GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 2006

BETWEEN:

HUGH WILDMAN

Appellant

and

THE JUDICIAL AND LEGAL SERVICES COMMISSION
OF THE EASTERN CARIBBEAN STATES

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal
The Hon Albert Mathew	Justice of Appeal [Ag.]

Appearances:

Mr. James Guthrie QC with Mr. Ramesh Maharaj SC and Mr. Adebe Olowu for the Appellant
Mr. Sydney Bennett QC with Mr. James Bristol for the Respondent

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2006: December 4; 5;
2007: March 1.

JUDGMENT

[1] GORDON, J.A.: By letter dated December 23, 2004 the Government of Grenada forwarded to the Judicial and Legal Service Commission, (hereafter referred to variously as the respondent, the Commission or the JLSC) a recommendation that the appellant be appointed to the public office of Attorney General of Grenada. Under the Constitution of Grenada (hereafter "the Constitution"), as with all of the other independent states within the jurisdiction of this court, an Attorney General can be either a public officer or a political appointee. Section 70 of the Constitution reads in part as follows:

> "70. (1) There shall be an Attorney-General who shall be the principal legal adviser to the Government of Grenada.

(2) The office of Attorney-General shall be either a public office or the office of a Minister.

[2] The Constitution also stipulates at section 88 that the power to appoint a public office Attorney-General rests with the Governor General acting on the advice of the JLSC (this latter provision is not common to all of the other constitutions in the independent states within the jurisdiction).

[3] Knowledge of this recommendation came to the attention of the Grenada Bar (nothing turns on how) which took a position of strong opposition to such an appointment of the appellant. The JLSC was written to by the Grenada Bar Association by letter dated February 1, 2005 expressing its strong opposition. Accompanying that letter was a dossier entitled "Grounds for opposing Mr. Hugh Wildman's appointment as Attorney General of Grenada." That dossier will hereafter be referred to as Volume 1. A second letter dated February 3, 2005 was dispatched from the Grenada Bar Association to the respondent setting out further grounds of opposition.

[4] By letter dated February 23, 2005 the appellant was invited to a meeting of the JLSC to be held at the Grand Beach Resort, Grand Anse, Grenada, on February 28, 2005. The letter informed the appellant that the Grenada Bar Association would be present to explain its opposition to the appellant's appointment and advised the appellant that he might be accompanied by a person of his choice. Accompanying the letter was a copy of Volume 1.

[5] The meeting scheduled for February 28, 2006 at the Grand Beach Resort was duly held. At that meeting a second bound volume of documents was presented by the Grenada Bar. The JLSC concluded that it could not recommend the appointment of the appellant as Attorney General of Grenada to the Governor General of Grenada. Further facts will be alluded to at appropriate times in this judgment.

[6] The appellant applied for judicial review of the decision of the JLSC. The matter was heard in November 2005 and a decision given on April 5, 2006.

[7] The Judicial and Legal Service Commission was established by section 18 of the West Indies Associated State Supreme Court Order, 1967. The JLSC is governed by regulations cited as the Judicial and Legal Services Commission Regulations, Cap 336 of the laws of Grenada. Regulation 8 of the regulations reads in part as follows:

> "For the purpose of exercising its functions in relation to appointments, whether substantive or acting, to any office, the Commission shall… consider the claims of all public officers eligible for appointment or promotion, may interview candidates for such appointments, and shall in respect of each candidate consider, amongst others, the following matters–
> (a) his qualifications;
> (b) his general fitness;
> (c) any previous employment of the candidate in the public service or in private practice…"

[8] The argument on behalf of the appellant fell into two discrete parts. Part one related to the apparent bias of the trial judge and part two dealt with the proceedings of the JLSC as it deliberated on the request of the government of Grenada. In this judgment I shall reverse the order in which the two issues were dealt with.

[9] There were three complaints concerning the proceedings of the JLSC. They were: insufficient investigation; the refusal to give reasons; and, finally, the refusal to reconsider or inadequate reconsideration of the decision.

[10] Learned Queen's Counsel for the appellant reminded the court that what was at issue was not the decision of the JLSC, but rather the process by which the decision was arrived at. As learned counsel put it in his speaking note, "it is not the decision but the decision making process which is under review."

[11] Learned Queen's Counsel for the appellant acknowledged that there was no set procedure mandated by Regulation for the JLSC to follow. Regulation 8 of the

Commission's Regulations set out above states what must be considered and not how the consideration is to be accomplished other than a suggestion of an interview.

