLR 1155:

- *"This remedy* [judicial review] *…, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and,… , administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner… It is important to remember in every case that the purpose of the remedy in JR is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for what of the authority constituted by law to decide the matters in question."*[1160]

The nature and scope of Judicial Review

- *"The Court will not, however, on a judicial review application act as a "court of appeal" from the body concerned; nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment"* [1173]

- The above have been cited with approval A. Lutchuman v. The Mauritius Sugar Terminal Corporation 1990 SCJ 241 ; 1990 MR 343

- See also: Naidoo G v. Public Service Commission & Anor 2007 SCJ 77; Hungsraz P v. Mahatma Gandhi Institute 2008 SCJ 122; 2008 MR 127

The nature and scope of Judicial Review

- The court will not, however, on a JR application act as a `Court of appeal from the body concerned. Nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body (unless ultra vires or unreasonable).
- The rule applies whether or not there is avenue of appeal against the decision on the merits.

The scope of Judicial Review

- **Against whom does Judicial Review lie?**
- **Judicial review is a procedure available only in relation with disputes raising questions of public law.**
- **The court must before an application can succeed be satisfied that-**
- **(i) the Respondent is a public authority and**
- **(ii) the right at issue is a public right**

The scope of Judicial Review

- **A body may be created by statute but its act might not be subject to review because there is no public law element involved.**

- **J.R is not available unless the right involved is a public law rights. An action relating to a private law rights can be commenced by a Plaint with Summons even against a Public body.**

The position in the UK

- Public authorities enter into a wide range of contracts to equip themselves to carry out their basic functions, including employment contracts and commercial contracts and commercial contracts for the supply of goods and services to the authority.

The position under English law

- The range and growth of contractual relationships in the public sector has presented a challenge for judicial review law.

- The current position on amenability to judicial review of situations involving contracts is the product of two policies.

JR v the Law of Contract- UK

- One is that judicial review, as a remedy of last resort, is inappropriate where there is another field of law governing the situation. Thus, contract disputes are normally to be left to the general law of contract (or, in relation to employment contracts, resource to an Employment Tribunal) rather than judicial review.

JR v the Law of Contract- UK

- The other policy is to recognize that some public functions may be carried out through the medium of contractual relationships, which justifies the use of the Administrative Court's judicial review supervisory jurisdiction.

JR v the Law of Contract- UK

The tests applied by the courts to determine whether a function involving a contract is susceptible to judicial review have been criticized as overly complex and liable to divert the attention of the court away from the substance of the complaint.

JR v the Law of Contract- UK

In the orthodox approach, the court assumes that the fact that the source of a public authority's power is statutory is in and of itself insufficient to make a dispute about a contract amenable to judicial review ; the court therefore goes on to consider whether there is some additional "sufficient public element, flavour or character" to the situation.

JR v the Law of Contract- UK

A more straightforward approach (though not one widely applied by the courts) would be to say that if the contractual decision in issue involves that exercise of statutory power, then in principle it should be subject to judicial review and the court should consider whether any of the grounds of review have been made out.

JR v the Law of Contract- UK

- As in other contexts, in working out whether a decision is susceptible to judicial review the court considers two main factors. It will have regard to the source of the power under which the impugned decision is made. If this is “purely” contractual, judicial review is unlikely to be appropriate; some close statutory underpinning of the contract will normally be needed.

JR v the Law of Contract- UK

Alternatively, the court may consider whether the function being carried out by the defendant is a public function.

Having decided that a decision is susceptible to judicial review, the court will go on to examine the grounds advanced by the claimant for the decision's unlawfulness.

JR v the Law of Contract- UK

Where a public authority takes action to an employee, such as disciplinary action or termination of an employment relationship, this will normally be matter for contract or employment law rather than judicial review.

JR v the Law of Contract- UK

Judicial review may also be possible in relation to disciplinary proceedings against office holders that are specifically provided for in legislation, as opposed to being wholly informal or domestic matters.

The principles of procedural propriety apply, so “an officer cannot be lawfully dismissed without first telling him what is alleged against him and hearing the defence or explanation.

As in other contexts, the claimant may, however, be expected to have exhausted internal grievance procedures and other available remedies before resorting to judicial review

Molinaro v K&C RLBC 2001

In my view, the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion.

Molinaro v K&C RLBC 2001

Of course, in many circumstances the nature of the complaint is one that identifies no public law principle. In such cases the fact that the defendant is acting pursuant to statute is irrelevant. For example, if the council sues for the rent due from a tenant, no public law issue arises.

