COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2018/PUB/JRV/FP/00006

IN THE MATTER OF an Application for Judicial Review pursuant to Order 53, Rules of the Supreme Court

AND IN THE MATTER of a Search and Production Order pursuant to section 72(a) of The Child Protection Act, Part IV, Ch. 132, Statute Laws of The Bahamas

AND IN THE MATTER of an Interim Care Order pursuant to section 79(1) of The Child Protection Act, Part IV, Ch. 132, Statute Laws of The Bahamas, dated the 7th day of May A.D. 2018 and extended the 16th day of August A.D. 2018

BETWEEN

THE QUEEN
AND
THE HONOURABLE FRANKIE CAMPBELL
THE MINISTER RESPONSIBLE FOR SOCIAL SERVICES
AND URBAN DEVELOPMENT

First Respondent

AND

FRAN BRICE
(In her capacity as Chief Welfare Officer
in the Department of Social Services)

Second Respondent

AND

STIPENDIARY & CIRCUIT MAGISTRATE, CHARLTON H SMITH
Third Respondent

AND

THE ATTORNEY GENERAL
OF THE COMMONWEALTH OF THE BAHAMAS

Ex Parte

GEORGINA LARODA

BEFORE The Honourable Mrs Estelle Gray Evans, Senior Justice

APPEARANCES: Mr Paul Wallace-Whitfield for the applicant

Mrs Eurika Coccia and Mr John Trevor Kemp for the respondents

DECISION

Gray Evans, Sr J.

1. On 20 September 2018, this court granted leave, ex parte, to the applicant, Georgina Laroda, to apply for judicial reviewof the following decisions:

(i) A Search and Production Order ("the first decision") and

(ii) An Interim Care Order ("the second decision"),

(the said orders hereinafter together referred to as "the said Decisions") made by the third respondent, Stipendiary and Circuit Magistrate, Charlton H. Smith, pursuant to the provisions of The Child Protection Act, chapter 132, Statute Laws of The Bahamas, with respect to each of the following children: Laron Laroda, born 9 May 2003; Lanai Laroda, born 4 September 2005; LavezLaroda, born 9 September 2007; and LashadLaroda, born 6 June 2009 ("the said children").

Background

2. The facts leading up to the issuance of the said orders and the subsequent commencement of this action, as gleaned from the affidavits and documents hereinafter referred to, areset out hereunder.

3. On 2 May 2018, the Department of Social Services, Child Welfare Division, received a report from Mr Quinton Laroda, the father of the said children, that Laron and Lanai had, allegedly, been physically abused by their mother, the applicant.

4. Mr Laroda and the applicant are divorced. They have joint custody, but the applicant has care and control, of the said children.

5. According to Mr Laroda's report, on or about Monday, 30 April 2018, Laron and Lanai, at the time aged 15 and 12 respectively, were punished by the applicant for not completing their chores. They ran away from their mother's house in Arden Forest to their father's housein Caravel Beach. The applicant went to Mr Laroda's residence and took the children back home with her. It was then that she allegedly used a wire to administer punishment and she also taped their mouths and stripped off their clothing before "beating" them with the "wire", resulting in the children receiving bruises and swelling, after which they were "made" to take cold showers.

6. On Wednesday, 2 May 2018, Probation Officer, Jenelle Cumberbatch, collected Lanai and Laron from school, Sister Mary Patricia Russell Junior High, and took them to the Child Welfare Division of the Department of Public Services. Ms Cumberbatch is the social worker assigned to that school.

7. The two children were interviewed separately by Trainee Welfare Officer, Genae Roberts, who recommended that the matter be investigated as a matter of urgency.

8. According to the file notes exhibited to Ms Hepburn's affidavit, Ms Roberts also spoke to the applicant shortly before 5:00 p.m. on 2 May 2018, informed her of the allegations of abuse being made by the children against her; and advised her that as a result the children would be placed respectively in Columbus Houses for Boys and Girls overnight.

9. The notes record that the applicant voiced her opposition to that plan and expressed her concerns. However, the Department maintained its position and asked the applicant to taketo the Department some clothing and necessities for the two children.

10. The following day, 3 May 2018, the applicant met with Ms Roberts and Chief Welfare Officer, Fran Brice, the second respondent herein, during which time, the applicant gave "her side" of the events, allegedly admitting to administering the treatment of which the said children complained; although the notes reflect that the applicant "saw it as well-deserved punishment", similar, the applicant allegedly said, to what had been administered to her by her own mother when she was growing up.

