COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2015/PUB/jrv/FP/00005

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

THE QUEEN

-And-

(1) **THE RT. HON. PERRY CHRISTIE,**
Prime Minister and Minister of Finance
1st Respondent

(2) **THE HON. MICHAEL DARVILLE,**
Minister for Grand Bahama
2nd Respondent

(3) **DR. MARCUS BETHEL**
(in his capacity as Chairman of
The Hawksbill Creek Agreement Review Committee)
3rd Respondent

Ex Parte

(1) **FREDERICK SMITH QC**

1st Applicant

(2) **CAREY LEONARD**

2nd Applicant

AND

THE GRAND BAHAMA PORT AUTHORITY LIMITED

Intervener

Before: The Hon. Madam Justice Indra H. Charles

Appearances: Mr. R. Dawson Malone and Mr. Adrian Gibson of Callenders & Co. for the Applicants
Mr. Loren Klein with him Mrs. Darcel Smith-Williamson and Ms. Akeyra Saunders of the Attorney General's Chambers for the Respondents
Mr. Robert Adams and Ms. Zia Lewis for the Intervener

Hearing Dates: 19, 20, 21 January, 03 February 2016

CATCHWORDS:

Public Law - Judicial Review – Grounds for Judicial Review – Procedural Unfairness- Whether fairness requires McKinsey Report - Irrationality and the *Wednesbury* unreasonableness – Whether decisions was so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at it - Whether there is any decision capable of judicial review – Prematurity of application- Legislation maintaining status quo.

The Applicants are both Attorneys and Licensees of the Grand Bahama Port Authority under the Hawksbill Creek Agreement (**the** "**HCA**"). The Judicial Review proceedings relate to a consultation exercise ("**Consultation**"), initiated by the Government, regarding proposals to amend or extend certain provisions of the HCA. The Consultation was carried out on behalf of the Government by the Hawksbill Creek Agreement Review Committee ("**the Committee**") which was appointed by the 1st Respondent who decided the Committee's terms of reference ("**Terms of Reference**") dated 5 March, 2015. The Consultation was founded upon a report commissioned by the Government from McKinsey & Co ("**the McKinsey Report**"). It was common ground that the McKinsey Report included both factual information which informed the Committee's deliberations on the recommendations which they made to the Government and specific proposals which the Committee considered before making its recommendations to the Government. Recommendations were made by the Committee and presented to the 1st Respondent, who received them on behalf of the Government, on 22 June 2015. This brought the consultation process to an end. Although the Applicants were consulted, the McKinsey Report was not provided to them or to any other consultees at any stage in the process. On the day before trial the Respondents produced copies of a redacted version of the McKinsey Report to the Applicants and to the Court.

At trial, the Applicants challenged the Respondents' decisions to bring the consultation process to a close and, in the case of the 3rd Respondent, to present and, in the case of the 1st Respondent, to accept the Recommendations as procedurally unfair given the failure to disclose the McKinsey Report and similarly irrational given the circumstances. The Respondents opposed the application on the grounds that: (i) the decisions were not amenable to judicial review; (ii) the judicial review application was premature; (iii)

there had been widespread and adequate consultation and the Applicants were given a reasonable opportunity to make representations; and (iv) the Government had passed legislation extending the Tax Exemption and Concessions which would otherwise have expired on 4th August2015 for a period of 6 months. The GBPA supported the application for judicial review in so far as the Applicants maintained that the consultation process was procedurally unfair and that it was conducted in breach of the Gunning criteria.

HELD:

(1) The Decisions were susceptible to judicial review: Paragraphs 3024 and 3025 of *DeSmith and Woolf on Judicial Review* (7th Edn) [48] and **R v Secretary of State for Transport Ex P Medway Council** [2002] EWHC 2516 (Admin). applied.

(2) The application for judicial review was not premature: **R v Secretary of State for Home Development, Ex Parte Hickey (No. 2)** [1995] 1 WLR 734 applied. **Birmingham Care Consortium v Birmingham City Council** [2011] EWHC 2656 (Admin) distinguished.

(3) Given the failure to disclose the McKinsey Report, the consultation process was conducted in circumstances which were procedurally unfair because of noncompliance with the Gunning criteria. **R v North and East Devon Health Authority, ex parte Coughlan** [2001] QB 213; **Responsible Development of Abaco (RDA) Ltd and Another v Ingraham and Others** [2012] 3 BHS J. No. 35; **R (on application of Greenpeace Ltd) v Secretary of State for Trade and Industry** [2007] (Admin); **Bushell v Secretary of State for the Environment** [1981] AC 75; **R (United Co Rusal plc v London Metal Exchange (CA)** [2014] EWCA Civ 1271; **The Queen (On Application of Eisai Limited) v National Institute for Health and Clinical Excellence et al** [2008] EWCA Civ 438; **Regina (Moseley) v Haringey London Borough Council** [2014] 1 WLR 3947 applied. Consequentially the Decisions are quashed.

(4) The *Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) (Amendment) Act 2015* is not relevant to the application for judicial review.

(5) The evidence in support of the ground that the Decisions were irrational did not reach the standard of *Wednesbury* unreasonableness which requires something overwhelming. **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** (1948) 1 KB 223; **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374; **Nottinghamshire County Council v Secretary of State for the Environment** [1986] Law Reports HOL 240.

(6) The McKinsey Report contained matters of sensitive nature which may affect national security. In any event, the redacted version of the McKinsey Report ought to be made available to any Interested Party who may wish to consider it.

(7) The Respondents shall continue with the consultation process and in engaging in further consultation, the Respondents shall provide the Applicants and Interested Parties with redacted copies of the McKinsey Report and sufficient time to study the report so that they can make informed and meaningful contribution. **Regina (Mosely) v Haringey London Borough Council** applied.

