REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

C.V. 2009-4627

BETWEEN

RADIO VISION LIMITED

Applicant

AND

MAGISTRATE MARCIA MURRAY

Intended Defendant

TELECOMMUNICATIONS AUTHORITY OF TRINIDAD AND TOBAGO

Interested Party

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Raphael Morgan for the Applicant

Mr. Byam for the Intended Defendant

Mr. Rikki Harnanan for the Interested Party

DECISION

The Application

1. This application for leave to apply for judicial review was filed on the 10th December, 2009 by the Applicant, Radio Vision Limited, (hereinafter referred to as "the Applicant") in which the Applicant sought to challenge a decision of Her Worship, Magistrate Marcia Murray given on the 4th September, 2009 to grant the Prosecution's request to amend two criminal complaints filed by the Telecommunications Authority of Trinidad and Tobago (hereinafter referred to as "the Authority") against the Applicant.

2. The application was supported by two affidavits in the name of Lennox Toussaint, a director of the Applicant, (hereinafter referred to as "Toussaint") filed on the 10th December, 2009 and 2nd March, 2010.

3. On the 24th February, 2010 I granted permission to the Authority to be heard on the application as an Interested Party and on the 9th March, 2010 an affidavit in the name of the Executive Director of the Authority, Mr. Cris Seecheran, was filed on behalf of the Authority. On the 15th March, 2010, written submissions were filed on behalf of the Applicant and on the 17th March, 2010 written submissions were filed on behalf of the Authority.

Summary of facts

4. Prior to the enactment of the Telecommunications Act (hereinafter referred to as "the Act"), the Applicant was the holder of a special licence dated 21st December, 2000 issued by the President under the Wireless and Telegraphy Ordinance to establish, maintain and operate a radio broadcasting station on frequency 102.1 MHz.

5. On or about the 23rd February, 2006, the Applicant was granted a concession to operate a broadcasting service under section 21 of the Act by the Minister of Cabinet responsible for telecommunications and a licence by the Authority under section 36 of the Act to (a) install, operate and use the radio transmitting equipment identified in the licence; (b) use the radio frequency 102.1 MHz; and (c) to establish, operate and use the related radio communication service. This concession and licence are valid for 10 years.

6. By complaint Nos. 7168/2006 and 7168A/2006, the Authority laid the following charges against the Applicant:

   i. Complaint No. 7168 of 2006
   "That Radio Vision Limited on 14th March, 2006 at Port-of-Spain did operate a radio communication service without a license granted by the Telecommunications Authority of Trinidad and Tobago contrary to section 36 (1) of the Telecommunications Act No. 4 of 2001as amended by Act No. 17 of 2004."

ii. Complaint No. 7168 (A) of 2006:

"That Radio Vision Limited on Tuesday, 4th April, 2006 at Port of Spain did operate a radio communication service without a license granted by the Telecommunications Authority of Trinidad and Tobago contrary to section 36 (1) of the Telecommunications Act No. 4 of 2001 as amended by the Act No. 17 of 2004"

7. On the 8th July, 2009, after many adjournments of the matter over three years, the prosecution applied to amend the charges laid against the Applicant by deleting the words "*contrary to section 36(1)*" and replacing them with the words "*as required by section 36(1) (a)*" and inserting the words, "*102.5 FM*" and "*contrary to section 65(a) of the Telecommunications Act 2001 as amended by Act No. 17 of 2004*".

8. On the 4th September, 2009, the Intended Defendant granted the Authority's application to amend. As a consequence, the amended charges against the Applicant now reads as follows:

Complaint No. 7168 of 2006

"That Radio Vision Limited on 14th March, 2006 at Port-of-Spain did operate a radio communication service without a licence **on 102.5 FM** granted by the Telecommunications Authority of Trinidad and Tobago **as required by section 36 (1)(a)** of the Telecommunications Act No. 4 of 2001 **contrary to section 65 (a) of the Telecommunications Act No. 4 of 2001 as amended by Act No. 17 of 2004**"

Complaint No. 7168 A of 2006

"That Radio Vision Limited on Tuesday 4th April, 2006 at Port-of-Spain did operate a radio communication service without a license **on 102.5FM** granted by the Telecommunications Authority of Trinidad and Tobago **as required by section 36 (1)(a)** of the Telecommunications Act No. 4 of 2001 **contrary to section 65 (a) of the Telecommunications Act No. 4 of 2001 as amended by Act No. 17 of 2004**."