[12] What was complained of on behalf of the appellant, and in a sense is the central core of the argument by learned Queen's Counsel, was that the JLSC having decided to determine the issue of the fitness of the appellant by way of a hearing conducted on an adversarial basis, the appropriate standard of procedural fairness had to be applied to that procedure which the JLSC in fact decided to adopt. As an expression of principle, I find the latter statement entirely unremarkable.

[13] The appellant filed an affidavit in support of his application for leave for judicial review in which he reviewed, from his point of view, the procedure that had been adopted by the JLSC when he appeared before them on 28th February 2006. Notwithstanding the risk of prolixity, I quote a substantial portion of that affidavit describing in the appellant's terms the procedure followed:

> "On Thursday the 24th of February, 2005 while at my office at the Financial Intelligence Unit, I received a letter from the Commission under the signature of Ms Angus Smith, Secretary to the Commission, inviting me to a meeting of the Commission to be held at the Grenada Grand Beach Hotel on Monday the 28th of February, 2005 at 1:30 pm. This letter stated that I was being invited to this meeting, inter alia, "in light of the concerns which have been raised by the Bar Association". The letter further stated that I had the option of being accompanied to the meeting by a person of my choice. A true copy of this letter is now produced and shown to me and is hereby annexed and marked **"**H.W.2.**"**
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> "The letter further stated that the Bar Association would be present at the meeting to explain the basis of their opposition to my appointment. Accompanying the letter was a bound volume entitled "Grounds for Opposing Mr. Wildman's appointment as Attorney General of Grenada Volume 1" (Grounds of Opposition Volume 1") comprising some 53 pages of documentation including newspapers from both local and international sources, numerous pieces of correspondence in the form of e-mails and letters, various judgments and other Court documents and multiple affidavits. The issues raised by the documentation spanned some 11 years and related to events both within and outside of Grenada. A true copy of this bound volume is now produced and shown to me and is hereto annexed and marked **"**H.W.3**"**

"On Monday the 28th of February 2005 at 1.30 p.m. I attended at the Grenada Grand Beach Hotel for the meeting with the Commission. Pursuant to the directions which I had received, I was accompanied by Colonel Nestor Ogilvie, retired Colonel of the Jamaica Defence Force, a former Commissioner of Police of Grenada and currently National Security Adviser to the Government of Grenada and the Chairman of the Supervisory Authority of Grenada.

"At this meeting the Commission comprised:

i. The Chairman Mr. Adrian Saunders, then Acting Chief Justice;
ii. Mr. Justice Albert Redhead;
iii. Mr. Justice Lyle St Paul, retired High Court Judge;
iv. Ms Justice Monica Joseph; and
v. Ms. Josephine Huggins

Also present were the Secretary Ms Angus Smith who recorded the minutes of the meeting and two members of the Bar Association namely, the President Mr. Ruggles Ferguson and Dr. Francis Alexis, the leader of one of the political parties opposed to the Government of Grenada, the Peoples Labour Movement.
The meeting commenced with the Chairman of the Commission inviting the members of the Bar Association to articulate their objections to my appointment to the post of Attorney General.

"Mr. Ruggles Ferguson stated at the outset that the Bar Association was not to be taken to be questioning my qualifications to be appointed Attorney General of Grenada. He referred to many of the matters set out in the Grounds of Opposition volume 1. Mr. Ferguson also referred to many items not set out in said Grounds of Opposition Volume 1, which he stated would be contained in a subsequent document which was yet to be provided to the Commission.

"During the meeting, a second bound volume of documents was brought to Mr. Ferguson by one Ms. Foster. This second bound volume comprised some 60 pages of documentation including journal articles numerous pieces of correspondence in the form of e-mails and letters, various judgments and other Court documents and multiple affidavits and was presented to the Commission by Mr. Ferguson. The second bound volume entitled Grounds for Opposing Mr. Hugh Wildman's Appointment as Attorney General of Grenada Volume 2 (Grounds of Opposition Volume 2") was seen by me for the first time only during this meeting with the Commission. A true copy of this second volume is now produced and shown to me and is hereto annexed and marked "H.W.4".

"Great significance was placed by Mr. Ferguson upon an alleged e-mail sent by one Mr. Jones ("the alleged Jones e-mail") which suggested that I

had been guilty of misconduct in helping to avoid certain investigations by the United States Federal Bureau of Investigations. He acknowledged that he was unable to ascertain or vouch for its truth but that it cast 'a cloud of suspicion' over me which he suggested was sufficient to debar me from appointment.

"Dr. Alexis, when invited to address the meeting, adopted the comments of Mr. Ferguson, and went on to indicate to the Commission that it was open to the Government if it wished, to appoint me as Attorney General by making me a Senator instead of obtaining my appointment through the Commission.

"The Chairman of the Commission enquired of Dr. Alexis as to the length of time it would take to investigate the allegations contained in the alleged Jones e-mail, to which Dr. Alexis responded 3 to 4 months.