JUDGMENT

Introduction

[1] This is an application for judicial review. The Applicants, in their capacity as licensees of the Grand Bahama Port Authority ("GBPA") under the Hawksbill Creek Agreement (the "HCA") are aggrieved with two decisions ("the Decisions") allegedly taken by one or the other of the Respondents relating to the process for consultation in relation to the expiry of tax concessions under the HCA. As such, they seek the following amended orders:

1) A Declaration that the purported consultation process was fundamentally flawed and did not constitute proper or meaningful consultation;

2) An order of Certiorari to quash the decisions by the Respondents relating to the purported consultation;

3) An order of Mandamus requiring the Respondents or each or any of them to provide them with copies of the unredacted McKinsey Report together with any appendices and reference material submitted therewith to the Government forthwith;

4) An order of Mandamus requiring the Respondents or each or any of them to conduct a fresh consultation process and/or ensure that a fresh consultation process is conducted according to law; in which the Applicants and all Interested Parties are given reasonable and sufficient time in which to consider the McKinsey Report and any other relevant document or

information and to formulate a meaningful and informed contribution to the fresh consultation process;

5) An order prohibiting any decisions being made by the 1st Respondent based on the Committee's HCA Recommendations and an order quashing the Committee's HCA Recommendations and

6) Costs.

[2] The GBPA, the Intervener in these proceedings, supported the Applicants' application for Judicial Review. The Respondents opposed the application on four broad grounds namely: (i) there is no decision capable of judicial review; (ii) Parliament has passed legislation extending the tax exemption and concessions; (iii) the application is premature as the consultation process is not closed and (iv) the consultation process was adequate and proper.

Dramatis Personae

[3] As a precursor to this application, it is helpful to set out the dramatis personae. The 1st Applicant, Frederick Smith QC, is a practising attorney. He is a licensee of the GBPA and, in that personal capacity, enjoys various rights and privileges under the terms of the HCA. He is also the Managing Partner of the Freeport, Grand Bahama Office of Callenders & Co which is also a licensee of the GBPA. The 1st Applicant has lived in Freeport for some thirty-five years during which time he has been intimately involved in the economic, social, political and cultural "lifeblood" of Freeport. As can be gleaned from his affidavit dated 24 July 2015, in support of an *ex parte* application for leave to bring judicial review proceedings, his love for Freeport appears to be overwhelmingly intense. As he puts it, *"…I live and breathe Freeport…. It is very different from the rest of The Bahamas, and particularly from Nassau. The air is fresher and cleaner. The water tastes sweeter and it can be drunk straight from the tap. There is a greater feeling of freedom…"*

[4] The 2nd Applicant, Carey Leonard, is also a practising attorney and a Senior Associate in the Freeport, Grand Bahama office of Callenders & Co. Like the 1st Applicant, he is a licensee of the GBPA and, in that personal capacity, enjoys various rights and privileges under the terms of the HCA. The 2nd Applicant has an amazing history. He was a former president of the Bahamas Chamber of Commerce (1989-1991), the former General Counsel of The Grand Bahama Port Authority Group and served on the Bahamas Government Airport Advisory Board and the Blue Ribbon Commission on National Health Insurance. It is undisputed that he has extensive knowledge of the operation and history of the HCA and the economic and fiscal governance of Freeport.

[5] The 1st Respondent, The Rt. Hon. Perry Christie is the Prime Minister and the Minister of Finance of the Commonwealth of The Bahamas. He heads the Government to which the Hawksbill Creek Agreement Review Committee ("the Committee") reported and to which the McKinsey Report was delivered.

[6] The 2nd Respondent, The Hon. Michael Darville is the Minister for Grand Bahama. He heads the Ministry that was responsible for providing administrative support to the Committee.

[7] The 3rd Respondent, Dr. Marcus Bethel, is the Chairman of the Committee which was appointed to carry out on behalf of the Government a consultation process regarding proposals to amend or extend certain provisions of the HCA and to increase the amount of Government revenue raised from Freeport. The Government also decided the Committee's terms of reference ("Terms of Reference").

[8] For present purposes, references to the Respondents shall include and be construed as "The Respondents and/or each or any of them."

Factual Chronology

[9] A summary of the relevant facts is set out in the affidavit of the 1st Applicant in support of the Ex Parte Application for Leave to Apply for Judicial Review and for Interlocutory Relief filed on 24 July 2015. It is undisputed and I gratefully adopt it.

[10] Certain tax exemptions ("the Tax Exemptions") under the HCA will expire soon if not renewed. The Government of The Bahamas views this as an opportunity to engage in an aggressive policy intervention in the governance of Freeport with the objective of extracting a greater net contribution to the Government's tax revenues from Grand Bahama. Undoubtedly, the policies that the Government adopts in this regard will have a significant impact on the licensees of the GBPA of whom the Applicants are two of approximately 3,500, on Grand Bahama itself, and on other stakeholders and interested parties (together "the Interested Parties").

[11] In late 2014 or early 2015, the Government of The Bahamas engaged the reputable managing consultants, McKinsey & Co to produce a report on the economic implications of the expiry of the Tax Exemptions and on policy measures that the Government could take to stimulate economic development both in Freeport and in Grand Bahama (the "McKinsey Report").

[12] On 5 March 2015, the 1st Respondent announced that the McKinsey Report had been delivered to the Government. He further announced that, as a result of the McKinsey Report, the Government had decided to appoint a six-person consultative committee. He stated that the Committee was to conduct a consultation with the Interested Parties ("the Consultation") and was then, among other things, to make "appropriate recommendations" to the Government regarding the policy the Government should adopt in relation to the Tax Exemptions and the economic development of Freeport and Grand Bahama. The 1st Respondent stated that McKinsey were to "assist" the Committee in its work.