The Grounds

9. The Applicant sought to rely on the following grounds:

(a) That the decision of the learned Magistrate amounted to an error in law as she misunderstood the effect of section 36(1) (a) of the Telecommunications Act Chap 47:31 in light of section 71 of the Act;

(b) That the learned Magistrate erred in law in allowing the amendment as the original charge laid under section 36(1)(a) of the Act was not an offence known to law and any consequential amendment would have created a charge outside the six-month statutory time limit provided for the laying of charges under the Summary Courts Act, Chap 4:02.

(c) The learned Magistrate erred in law in holding that the amendment did not create serious prejudice to the Applicant as the amendment exposed the Applicant to a fine of $250,000 and a term of imprisonment which is a greater penalty than that imposed by section 71 of the Telecommunications Act.

(d) That the learned Magistrate erred in law in allowing the amendment as she failed to take into account that if the charges laid were liable to be dealt with, under section 65(a) of the Telecommunications Act then there was no need for the charges as amended by the prosecution.

Legal Principles: Application for leave for judicial review

10. The test to be applied by the Court on an application for leave for judicial review is whether there is an arguable ground for judicial review that has a realistic prospect of success. In ***Sharma v Brown-Antoine and others***[1], the Privy Council stated the test in the following terms:

[1] [2007] 1 WLR 780 at 787E-H

"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see ***R v Legal Aid Board, Ex p Hughes (1992)*** *5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:*

> *"the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on a balance of probabilities. Thus the flexibility of the standard lies not in the adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

The Privy Council then went on to say:

"It is not enough that a case is potentially arguable: an Intended Claimant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733.

Is this claim subject to any discretionary bars, such as delay or alternative remedy?

Delay

11. At the outset, it is necessary to consider the issue of delay since the Applicant made this application on the 10th December, 2009, which was three months and six days after the decision of the Intended Defendant. Section 11 of the **Judicial Review Act Chap 7:08**

requires an application for judicial review to be made promptly and in any event within three 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. The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration. In forming an opinion under this section, the Court must have regard to the time when the applicant became aware of the making of the decision and may have regard to other matters as it considers relevant. Since the relief sought by the Applicant herein is for an order of certiorari in respect of the decision of the Intended Defendant, the date when the ground for the application first arose was the 4th September, 2009 being the date of the decision of the Intended Defendant.

12. Part 56.5 of the Civil Proceedings Rules 1998, (as amended), also mirrors the language of the Judicial Review Act insofar as it provides as follows:

> "(1) The judge may refuse leave or to grant relief in any case which he considers that there has been unreasonable delay before making the application.
>
> (2) Where the application is for leave to make a claim for certiorari the general rule is that the application must be made within three months of the proceedings to which it relates.
>
> (3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave for relief would be likely to –
>
> (a) cause substantial hardship to or substantially prejudice the rights of any person; or
>
> (b) be detrimental to good administration."

13. Therefore, the question to be determined here is whether there is good reason for granting an extension of time to the Applicant. This will depend on the circumstances of each case. Some of the factors which the Court may take into account are: (a) the length of the delay; (b) the reason for the delay; (c) the prospect of success; (d) the degree of prejudice; (e) the overriding objective that justice is to be done; and (f) the importance of the issues involved in the challenge.[2]

14. In **R v Secretary of State for Trade and Industry ex parte Greenpeace** [3], Justice Maurice-Kay laid down some judicial guidelines for the grant of an extension of time. He stated at pg 261:

"(i) Is there a reasonable objective excuse for applying late? (ii) What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which would be occasioned if permission were now granted? (iii) In any event, does the public interest require that the application should be permitted?"