11. The notes also reflect that the applicant allegedly said that one of her other children, Landy, tried to stop her while she was punishing Lanai; that "she was able to get her cutlass and threatened that the police would find his body chopped up, if he did not leave; that Landy got the cutlass and ran out of the house, while the applicant proceeded to "beat" Lanai as she had done Laron – with a wire.

12. In an affidavit by Genae Roberts filed in the Magistrate's Court on 7 May 2018, Ms Roberts averred that the applicant "confessed that she taped her children's mouths, made them strip their clothing and had beaten them with a belt and a wire."

13. The notes reflect that the applicant and Mr Laroda met with Ms Brice and Ms Roberts on 4 May 2018 and were informed that although the allegations under investigation involved only Laron and Lanai, all of the minor children, namely, Laron,Lania, Lavez and Lashad,living with the applicant would be placed in the care of the Minister as there was a risk that the others may be subjected to similar treatment.

14. It appears that after some discussion with Mr and Mrs Laroda, the parties were not able to agree a placement solution for the children. Laron and Lanai were left in Columbus Houses for Boys and Girls while the two younger children were permitted to remain with the applicant during the weekend,on her undertaking to bring them to the Department of Social Services on the following Monday, 7 May 2018; which she did.

15. On Monday, 7 May 2018, search and production orders for the said children were requested and obtained by the Department of Social Services from the third respondent. The transcript of proceedings in the Magistrate Court for that day statesthe following:

> "Mrs G Roberts c/o Social Services present Affidavit for search and protection [sic] and Care Order with respect to the minor children. Court granted Order based on Affidavit. Summons to issue."

16. Thereafter, the said children, Laron and Lanai, Lashad and Lavez, were placed in the care of the first respondent, the Minister Responsible for Social Services, and later with their father.

17. Also, on 7 May 2018, a summons was filed in the magistrate's court requiring all parties concerned to attend Juvenile Court No. 2 on 19 July 2018 on the hearing of "the said matter. That the child is in need of care and protection.

18. According to the Magistrate's Court transcript of proceedings for 19 July 2018:

> "The respondents appeared before the Panel. Children are in the care of their father who assist [sic] by his mother. Social Services to continue with investigation and report. Respondent Ms Laroda had made admission with respect to the allegation but stated that it was not her intent to harm the children but discipline them. The recommendations as set out by Social Services is [sic] adopted. Care Order extended. Adjourned for further report."

19. While the transcript for 19 July 2018 does not state the period for which the care order was extended, included amongst the documentary evidence is a care order issued pursuant to section 73 of The Child Protection Act in respect to each of the said children by which it was ordered that the respective child "be committed to the care, custody, and control of the Minister with responsibility for Social Services who is a fit person willing to undertake the care of the said child for six (6) months."

20. (Section 73 of the CPA provides for the duration, renewal and review of care orders with respect to children under the age of 17 years old).

21. On 29 August 2018, the applicant filed her application for leave to apply for judicial review, which application was heard, and leave granted, ex parte, on 20 September 2018.

22. The magistrate court's transcript of proceedings for 20 September 2018, shows that the learned magistrate revoked/cancelled the respective care orders and ordered that the children be returned to the care of the applicant by 7:00 p.m. that day.

23. In that regard, included amongst the documentary evidence is an order, duly signed by the third defendant and two juvenile panel members, in the following terms:

> "The Care Order made by the Juvenile Panel sitting in Magistrate's Court No. 2 on 19 July 2018 A.D., that the Care Order placing the child/children Lanai, Lashad, Laron, Lavez Laroda, in the care of the Minister Responsible for the Department of Social Services, is hereby revoked/cancelled.
>
> Dated this 20th day of September A.D. 2018."

The application for Judicial Review

24. Pursuant to the aforesaid leave, the applicant, on 24 September 2018, filed an originating notice of motion seeking orders of certiorari, mandamus, prohibition, injunction, a declaration, damages and costs.

25. The grounds and reasons on which the aforesaid relief is sought are that the learned magistrate acted ultra vires in granting the aforesaid orders; that the learned magistrate, in ordering the said children to be removed from the applicant's care and control, breached the rules of natural justice; that the aforesaid decisions were unreasonable in that the magistrate failed to take into account relevant considerations.