[13] The consultation exercise itself is founded upon the McKinsey Report. The Committee's Terms of Reference record that the McKinsey Report includes:

> **"…a study of the economic situation within the Port Area, the implications of the expiring incentives, and measures which might be taken to spur economic development."**

[14] The Applicants and other Interested Parties have been invited to make representations to the Committee. However, all requests for the McKinsey Report proved futile. On or about 10 April 2015, the 2nd Applicant was invited to appear before the Committee. On 13 April 2015, he telephoned the secretariat of the Committee and requested a copy of the McKinsey Report. He was informed that the Report was not available to the public.

[15] On 17 April 2015, the 2nd Applicant appeared before the Committee and renewed his request for a copy of the McKinsey Report. The 3rd Respondent denied his request. The 2nd Applicant said that without sight of the Report, he was unable to make informed or substantive representations on topics that he wished to address including (i) the customs regime; (ii) the industrial area and (iii) the cost of electricity and how to reduce it because he did not have any information about McKinsey's advice or the Government's proposals in relation to these issues.

[16] On 29 April 2015, Aniska Strachan, on behalf of the 2nd Respondent, informed a number of undisclosed recipients, including the 1st Applicant, by email, of the "town meetings" which the Committee intended to hold in Grand Bahama from 4 May to 7 May 2015.The 1st Applicant replied requesting a copy of the McKinsey Report. There was no response to the request.

[17] By letter dated 7 May 2015, the Applicants wrote to the 3rd Respondent requesting a copy of the McKinsey Report. There had been no response.

[18] By letter dated 8 May 2015, the 1st Applicant wrote to the Respondents indicating that he intended to apply for leave to bring Judicial Review Proceedings. In that letter, he further requested that the Respondents undertook, pending determination of the intended proceedings, not to make any decisions in respect

of: (i) the Tax Exemptions and (ii) any proposed wider policy interventions in the economic and fiscal regime that operates in Freeport. The 1st Applicant stated that, if such undertakings were not given, he would apply for interlocutory relief. He wanted a response by 4 p.m. on 12 May 2015.

[19] It is alleged that the Committee terminated its hearing on about Friday 8 May 2015 or Monday, 11 May 2015. The affidavit of Dr. Doswell Coakley, Secretary to the Committee, sworn to on 24 September 2015 (Tab 17 of Volume 1 of 1) does not speak to a specific date. It states: "All told, between **early March to mid-May of 2015**, in pursuance of its functions, the Committee met with some 120 stakeholders including civil society, manufacturers, developers, tourism operators, present and former parliamentarians, and other professionals. Additionally, four town meetings were held across the island, in which more than 250 persons participated, and the Committee received numerous papers and submissions by individuals.

[20] A report in The Tribune of 13 May 2015, suggested that the Committee would report to the Government within two weeks.

[21] Under cover of an email received on 12 May 2015, Ms. Danya Wallace of the Office of the Attorney General wrote to the 1st Applicant seeking an extension of time in which to respond to his request for the McKinsey Report. The letter did not specify a time frame but left the request flexible. The 1st Applicant responded that he would be happy to do so.

[22] Later on that same day, Ms. Wallace responded and said that the Applicant's request was under consideration and threatened to draw the 1st Applicant's correspondence to the court's attention if he instituted Judicial Review Proceedings.

[23] In view of that letter, the Applicants waited a further week for the McKinsey Report. It was not forthcoming and so, on 20 May 2015, the Applicants sought leave to apply for Judicial Review.

[24] On 22 May 2015, Hanna-Weekes J. refused leave on two limbs namely: (i) the application had been made prematurely because the Committee had not yet reported its findings to the Government and (ii) of findings as to the substance of the application.

[25] The Applicants renewed their application to the Court of Appeal but the Court of Appeal ruled that it had no jurisdiction to hear the renewed application and that the renewed application should be made to the Supreme Court

[26] In the interim, on 22 June 2015, the Committee delivered its recommendations to the 1st Respondent ("the HCA Recommendations").

[27] On 22 July 2015, a Notice from the Cabinet Office entitled "*House Communication by Bahamas Prime Minister The Rt. Hon. Perry G. Christie Status of Hawksbill Creek Agreement Tax Concessions*" indicated that in light of the fact that the HCA Recommendations are currently still under consideration the Prime Minister proposes a 6 month extension to the Tax Exemptions due to expire on 4 August 2015 and intends to introduce the Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) (Amendment) Bill 2015 in order to effect this extension.

[28] The Communication states that the extension time is necessary for "*further consultation and negotiations with stakeholders and the Grand Bahama community*."

[29] The Applicants argued that any further consultation will be fundamentally flawed in the same way as the consultation that has taken place to date because the Communication indicates that the information in the relevant documents (the McKinsey Report and HCA Recommendations) will be presented to Parliament once the entire process is complete. It will also be flawed, say the Applicants, because the HCA has already made its recommendations to Cabinet without conducting a proper consultation process.

[30] Against this backdrop, the Applicants applied, ex parte, for leave to bring Judicial Review proceedings. On 7 August 2015, Hanna-Weekes J granted leave. For reasons which are not germane to this application, the learned judge recused herself.

[31] Subsequently, by Notice of Motion filed on 22 September 2015, the GBPA, applied for leave to intervene and be heard as an Interested Party in **these** proceedings. On 25 September 2015, leave was granted to GBPA to intervene.