15. According to Toussaint's affidavits, the Intended Defendant gave her decision orally on the 4th September, 2009 and at that hearing the Applicant was represented by an Attorney-at-Law who was holding for Counsel for the Applicant. Toussaint was then advised by Counsel to await the written Reasons of the Intended Defendant before pursuing judicial review. Counsel then made several attempts in September and October to obtain the written Reasons of the Intended Defendant and eventually on the 23rd November 2009 he went before the Intended Defendant to request the written Reasons. After apologizing for the delay, the Intended Defendant supplied Counsel with her written Reasons. As a consequence of the late receipt of these Reasons, the application was filed more than three months after the decision was delivered.

16. Counsel for the Authority submitted, however, that the Applicant's delay ought not to be excused because the Reasons of the Intended Defendant were irrelevant to the complaint made by the Applicant that the Intended Defendant committed an error of law.

[2] Abzal Mohammed v. Police Service Commission, Civil Appeal No. 53 of 2009, per Kangaloo J.A.
[3] [2000] Env LR 221

Therefore, the Applicant's explanation for delay ought not to be accepted. Further, if time is extended, the administration of the criminal justice system in this case would be thwarted and there is no issue of public importance raised in this matter.

17. I have carefully considered the facts set out in Toussaint affidavits and the Seecharan affidavit and I am prepared to extend the time to the 10th December, 2009 for the Applicant to make this application for leave for the following reasons:

(i) The delay in this matter was for 6 days beyond the three month period prescribed by the Judicial Review Act and this does not appear to me to so "undue delay" as to justify preventing the Applicant from challenging the decision of the Intended Defendant on the grounds of delay;

(ii) The charges were first called for hearing on the 23rd May, 2006 but the Authority's application to amend was not heard until the 8th July, 2009 and determined on the 4th September, 2009. Accordingly, although there has been a long lapse of time in bringing this matter to conclusion, the fact remains that the application to amend was not heard until July 2009;

(iii) Based on the evidence of Toussaint, there was an apparent misapprehension on the part of the Intended Defendant that she had already given a copy of her Reasons to the Attorney at Law who had appeared before her on the date that she delivered her decision. It was in those circumstances, therefore, that she only gave her written Reasons to Counsel for the Applicant on the 23rd November, 2009. Although it has been argued that the Reasons were not required in order to raise a challenge based on error of law, the fact is that by section 16 of the Judicial Review Act the Applicant was entitled to request from the Intended Defendant a statement of the reasons for her decision and, in my opinion, it was prudent for Counsel for the Applicant to make every effort to obtain her written Reasons before filing an application for judicial review of her decision;

(iv) Apart from the continued delay in concluding the hearing and determination of the charges against the Applicant, I do not consider that it has been established that there would be any substantial hardship or detriment to good administration or substantial prejudice to the rights of any other person by extending the time for the Applicant to make the application for leave to apply for judicial review;

(v) I consider that it is in accordance with the overriding objective of dealing with cases justly that this matter should be decided on the merits of the arguments advanced by the parties as to the legality of the Intended Defendant's decision rather than on the basis that the Applicant is barred from making this application because it filed this application six days late;

(vi) In coming to my conclusion that the time ought to be extended for the Applicant to apply for judicial review, I have taken into account the guidance provided Kangaloo J.A. in **Abzal Mohammed v. Police Service Commission** (ibid) at parag. 21 where he stated:

> "*Section 11 (2) shows when the Court may refuse to grant leave to apply for judicial review. It is when the Court considers that there has been undue delay in making the application* ***and*** *the grant of any relief would result in prejudice to other persons or there should be detriment to good administration.*
>
> *From the legislative scheme, therefore, it is clear that is only if there is both undue delay and prejudice or detriment that the Court may refuse to grant leave.*
>
> *I am therefore fortified in my opinion that delay alone without prejudice or detriment is not sufficient to preclude an otherwise worthy applicant of permission."*

Alternative Remedy

18. According to the Applicant, at paragraph 5 of the Application, "no alternative form of redress exists." According to the Authority, however, the Applicant has an adequate alternative remedy by way of an appeal to the Court of Appeal if it is convicted of the offences outlined in the amended charges. Section 132 of the Summary Courts Act, Chap. 4:20 permits the Applicant to appeal on grounds that "*(h) the decision is erroneous in point of law*" and/or "*(i) some other specific illegality, not mentioned above, and substantially affecting the merits of the case has been committed in the course of the proceedings.*"

19. Section 9 of the Judicial Review Act, Chap. 7:08 provides that "the Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances."