26. Both in support of her application for leave as well as the substantive judicial review application, the applicant relies on her affidavit filed on 29 August 2018 in which she deposed, inter alia, as follows:

> (1) That I am the mother of seven children ranging from 22 years of age to 9 years of age, and the four children the subject of this application, viz, Laron Laroda, Lanai Laroda, Lavez Laroda and Lachard Laroda, are the four youngest of my said children. They are aged 15, 12, 10 and 9 years old respectively.

(2) That by order of the Stipendiary and Circuit Magistrate Charlton H Smith sitting in the Magistrate's Court No. 2 Freeport, Grand Bahama, my four children, Laron Laroda, Lanai Laroda, Lavez Laroda and Lachard Laroda, were declared to be in need of an Interim Care Order and were ordered to be removed from my custody, care and control and placed in the custody, care and control of the Minister Responsible for the Department of Social Services for a period of ninety days while further investigations are being carried out. I was at no time whatsoever notified by the Department of Social Services or the Magistrate's Court of the hearing, or of its nature or of the ramifications of such a hearing. I was denied the right to be heard in advance of my said minor children being removed from my custody, care and control by the learned Magistrate. I am advised by my attorney and verily believe that that constitutes a breach of the rules of natural justice viz the *audi alteram partem rule* ("let both sides be heard").

(3) That my children have yet to be brought before the Magistrate's Court, despite the legal requirements of Section 79(2) of the Act, that they be produced to the Court within forty-eight hours of their removal under the subject (or any) search and production order

(4) That I am advised by my attorney and do verily believe that the provisions of Section 62 of the Act have not been complied with, and the grounds for a care order (interim or otherwise) have not been established, by the report of the Second Respondent or at all. For example, I have not to date, been charged with any of the offences enumerated in Section 62(1) of the Act.

(5) That I am advised by my attorney and do verily believe that the provisions of Section 63 of the Act have not been complied with. The report of the second respondent dated 17 July 2018 makes no mention whatsoever of her having referred the matter of my alleged abuse of my children to the Director of Social Services, as required by section 63(1) of the Act.

(6) That it was the second respondent who unilaterally and without any or any proper investigation or without any or any sufficient evidence decided that my parental rights ought to be suspended in respect of Laron Laroda and Lanai Laroda, and it was she who also unilaterally decided that the two younger children not originally involved in my acts of discipline, viz Lavez Laroda and Lachard Laroda should also be removed from my custody, care and control by means of a search and production order – again, without any investigation or evidence to support or substantiate her decision. In fact, the second respondent was responsible for taking Laron Laroda and Lanai Laroda from me and placing them in the Grand Bahama Children's Home on the 2nd May 2018, five days prior to the making of the impugned Care and Production Orders.

(7) That I decided to familiarize myself with the provisions of the Act, with a view to impressing upon the Third Respondent at the adjourned hearing of the matter on Thursday, 16thAugust 2018, the error of the Magistrates' Court and Department of Social Services in the making of the impugned Orders and the removal of my minor children from my custody care and control. Despite my arguments that the interim care order expired on 5th August 2018 and, not having been renewed during its currency was incapable of being renewed

and could not be extended in any event, pursuant to the provisions of section 76(2) and section 76(3) respectively of the Act, the third respondent ordered that the children remain in the care of their father, Quintin Laroda, and that were be a review in six weeks. As best as I am aware there is no express provision in the Act which permits children taken into the care of the Minister Responsible for Social Services to be removed therefrom and placed with the other parent.

(8) That out of frustration and exasperated by the situation, I, on the 17 August 2018 wrote the Acting Director of Social Services, Mrs Lillian Quant-Forbes, putting the events leading up to the renewal of the Interim Order into a chronology, complaining also about what has happened to my minor children and myself, and requesting that changes be made immediately within the Department of Social Services to prevent such injustices from happening in the future to other Bahamian parents as having happened to me and my children.

(9) That I therefore humbly apply to this court for leave to apply for Judicial Review of the Search and Production Order dated 7thMay 2018 and of the Interim Care Order of the 7thMay 2018 and its extension dated the 16thAugust 2018.

27. Exhibited to the applicant's affidavit are:

(1) Copies of the Search and Production Orders with respect to each of the said children;

(2) A copy of a report from Fran Brice, Chief Welfare Officer, dated 17 July 2018 recommending that care orders be granted placing the said children in the Care of the Minister Responsible for Social Services for a period of six (6) months; and

(3) A copy of the said letter to Mrs Lillian Quant-Forbes dated 17 August 2018.