The Decisions

[32] The impugned Decisions which are the subject of this application for judicial review are:

i. The Decision by the 1st and/or 2nd Respondent to take receipt of the Committee's HCA recommendations with regard to the expiring Tax Exemptions and the economic development of Grand Bahama to the Government, thereby enabling or allowing the consultation to be brought to a close and/or thereby approving and legitimizing the consultation process, in circumstances where the purported consultation conducted by the Committee was fundamentally flawed because the interested parties whom the Committee had purported to consult did not have sufficiently full and proper information to make informed, substantial or meaningful contributions to the consultation process ("the 1st Decision") and;

ii. The Decision by the 3rd Respondent to bring the consultation to an end by presenting the Committee's HCA recommendations to the 1st and/or 2nd Respondents, and to the Cabinet, in the same circumstances as those described above ("the 2nd Decision").

Judicial Review

[33] In **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review

as illegality, irrationality or "*Wednesbury unreasonableness*" and procedural impropriety. He explained them in this way:

> **"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
>
> **By irrationality, I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."**
>
> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".**

Grounds upon which Judicial Review is sought

[34] The Applicants premised their application for judicial review on two grounds namely (1) Procedural Unfairness and (2) Irrationality.

The 1st Decision

[35] The Applicants allege that the 1st and /or 2nd Respondents' decision to take receipt of the Committee's HCA Recommendations, thereby enabling or allowing the Consultation to be brought to a close and/or thereby approving and legitimizing the consultation process in circumstances where the purported consultation conducted by the Committee was fundamentally flawed was **procedurally unfair** for a miscellany of reasons.

[36] Stripped to its bare essentials, all of these reasons amount to an allegation that the consultation process which was undertaken by the Committee was fundamentally flawed because they were deprived of the McKinsey Report which formed the basis of the Consultation. Consequently, they were unable to make informed representations to the Committee. The corollary is that if they were provided with copies of the McKinsey Report prior to the consultation process, they would have been able to meaningfully contribute to the Consultation.

[37] The GBPA joined with the Applicants on the ground of procedural unfairness. They mutually assert that the Respondents, having embarked on a public consultation process, are legally obligated to conduct such consultation which satisfied the legal standards approved by the English Court of Appeal in the landmark case of **R v North and East Devon Health Authority, ex parte Coughlan** [2011] 1 QB 213 (also referred to as the "***Gunning Criteria*** or ***"Sedley Principles")***.

[38] The Applicants next contend that the said Decision was **irrational** because no reasonable decision-maker, acting fairly and only for proper purposes, would take receipt of recommendations produced pursuant to a fatally flawed consultation process thereby legitimizing that process and bringing it to a conclusion. Further, that no reasonable decision-maker, acting fairly and only for proper purposes, would take receipt of recommendations produced by a consultative committee that had purported to conduct a public consultation in circumstances where that same decision-maker had instructed the members of the Committee to act "in collaboration" with the authors of a prior report in circumstances where (i) the subject-matter of that prior report formed the basis of the consultation; but (ii) the contents of the prior report were kept secret from interested parties.

The 2nd Decision

[39] The Applicants allege that the 3rd Respondent's decision to present the Committee HCA's Recommendations to the 1st Respondent and to the Government thereby bringing the Consultation to an end, without giving them a

reasonable opportunity to make recommendations following the provision of full and proper information (including the provision of the McKinsey Report) was (1) **procedurally unfair** because the Applicants and the other Interested Parties had not been given proper information about the Government's proposals so as to enable them to make an informed and substantial contribution to the consultation process; and (2) **irrational** because no reasonable decision-maker, acting fairly and only for proper purposes would present a report based on a purported consultation without allowing those being consulted to make an informed and substantial contribution to the consultation.

Grounds opposing application for Judicial Review

[40] As earlier stated, the Respondents opposed the application for Judicial Review on four grounds namely:

(i) The Respondents have taken no decision which is capable of judicial review;

(ii) The judicial review application is premature;

(iii) There has been widespread and adequate consultation and the Applicants were given a reasonable opportunity to make representations and

(iv) Government has passed legislation extending the Tax Exemption and Concessions which would otherwise have expired on 4 August 2015 for a period of six months, i.e. 4 February 2016. The court is uninformed of what has transpired since 4 February 2016.

No decision capable of Judicial Review

[41] Learned Counsel for the Respondents, Mr. Klein forcefully argued that the Respondents have taken no "decision" which is susceptible to judicial review. While acknowledging that it is possible to apply for judicial review in respect of a decision that is not absolutely final, he averred that judicial review in the main is directed to substantive actions: **Shrewsbury & Atcham Borough Council,**

Congelton Borough Council v The Secretary of State for Communities and Local Government [2008] EWCA 148 (at para. 32).

[42] Mr. Klein next submitted that the Decisions, the subject of the application for judicial review, are the formal acts by the 1st and 2nd Respondents of presentation/receipt of the Committee's HCA Recommendations and they are clearly not decisions which are capable of having any legal consequences for any of the Applicants. Put another way, he argued that "the mere handing over and the corresponding act of receiving a report, which is advisory, cannot have any legal consequences on the Applicants".

[43] Additionally, Mr. Klein submitted that the supervisory jurisdiction of the court to exercise control over decisions made by bodies or persons amenable to judicial review exists to protect persons against decisions which might materially affect their rights on the main grounds of illegality, irrationality, procedural impropriety (and now legitimate expectation). However, it would be incompatible with this jurisdiction, waste judicial time and resources and create administrative uncertainty if the courts were to use this jurisdiction to set aside a course of action or step as "illegal" or flawed in the abstract, regardless of its effect.

[44] In maintaining that there is no decision susceptible to judicial review, learned Counsel referred to the Court of Appeal decision of **Callenders & Co. (a firm) v The Comptroller of Customs,** SSCApp No. 63 of 2012 at para 32:

> **"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. <u>If there is no decision there can be no judicial review to quash the nonexistent 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</u>…"**

[45] Mr. Klein submitted that since there is no decision, the application for judicial review is premature.