20. It cannot be disputed that the Summary Courts Act provides an alternative procedure for the Applicant, if convicted, to appeal his conviction and to include as a ground of appeal that the Intended Defendant's decision to permit the amendment amounted to an error of law. Accordingly, the question for this Court to decide is whether there are exceptional circumstances shown by the Applicant to persuade the Court to grant leave to the Applicant to apply for judicial review, notwithstanding the existence of this alternative statutory procedure for appealing the decision of the Intended Defendant.

21. Upon a close scrutiny of the Toussaint affidavits, it is clear that the Applicant has not put forward any exceptional circumstances to justify the exercise of the Court's discretion in its favour. Accordingly, in the absence of any exceptional circumstances, I am of the view that an alternative procedure existed for the Applicant to challenge by way of appeal the decision of the Intended Defendant. Therefore, in accordance with section 9 of the Judicial Review Act, I shall not grant leave to the Applicant to apply for judicial review of the decision of the Intended Defendant.

22. I also accept as persuasive the opinion of Lord Justice Hughes in **R. v. Stratford Magistrates Court, ex p. Surat Singh**[4] where he stated at paras. 6 and 7 of his judgment:

"*6. In general terms this court will not entertain, whether by way of application for judicial review or by way of appeal by case stated, a purely interlocutory challenge to proceedings in the magistrates' court. Lord Widgery CJ put the point thus in R v. Rochford Justices ex p Buck (1979) 68 Cr App Rep 114, in which the Crown complained that the magistrates had wrongly excluded relevant evidence:*

> *"It is very unsatisfactory in this Court to be asked on an application for a prerogative order to deal with proceedings in a lower court which have not run their course and which are still pending so that the application is in respect of an interlocutory matter….*
>
> *I think the right course here would have been for the prosecution to go on with their case, accepting with good grace the justices' decision, and then, if at the end the prosecution failed, they could come here on a case stated and we should have a firm basis of fact on which to decide the issues….*
>
> *The obligation of the Court to keep out of the way until the magistrate has finished his determination seems to me to be a principle properly to be applied both to summary trial and to committal proceedings."*

7. …. We nevertheless should draw attention to the general rule, because it is important that proceedings in a magistrates' court should not be punctuated by expeditions to this court when one or other party is the object of a ruling which it does not like. It is necessary, in nearly every case, to wait until the end result of the proceedings is known before anyone can tell whether there is a source for complaint or not, and also before the facts of the case can reliably be known for the purposes of the decision here."

[4] [2007] EWHC 1582 (Admin)

In any event, has the Applicant raised an arguable ground with a realistic prospect of success?

23. Notwithstanding my earlier finding that the Applicant has an alternative remedy available to it, I still consider that I ought to express my opinion on whether, in any event, the Applicant has satisfied me that it has an arguable ground for judicial review having a realistic prospect of success.

24. The first point I wish to make is that, having considered the affidavits filed herein and the submissions of the Applicant and the Authority, I am of the view that I am in as good a position at this leave stage as I would be at the later stage of hearing an application for judicial review to determine the issues in this matter since it is really a question of pure law. Therefore, I consider I am well placed to evaluate fully the Applicant's prospects of success at a judicial review hearing.

25. Accordingly, I propose to adopt the approach recommended by Weekes J.A. in **His Worship Sherman Mc Nicholls Chief Magistrate v Fidelity Finance and Leasing Company Limited and Anor.**[5] where she stated at para. 19:

> "19. With this latter submission, I must agree. There was nothing needing "*further investigation*"; all the evidence and all the arguments on law were before the judge. In the circumstances the approach of Glidevel LJ in **Mass Energy v Birmingham City Council [1994] Env 298, at 307** was to be adopted.
>
> "*First, we had the benefit of detailed inter partes argument of such depth and in such detail that, in my view, if leave were granted, it is more unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. In particular, we have had all the relevant documents put in front of us.*
>
> *….Thirdly, as I have already said, we have most, if not all, of the documents in front us; we have gone through the relevant ones in detail – indeed in really quite minute detail in some instances – in a way that a court dealing with an*

[5] Civ. App No. 127 of 2007

application for leave to move rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents.