"After Mr. Ferguson and Dr. Alexis presented their objections to my recommendation, the Chairman requested that I comment upon the allegations and the submissions. Having regard to the breath and generalized tenor of their statements and to the fact that I had only minutes before received the voluminous Grounds of Opposition Volume 2, it was extremely difficult to properly articulate an adequate reply. In an effort to defend my good name I presented to the Commission an outline of the history of my tenure in Grenada and my present employment in Jamaica. I also denied any wrongdoing contained in all the allegations made against me.

'The Chairman and other members of the Commission questioned me for the most part with respect to the allegations contained in the alleged Jones e-mail.

I explained to the Commission that all the allegations made against me in the alleged Jones e-mail were false. I explained that insofar as the e-mail suggested that I had been instrumental in preventing the FBI from investigating First International Bank of Grenada ("FIBG"), that it was untrue and implausible in any event as at the relevant time I was not a member of the regulatory body for offshore banks, Grenada International Financial Services Authority ("GIFSA").

"I further informed the Commission that both Colonel Ogilvie and myself had been asked by the Government of Grenada to assist the then Executive Director of GIFSA, Mr. Michael Creft in the regulation of the offshore banking industry. Our advice to Mr. Creft was to the effect that there existed information which suggested that FIBG was fraudulently incorporated and that the Board of GIFSA should undertake investigations of FIBG. Mr. Creft informed both Colonel Ogilvie and myself that the Board of GIFSA had decided that we were not members of the Board therefore it would decline to follow our advice in this regard and that we

did not have any locus to give them any further advice or to get involved. I also informed the Commission that both Colonel Ogilvie and myself were subsequently appointed to the Board of GIFSA about a year after these events.

"Further, in so far as there was suggestion that I was interested in covering up the activities of FIBG, I informed the Commission that Colonel Ogilvie and myself had been responsible for encouraging police investigation of FIBG's activities and further that the only search warrants which had been executed upon the subsidiaries of FIBG had been issued under my watch as Director of Public Prosecutions.

"I informed the Commission that indeed, the only criminal charges that had been preferred to date arising out of the activities of FIBG were preferred on my directions as Director of Public Prosecutions and that the accused persons in that matter subsequently fled the jurisdiction whilst they were released on bail.

"In response to the enquires of the Commission as to my knowledge of Mr. Jones, I informed it that I had met him only briefly whilst he was in Grenada and he had informed me that he was about to be called to the Bar in Grenada and was interested in representing the Government before the Courts. I had accordingly introduced him to the relevant authorities who had indicated that they were seeking persons who could assist in filling vacancies in the Civil Law Department including the post of Solicitor General. I informed the Commission that outside of this limited capacity I had had no dealings with Mr. Jones and that the first time any further relationship between us was suggested was in a newspaper article published in September 2004. I informed the Commission that his newspaper article was libelous and had been and was the subject of defamation proceedings in the High Court and that further there was presently an injunction in place restraining the editor and the newspaper from the publication of similar allegations. A copy of the court proceedings in that matter are now produced and shown to me and are hereto annexed and marked "H.W.5". I have since obtained default judgment in this action.

"I further indicated to the Chairman and other members of the Commission that the President of the Bar Association, Mr. Ferguson was opposed to me because I was supporting the Government of Grenada and he was a member of the opposition party National Democratic Congress which was critical of my support of the Government. I informed the Commission that he was actuated by malice and improper motives in making the allegations against me.

"I further objected to the President of the Bar Association, Mr. Ferguson purporting to comment upon my suitability for public office as I had serious doubts about his bona fides as I had information in my possession which

implicated him in certain criminal matters. The Commission asked me the nature of the criminal matters and I told it that it involved murder. The Commission further asked me what I would do with that information if I were appointed Attorney General. I informed the Commission that the statement was already in the hands of the police and that I would treat with this matter in the same way that I would treat with any other criminal matter. I offered to produce the statement to the Commission but the Chairman refused to himself examine the statement. No other member of the Commission asked for this statement. A true copy of the statement which I referred to and which I offered to produce to the Commission is now produced and shown to me and is hereto annexed and marked "H.W.6".

"At no time during the proceedings did the Commission ask Colonel Ogilvie to comment on any of the issues raised in the proceedings even though he accompanied me as a person pursuant to the invitation of the Commission. The Commission did not at any time inform me of any entitlement to call Colonel Ogilvie or any other person as a witness. The Commission also did not at any time inform me of any entitlement to have a lawyer represent me although it allowed the Bar Association to be represented by two Attorneys-at-Law. Dr. Francis Alexis is a former Attorney General and a former senior lecturer in law at the University of the West Indies. The Commission did not give me any opportunity to cross examine any of the authors and or persons who made allegations against me. The Commission did not in advance of the meeting or during the meeting give me any opportunity to present any affidavits or any other documentary evidence to answer any of the allegations made against me at the hearing. The Commission also did not take steps to summon any official to produce any official records to support the answers I had given to the allegations and did not order the production of any such official records or documents.

