COMMONWEALTH OF THE BAHAMAS 2009/*PUB./JRV./*00
IN THE SUPREME COURT
Public Law Division

IN THE MATTER of *sect. 15* of *The Legal Profession Act, 1992,* Chap. 64;

AND IN THE MATTER of a certain recommendation for appointment as one of Her Majesty's Counsel;

AND IN THE MATTER of *Arts. 2, 15* and *26* and other provisions of Chapter VIII of the Constitution of the Commonwealth of The Bahamas ("the Constitution");

AND IN THE MATTER of an application for redress pursuant to *Art. 28* of the Constitution;

AND IN THE MATTER of an application for an Order granting leave to apply for judicial review and for declarative and such other relief as appropriate for the purpose of enforcing or securing enforcement of *Art. 26* of the Constitution to protection of which the applicant here concerned is entitled.

BETWEEN

REGINA

V.

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

First Respondent

THE RT. HONOURABLE HUBERT A. INGRAHAM (In his Official capacity as Prime Minister)

Second Respondent

THE PRESIDENT OF BAR COUNCIL AND OFFICERS OF THE BAR ASSOCIATION

Third Respondents

Ex Parte
MAURICE O. GLINTON

Applicant

NOTICE OF APPLICATION

S T A T E M E N T

(Pursuant to *R. S. C., (1978), Order 53, Rule 3(2)(a)*)

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1. The applicant Maurice O. Glinton ("**the Applicant**") is a citizen of the Commonwealth of The Bahamas and a counsel and attorney of the Supreme Court, having been called to The Bahamas Bar and his named inscribed in the Roll thereof on 19th December 1980 pursuant to provisions of *The Bahamas Bar Act*, (then) Chap. 44 of The Statute Law of The Bahamas (now repealed and replaced by *The Legal Profession Act, 1992* ("**the Act**").

2. The applicant for purposes of this application was at all relevant times a member in good standing of The Bahamas Bar Association ("**the Bar**") and Vice-President of the Bar and Vice-Chairman of the Bar Council ("**the Bar Council**") for the period 1991 to 1995. Since being called and enrolled as such counsel and attorney the applicant has continuously practiced as a general litigation counsel at all levels in the courts of The Bahamas and at the Privy Council for upwards of twenty-eight years. From 1st August 1987 he has practiced under the name and style of Maurice O. Glinton & Co. at chambers, Suite B, Regent Centre East, Freeport, Grand Bahama.

3. The applicant is also a member of the Bar of England and Wales to which he was called and enrolled on 18th November 1980 an Utter Barrister as a member of Grays Inn, London, England.

4. The applicant is justly aggrieved by a decision (being an act and/or omission by or on the part of the above-named Second and Third Respondents or either of them) revoking the Attorney-General's recommendation to the Prime Minister that the applicant be among those counsel and attorneys appointed as one of Her Majesty's Counsel and/or purging the applicant's name from a list of persons ("**the Attorney-General's list**") recommended for such appointment.

5. The effect of removal and/or purging of the applicant's name from the Attorney-General's list is to deprive him of seniority *vis-a-vis* such lawyers (including two among such lawyers on the said list

then his junior at the Bar, they having been called and enrolled on 18th December 1987 and 15th December 1989, respectively) who were also recommended and actually appointed from the said list as one of Her Majesty's Counsel.

6. In the circumstances the applicant had a legitimate expectation to retain and not be deprived of the right of precedence that seniority at the Bar gave recognition to (including precedence in the Courts) *vis-a-vis* the lawyers named on the Attorney-General's list having lesser seniority to him at the time immediately prior to their eventual appointment as one of Her Majesty's Counsel.

7. Among the factors and circumstances which appear to explain the respondents' alleged act and/or omission leading to the revocation of then Attorney-General Michael L. Barnett's recommendation of the applicant to the Prime Minister, and removal or purging of the applicant's name from the list of lawyers actually appointed as one of Her Majesty's Counsel including two lawyers of less seniority in status to the applicant at the Bar at the time of their appointment, are that: (**i**) unlike the applicant, the lawyers actually appointed as one of Her Majesty's Counsel (including two lawyers less senior in status at the Bar to the applicant) are all so-called partners in larger white controlled or established law firms in The Bahamas; (**ii**) unlike the applicant, the said lawyers actually appointed (including two lawyers junior at the Bar to the applicant) are either members or supporters of the political party of which then Attorney-General Michael L. Barnett and the Prime Minister Hubert A. Ingraham are known members and who now or once represented that political party in the House of Assembly or in the Senate (the exception in this last regard being a former Attorney-General who was or once was a partner of then Attorney-General Michael L. Barnett in the same white owned or established or controlled law firm in Nassau; and (**iii**) unlike the applicant, the said lawyers actually appointed (including two lawyers less senior at the Bar than the applicant)

although members in good standing at the Bar, are either not or any longer in active practice in the Courts in areas of public law.