The Law/Authorities

28. By section 19 of the Supreme Court Act, chapter 53, Statute Laws of The Bahamas, the court is empowered to hear judicial review applications and the rules relating to judicial review proceedings are to be found in Order 53 of the Rules of the Supreme Court (RSC).

29. An application for judicial review requires the leave of a judge. Suchapplication may be made ex parte. See section 19(3) of the Supreme Court Act and RSC Order 53 rule 3 respectively.

30. It is common ground that an applicant for leave to apply for judicial review must satisfy the court that (i) he has a sufficient interest in the subject matter [rule 3(7)]; that (ii) he has an arguable case with a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: See Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; Sharma v Brown-Antoine [2006] UKPC 57; [2007 WLR 780, para 14; Attorney General of Trinidad and Tobago v Ayers-Caesar [2019] UKPC 44; Privy Council Appeal No. 0014 of 2019; and that (iii)he has not waited too long to make his application: See RSC Order 53 rule 4(1) which provides that an application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made.

31. It is accepted that as the biological mother of the children and the person against whom the said decisions were made, the applicant has a sufficient interest in the subject matter to commence judicial review proceedings. The said decisions having been made on 7 May 2018, and the application for leave having been made and granted on 20 September 2018, it is clear that the application was well within the period limited by RSC Order 53 rule 4(1) aforesaid.

The grant of leave

32. At the hearing for leave on 20 September 2018, counsel for the applicant represented to the court that he had just left the Magistrate's Court where he had appeared in relation to this matter and had invited the learned Magistrate to "restore the status quo" by returning the said children to the applicant. However, he said, the learned Magistrate had declined his invitation. Hence the applicant proceeding with the application for judicial review.

33. So, having regard to counsel for the applicant's representation that the third respondent had "refused to restore the status quo" when requested by counsel for the applicant to do so, coupled with the allegations made by the applicant in her said affidavit, and no evidence that the interim care orders had been revoked or cancelled, I was satisfied that the applicant had an arguable case and that, in my judgment, she had met the criteria for obtaining leave to move this court for judicial review of the said decisions. Consequently, such leave was granted as aforesaid.

Application to set leave aside

34. By summons filed 11 December 2018, the respondents apply, inter alia, to set aside the aforesaid leave.

35. In support of that application, as well as in opposition to the substantive judicial review application, the respondents rely on the affidavit of Aramantha Hepburn filed on 14 February 2019 and the affidavits of John Trevor Kemp filed on 29 May 2019, 6 November 2019, and 30 January 2020, respectively.

36. So far as is relevant for the purpose of this decision, Aramantha Hepburn deposes, inter alia, that the subject children were released from care; that none of the actions taken by the Department of Social Services and or their agents was unlawful; that as the welfare and safety of the said children are of utmost importance, "it is their duty to ensure the safety of children in situations where there is a possibility that such children are in danger and are at risk of being abused, physically or mentally"; that the Magistrate made the proper decision to grant care orders in order to have the children removed from Mrs Laroda's care; that in light of the matters alluded to, a decision was made and there was a need to isolate the children for their own protection or at least until such time as a thorough investigation could be conducted; and that every decision made pertaining to this matter was done out of an abundance of caution and for the sole purpose of protecting the welfare of the said children that were removed from their mother's care.

37. In his affidavit filed 29 May 2019 Mr Kemp avers, inter alia, that the application for judicial review is a moot exercise in that the children were placed back in the care of the applicant"after she got her attorney involved in the matter"; and that any order granting leave ought to be set aside in light of the foregoing and in light of the facts of the matter now being brought before this honourable court.

38. Exhibited to Mr Kemp's 30 January 2020 affidavit are copies of "the transcript of the proceedings of Stipendiary and Circuit Magistrate Charlton H. Smith and correspondence relating to this matter."

39. The learned authors of the English Supreme Court Practice 1997, say: "It is open to a respondent (where leave to move for judicial review has been granted ex parte) to apply for the grant of leave to be set aside but such applications are discouraged and should only be made where the respondent can show that the substantive application will fail."(See paragraphs 14/62-14/64).

40. The respondents say that this is a case where the substantive application will fail and, therefore, the aforesaid leave should be set aside.