"At no time during the meeting of the Commission did the Commission indicate to me any concerns that it had arising from the very generalised documents and submissions of the Bar Association. At no time was I invited to ask members of the Bar Association present any questions concerning the wide-ranging issues they had articulated.

"Further, the Commission did not at any time indicate to me any matter and or allegation which it considered in issue or of relevance so that I could address the same. Neither did it indicate to me any matters in respect of which it was not satisfied in the light of my response. The Commission did not any time inform me of the gist of the case if any which I had to answer. The Commission also did not invite the representatives of the Bar Association to answer any of my responses.

> After my attendance before the Commission I never received any official notice of the decision as to my recommendation to the office of Attorney General.
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> On the evening of Tuesday March 1, 2005, I heard on the electronic media that the Commission did not recommend me for appointment as Attorney General to the Governor of Grenada and that the members of the Bar Association were happy over the outcome. I was subsequently told by the Prime Minister and verily believed that the Chairman of the Commission visited the Prime Minister on the said date and informed him of the Commission's decision in the presence of the Minister of Legal Affairs the Honourable Elvin Nimrod. The Prime Minister further informed me that the Chairman of the Commission informed him that the alleged Jones e-mail was the reason for the Commission not accepting the recommendation of the Government to have me appointed Attorney General."[1]

[14] Mr. S. Bennett QC, counsel for the JLSC does not dispute that the Commission had a duty to act fairly in coming to its decision regarding the appellant. The appellant argued that as part of the duty to act fairly in the particular context of a hearing conducted on an adversarial basis the JLSC had a duty to carry out further investigations of the allegations of wrong doing made against the appellant.

[15] The learned trial Judge dealt with the issue in this way:

> "It was contended that the Commission refused and or neglected to undertake any further investigations in relation to the widespread and very generalized allegations against Mr. Wildman. Mr. Wildman was therefore unable to deal with the specific charges of misconduct. In the circumstances of this case did fairness require further investigations? The Commission was not engaged in the conduct of a disciplinary hearing. It was not engaged in determining whether Mr. Wildman had taken a bribe or otherwise acted improperly. The Commission was engaged in assessing Mr. Wildman's suitability for appointment to the public office of Attorney General…It is for the Commission to decide upon the manner and intensity of any investigation it undertakes into any relevant factor. The scope and scale of the inquiries to be made were primarily a matter for the Commission."[2]

[1] Paragraphs 11-12, and 15-36 Affidavit by Appellant dated 19 July 2005
[2] High Court Judgment paragraphs 55 and 56

In coming to this conclusion the learned trial Judge relied on the authority of R v Royal Borough of Kensington and Chelsea ex p Bayani[3].

[16] In the skeleton argument filed on behalf of the appellant, issue was taken with the reliance by the judge on Bayani on the grounds that that latter case was to be interpreted in its own narrow context of an inquiry into a case of homelessness. In Bayani the respondent applied to the appellant authority for accommodation on the grounds that she was homeless. The authority informed the respondent that they considered her homeless and in priority need, but they regarded her as intentionally homeless for having given up accommodation with her mother in the Philippines which accommodation it would have been reasonable for her to continue to occupy. Under section 62 (2) of the Housing Act 1985 of England, once an authority is satisfied that an applicant is homeless and in priority need of accommodation they must make further inquiries to satisfy themselves whether the applicant is intentionally homeless. The High Court in England quashed the decision of the Authority on an application for judicial review and the Authority appealed. The English court of appeal held that the duty to make inquiries is to make such inquiries as are necessary to satisfy the authority; as it is the authority that is to be satisfied, the scope and scale of the inquiries is, primarily at least, a matter for the authority. However, the inquiries must be those which are necessary to enable the authority to make a decision. If the court is to intervene by way of judicial review it must be on the basis that the inquiries have not reached the required standard in the circumstances of the case. In the course of the judgment Neill L.J. quoted with approval a passage by Lord Brightman in R v Hillingdon L.B.C. ex parte Puhlhofer[4] where he said at page 518:

> It is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case…Where the existence or non existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of the fact to the public body to whom Parliament has entrusted the decision-making