[46] The bone of contention by the Applicants is not merely restricted to the formal act by the 1st and 2nd Respondents of presentation/receipt of the Committee's HCA Recommendations, as submitted by Mr. Klein, but their decision to take receipt of the Recommendations thus enabling or allowing the consultation to be brought to a close and/or thereby approving and legitimizing the consultation process, in circumstances where the purported consultation conducted by the Committee was fundamentally flawed because they were not provided with the McKinsey Report and the decision by the 3rd Respondent to bring the consultation to an end by presenting the Committee's HCA Recommendations to the 1st and/or 2nd Respondents, and to the Cabinet.

[47] In my opinion, it defies logic and common sense if these are not decisions. Collins' English Dictionary defines a decision as "a judgment, conclusion, or resolution reached or given, verdict, the act of making up one's mind."

[48] As the Applicants submitted, the requirements as to justiciability are not stringent and have been considerably relaxed in recent years. It is not necessary for an applicant to demonstrate that a decision or action has direct consequences upon an applicant. The exercise of a public function is amenable to judicial review even in the absence of there being a statutory source for the power being exercised: see paragraphs 3-024 and 3-025 of *De Smith and Woolf on Judicial Review* (7th Edn).

[49] In addition, judicial review is not restricted to decisions taken as a result of a consultation. Decisions relating to the conduct of a consultation are also justiciable, even before the consultation has concluded: **R v Secretary of State for Transport Ex p Medway Council** [2002] EWHC 2516 (Admin).

[50] Briefly put, each decision is justiciable. They concern the conduct of a purported consultation exercise which itself constituted the exercise by the Respondents of public functions: the purpose of the Consultation was to make recommendations that would inform policy decisions to be taken by the Government.

[51] I am not persuaded by the arguments advanced by Mr. Klein.

Prematurity of application

[52] Learned Counsel Mr. Klein submitted that an important plank of the Respondents' submissions is that the administrative process is not concluded and no decision has been made rendering the Applicants' application premature. In his proverbial panache, Mr. Klein asserted that "they [the Applicants] have put the cart before the horse."

[53] In contrast, the Applicants asserted that the process came to an end on 22 June 2015 when the Committee presented its report to the 1st Respondent in his capacity as chair of the relevant Ministerial sub-committee and as Prime Minister, Minister of Finance and Head of the Government. Learned Counsel Mr. Malone referred to the 1st Applicant's affidavit (at para. 69) which quoted an article titled "Hawksbill Creek Agreement Report presented to the Prime Minister" dated 22 June 2015 reported by *Bahamaislandsinfo.com*. The 1st Respondent stated that he is considering the report and continued "*[a]ccordingly, I shall be introducing the Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) Extension of Tax Exemption Period (Amendment) Bill 2015 in order to effect the 6 months extension. This extension is necessary to enable full analysis and further consultation, if necessary, so as to set the foundation and framework for the accomplishment of Grand Bahama's full potential in the national interest for the benefit of all Bahamians*."

[54] To fortify his submission that the consultation process has ended, Mr. Malone submitted that the 1st Respondent thanked all of the members of the HCA Committee for their hard work and commended them for a great job. The 1st

Respondent ended "*It will certainly be of enormous value to the Cabinet as it proceeds to complete its deliberations on the longer term economic future of Freeport and Grand Bahama generally*." Learned Counsel added that even if the consultation process had not ended, the application is not premature. He submitted that the court, in assessing the justiciability/prematurity issue must decide whether the Applicants have suffered "real injustice". According to him, the failure to provide the McKinsey Report meant that the Applicants have suffered such injustice.

[55] Much was made as to whether the consultation process embarked upon by the HCA Committee came to an end. The Applicants insisted that the process ended upon the presentation of the Committee HCA's Recommendations to the 1st Respondent and to the Government on 22 June 2015. The Respondents submitted that the consultation process has not ended and that there is still room for further consultation. At paragraph 17 of his affidavit, Dr. Coakley averred that "[a]lthough the Applicants in their affidavits make various challenges to the consultation process and describe it as being flawed, **it is also clear based on certain developments that there is still room for further consultation with respect to the issues the Committee had to consider**." At paragraph 18, Dr. Coakley next averred that "the Rt. Hon. Prime Minister emphasized at several passages that part of the purpose for the extension was to facilitate further consultation in respect of the matter, to the extent such consultation was required. For example, on 22 July 2015, in his Communication, the 1st Respondent said "[D]ue to the indepth and comprehensive nature of the study and the report of the Committee **which would also require further consultation and negotiations with stakeholders and the Grand Bahama community, more time is clearly needed to complete this vital exercise."**

[56] The Respondents also relied on the affidavit evidence of the 2nd Applicant where he said "*as far as I am aware, since the report from the HCA Committee was presented to the Prime Minister on 22nd June 2015 (and confirmed in the House*

of Assembly on 22nd July 2015), ***save for the meeting in London with Hutchinson Whampoa in December of 2015****, there has been no further consultation"*.