41. In that regard, counsel for the respondents submits that there is no merit in the application for judicial review sought by the applicant as there were no procedural irregularities in the granting of the said orders and while it is accepted that the lower court must act justly, fairly, judiciously, and within its statutory power, the court must also act with the overriding objective of the CPA, that is, in the best interest of the child.

42. Moreover, counsel for the respondents point out,the decisions which the applicant seeks to have reviewed have been spent and or revoked/cancelled. Consequently, the respondents say, as there is no decision to be reviewed, to proceed with the judicial review would be a moot and purely academic exercise, as no remedy lies if there is no decision to quash. For that position, the respondents rely, inter alia, on the case of R v Statutory Visitors to St Lawrence's Hospital, Caterham (1953) 1 WLR 1158, where the court said "that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision." See also Macnaughton v Macnaughton Trustees [1953] SC 387; and Callenders& Co. (a Firm) v The Comptroller of H.M. Customs [2013] 2 BHS J. No. 33.

43. On the other hand, counsel for the applicant argues that the threshold for obtaining leave to apply for judicial review is low – the applicant merely having to show that she has an arguable case: See Sharma v Brown-Antoine[2006] UKPC 57; [2007] 1 WLR 780; The Attorney General of Trinidad & Tobago v Ayers-Caesar [2019] UKPC 44); and,in his submission, the fact that the court granted leave shows that the applicant had met that threshold. Therefore, he submits, the aforesaid leave should not be set aside.

44. Furthermore, while he does not concede that there was no longer an order to quash, counsel for the applicant argues that even if the said orders had been spent and/or revoked/cancelled, the court, nevertheless, had a discretion to refuse to set aside the aforesaid leave and to proceed to hear the judicial review application. In support of that submission, counsel for the applicant relied on the decision of the Court of Appeal in the case of Lucayan Towers South Condominium Association and others v Douglas Prudden and others, SCCivApp No. 37 of 2018, a case in which the Court of Appeal heard the appeal even though the substantive issue had fallen away.

45. I am mindful that applications to set aside leave to apply for judicial review where the same has been granted ex parte ought only to be acceded to where the respondent can show that the substantive application will fail.

46. I am also mindful that because of the nature of judicial review proceedings, where there is no decision to review, a judicial review will not lie or an application therefor is likely to fail.

47. Moreover, I am mindful that even where a case falls into one of the categories for which judicial review lies, the reviewing court has a discretionwhether or not to grant the relief sought by the applicant, even where leave to apply has been granted.

48. As I indicated, counsel for the applicant does not concede that there are no longer any orders to be quashed or reviewed. Curiously, however, during a discussion between counsel and the court at the hearing on 30 January 2020, counsel for the applicant said that while the said orders were extant at the time this action was commenced on 29 August 2018, by the date the application for leave was heard and leave granted, 20 September 2018, the "interim care orders and the search and production order had actually expired in terms of the dates which he [the third respondent] had imposed. So, on the date when we appeared before him on 20 September the order had expired. He was intimating to us that he intended to renew them. And I suggested to him that he would be making a grave error by doing so." (See transcript of proceedings 30 January 2020, page 22, lines 23-30).

49. As I understood him, counsel for the applicant said he continued with the application because the magistrate was "intimating to the parties that he intended to renew or re-instate the orders".

50. Additionally, counsel for the applicant said that the reason for seeking orders of prohibition and injunction was "because of the uncertainty as to whether the respondents might again and again wrongfully impose search and production orders or interim care orders which are not in conformity with the provisions of the CPA, thereby resulting in the unlawful removal of the minor children from the applicant's care."

51. Whether or not the said orders had been spent or expired prior to the grant of the aforesaid leave, it is clear that at the hearing before the third respondent on 20 September 2018, which I accept occurred subsequent to the grant of the aforesaid leave, the said care orders were revoked/cancelled by him and the said search and production orders, if not spent prior thereto, were certainly revoked/cancelled when the said care orders were revoked/cancelled by the third respondent on 20 September 2018.

52. Consequently, I find that at the date of the hearing of the respondents' application to set aside the aforesaid leave, there were no longer any decisions to be reviewed, and, therefore, the issues raised in the substantive judicial review application have, since the grant of the said leave, become moot and are of academic interest only.

53. The question then is whether, this court should, in the exercise of its discretion and,in the circumstances of this case,refuse to set aside the aforesaid leave and proceed to hear the substantive judicial review application, as urged by counsel for the applicant.