[3] [1990] 22 HLR 406
[4] [1986] AC 484

power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

[17] I am of the view that Bayani is not of narrow application but rather expresses certain general principles. In R v Home Secretary ex p. Doody[5] Lord Musthill expressed similar concepts in different words. He said at page 560:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

[18] In McInnes v Onslow Fane[6] the court was dealing with an application by the plaintiff for a declaration that the British Boxing Board of Control had acted in breach of natural justice and/or unfairly in failing to comply with his request to be informed of the case against him or to grant him an oral hearing. Megarry V-C sitting at first instance distinguished the requirements of a fair hearing in three different kinds of situations. They were: (i) "forfeiture cases where a vested interest was being withdrawn; (ii) application cases where no interest existed at the time of application; and, (iii) cases where there is a legitimate expectation, which differ from the application cases only in that the applicant has a legitimate expectation

[5] [1994] 1 AC 531
[6] [1978] 3 All ER 211

from what has already happened that his application will be granted (e.g. renewal of a license). At page 218 the learned Vice Chancellor said:

> "It seems plain that there is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason; and in such cases the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges (which, in Ridge v Baldwin, Lord Hodson said were three features of natural justice which stood out) are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for membership or a licence. The distinction is well-recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on an application for admission to it.
> The intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable."

[19] It would appear that there are common chords running through these cases which I perceive to be:

- that where no statutory guidelines are set, courts will be slow to interfere with a procedure adopted by an administrative entity in fulfilling a function which could be broadly expressed as 'selection' on the grounds of unfairness;
- the requirements of fairness vary from a high point in forfeiture cases to a low in initial application cases and between the two there are the legitimate expectation cases;
- fairness will often require that where a decision is to be given against the interests of an individual that that individual be given an opportunity to make representations on his own behalf. In that connection the individual should be advised if there are any factors that might weigh against him.

The present case

[20] Recapping the salient facts:

- The power to appoint a public office attorney general rests in the Governor General acting on the advice of the JLSC.
- By letter dated December 23, 2004 the government of Grenada forwarded to the JLSC a recommendation that the appellant be appointed to the public office of attorney general of Grenada.
- The JLSC is governed, as to its procedure by Regulation 8 of the Judicial and Legal Services Commission Regulations, Cap 336 of the laws of Grenada[7] which speaks to no specific procedure other than saying the JLSC "may interview candidates for…appointments."
- Knowledge of the recommendation by the Government came into the public domain and the Grenada Bar Association took a position of strong opposition.
- By letter dated February 23, 2005, (received by the appellant on February 24, 2004) the appellant was invited to a meeting of the JLSC to be held at the Grand Beach Resort, Grenada. Accompanying that letter was Volume 1[8].
- The letter of invitation to the appellant informed him that the Grenada Bar Association would be present, and, that he might be accompanied by a person of his choice.
- The appellant has been a member of the Bar of Jamaica since 1988 and has held various public offices in Grenada such as Director of Public Prosecutions during the period 1994-5. He has also been senior legal counsel in the Ministry of Legal Affairs, member of the Supervisory Authority responsible for advising the Minister of Finance on money laundering issues, among other undertakings in the public service of Grenada. There is no issue as to his qualifications for the post.

[7] Quoted at paragraph 7 above
[8] See paragraph 3 above

[21] I am satisfied that up to the point of the hearing and the decision-making there was no procedural unfairness that would entitle this court to interfere with the decision. This was a case involving an initial application rather than a forfeiture of a vested interest. I would not put it as high as a case involving legitimate expectation, but even if it did, I would remain of the view that there was no procedural unfairness such as to permit this court to interfere with the process of the JLSC. The appellant was given an oral hearing, he knew in advance the case he had to meet and his appointment was considered by a tribunal whose impartiality has not been challenged. As to the need to investigate, as the trial judge indicated this depended on the approach the Commission decided to take to the allegations in relation to the Jones e-mail and the other allegations made against the appellant. If the Commission intended to act upon the allegations as true, then a full investigation was called for. If on the other hand the Commission proposed to treat the allegations as unproven, as the Bar Association acknowledged the Jones e-mail allegation to be, and advanced only to show the reputation of the appellant, the Commission would need to do no investigation but would equally be required to place no reliance on the allegations as true. In the paragraphs that follow, I treat with how the Commission dealt with the allegations.

[22] As learned Queen's Counsel for the respondent put it in his written skeleton argument:

> "The real question for the court in considering the issue of the sufficiency of inquiry in the context of the instant case was whether any reasonable commission considering the evidence that had been made available to the respondent Commission could have been satisfied that it had before it sufficient information to enable it to come to a fair assessment of Mr. Wildman's suitability for appointment."