[57] Dissecting the articles of 22 June 2015 in the *Bahamaislandsinfo.com*. and more specifically, the House Communication by the 1st Respondent dated 22 July 2015, it is plain that even though the Report was presented, the 1st Respondent realized that the Tax Exemptions are of great importance to the further economic development of Grand Bahama and that further consultation is necessary. This is evident in the 1st Respondent's speech when he said: "*[D]ue to the depth and comprehensive nature of the study and the report of the Committee which would also require further consultation and negotiations with stakeholders and the Grand Bahama community, more time is clearly needed to complete this vital exercise…., and the extension is necessary to enable full analysis and further consultation, if necessary."*

[58] Mr. Klein quoted extensively from the judgment of Beatson J in **Birmingham Care Consortium v Birmingham City Council** [2011] EWHC 2656 (Admin) to bolster his argument that the application is premature. The case concerned an application for permission to apply for judicial review to challenge the defendant City Council's failure to determine the fees to be paid for the care and accommodation of occupants in residential care and nursing homes with effect from 1 April 2001. The defendant had extended the contracts with providers which were due to expire on 31 March for a further period of 12 months on the basis that pending such determination, the rate payable in the previous year would continue to be paid. The judge refused permission on the basis that the application was premature as the consultation process was continuing. He exhorted the defendant to get on with the process.

[59] Beatson J had this to say at paragraph 31:

> **"On considering other cases where the court may intervene before the administrative process is concluded I note that those very often involve situations where there is a clearly identified and discrete question of law.**

> **That was so in the *Alconbury* case, on which Miss Robertson relied. Essentially, in this case the challenge is either, leaving aside consultation, a failure to take into account a relevant consideration, or all relevant considerations, other than cost, or a rationality challenge. On either basis it is likely to a challenge, the resolution of which will be very fact sensitive. I consider that, absent a clear and discrete sharp question of law, because it is likely to be fact sensitive, a challenge now would be premature."**(Emphasis added).

[60] In my opinion, there is a question of law to be dealt with in this application namely whether the consultation process was fatally flawed from its inception. **Birmingham Care Consortium** is therefore distinguishable.

[61] Furthermore, in **R v Secretary of State for the Home Development, Ex Parte Hickey (No. 2)** [1995] 1 WLR 734, the applicants, before a substantive decision was taken against them, challenged the Secretary of State's policy of only permitting them to make representations after he had made his substantive decision whether to refer any of their cases to the Court of Appeal. The applicants applied for declarations that they should have been given fuller disclosure of the information from the police investigations so as to make informed submissions upon the same. At page 744B-C, Simon Brown LJ held that:

> **"[E]lementary fairness surely requires that he should then have the opportunity to address these fresh obstacles in his path before an adverse decision is taken against him."**

[62] This case is sound authority that a decision to withhold information even prior to the determination of any substantive rights can be successfully challenged by way of judicial review.

[63] For all of these reasons, the application for judicial review is not premature.

Proper and meaningful consultation

[64] It is not disputed that the Respondents voluntarily engaged in a public consultation exercise in relation to, among other things, the concessions and exemptions from the payment of business licence fees and real property tax

under the HCA that was due to expire on 4 August 2015 and later renewed for a further period of six months. The court is uninformed of the present position since the further extension of six months had expired on 4 February 2016.

[65] Once public consultation has been embarked upon, there is a legal requirement that it be done properly. In **R v North and East Devon Health Authority, ex parte Coughlan** [2001] QB 213, Lord Woolf MR said at paragraph 108:

> **"It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168."**

[66] At paragraph 112, Lord Woolf MR continued:

> **"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."**

[67] The Gunning criteria were adopted by the Court of Appeal in **Responsible Development of Abaco (RDA) Ltd and Another v Ingraham and Others** [2012] 3 BHS J. No. 35 at paragraph 54.

[68] The case of **R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry** [2007] EWHC (Admin) referred to by Mr. Klein is also important. It is good authority for the proposition that there is a broad discretion in the conduct of a consultation and the courts will only interfere for egregious error. Sullivan J indicated at paragraphs 62 and 63:

> **"62. A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out.**
>
> **63. In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went "clearly and radically" wrong."**

[69] Against these legal principles, I shall examine the facts. Unquestionably, whether a consultation is adequate and meaningful will depend on the particular circumstances of the case.

[70] In his affidavit, Dr. Coakley detailed the process of consultation. At paragraphs 5-7, he elaborated that the Committee began its work in early March, which continued to mid-May 2015. The Committee conducted personal and private interviews with specific individuals and groups and held town meetings. The process was promoted and advertised through a mixed-media public relations approach, which included public advertising on Channel 11 television, daily radio advertisements on station 810 during community announcements 3 times daily. Additionally, flyers were also sent out to the various communities and posted on *Facebook* on the Minister of Grand Bahama's page.

[71] Further, the Committee extended personal invitations to specific groups and individuals by means of letters, emails, phone calls, as part of the consultation process. Both Applicants were invited to attend the meeting of the Northern Bar on 20 April 2015.

[72] The Committee met with some 120 stakeholders including civil society, manufacturers, developers, tourism operators, present and former Parliamentarians and other professional. Additionally, four town meetings were

held across the island, in which more than 250 persons participated, and the Committee received numerous positions papers and submissions.

[73] Dr. Coakley emphasized, at paragraph 8, that the Committee extended personal invitations to both Applicants to participate in different aspects of the consultation process. By an email dated 9 April 2015, Mrs. Ingraham of Callenders & Co. was requested to extend an invitation to both Applicants to meet with the Committee to discuss their views on the provisions of the HCA. Mr. Leonard attended the meeting. Dr. Coakley recalled that Mr. Leonard referred to the McKinsey Report but could not recall whether he said that he could not make any meaningful contribution because he was deprived of the Report. Dr. Coakley was unable to substantiate whether Mr. Smith attended any of the Northern Bar's meetings or town meetings.

[74] At first blush, it appears that the Committee did a fair bit of consultative work. However, proper and meaningful consultation cannot only be measured by how many stakeholders participated, how many meetings were held and how long it lasted but crucially, whether those who have a legitimate interest in its outcome, had all the information necessary for such consultation.