Indeed, in general questions of construction of the contract or breach will attract no special public law principles, and judicial review is not an appropriate procedure to resolve such disputes. The fact that a public body is a party to the proceedings is, in such cases, irrelevant to the action formulated or to the relief granted. There is no justification then for treating the local authority in any different way to private bodies.

Molinaro v K&C RLBC 2001

But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused.

I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organisations and their employees.

Molinaro v K&C RLBC 2001

Moreover, there are a host of important cases where decisions relating to contracts have been subject to principles of judicial review to prevent the power being unlawfully exercised. In *Roberts v Hopwood* [1925] AC 578 for example, to which I have already made reference, the court held that certain contractual terms were unlawful.

Molinaro v K&C RLBC 2001

In *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938 and *Wheeler and others v Leicester City Council* [1985] AC 1054; 83 LGR 725 decisions of the councils involved not to contract with the organisations to whom they were ideologically unsympathetic, were held to be unlawful.

Molinaro v K&C RLBC 2001

Similarly, there have been decisions which recognise that in appropriate circumstances the decision to terminate a contract might be subject to judicial review principles: see for example the Court of Appeal decision in *R v Hertfordshire County Council, ex p National Union of Public Employees* [1985] IRLR 258 and, in context of a lease, the decision of the House of Lords in *Wandsworth London Borough Council v Winder* [1985] AC 461; 83 LGR 143

Molinaro v K&C RLBC 2001

In my opinion, the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the courts should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly and abusively without legal redress.

But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles.

Molinaro v K&C RLBC 2001

I would respectfully suggest that the *Bolsover* case [2001] LGR 43 can be justified on that basis. As the judge pointed out, it would have undermined the operation of the private law of contract, and would have put public bodies at a significant disadvantage, if the doctrine of legitimate expectation could be used to defeat the right of public bodies to withdraw from a proposed contract whilst leaving the other party free to do so

Molinaro v K&C RLBC 2001

However, in other cases, including some I have cited, public law principles have been superimposed upon the private law relationships. The two are not necessarily incompatible. The facts of each case will need to be carefully considered to determine whether they can properly co-exist.

The scope of Judicial Review in Mauritius

- **Judicial review is not available so as to permit the enforcement of private rights, such as rights of particular employees vis à vis their employers.**

- It is to be noted that the attitude of the Supreme Court has changed since the court now is even inclined to review decisions pertaining to appointment and promotion within the parastastal sector.

- In relation with procurement, the court now shows a greater willingness to review decisions of parastatal bodies. It must be said that the Public Procurement Act now provides for review before the Review Panel set up by the Act.

Public Law Element

- Not all decisions of public bodies can be reviewed by Courts; only decisions containing a public law element are amenable to judicial review

- Augustave v. Mauritius Sugar Terminal Corporation 1990 MR 222

Public Law Element
The employment disputes

- In Augustave, the following extracts from R v East Berkshire Health Authority, ex parte Walsh 1984 3 All ER 425 were cited with approval:

"Employment by a public authority does not per se inject any element of public law. Nor does the fact that the employee is in a "higher grade" or is an "officer". This only makes it more likely that there will be special statutory restrictions on dismissal or other underpinning of his employment … It will be this underpinning and not the seniority which injects the element of public law. [at 430] (underlying mine)

"Parliament can underpin the position of public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively, it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private" law rights under the terms of thecontract of employment… " [431]

The Public law element

- Extracts of Ex parte Walsh contd

"There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed on it as part of the statutory terms under which it exercises its powers. The former are appropriate for private remedies inter partes…" [at 435]

The Public law element

- Based on the above extracts, the Court in Augustave reached the following conclusions:

"It seems to us therefore that the question is not to be solely decided by reference to the status of the body whose decision is challenged";

"the remedy of judicial review cannot be available to someone who wishes to exercise rights arising under a contract of employment unless there is what has been termed a "public element"".

The Public law element

- In Mungroo v. The Minister of Agro Industry, Food Production and Security 2013 SCJ 329, as stated in Le Repaire Resort Ltee v Rodrigues Regional Assembly 2012 SCJ 113 and approved in Compagnie Sucriere de St. Antoine Limited v The State of Mauritius & Anor (2012 SCJ 374) stating that:

"the issue is essentially one of contract between two parties and the interpretation of contractual terms which had been put in writing and signed by the parties. That one of the parties to the contract, the respondent, is a public body, does not create a public law element in the resolution mechanism of any dispute it may have with the applicant."