The right to reasons for the decision

[23] A helpful statement on this subject is to be found in R v Civil Service Board, ex p Cunningham[9] where Lord Donaldson of Lymington MR said the following at page 316:

> "The principles of public law will require that those affected by decisions are given reasons for those decisions in some cases, but not in others. A classic example of the latter category is a decision not to appoint or not to promote an employee or office holder or to fail an examinee. But once the public law court has concluded that there is an arguable case that the decision is unlawful, the position is transformed. The applicant may still not be entitled to reasons, but the court is."

[24] I am of the view that the particular circumstances of this case were not so extra-ordinary as to cause the Commission to depart from a practice of over 35 years and give reasons for its decision. However, once the matter became the subject matter of litigation, the Commission was bound to disclose their reasons for the decision it took. This they did.

[25] The minutes of the meeting of February 28, attached to the affidavit of Angus Smith set out the process by which the Commission arrived at its decision. The many complaints against the appellant were catalogued. One such complaint was the "alleged Jones e-mail" as it is referred to in the affidavit of the appellant and quoted above. There were, however, many other complaints concerning the behaviour of the appellant. At the point in the minutes where the decision is recorded, the minutes state:

> "After discussion the Commission agreed on the following:
>
> [1] that the Commission did not support the recommendation for Mr. Wildman to be appointed to the position of Attorney General, Grenada…"

[26] The affidavit of retired judge Monica Joseph, a member of the Commission, provides further insight into the reasoning of the Commission. It is clear that Justice Joseph did not dissent from the decision taken by the Commission,

[9] [1991] 4 All ER 310

though, according to her affidavit, she discounted absolutely any reliance on the Jones e-mail. Clearly, therefore one can infer that in agreeing with the Commission she relied on the complaints about the appellant's behaviour. I quote her affidavit at paragraphs 4 - 6 on the subject:

> "I have read the two affidavits of Josephine Huggins and Angus Smith. I have not had sight of any document filed on behalf of the Claimant. With respect to the query as to whether I dissented I say that the matter was first discussed by the Commission on 28th February, 2005.
>
> My clear recollection of that meeting is that there were two heads of disagreement by the Bar Association to the proposed appointment of Mr. Hugh Wildman. These two heads can be described as firstly relating to the comments in an e-mail and secondly a complaint as to Mr. Wildman's aggressive conduct. I think it is fair to say that the Bar Association's major concern related to the allegations that it construed as being made or arising out of the e-mail. By its very nature the first amounts to an allegation of a criminal offence and the second relates to what the Bar considered to be an unacceptable attitude for an officer.
>
> Documents including an extract from the said e-mail document had been circulated prior to the said meeting. I expressly stated at that meeting words to the effect that I could not attach any real significance to the contents of the e-mail document without more information. When I made that comment Justice Lyle St. Paul recounted an incident which underscored my misgivings about placing any reliance on the e-mail document, and my clear recollection is that I so stated at the meeting. I also recall saying that one cannot accept at face value comments made in the e-mail document as people do all sorts of things for all sorts of reasons."

[27] Further insight into the reasons for the decision arrived at is provided by Josephine Huggins also a member of the Commission, in her affidavit. She states at paragraph 11:

> "At the conclusion of the interview, the Commission, by consensus, taking into account all the facts and circumstances that it considered relevant, thought that the Claimant was unsuited to be the Attorney General of Grenada. We had regard to several instances of rowdy, uncouth and unprofessional behaviour on his part. Many of these were matters recorded in the judgments of our Courts and in the personal experiences of Judges. When the Claimant was confronted with our perception of this behaviour we expected that he would express contrition and accept some blame. He did not. He expressed little remorse or regret over any of the matters. Generally speaking, he sought either to justify them or to shift the blame on to others for their occurrence; either the Judge had provoked

him or else his opponent had started it or else everyone was wrong and he was right.

Further, we were extremely concerned – not about the e-mail referred to in paragraph 4 above per se – but about assessment of a judge of the Chancery Division of the English High Court as to the interpretation to be placed thereon. Plain and simply, the e-mail suggested that Mr. Jones had been bribing the Claimant. Subsequent to the sending of this e-mail, legal proceedings in the British High Court, proceedings to which Mr. Jones himself was a party, and had or ought to have had an opportunity to explain, justify, deny the authorship of, or otherwise address that e-mail, Mr. Jones evidently was unable to do so either by himself or his Queen's Counsel. Not surprisingly, the judge, in his judgment, placed an interpretation upon the e-mail that was not complimentary of either Mr. Jones or the Claimant.