8. The said factors and circumstances giving rise to the respondents' said act and/or omission are an unwarranted interference with the procedure laid down by the Act and therefore an abuse of power. Moreover the said act and/or omission is or amounts to unlawful discrimination against the applicant and lawyers equally affected and prejudiced by such deprivation (being lawyers of greater seniority to the applicant at the Bar at the time and like him not persons described in para. **5(i)**, **(ii)** and **(iii)** hereof), whose names were purged from the Attorney-General's list of appointees as one of Her Majesty's Counsel recommended to the Prime Minister, in contravention of the provisions of *Art. 26* of the Constitution. The said act and/or omission was motivated by bad faith constituting misfeasance in public office by the First and Second Respondents.

9. The overall deprivative effect of the alleged act and/or omission to the applicant's prejudice (and of others like him equally affected), unless appropriately and effectively remedied by this Honourable Court is to perpetually and permanently deprive him (and them) of their seniority at the Bar *vis-a-vis* the lawyers actually appointed (including two lawyers junior at the Bar to the applicant).

10. The First and Second Respondents are statutory functionaries and public officers designated by *sect. 15* of the Act for the purposes therein mentioned.

11. The Third Respondents are the officer and persons constituting the Bar Council, mentioned in *sect. 4* of the Act and the officer of the Bar designated by *sect. 15* thereof as one of the persons required to be consulted by the Attorney-General on recommendations to the Prime Minister of appointments of one of Her Majesty's Counsel.

12. The relief sought herein is:

(1) a declaration that the applicant was entitled to have his name as put forward among those recommended by the Attorney-General to the Prime Minister for appointment as one of Her Majesty's Counsel in accordance with the provisions of *sect. 15* of the Act; further or alternatively,

(2) a declaration that the applicant is entitled to retain his seniority status at the Bar *vis-a-vis* the lawyers (including two lawyers less senior than he at the Bar) who were actually appointed from the purged Attorney-General's list of recommended appointees; further or alternatively,

(3) a declaration that the applicant is entitled to his name remaining on the Attorney-General's list and to his name being restored thereto as if it had not been removed or purged therefrom; further or alternatively,

(4) an Order of mandamus directed to the Attorney-General that he restore or cause to be restored to the said list of appointees as one of Her Majesty's Counsel the name of the applicant as recommended by then Attorney-General Michael L. Barnett with rights and privileges of seniority *vis-a-vis* lawyers (including two lawyers of less seniority at the Bar) actually appointed from among those named in the Attorney-General's list from which the applicant's name was purged; further or alternatively,

(5) a declaration that revocation of the Attorney-General's recommendation of the applicant for appointment as one of Her majesty's Counsel and/or the removal or purging of his name from the Attorney-General's list diminishing or reducing or revoking the applicant's seniority at the Bar *vis-a-vis* lawyers (including two lawyers of less seniority at the Bar) actually appointed from among those named in the Attorney-General's list and from which the applicant's name was purged in the circumstances and the manner by which it occurred, is *ultra vires* the Act and an abuse of power that denies the applicant protection of the law and discriminatory in contravention of *Arts. 15* and *26* of the Constitution; further or alternatively,

(6) an order requiring the First and Second Respondents (or either of them) to disclose the Attorney-General's list as initially recommended to the Second Respondent on or

about 19th August 2009, upon the requisite consultation with the designated persons that then Attorney-General Michael L. Barnett had in accordance with *sect. 15(2)* of the Act; further and alternatively,

(7) an order requiring the Third Defendant to disclose the list of names of counsel and attorneys of the Supreme Court they would have exchanged with the Attorney-General in the consultation process with the recommendation of Bar Council's; further or alternatively,

(8) an order of exemplary damages; further or alternatively,

(9) an order that the Attorney-General's recommendation of the applicant be dealt with in accordance with law.