54. In the case of Macnaughton v Macnaughton Trustees [1953] SC 387 at 392, Clerk-Thompson, LD expressed the following view:

> "Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions and that they have no concern with hypothetical premature or academic questions..."

55. And in Ainsbury v Millington [1987] 1 WLR 379, Lord Bridge of Harwich, with whom the other Law Lords agreed, said at page 381:

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

56. In relation to public law matters, the issue was discussed more recently in the case of R (on the application of YA) v Secretary of State for the Home Department [2013] EWHC 3229 (Admin)where Patterson J, at paragraph 36, outlined what he considered to be the prevailing English approach to dealing with academic issues arising in public law appeals of the type before him as follows:

> "36. In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of applications now before the court. The first condition is in the words of Lord Slynn in Salem (supra) that "a large number of similar cases exist or anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs."

57. It is noted that in arriving at that conclusion, Patterson J relied on the following statement of principle by Lord Slynn in the House of Lords decision in R v Secretary of State for the Home Department ex parte Salem [1999] 1 AC 450, which he found had not been disapproved or qualified in any later case:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

58. More specifically on the issue of whether leave to apply for judicial review ought to have been granted where the decision sought to be reviewed had been rescinded, the Court of Appeal in a majority decision in the case of Callenders& Co. (above) said at paragraph 32:

> "32 At the risk of stating the obvious, judicial review seeking prerogative orders cannot take place in a vacuum; there must be an unfair or unlawful decision to quash by certiorari, a public duty not being performed which may be enforced by an order of mandamus to compel its performance, ultra vires proceedings which may be restrained by an order of prohibition, or public acts being performed or threatened which may be stopped by injunction. If there is no decision there can be no judicial review to quash the non-existent decision, if there is no public duty there can be no judicial review to seek an order of mandamus to compel its performance, and if the public body is not performing or threatening to perform any public act unlawfully there can be no judicial review to obtain an injunction or order of prohibition to stop it. The same applies to declarations sought in the judicial review process."

59. However, counsel for the applicant has urged upon this court the approach of theCourt of Appealin the Lucayan Towers South case cited above.

60. In that case, the Court of Appeal considered the approaches of courts in England and Newfoundland, Canada, in cases where the substantive or concrete issue in dispute had disappeared.

61. The Court of Appeal noted that in the English cases, the courts' approach is to apply a two-step test whereby theydecline to hear such appealsunless there were exceptional circumstances such as where two conditions are satisfied, namely, that "a large number of (or at least) similar cases exist or are anticipated"; and that the decision in the academic case will not

be fact-sensitive. See R (on the application of YA) v Secretary of State for the Home Department and R v Secretary of State for the Home Department ex parte Salem [supra.

62. The Court of Appeal found the English approach to be a "rigid and exclusionary" one.

63. On the other hand, the approach of the Canadian court in the case of The Attorney General for the Newfoundland and Labrador v I.N. et al is to undertake a two-stage inquiryby determining firstly,whether the tangible and concrete dispute has disappeared and the issues for determination have become academic; and secondly, whether the court should nonetheless exercise its discretion to hear the appeal.

64. Following the approach of the Canadian court, the Court of Appeal in the Lucayan Towers case determined firstly, that,as the interlocutory injunction was no longer required by the appellants at the appellate stage, the substantive issue on the appeal had become moot; and secondly, that, in the circumstances of that case, they would nevertheless hear the appeal.

65. In preferring the Canadian approach, the Court of Appeal expressed the view that that approach "allows for greater flexibility and has the obvious advantage of leaving the appellate court free to exercise its discretion in a deserving case, on a case by case basis, as it sees fit and completely uninhibited by artificial pre-condition." Para 36.

66. As I said, counsel for the applicant urged upon this court the procedure followed by the Court of Appeal in the Lucayan Towers caseabove.

67. However, for the reasons set out hereunder, I am not persuaded that this is a case in which this court, having determined that the substantive issue has become moot and or academic, should, in the exercise of its discretion, allow the judicial review to proceed.

68. Firstly, while a number of cases cited, including the Newfoundland and the Lucayan Towers cases, dealt with appeals where the issue had become moot and academic, the English cases of YA and ex parte Salem referred to in the Lucayan Towers case, as well as the Callenders case, all dealt specifically with public law matters, as does the present case.