The decision of the Commission was not one which caved in to pressure from any quarter. In fact, in the presence of both the Claimant and the President of the Grenada Bar, we expressed disapproval of the manner in which the Grenada Bar had approached their campaign against the Claimant. Nonetheless, we had to make a decision, which we did, bearing in mind the general fitness of the Claimant as reflected by his demeanour at the interview, his performance and conduct in his previous employment in the public service in Grenada, and the comments by the Courts thereon, and his conduct in previous public service in territories other than those to which the Courts Order applies namely, Jamaica, and further bearing in mind the Claimant's unwillingness to recognize or admit to any shortcomings on his part. At the time that the decision was made no member of the Commission expressed any dissent from the collective view that the Claimant was not suitable to be appointed to the office of Attorney General of Grenada and no member then dissented from the decision not to advise the Governor General to appoint him."

[28] Whilst the arguments on behalf of the appellant focused almost exclusively on the "alleged Jones e-mail" learned Queens' Counsel failed to deal with, or, in my view, did not deal adequately with the several complaints concerning the appellant's behaviour. Nowhere in the minutes of the meeting of February 28, is there recorded any denial of the incidents of which complaint was made. No wherein the appellant's affidavit does he seek to exculpate himself. Rather, it was the fault of the Grenada Bar Association which had a political agenda and had not welcomed him. I do not believe that any purpose will be served by the repetition of the charges of bad behaviour leveled at the appellant.

[29] Perhaps it is not surprising where the focus of the appellant's arguments lay. In an affidavit filed on behalf of the appellant by the Hon. Elvin Nimrod, Member of the House of Representatives, Attorney General of Grenada, the affiant swore that on the 1st March 2005 he was summoned by the Prime Minister to a meeting with the then Chairman of the Commission, Mr. Justice Adrian Saunders, acting Chief Justice, as he then was. At paragraph 4 of his affidavit the Hon. Elvin Nimrod states:

> "At the said meeting His Honour Justice Adrian Saunders informed us that the Commission decided not to recommend to His Excellency the Governor General that the Claimant [appellant] be appointed Attorney General. His Honour Adrian Saunders stated that the reason for the decision of the Commission was that the Commission had before it an email which he stated was sent by one Lawrence Jones. He said that the Commission had had regard to the contents of the email and the Commission concluded therefrom that the Claimant was unsuitable to be recommended for the appointment of Attorney General."

[30] One may wonder at the accuracy of what the appellant said, the Hon. Prime Minister, and what the Hon. Attorney General , who bore witness for the appellant, recollected of what the Commission's Chairman, the Hon. Adrian Saunders, Acting Chief Justice, told the Prime Minister was the reason for rejecting the appellant. It is not a matter on which the trial judge pronounced and its resolution is not necessary for this appeal to be determined because the issue was not what Justice Saunders told the Prime Minister were the reasons for the Commission's decision but what, in fact, were the reasons for the Commission's decision. Those reasons were given directly to the court in the affidavits of Angus Smith and Josephine Huggins, respectively the secretary and a member of the tribunal. That the reason was not the Jones e-mail, was confirmed by Justice Joseph, who swore an affidavit on behalf of the appellant. The reason for the decision, as stated in the affidavits sworn on behalf of the tribunal and summarized in the language of Ms. Huggins, was the "rowdy, uncouth and unprofessional behaviour" on the part of the appellant.

[31] I am, therefore, of the clear view that the decision of the Commission was in no sense aberrant; it was clearly a decision that a commission faced with the information with which the Commission was faced could come to. I remind myself that the function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged. If the process was fair and the decision not deviant, then the order sought under the judicial review must be refused.

[32] Given the view expressed at paragraph [30] above, when the letter of denial came from Mr. Jones, there was no need to reconsider the decision.

Apparent Bias

[33] Learned Queen's Counsel for the appellant cited the House of Lords case of Porter v Magill[10] as defining what a court should look at as the criterion for determining bias. It was thus expressed by Lord Hope of Craighead[11]: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased."

[34] It should be stated that learned counsel was at pains to point out that what was being complained of was apparent rather than real bias based on the Porter v Magill test.

[35] The circumstances advanced in support of the appellant's position as adumbrated by learned Queen's Counsel for the appellant are as follows:

- the learned trial judge's salary apparently had not been paid in a timely manner by the Government of Grenada;
- Mr. Ruggles Ferguson, president of the Grenada Bar Association (GBA), had taken up the issue of the late payment of the judge's salary with the Grenadian authorities;

[10] [2002] 2 AC 357
[11] Ibid at page 494

- on April 4th 2005, or one day before the delivery of the judgment in this matter, Mr. Ferguson wrote to Mr. Robert Branch, Registrar of the Supreme Court in terms partially reproduced at paragraph 36 below;
- Mr. Ferguson as President of the GBA had been one of the persons leading the opposition to the appellant's appointment as Attorney General and who had presented the dossier in opposition to the appellant;
- no reasonable person could assume that the letter "would have been written without the knowledge, involvement and/or at the instigation of the learned judge"[12];
- the trial judge made no comment or criticism of the GBA for their conducting of public protests and organizing of a boycott of the Law Courts;
- on the next occasion that the appellant appeared before the trial judge (after delivery of the judgment in this case) the judge refused to hear the appellant and walked out of his own court.