(10) such orders, writs, or directions pursuant to *Art. 28* of the Constitution as may to the Court seem appropriate for the purpose of enforcing or securing the enforcement of any right or freedom to the protection of which the Applicant is entitled.

(11) The applicant seeks expedited hearing of the substantive judicial review application (if leave to apply is granted) together with an Order abridging time for service of the Respondents' evidence to fourteen (14) days or such other period as the Court deems appropriate.

(12) The applicant seek an oral hearing of the application for leave.

AND that the costs of and incidental to this application and any Order made herein be paid by the First and Second Respondents.

AND that such further or other Order may be made as the nature of the case may require.

13. The grounds and reasons therefor upon which relief is sought, are:

A. **FACTUAL BACKGROUND** (to which the material exhibited to the Affidavit sworn by the applicant is supplemental).

(1) The applicant was on or about 19th August 2009 invited by then Attorney-General Michael L. Barnett to indicate to him in writing his consent to being recommended for appointment as one of Her Majesty's Counsel, as one of

the attorneys whose name was being put forward on a list that included eight recently appointed Queen's Counsel. Having been satisfied by the said then Attorney-General of certain matters relating to the seniority of the attorneys named by him on the Attorney-General's list at the time, and upon his representation and giving certain assurance for his name being included on the Attorney-General's list, the applicant did so consent in writing and accepted his invitation.

(2) Thereafter it came to the knowledge of the applicant in the most inadvertent and indirect way that his name was removed from the Attorney-General list, but not by the then Attorney-General who represented the list as being his. Soon after, the applicant's exclusion was confirmed by a general public announcement of the names of those persons actually appointed from among the said list then represented to the applicant as including his name and names of others identified at the time that were either removed or the Attorney-General's recommendation of their appointment withdrawn. His and their names were not included among the eight persons actually appointed.

B. LEGAL MATRIX

(1) The appointment of a counsel and attorney as one of Her Majesty's Counsel is prescribed under *sect. 15* of the Act. The right to recommend such an appointment is solely that of the Attorney-General who, *after* consultation with the Chief Justice, the President of the Bar Association **"and such other persons as the Attorney-General sees fit"**, recommends the appointment of the individual applicant to the Prime Minister. The Prime Minister upon receipt

of such recommendation from the Attorney-General then advises the Governor-General to make the appointment.

(2) *Sect. 15* of the Act prescribes (so far as material) that:

> **"15.-(1) A counsel and attorney may apply to the Attorney-General for appointment as one of Her Majesty's Counsel.**
>
> **(2) The Attorney-General, after consultation with the Chief Justice, the President of the Bar Association and such other persons as the Attorney-General sees fit, may recommend to the Prime Minister the appointment of the applicant.**
>
> **(3) Upon receipt of a recommendation from the Attorney-General the Prime Minister may advise the Governor-General to appoint the applicant as one of Her Majesty's Counsel."**

(2) The statutorily designated maker of recommendations for appointment is the Attorney-General *ex officio* and under the scheme of the Act the function of the Prime Minister and the Governor-General is that of facilitators. The Act reserves no right in the Prime Minister or in anyone else to alter or reject the Attorney-General's recommendation once made, notwithstanding presence of the word *may*.

(4) It is submitted where any such recommendation from the Attorney-General to the Prime Minister takes the form of a list, that list is entire and complete and neither it nor a single individual recommendation is susceptible to recall or being replaced by another Attorney-General in office succeeding the maker of the recommendation or the said list.

(5) The only discretion implicit in the scheme of the Act is that of the Attorney-General in the consultation process. It is submitted that not only may the Attorney-General

consult as he sees fit persons other than the Chief Justice and the President of the Bar Association (as he must do), but in making his recommendation he is not bound by their views or the view of the Prime Minister. This latter point goes to his independence institutionally ascribed to the office of Attorney-General historically and expressly by the Constitution.

(6) This independence which is a characteristic feature of the Bar essential to the maintenance of honour institutionally and to its defence in its relations with the executive and the judiciary, is also a vital safeguard for the preservation of judicial independence in the administration of justice. By the scheme of the Act that independence is therefore preserved in the Attorney-General as the head of the Bar (**P. W. Young**, *'Queen's Counsel'* (1993) 67 A L J 171).