[75] The gravamen of the complaint here is that despite several requests for the McKinsey Report, upon which the consultation exercise was founded, the Respondents have failed and/or refused to provide them with that vital report. As already observed, the Committee's Term of Reference record that the McKinsey Report includes "*a study of the economic situation within the Port Area, the implications of the expiring incentives, and measures which might be taken to spur economic development*."

[76] It is not disputed that an electronic redacted copy of the Report was not received until the eleventh hour – the night before this hearing commenced. A copy was handed to the court on the morning of the hearing.

[77] The overriding requirement of any consultation is that it must be fair. In **Bushell v Secretary of State for the Environment** [1981] AC 75, Lord Diplock said, at page 96:

> **"Fairness, as it seems to me, also requires that the objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons are based."**

[78] In my opinion, the Applicants, as licensees, who stand to have their rights and interests affected by any decisions taken in relation to the Tax Exemptions and the economic and fiscal governance of Freeport, have a right to be properly consulted and should have sufficient information to enable them to make informed and meaningful contributions to the Consultation process. That being said, whether consultees in a particular case have sufficient information to enable them to be usefully consulted depends on the facts of the case. In **R (United Co Rusal plc v London Metal Exchange (CA)** [2014] EWCA Civ 1271, the UK Court of Appeal rejected submissions from Counsel for the Applicants that the omission of competition concerns (which was said to be material) was such as to render the consultation unfair. Arden LJ said at paragraph 51:

> **"…The adequacy of consultation must depend on the sufficiency of information in the context in which the consultation took place. Therefore the court cannot ignore information which was well known to the consultees even if it was not set out or referred to in the consultation document. Any other conclusion would lead to cumbrous and potentially self-defeating consultation exercises where the real issue is obscured by common knowledge. There was evidence that the competition law difficulties were known in the market…"**

[79] Dr. Coakley opined that both Applicants are knowledgeable about the matters which the Committee had to consider. He said that the 1st Applicant, in his affidavit at paragraphs 29 to 40, outlined his vast and diverse knowledge of matters relating to the HCA and the economy of Freeport including the fact that he has participated in preparing a report for a similar purpose when the same tax

exemptions were to expire in 1990. About the 2nd Applicant, Dr. Coakley said that his credentials especially as a former counsel for the GBPA, past President of the Bahamas Chamber of Commerce and former Director of Grand Bahama Chamber of Commerce, conferred upon him particular knowledge and insight of the matters.

[80] That being said, the Applicants have made several requests for the McKinsey Report so it escapes me why such Report was not given to them as they contributed to it.

[81] Learned Counsel for the GBPA, Mr. Adams, joined with the Applicants on the single ground of procedural unfairness. He submitted that the McKinsey Report was the backbone to the consultation exercise and disclosure at the outset of the consultation was quintessential.

[82] Mr. Adams argued that although the McKinsey Report was prepared by a private firm engaged to provide advice to the Respondents, that did not warrant the suppression of the report from members of the public whom were being consulted. In that regard, he cited the case of **The Queen (on application of Eisai Limited v National Institute for Health and Clinical Excellence et al** [2008] EWCA Civ 438 at para 30:

> **"…The fact that the material in question comes from independent experts is plainly relevant to the overall assessment, but it was a combination of factors – including the requirement of a high degree of fairness (see reasons at p. 370B-D), the crucial nature of the advice, the lack of good reason for non-disclosure, and the impact on the applicants –which led to what was on the facts a fairly obvious conclusion. The reasoning and conclusion depended heavily on the particular context."**

[83] According to learned Counsel, the same factors apply to the present case. The McKinsey Report formed the basis of the consultation process and was therefore crucial for a proper and meaningful consultation. In addition, there was no good reason to withhold the Report from the consultees.

[84] Mr. Adams cited the case of **Regina (Moseley) v Haringey London Borough Council** [2014] 1 WLR 3947. The facts are not dissimilar to the facts in the present case. A local authority undertook wide-ranging public consultation with respect to its draft for council tax reduction. The claimant sought judicial review of the council's decision to make the scheme, contending that the consultation process had been unfair and therefore unlawful because consultees were not provided with sufficient information to enable them to appreciate that there were alternatives to the draft scheme. The UK Supreme Court held, allowing the appeal, that for the consultation to be fair and fulfill its statutory objective of public participation in the decision-making process it was necessary for the local authority to provide to the consultees with adequate information concerning certain alternative proposals that were under consideration.

[85] At paragraphs 23 – 25 of his judgment, Lord Wilson reverberated the protean concept of procedural fairness under common law and approved the *Gunning criteria*. At paragraph 26, after considering a miscellany of authorities, the learned law Lord continued:

> **"Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting….Second, in the words of Simon Brown LJ in *Ex p Baker* [1995] 1 All ER 73, 91, "the demands of fairness are likely to be somewhat higher when the authority contemplates depriving someone of an existing benefit or advantage than when a claimant is a bare applicant for a future benefit."**[Emphasis added]

[86] Lord Reed agreed with Lord Wilson and stated at paragraph 35:

> **"The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty was explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139, [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is**

> **held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 *and R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, cited by Lord Wilson JSC, with which the *BAPIO* case might be contrasted."**

[87] At paragraph 39, Lord Reed continued:

> **"In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme. That follows, in this context, from the general obligation to let consultees know "what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response." *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 112, per Lord Woolf MR."**

[88] As Mr. Adams vigorously submitted, there was no reason why the Applicants were not provided a good time before the consultation process with the McKinsey Report which they implored on several occasions. In my opinion, it would have informed them so that they could have meaningfully contributed to this fundamental issue which has substantial ramifications on their livelihoods.

[89] I conclude that, without the benefit of the McKinsey Report, the consultation process was fundamentally flawed.