[36] The letter of April 4, 2005 referred to at paragraph 35 above was, in part, in the following terms:

> "Dear Sir,
>
> Re: Consistently Late Payment of Justice Davidson Baptiste's Salary
>
> Further to our telephone conversation (Ferguson/Branch) this morning (April 4th), I write to confirm the deep and continuing concerns of the Bar regarding the above.
>
> Since his arrival in the Jurisdiction (September 2005), Justice Baptiste has been receiving his salary late virtually very month – several days after the month has ended! He has raised this matter, and other matters causing great inconvenience to him, on several occasions.
>
> In my capacity as President of the Bar, I have raised this issue with you and other senior administrative personnel at the Supreme Court Registry, the Ministry of Legal Affairs and the Government Treasury. In response to my concerns, I was assured – and reassured – since December 2005 and several times thereafter that such unacceptable late payment would not be repeated…

[12] Paragraph 9.3 of written skeleton argument of counsel for the appellant

> On the contrary, it is my understanding that the Judge continued to receive his salary late with very few exceptions. This morning (April 4th) it was drawn to my attention that up to yesterday (April 3rd) the Judge had checked with the bank, where his salary is assigned, and –like other months – it had not yet reached his account. One can very well imagine his frustration.
>
> Given the problems that Justice Baptiste experience in the last several months regarding this matter, his several complaints and the high judicial office he holds, we find it incomprehensible that the problem remains unchecked and recurring, causing great embarrassment to himself and his family. What makes matters much worse is the apparent indifference being shown to the Judge and the unwillingness and/or inability to resolve the problem…"

[37] I am of the view that in any of the jurisdictions served by this court, the largest of which is St. Lucia with a population of approximately 170,000 persons, it is inevitable that there will be social contact between judges assigned to the jurisdiction, of which there are only two, and practitioners, whether they have an active case before the judge or not. Indeed, active advocates will almost always have active cases before judges. Judges, unless they are to lead the lives of Trappist monks, will inevitably intermingle at a social level with members of the Bar with whom they have an identity of interest. Based upon my thirty-five years of private practice, this has always been so. There is an acceptance in our societies that there will be contact between judges and lawyers, without a lowering of the expectation of independent fairness. In other words, the informed observer must be a Grenadian informed observer.

[38] Given the views expressed above on the fairness of the process employed by the JLSC, I find no reason to go further on the issue of apparent bias.

[39] In conclusion, I would dismiss this appeal and confirm the findings of the trial judge.

[40] Part 56.13 (6) reads as follows:

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

In The Attorney General v Martinus Francois[13] this court made a short analysis of the circumstances in which costs would be ordered in cases such as this one[14]. I do not consider that the appellant has acted unreasonably in making the application or in the conduct of the application or the appeal. In the circumstances I make no order as to costs in this appeal. There was no specific appeal against the costs order in the court below other than the generic request that the judgment of the court below be set aside. The learned trial judge not having addressed his mind to the reasonableness of the application (most probably because he was not addressed on the issue) I feel able to reverse the order for costs made against the appellant in the court below. The result, for the sake of clarity is that no order for costs is made against the appellant/applicant either in this appeal or in the court below.

Michael Gordon, QC
Justice of Appeal

[41] RAWLINS, J.A.: In concurring with the decision of my brother, Gordon JA, I shall merely point out that the purview of the court in this matter is quite narrow. The court is not involved in a review of the merits of the decision of the Commission. The court cannot therefore determine the suitability or otherwise of the appellant for the Office of Attorney General, particularly in the absence of a trial process in which allegations and evidence are not tested. That determination falls within the purview of the Commission. The jurisdiction of the court is to review the decision making process of the Commission in the light of the applicable legal principles for such a review, which Gordon JA has analyzed. The decision making process of the Commission fell within the compass of those principles. Since this was not a spurious case and the conduct of it by the appellant was not unreasonable, there

[13] St. Lucia, Civil Appeal No. 37 of 2003, delivered March 2004
[14] Ibid at paragraphs 154 et seq

can be no order as to costs either in the High Court or in this Court by the operation of rule 56.13 of CPR 2000.

Hugh A. Rawlins
Justice of Appeal

I concur.

Albert Matthew
Justice of Appeal [Ag.]