(7) It is implicit in the scheme of the Act that an applicant to the Attorney-General that he or she be recommended for appointment as one of Her Majesty's Counsel has a sufficient interest in the recommendation and a legitimate expectation to substantive and procedural rights assured by faithful compliance with the Act, i.e., due process.

(8) The unmistakable inference to be drawn from the Act's obvious purpose and objective is that the appointment of Queen's Counsel is not for the Attorney-General's and/or the Prime Minister's benefit or meant to *reward* a person. The designation by way of *recognition* of the individual's status is accorded to the legal fraternity generally for its institutional benefit and the benefit of the public. Such recognition obviously reflect the importance of the Bar as an institution and the individual members of the legal profession:

> **"The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges."** (*In re* Davis [1947] 75 CLR 409, p. **420** *per* Dixon J.).

(9) Nor is the recognition conferred upon law partnerships or firms as such, irrespective of size and hue or the political affiliation of members of a firm or its partners: it is **"a mark and recognition by the Sovereign of the professional eminence of counsel upon whom it is conferred"** (Attorney-General for Canada v. Attorney-General for Ontario [1898] A C 247, p. **252** *per* Lord Watson).

(10) Of course the individual who is or stands to be conferred with the designation has a personal professional interest in the outcome once he has satisfied the criteria and it is so represented to him or her. In this sense the individual has a legal right of his or her own - actual or contingent, that becomes an issue upon denial or deprivation of the rank on account of *ultra vires* acts or bad faith on the part of a functionary or depository of the benefit, more often than not evidenced by the circumstances or the outcome.

(11) Also *sect. 5* of the Act prescribes (so far as material) that:

> **"(2) In addition to any other powers or duties conferred or imposed by this Act, the Bar Council shall be responsible for-**
>
> **(a) the maintenance of the honour and independence of the Bar and the defence of the Bar in its relations with the executive and the judiciary;**
>
> **---------**
>
> **(h) such other matters of professional concern to members of the Bar as the Bar Association may determine."**

(12) Foreshadowing the submissions of law, it is contended (in outline) as follows:

(a) Having regard to the purpose and object of *sect. 15* of the Act, the First and Second Respondents acted *ultra vires* in that the then Attorney-General either subordinated his legal constitutional duty and function to the Prime Minister or ceded his right to their exercise to the Prime Minister; alternatively, that the latter unlawfully usurped the authorised duty and function of recommending appointment of Queen's Counsel rightly the Attorney-General's alone to perform in virtue of *sect. 15*, in which act of usurpation the then Attorney-General had to have been complicit.

(b) The First and Second Respondents (or either of them) acted in bad faith and abused their powers by ignoring the Attorney-General's recommendation for the appointment of the applicant as Queen's Counsel entirely; also, and/or by according different treatment to the applicant in the then Attorney-General's recommendation of him for appointment on the Attorney-General's list on grounds that are either unlawful and/or irrational and/or improper, thereby frustrating the applicant's legitimate expectation and, to his prejudice, also depriving him of seniority at the Bar *vis-a-vis* lawyers less senior to him thereat appointed from among those named in the Attorney-General's list from which the applicant's name was removed or purged.

(c) The applicant's acceptance of an invitation of the Attorney-General to be recommended for appointment as Queen's Counsel along with the other lawyers represented to him as named then on the Attorney-General's list, gave rise to a legitimate expectation that he would be accorded the same treatment as the others to which he was entitled based on the Attorney-General's said recommendation.

(d) At least in respect of two lawyers represented to him named on the Attorney-General's list *vis-a-vis* whom he then claimed all rights, privileges, and precedence in connection with the Courts accorded him by virtue of seniority at the Bar, and who from among those named on the Attorney-General's list were in fact appointed Queen's Counsel, the applicant had a legitimate expectation of his seniority being retained, given established criteria historically a potential appointee to the rank of Queen's Counsel is to have met.

(e) In the circumstances of the applicant's claim of a legitimate expectation thwarted or frustrated by the conduct of the First and Second Respondent or either of them, it is submitted the case falls to be considered within categories (**a**) and/or (**c**) identified in R. v. North and East Devon Health Authority, *Ex p.* Coughlan [2001] QB 213, at *para.* **57.**

(f) In any event such treatment of the applicant by the removal or purging of his name from the Attorney-General's list nstitutes discrimination.