Statutory amendments extending tax concessions

[90] The Respondents contend that there is no imminent threat of any decision being made adverse to any of the parties and Parliament has, by virtue of the Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) (Extension of Tax Exemption Period) (Amendment) Act 2015 extended the "taxes and other imports conferred by the Agreement."

[91] Learned Counsel Mr. Klein submitted that the effect of the amendment is to maintain the status quo as the issue is being discussed. Attractive though this may sound, it is not relevant to the application for judicial review. It therefore warrants no further consideration.

Irrationality

[92] The Applicants assert, and the onus is on them to prove, that the Decisions were irrational in that it is "unreasonable" in the *Wednesbury* sense. In support of this submission, the Applicants trenchantly argued that the 1st Decision was irrational because no reasonable decision-maker, acting fairly and only for proper purposes, would knowingly take receipt of recommendations produced pursuant to a fatally flawed consultation process thereby legitimizing that process and bringing it to a conclusion. Further, that no reasonable decision-maker, acting fairly and only for proper purposes, would take receipt of recommendations produced by a consultative committee that had purported to conduct a public consultation in circumstances where that same decision-maker had instructed the members of the Committee to act "in collaboration" with the authors of a prior report in circumstances where (i) the subject-matter of that prior report formed the basis of the consultation; but (ii) the contents of the prior report was kept secret from interested parties.

[93] The Applicants next argued that the 2nd Decision was irrational because no reasonable decision-maker, acting fairly and only for proper purposes would present a report based on a purported consultation without allowing those being consulted to make an informed and substantial contribution to the consultation.

[94] In the seminal decision of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** (1948) 1 KB 223, Lord Greene MR stated (at page 230):

> **"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of**

that kind would require something over-whelming, and, in this case the facts do not come anywhere near anything of that kind…

It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high policy of this kind…

The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that is set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."

[95] Irrationality in judicial proceedings was also considered by the House of Lords in **Council of Civil Service Unions v Minister for the Civil Service** [supra], where Lord Diplock stated (at page 410 G):

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system… Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

[96] In **Nottinghamshire County Council v Secretary of State for the Environment** [1986] Law Reports HOL 240, the House of Lords held (at 241):

"That in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the Secretary of State it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration that had been one for the political judgment of the Secretary of State and the House of Commons".

[97] Simply put, the issue to be determined is whether the Decisions made by the Respondents were so outrageous that they defy logic or accepted moral standards and that no reasonable authority could have arrived at those Decisions.

[98] Putting the case for the Applicants at its highest, it is this: since they were deprived of the McKinsey Report, the consultation process was fatally flawed from the inception and no reasonable decision-maker acting fairly would have taken receipt of recommendations obtained from a fatally flawed process. In addition, no reasonable decision-maker would present a report based on a purported consultation without allowing those being consulted to make informed contribution to the consultation.

[99] Unreasonableness, in the *Wednesbury* sense, requires overwhelming evidence. In **Nottinghamshire County Council v Secretary of State for the Environment** [supra] the House of Lords held that in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the decision-maker, it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration.

[100] It is therefore apposite for the court to look at the evidence when considering the reasonableness or rationality of the Decisions. Unquestionably, the McKinsey Report would have informed the Applicants so they could have meaningfully contribute to the consultation process. But that is not all. The failure to provide them with the Report has resulted in procedural unfairness but not irrationality.

[101] Moreover, bad faith on the part of the Respondents has not been suggested. No one suggests, nor could it be suggested that the Respondents acted for an improper motive.

[102] I will therefore reject the so-called *Wednesbury* unreasonableness argument. Despite the eloquent and able submissions of Mr. Malone, in order to prove the *Wednesbury* unreasonableness, it requires something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. This ground of challenge fails.

Consultation Process

[103] Learned Counsel Mr. Malone aspired with much enthusiasm to persuade the court to order the Respondents to undertake a fresh consultation. In **Regina (Moseley) v Haringey London Borough Council** [supra], a case with similar facts to the present case, the court held that the claimant was entitled to the declaration that the consultation had been unlawful but it would not be proportionate to order the Council to undertake a fresh consultation exercise in relation to the process which had been in operation since March 2015. In similar vein, I would not order the Respondents to conduct a fresh consultation but to get on with the process. By engaging in further consultation, the Respondents should give to the Applicants and Interested Parties redacted copies of the McKinsey Report upon request and also, sufficient time to study the Report so that they can make informed and meaningful contribution.

McKinsey Report

[104] The Applicants were provided with a redacted copy of the McKinsey Report just before the commencement of the hearing but they seek the unredacted Report together with any appendices and reference material submitted to the Government.

[105] I have carefully scrutinized the unredacted Report. In my opinion, it contains matters of a sensitive nature which may affect national security. Consequently, the McKinsey Report, in its redacted form, ought to be made available to Interested Parties upon request.

Conclusion

[106] For all of the reasons given, it is hereby declared and ordered as follows:

(1) The consultation process was procedurally unfair and did not constitute proper and meaningful consultation;

(2) The decisions made by the Respondents relating to the consultation process be and are hereby quashed;

(3) The Respondents or each or any of them shall provide copies of the redacted McKinsey Report to any of the Interested Parties upon request.

(4) The Respondents or each or any of them shall continue with the consultation process and give to the Applicants and all Interested Parties a reasonable and sufficient time, of not less than a month, to consider the McKinsey Report so that they can properly and meaningfully contribute to the consultation process;

(5) Costs to be taxed if not agreed. Parties will address me on costs at a date convenient to all parties.

[109] Last but not least, I would like to commend all Counsel for their sterling presentation and immeasurable assistance to the court. For this, I am immeasurably grateful.

Dated this 5th day of May 2016.

Indra H. Charles
Supreme Court Justice