The Public law element

- Maitaram J. v The Financial Services Comission 2011 SCJ 143

- *"… decision of a body may be subject to judicial review by reason of either the source from which it derives its power or because it discharges public duties or performs public functions… not every single act or decision of such a body which is amenable to judicial review. The crucial consideration is whether there is a sufficient public law element in the decision which will make it reviewable as a justiciable issue. That will involve consideration of both the nature of the decision and whether the decision was made under a statutory power"* (underlying mine)

The Public law element

- Maitaram J (contd)

- *"No judicial review would lie at the behest of an employee unless there are special statutory restrictions upon dismissal, or some other statutory underpinning of his employment"*
- It is the statutory underpinning which brings a public law element to the employment, making it amenable to judicial review
- The Court used this reasoning to distinguish the case of Maitaram from that of Bhadain, *infra*

The Public law element

- Based on the above, in Veragoo v The Central Electricity Board 2013 SCJ 64, the Court confirmed Maitaram in that
- *"… ordinary management powers of public bodies and government departments may not be amenable to judicial review where the exercise of such powers lack a sufficient public law element or where the exercise of the power lacks any statutory underpinning."*

The Public law element

- Bhadain S v ICAC 2005 SCJ 132; 2005 MR 272

- Sections 24(7) and 24(8) of POCA provides certain procedures to be followed by ICAC to terminate the contract of its employees

- The Court considered Ex Parte Walsh (above) and stated: "*The Commission was required by statute, in the present cases, to follow a specified statutory procedure. The Commission defied that statutory procedure so that those directly touched by the non compliance as well as those who are vested with a duty to maintain good governance in public institutions have a public law right to compel the Commission to comply with its obligations under the Act of Parliament which established the institution…*"

The Public law element

- In Chittoo v The University of Technology Mauritius 2014 SCJ 323, it was held that a promotion policy which was made under the statutory powers vested in the Board and Staff Committee, had to be followed and any decision which was ultra vires that policy was amenable to judicial review.

The Public law element

- Based on the above, in Achameesing v The Mahatma Gandhi Institute 2014 SCJ 431, the decision in appointing a Rector was held to be "*essentially a decision which fell within the province of the ordinary management powers of the respondent as a statutory body with regard to employment of its employees which would not be amenable to judicial review.*"

- It was also not established that there was any sufficient public law element involved by any statutory underpinning or otherwise.

The Public law element

- Dacruz L.G. v Central Housing Authority 1983 SCJ 267

  "We are of the opinion that there may be instances where the Authority, when proceeding to appoint an officer, acts ***so blatantly against the basic principles of fairness and reasonableness that its decision have to be reviewed*** *and held to have been made ultra vires the provisions of the Act."*

- In *Augustave*, the Court expressly stated that notwithstanding the fact that powers of appointment are basically an internal issue, the above quote from Dacruz still applied, in that the blatant breach of basic principles of fairness and reasonableness would provide the public element (see Atlas *infra*)

- This stance was reiterated in Maitaram

Mooneyan v Mauritius Examinations Syndicate & Anor 2004 SCJ 293

- Applicant's ranking following interview meant that he could be appointed Deputy Director of Respondent;
- Candidate who ranked 5th in interview was instead appointed;
- Respondent stated that Applicant did not hold a post-graduate qualification in education and that was the only reason why he was not appointed;
- Applicant in fact held an M.Phil in Education and produced to the attention of Respondent correspondence from his university confirming that an M.Phil amounts to a post-grad in Education
- The decision of not appointing Applicant was quashed and Respondent directed to appoint him

The Public law element

- Court did not explain rationale of decision; especially in light of principles laid down in Augustave regarding presence of public law element

- Could the Court have applied the *Dacruz* principle without expressly stating so? (see also Hungsraz *infra*)

Public Element (Procurement cases)

- Biwater PLC v Central Water Authority & Anor 2000 SCJ 166

  Stated that judicial review could in principle lie against the first Respondent given that there was a public interest in the allocation of a contract to the 2nd Respondent to manage the water resources of the 1st Respondent in Mauritius

- It would also appear on the basis of Mercury Energy Ltd. v Electricity Corporation of New Zealand Ltd [1994] 1 W.L.R. 521 that a decision of a public body to enter into or determine a commercial contract to supply goods or services can be the subject of judicial review **where there is fraud, bad faith or corruption** (view endorsed impliedly in SWE Fort George Sugar & Power Ltd v Central Electricity Board 2004 SCJ 268)

- Atlas Communication International Co Ltd v The Central Electricity Board 2005 SCJ 104