69. Secondly, as I understand the decision in the Lucayan Towers case, while the Court of Appeal determined that the substantive issue had become moot, the Court also recognized that they could not resolve the ancillary issue of the costs which had been awarded against the appellant in the court below, without determining the substantive issue, that is, whether the injunction should have been refused. Hence they decided in the exercise of their discretion to hear and determine the appeal, notwithstanding the substantive issue had become moot.

70. Thirdly, as pointed out by the Court of Appeal in the Lucayan Towers case, the English approach is employed particularly in public law cases as a strategy to preserve valuable judicial time and to ensure that only points of law of some general importance are brought before the court for determination. See para 34.

71. In any event, it seems to me that whether the English or Canadian approach, both require the determination firstly of whether or not the substantive issue has become moot and if so, whether there is any good reason for the court, nevertheless, to hear the matter.

72. It seems that in the English cases, the "good reason" is "any exceptional circumstances" which are narrowed down to instances where, firstly, there are or are likely to be a number of such or similar cases and a judicial determination of the issue, although academic, may be of interest to the public; and secondly, where the case is not too fact-sensitive; whereas the Canadian case and the Court of Appeal in the Lucayan Towers case leave it to the Court to decide based on the circumstances of the case what may be that "good reason" for the court to hear the case.

73. In this case, there is no dispute that the said orders/decisions are spent and or have been revoked/cancelled. There is no evidence of any ancillary issue, such as the costsissue in the Lucayan Towers case, left unresolved. There is also no evidence of any exceptional circumstances as mentioned in the cases of YA and ex parte Salem, or, in my judgement, otherwise. Further, there is no evidence that a large number of similar cases exist or are anticipated; and, in my view, having regard to the circumstances of this case, the allegations made by the applicant in her said affidavit, the transcript of proceedings in the magistrate court and the documentary evidence exhibited to Ms Hepburn's said affidavit, the decision in this case is likely to be fact-sensitive.

74. Further, while I accept, as counsel for the applicant submits, that one of the roles of the court in cases such as the instant case, is to give guidance to the lower courts, as the learned author of Judicial Review Handbook, sixth edition, at paragraph 4.6 notes that "...even that function is recognised as a function which arises out of deciding a specific dispute requiring resolution." The learned author continued: "In general judges need persuading that it is right to entertain a judicial review challenge where the issues are, or have become, academic or hypothetical."

75. For the reasons set out above, I am not persuaded that this is a case in which it is right to entertain a judicial review challenge where the issues are now academic or moot. As the learned author of the said Judicial Review Handbook observed: "Courts do not like holding moots".

76. So, in the light of the foregoing, and in view of the material now available, the authorities cited, the said decisions having been spent and or revoked/cancelled, in my judgment, the applicant does not have an arguable case for the orders sought since there is no decision to quash by an order of certiorari; no public duty, performance of which needs to be compelled by an order of mandamus; no performance or threatened performance of any public act to stop or prevent by an order of prohibition or injunction.

77. Similarly, with respect to the declaration sought by the applicant, namely that the aforesaid orders are void ab initio and are therefore null and void and of no legal effect whatsoever.

78. It is settled law that the court will not make declarations of right in hypothetical cases. See Callenders& Co. supra and the oftentimes quoted dicta of Clerk-Thompson, LJ in Macnaughton v Macnaughton Trustees supra that "it is only with live and practical issues that the court is concerned."

79. In the result, then, theaforesaid leave to apply for judicial review granted to the applicant on 20 September 2018 is hereby set aside on the grounds that the applicant does not have an arguable case and the substantive application will, in my judgment, fail.

80. In the words of Schiemann J in the case of R v Horseferry Road Magistrates ex parte Prophet [1995] Env. L.R. 104 at 112, which I respectfully adopt:

> "Applicants should bear in mind that judicial review is a discretionary remedy. This Court will not grant it when it will no longer achieve anything useful. This Court, as part of its decision making process in a judicial review case, will usually ask itself this question: if the decision under attack is quashed, and we send the case back to the decision-maker, what are the options open to that decision-maker when it gets back to him? <u>It is, therefore, advisable for applicants when they are given a hearing date to consider carefully whether or not it is sensible, in the light of intervening events and the passage of time, to continue to pursue the request for relief. If it is not, then whatever may have been the merits at the time</u>

of the application for leave, an attempt should be made to come to terms with the respondent and to discontinue the proceedings." [Underline added for emphasis.]

81. Each side will pay its own costs.

DATED this 19th day of March A.D. 2020

Estelle Gray Evans
Senior Justice