For those reasons taken together, in my view, the proper approach of this court, in this particular case, ought to be – and the approach I intend to adopt will be – that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, likely to succeed."

26. In view of the foregoing, the issue for me to decide is whether the Applicant has satisfied me that its case is not merely arguable but strong and likely to succeed.

The Legislation

27. Section 36(1) of the Telecommunications Act Chap 47:31 states:

"No person shall-

(a) establish, operate or use a radio-telecommunications service, … without a licence granted by the Minister."

Section 65 of the of the Telecommunications Act Chap 47:31 states:

"A person who knowingly-

(a) fails to comply with or acts in contravention of .. section 36(1) (a) .. commits an offence and is liable on summary conviction to a fine of two hundred and fifty thousand dollars and to imprisonment for five years."

Section 71 of the Telecommunications Act Chap 47:31 provides:

"A person who contravenes or fails to comply with any of the provisions of this Act or any regulations made hereunder commits an offence and except where the provision by or under which the offence is created provides the penalty to be imposed, is liable on summary conviction to a fine of twenty-five thousand dollars, and in the case of a

continuing offence to a further fine of one thousand dollars for each day that the offence continues after conviction."

Section 118 (2) and (3) of the Summary Courts Act Chap. 4:20 provides:

"118 (2). No objection shall be taken or allowed, in any proceeding in the court, to any complaint, summons, warrant or other process for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof.

118 (3). Where any variance or defect mentioned in this section appears to the court at the hearing to be such that the defendant has been thereby deceived or misled, the court may make any necessary amendments and if it is expedient to do so, adjourn, upon such terms as it may think fit, the further hearing of the case."

Analysis of the Magistrate's Decision

28. It is not in dispute that the power of a Magistrate to amend a charge is to be found in **sections 118 (2) and 118(3) of the Summary Courts Act Chap 4:02.** By these sections, the Magistrate is empowered to amend complaints to cure any defect whether in substance or form, even where a defendant has been deceived or misled by any defect in the complaint.

29. The Applicant put forward the following arguments in support of the grounds as set out at paragraph 9 above:

(1) There was no need to amend the charge as an act contrary to section 36(1) would fall to be dealt with by the general penalty provision of section 71. Therefore, the Intended Defendant's decision amounted to an error of law as she exceeded her jurisdiction since the court can only amend pursuant to section 118 where there is a defect or variance in the charge;

(2) The initial charges were nullities since section 36(1) creates no charge known to law and the Intended Defendant had no jurisdiction to amend the charge. Accordingly, the amended charges amounted to new charges laid outside the statutory time limit of six (6) months provided in section 33 (2) of the Summary Courts Act and fail ab initio;

(3) The amended charges create serious prejudice to the Applicant as the amendment exposed the Applicant to a penalty of $250,000 and a term of imprisonment which is a greater penalty than that imposed by section 71;

(4) Even if the charges were always liable to be dealt with under section 65 of the Act, there was no need to amend the charges and the Intended Defendant would have exceeded her jurisdiction since, as stated in (1) above, the court can only amend pursuant to section 118 where there is a defect or variance in the charge.

30. On the other hand, the Authority contended that section 118 (2) and (3) should be given the widest possible construction as they give the Magistrate a wide discretion to amend, subject only to proof of prejudice accruing to the Applicant. The Authority also contended that the amendments granted by the Intended Defendant were merely technical and the effect of the amendments was simply to accurately describe the misdoing prohibited by the Act and which constitutes the offence.

31. In **Karyl Gajadhar v Sidewalk Radio Limited**[6]**,** an appeal was filed against the orders of a Magistrate who refused applications to amend two complaints laid by the Authority. After approximately twenty-five adjournments over a two-year period, the Authority sought to amend the complaints to change the name of the defendant to "Sidewalk Radio" instead of "Sidewalk Radio Limited". The Magistrate refused to grant the amendments sought and upheld no-case submissions made on behalf of Sidewalk Radio Limited. The Court of Appeal found that the Magistrate was empowered by section 118 of the Summary Courts Act to amend the complaints and ought to have permitted the amendments even at that stage of the proceedings.