(g) This application invokes the Supreme Court's original jurisdiction in virtue of *Art. 28* of the Constitution as it involves an allegation of actual contravention, in relation to him, of *Arts. 15* and *27* thereof.

C. SUBMISSIONS OF LAW

(1) On the matter of the statutory and ordinary jurisdictions of the Court to entertain this judicial review application and grant appropriate relief, the following are applicable.

(a) *Sect. 19* of *The Supreme Court Act, 1996* as regulated by *R. S. C., (1978), Ord. 53*, and the common law as stated in several cases:

> **"Just as the allegation of a wrong of a kind recognised as remedial by private law is sufficient to found the court's ordinary jurisdiction, so the allegation of a wrong of a kind recognised as remedial by public law is sufficient to found jurisdiction in judicial review."** (*Leech v. Deputy Governor of Parkhurst Prison [1988] A C 533, p.* ***562*** *per Lord Bridge).*

and

> **"Judicial review... is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament."** (Wade, *Administrative Law, 5th ed.*, p. **35**).

(b) *Art. 28* confers the Court with jurisdictional powers to enforce and secure enforcement of the protective provisions of *Art. 16* to *27*.

(2) The jurisdictional requirement of "**sufficient interest**" for an applicant to apply for judicial review, is *sect. 19(3)* of *The Supreme Court Act, 1996* and *Ord. 53, r. 3.*

(3) It was held by the House of Lords that, except in an obvious case, questions as to sufficient interest ought not to be dealt with as a preliminary issue at the leave stage, but should be postponed to the hearing of the substantive application, to be considered together with the full legal and factual context of the application, which included the whole question of the statutory duties of the Revenue and the duties alleged to have been breached in the situation (Inland Revenue Commissioners v. National Federation for the Self-employed and Small Business Ltd. [1982] A C 617, p. **630** *per* Lord Wilberforce with whom Lords Fraser and Roskill agreed):

> **"...it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and the breach of those said to have been committed. In other words the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with legal and factual context."**

(4) A public authority when exercising discretionary powers, and by whose act or conduct a potential recipient is denied or deprived of a benefit, whilst strictly speaking not a determination of rights, nevertheless in public law terms entitles the claimant to have the subject-matter of the exercise of power properly considered and determined in accordance with law. Such 'decision' is therefore reviewable ostensibly to ensure that the power is validly and lawfully exercised:

> **"The days when respondents might escape judicial scrutiny by claiming that the decision affected privileges, not rights, and so are not reviewable, are now well and truly over."** (Clive Lewis: *Judicial Remedies In Public Law*, 2nd ed., *paras.* **4-012 - 4-013**).

(5) The Court has jurisdiction to grant a declaration even in the absence of a 'decision' capable of being reviewed where the real object of the application is interpretation and application of provisions themselves affecting the applicant (R. v. Secretary of State for Employment, *ex parte* Equal opportunity Commission [1995] 1 A C 1):

> **"There is clear authority that the courts may review actions which do not constitute a "decision"..... [T]he courts have been focusing on whether there has been an unlawful exercise of power rather than looking narrowly for a "decision" affecting "rights"** (Clive Lewis: *Judicial Remedies In Public Law*, 2nd ed., **4-043 - 4-044**).

(6) Decisions affecting legitimate expectations are subject to judicial review (R. v. I. R. C. *ex p.* Preston [1985 A C 835):

> **"Such an expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken.... It is founded upon a basic principle of fairness that legitimate expectations ought not be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public."** (De Smith, Woolf and Jowell: *Judicial Review of Administrative Action*, 5th ed., (1995), **8-037 - 8-038**).

(7) Legitimate expectation may arise "**either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.**" (Council of Civil Service Unions v. Minister for the Civil Service [1985] A C 374, p. **401** *per* Lord Fraser; Webb v. Ireland [1988] I R 353, p. **384** *per* Finlay C J.).