  "There is authority that procurement decisions are capable of being judicially reviewed if there is a sufficiently "public law element" to the case… There is authority that public law element might be found in cases where either there was some special aim being pursued by the public body through the tendering process which set it apart from ordinary commercial tenders, or where there was some statutory underpinning, such as where there was a statutory obligation to negotiate the contract in a particular way, and with particular terms"

Public Element (Procurement cases)

- Atlas (contd)
- Based on R v. Legal Aid Board, ex parte Donn & Co [1996 3AER 1], it was also stated that *"irrespective of whether there was a remedy in private law, the public dimensions of the matter were of a quality which made it justiciable in public law."*

Public Element (Procurement cases)

- Atlas

The public law duty was found in the following way:

"The affairs of the respondent, including its entering into substantial contractual obligations with commercial firms for the supply of equipment it may need to ensure that its statutory duty to supply electricity to the public is carried out efficiently, must therefore be conducted with utmost transparency and fairness. Accountability before the Court by way of judicial review of its decisions must therefore be preserved, specially where it is claimed that respondent has transgressed its own procedural rules when allotting a contract."

- It could be said that the decision challenged had enough “public law element” since, even though the decision itself was not a statutory decision, it concerned a contract entered into that would help the Respondent could pursue its statutory obligations

Public Element (Procurement cases)

- In Mauritius CT Power Ltd v Ministry of Finance & anor 2016 SCJ 261:
- CT Power and CEB signed an agreement to purchase and sell power.
- Govt contends that CT Power did not meet the criteria for EIA license and decided not to proceed.
- Was the decision of the Government amenable to judicial review?
- Ministry of Energy (2nd respondent) contended that the decision is not amenable to judicial review as the agreement was a private and commercial one.

Public Element (Procurement cases)

- However it is the source of power under which the impugned decision is made which needed to be looked at.
- In R v Panel on Take-Overs and Mergers, Ex p Datafin PLC (1987) QB 815, 847, it was held that, "*if the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review.*"
- Here, under s.62 of the Constitution, the Minister was responsible for the conduct of the business of Govt. Therefore, the decision of the Minister of Ministry not to sign the implementation agreement had a public law element.

Procedure for Applying for Judicial Review

Two-stage process

- It is necessary to apply for, and obtain, leave to move for Judicial Review, and only if and to the extent that such leave is granted will the Court proceed to hear the substantive application for Judicial Review.

- The applicant must -

- (a) have a “sufficient interest”;

- (b) have a case sufficiently arguable to merit investigation at a substantive hearing;

- (c) must apply for leave promptly.

Application for leave

- The application for leave must be made ex parte to a single Judge.

- The purpose of the requirement of leave is -

- (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless; and

- (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further consideration. [See Lutchumun v. MSTC 1990 SCJ 138].

Procedure for leave

- The requirement that leave must be obtained is designed to "prevent the time of the Court being wasted by busy bodies with misguided or trivial complaints of administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived." [*R v. IRC ex.p National Federation of Self-Employed 1982 AC 617]. (Mestry v. PSC 1991 SCJ 264*).

Procedure for leave

- Leave should be granted, if on the material then available the Court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant. [See Muttur v. LGSC 1992 SCJ 144 - Deira v. LGSC 1996 Bucha v LGSC 1996

Procedure for leave

- The Court of Appeal held that the test to be applied in deciding whether the grant leave is whether the Judge is satisfied that there is a case fit for further investigation at full inter partes hearing of a substantive application for judicial review.

Procedure for leave

If, on considering the papers, the Judge cannot tell whether there is, or is not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application and make representations on the question whether leave should be granted.

Duty to make a full and frank disclosure

The applicant for leave must show uberrima fides, and if leave is obtained on false statement or suppression of material facts in the affidavit, the Court may refuse an order on this ground alone. [R. v. Kensington Comssrs. 1917 1 KB 486].

See Gopaul v. National Transport Authority 1991 SCJ 353 and Monty V PSC

Delay in applying for relief

- Application for leave to move for judicial review must be made promptly, which in this context means as soon as practicable or as soon as the circumstances of the case will allow, and in any event such application must be made within 3 months from the date when grounds for the application first arose.
- For this purpose time starts to run from the date when the grounds for the application first arose.

Substantive Judicial Review Application

- Having obtained leave to move for Judicial Review the next stage is for applicant to institute a substantive application for judicial review. To institute such a substantive application the applicant must within 14 days of the date of the grant of leave -

- (a) serve on all parties directly affected a Notice of motion and affidavit;
- (b) lodge the motion with the Court

- See Seeboo v LGSC