[6] Mag. App. No. 75 of 2009

32. Weekes J.A. at pp. 8 and 9 had this to say about section 118 of the Summary Courts Act:

> "*Without considering the application of the section in previous cases, it is important to mention that this section appears to be clear and unambiguous.* I*t empowers the Magistrate upon the hearing of a complaint to amend the same unless to do so would be detrimental to the accused in that it causes prejudice or injustice….."*

33. Then, after citing **Ellis v. Cowie, Magisterial Appeal No. 35 of 2005 and DPP v. Short [2001] EWHC 885**, she continued:

"*From the foregoing, it is clear that the test that has to be applied when a Magistrate is determining whether or not to exercise his discretion in favour of an amendment is whether the amendment will result in serious injustice to the defendant. If it will, then the amendment should not be granted. Further, sub-section (3) expands the Magistrates' discretion by allowing amendments even in circumstances where the defendant was deceived or misled."*

34. Applying that test to the facts of this case, therefore, it is clear that the Intended Defendant in the exercise of her discretion was empowered to amend the complaints laid against the Applicant unless the amendment would result in serious injustice to the Applicant and her discretion was so wide that she could grant the amendments even where there was a variance between the complaint and the evidence adduced or a defect in the complaint that had deceived or misled the Applicant.

35. It is not in dispute that the Applicant was licensed to operate and use radio transmitting equipment using radio frequency 102.1 MHz and that the charges as originally laid in May 2006 were that on the 14th March 2006 and 4th April 2006 the Applicant operated a radio communication service without a licence contrary to section 36 (1) of the Act. Such action, if proved, would clearly be contrary to the express prohibition contained in section 36(1)(a) and therefore I do not accept the submission made on behalf of the Applicant that the charges as originally laid were nullities, incapable of amendment.

36. The real issue to be determined herein is whether the amendments would result in serious injustice to the Applicant.

37. The Applicant has submitted that the charge as amended would expose it to serious prejudice in that it would now be exposed to a fine of $250,000 and to imprisonment for 5 years, which is significantly greater than the penalty of $25,000 imposed by section 71 of the Act.

38. In my opinion, this submission is misconceived since section 65 of the Telecommunications Act expressly provides that "*a person who knowingly (a) fails to comply with or acts in contravention of .. section 36(1) (a) .. commits an offence and is liable on summary conviction to a fine of two hundred and fifty thousand dollars and to imprisonment for five years."* Accordingly, if the Authority can prove that the Applicant knowingly operated a radio communication service without a licence, the applicable penalty provision was always section 65 and not section 71 of the Act.

39. Section 71 is only applicable where the provision "*by and under which the offence is created does not provide the penalty to be imposed"* and *S*ection 65 makes contravention of section 36 (1)(a) an offence and expressly provides the penalty to be imposed. Therefore, I find that the Applicant was always liable to the penalty contained in section 65(1) in the event that the Authority proved that it acted in contravention of section 36 (1)(a), and the amendment of the charges does not expose the Applicant to any greater prejudice or injustice than it was exposed to prior to the amendment.

40. Accordingly, the Applicant has not satisfied the Court that it has a strong case that is likely to succeed and the application for leave to apply for judicial review is hereby refused.

Costs

41. This application for leave to apply for judicial review was originally made ex parte and it is at the request of the Authority that I granted permission to it on the 24th February, 2010 to be heard as an interested party. Accordingly, although I was greatly assisted by

the submissions made by Counsel for the Authority, I do not think that, in the circumstances, it would be appropriate or fair to order the Applicant to pay the Authority's costs. Further, since Counsel for the Intended Defendant did not make any independent submissions on the application, I also do not consider that it would be appropriate or fair to order the Applicant to pay the Intended Defendant's costs. Accordingly, following the guidance provided by the Court of Appeal in **Abzal Mohammed v. Police Service Commission,** at paragraphs 29-31, I will order that each party bear its own costs.

Dated this 9th day of May, 2011

André des Vignes
Judge