(8) In public law terms the role of Courts is to identify and, in a proper case, correct the expectation frustrated or thwarted by abuse of power:

> **"Power may be abused in a variety of ways, of which acting beyond the limits of the power is one, acting irrationally is another, acting for an improper purpose is a third and acting so as to frustrate a legitimate is a fourth; and there are more, both procedural and substantive. Very commonly they run into one another, as Lord Greene MR pointed out in *Associated Provincial Picture Houses Ltd v. Wednesbury Corpn* [1948] 1 K B 223. Particularly when one is considering an allegation of abuse of the prerogative power, the search for categories of abuse may therefore be less important than the search for principle.."** (R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2007] 3 WLR 768, p. **791** *per* Sedley L J).

(9) The Court's role, where what is in issue is the claim that as a result of "**a promise or other conduct**", a member of the public has a legitimate expectation that he or she will be treated in one way and the public body wishes to treat him or her in a different way, was pointedly analysed in R. v. North and East Devon Health Authority, *Ex p.* Coughlan [2001] Q B 213, at paras **55-58**:

> **"Here the starting point has to be to ask what in the circumstances the member of**

> **the public could legitimately expect. In the words of Lord Scarman in** *In re Findlay* **[1985] A C 318, 338, 'But what was their *legitimate* expectation?' Where there is a dispute as to this, the dispute has to be determined by the court, as happened in** *In re Findlay*. **This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.**
>
> **57. There are at least three possible outcomes. (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on** *Wednesbury* **grounds... (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken.... (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a** *benefit which is substantive*, **not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy"** (paras. **56-57** *per* Lord Woolf M R).

(10) Recommendations by one body to another are reviewable and its status or legal effect will depend on the context. The legal significance of a recommendation may require that it and its subject-matter be reviewed to ensure that

the statutory criteria have been properly observed, one possible ground of review being that the outcome was based on an irrelevant consideration (R. v. Portsmouth City Council, *ex p.* Gregory (1990) 154 L. G. Rev. 173).

(11) Given that historically awarding of the rank of Queen's Counsel was exercising a prerogative power **"personally by the sovereign with the advice of the Lord Chancellor"** (Attorney-General for Canada v. Attorney- General for Ontario [1898] A C 247, p. **251-252**), it being established in The Bahamas as an executive prerogative governed by *sect. 15* of the Act, that power is now amenable to review within the principle in *De Keyser's case* [1920] A C 508:

> **"We are no longer in the era where there is a contest between the Crown and Parliament as to who has the power to do what. In that era it was the "the Crown", ie the sovereign, who preserved for himself or herself the power to do certain things. Matters have gradually developed over the years so that now, constitutionally, the Crown never acts other than on the advice of her ministers, and the decision to exercise the royal prerogative is actually taken... by the Government or by ministers individually"** (Bancoult (No. 2) p. **799** *per* Waller L J).

(12) The minister whom Parliament has authorised by *sect. 15* of the Act to exercise individually what may have been a prerogative power is the Attorney-General *ex officio*, who is by definition a public authority.

(13) Parliament has thereby uauthorised and empowerd the Attorney-General in terms which by the presence of the permissive word 'may' ordinarily connotes a discretion; however, having regard to the objects and purpose of the provision the true meaning of the word in the contexts it

appears, rather, is that it is facultative or enabling, that is, "it shall be lawful". It is submitted the dictum of Coleridge J. in R. v. Tithe Commissioners (1849) 14 Q B 459, p. **474** (117 E R 179) is apposite:

> **"The words undoubtedly are only empowering; but it has been so often decided as to become an axiom that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice."**

(14) It is submitted that having complied with the requirement to consult the named persons, once the Attorney-General makes a recommendation under *sect. 15(2)* of the Act, the Prime Minister upon its receipt must likewise advise the Governor-General pursuant to *sect. 15(3)* to make the appointment. The Prime Minister has no veto power.

(15) It follows that the then Attorney-General and successors in office are estopped by representation or promise made to the applicant and which gives rise to the expectation, from acting in any way that would frustrate or thwart the expectancy. By the same token, the Prime Minister will have abused his power to have encroached upon the duty and function and authority that Parliament conferred on the Attorney-General by altering the Attorney-General's lists to either add to or subtract from the names of those recommended for appointment as Queen's Counsel.

(16) It must also follow that neither the then Attorney-General nor a successor may lawfully delegate his authorised duty and function in virtue of *sect. 15* to the Prime Minister: *Delegatus non potest Delegare.* The purported exercise thereof by the Prime Minister or anyone else constitutes unlawful usurpation and is amenable to judicial review.

(17) The law is well established that an authority entrusted with a discretion must not in the purported exercise of its discretion act under the dictation of another body or person. The Canadian case Roncarelli v. Duplessis [1959] 16 D L R (2d) 689 is invariably cited as one example of a lawfully empowered authority found to have abdicated its decision-making power to the instructions of the head of Government who was himself prompted by extraneous motives.

(18) It is sufficient to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide. (McLoughlin v. Minister for Social Welfare [1958] IR 1, p. **27** *per* O'Daly J.).

(19) The Attorney-General having recommended appointment of the applicant together with those named represented on the Attorne-General's list could not have removed the applicant's name from the said list unilaterally; nor could he have done so (in mistaken exercise of his authorised duty and function) in complicity with the Prime Minister or any one extraneous to the exercise of at authority. It is submitted he would have to first recant his representation of the recommendation of the applicant for appointment as Queen's Counsel to the applicant himself in view of the letter accepting the invitation so as not to give rise to the present expectation now being asserted on the basis of the said representation evidenced by the applicant's acceptance of the then Attorney-General's invitation.

(20) In this regard the applicant was denied protection of the law (or due process) within the meaning of *Art. 15* of the Constitution, in that a decision was made affecting him

of which he had no opportunity to satisfy himself as to the correctness or propriety thereof.

(21) There is no distinction to be made between a reference in The Bahamas Constitution of **"the protection of the law"** and the reference in, say, the Constitution of the Republic of Trinidad and Tobago of **"due process of law"** (Lewis v. Attorney-General of Jamaica [2000] 3 W L R 1785, p. **1811** *per* Lord Slynn of Hadley):

> **""due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law.....**
>
> **The clause thus gives constitutional protection to the concept of procedural fairness."** (Thomas v. Baptiste [1999] 3 W L R 249, p. **259** *per* Lord Millet).

(22) The Bar Council whilst having a sufficient interest in the matter to which this application relates by virtue of its primary obligations imposed by *sect. 5(2)(a)* and *(h)*, has given no indication to the applicant, either confidentially or publicly, of its or the Bar Association's position in the aftermath of the events giving rise to this application and about which it and members of the Bar generally are presumed to have knowledge.

(23) In the premises, and in the absence of any right of appeal available to him, there is no alternate remedy available to the applicant. Moreover the misdirection by the First and Second Respondents of their respective duties, functions, and powers and their unlawful conduct in abuse of such powers deprive the applicant of a legitimate expectation based on, as it appears, irrational and improper motives

as to be *ultra vires* the Act and to constitute conduct discriminatory of the applicant in contravention of his fundamental rights under the Constitution. This makes this a compelling case for the Court to grant the relief sought on this application as the only appropriate means of redress in the circumstances.

MAURICE O. GLINTON
Suite B, Regent Centre East,
Freeport, G. B., The Bahamas.

DATED the 7th day of November, A. D., 2009.

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division

IN THE MATTER of *sect. 15* of *The Legal Profession Act, 1992,* Chap. 64;

AND IN THE MATTER of a certain recommendation for appointment as one of Her Majesty's Counsel;

AND IN THE MATTER of *Arts. 2, 15* and *26* and other provisions of Chapter VIII of the Constitution of the Commonwealth of The Bahamas ("the Constitution");

AND IN THE MATTER of an application for redress pursuant to *Art. 28* of the Constitution;

AND IN THE MATTER of an application for an Order granting leave to apply for judicial review and for declarative and such other relief as appropriate for the purpose of enforcing or securing enforcement of *Art. 26* of the Constitution to protection of which the applicant here concerned is entitled.

BETWEEN

REGINA

V.

THE ATTORNEY-GENERAL
OF THE COMMONWEALTH OF THE BAHAMAS
First Respondent

THE RT. HONOURABLE HUBERT A. INGRAHAM
(In his Official capacity as Prime Minister)
Second Respondent

THE PRESIDENT OF BAR COUNCIL
AND. OFFICERS OF THE BAR ASSOCIATION
Third Respondents

Ex Parte
MAURICE O. GLINTON Applicant

NOTICE OF APPLICATION

S T A T E M E N T

(Pursuant to *R. S. C., (1978), Order 53, Rule 3(2)(a)*)

2009
PUB/Jrv/00

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