COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2019/PUB/con/0002

IN THE MATTER OF ARTICLE 20 OF THE CONSTITUTION OF THE COMMONWELATH OF THE BAHAMAS

AND

IN THE MATTER OF AN APPLICATION BY JAMILE FERGUSON FOR CONSTITUTIONAL RELIEF

BETWEEN:

JAMILE FERGUSON

Plaintiff

AND

THE COMMISSIONER OF POLICE

1st Defendant

AND

ATTORNEY GENERAL

2nd Defendant

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Alex Dorsett for the Plaintiff Fern Bowleg for the Defendants
Hearing Dates:	21 April 2021

RULING

KLEIN, J.

Civil Practice and Procedure—Rules of the Supreme Court (R.S.C.) 1978—Order 18, r. 19(1) (b) and (d)—Application to Strike out—Frivolous and Vexatious—Abuse of Process--Constitutional Motion—Claims for Declaration in respect of dismissal of Police Officer—Police Act Ch. 205—Section 26 (c)

INTRODUCTION

[1] The extraordinary powers of the Commissioner of Police ("COP") to discharge subordinate police officers under section 26(c) of the Police Act 1965 has been the subject of several legal challenges by officers aggrieved by the use of this statutory power to dismiss them from the Police Force. That section, now repealed but substantially re-enacted as 21(c) of the 2009 Police Force Act, provided for the COP in the exercise of his discretion to discharge a police officer on two broad grounds: (i) that the officer was "*unlikely to become or has ceased to be an efficient police officer";* and (ii) if for any other reason his discharge is *"deemed necessary in the public interest*".

[2] The applicant Jamile Ferguson was dismissed from the Police Force pursuant to those powers. He filed a Notice of Originating Motion on 14 January 2019 ("the motion"), as amended 11 June 2020, seeking declarations that various constitutional and other rights were breached in relation to his discharge.

[3] Standing in the way of his claims, however, is an application by the respondents to strike out his motion on the grounds that it is frivolous, vexatious and an abuse of the process of the court. This is because his discharge took place on 8 July 2009, nearly 10 years ago and, furthermore, a previous judicial review claim instituted by him in 2015 seeking to quash his dismissal from the Police Force was rejected by the Supreme Court as being way out of time (*Jamile Ferguson v. Commissioner of Police and the Attorney General* [2015/PUB/jrv/0003, ("the judicial review ruling").

The applications

[4] In the motion currently before the Court, the applicant applies for the following declarations and relief, as well as consequential relief, including damages (omitted from the excerpt):

> "1. A declaration that the Commissioner of Police did not follow proper procedure when he made the decision to dismiss the Applicant and not allowing the due process of law afforded to him by the Constitution of the Bahamas.
> 2. A declaration that the Applicant's right to a fair hearing afforded to him by the Constitution of the Bahamas was violated.
> 3. A declaration that the decision of the Commissioner of Police to dismiss the Applicant because he was charged with an offense violates the right of the Applicant afforded to him by the Constitution of the Bahamas of being presume[d] to be innocent until proven guilt[y].
> 4. A declaration that the Applicant was unlawfully dismissed by the Commissioner of Police.
> 5. A declaration that the Commissioner of Police had no authority to dismiss the Applicant under section 26(c) of the Police Act, Chapter 205."

[5] The grounds of the application are as follows:

> "1. That the Applicant was dismissed by the Commissioner and was not given an opportunity to respond to any allegation or the opportunity to give reasons why he should not be dismissed.
> 2. That the decision of the Commissioner gave the inference that the Applicant was guilty of the offences without being tried.
> 3. That the decision of the Commissioner did not afford the Applicant an opportunity to be heard.
> 4. That the Commissioner of Police did not follow proper procedures when he made the decision to dismiss the Applicant.
> 5. That the Commissioner unlawfully dismissed the Applicant under section 26(c) of the Police Act, Chapter 205."

[6] The application was supported by an affidavit filed by the applicant in the matter on 8 July 2020.

[7] Pursuant to a re-amended summons filed 3 February 2021, the respondents applied for an order pursuant to Order 18, rule 19(1)(b) and (d) of the Rules of the Supreme Court 1978 (R.S.C. 1978) and/or under the inherent jurisdiction of the court for an order that:

"1. The Applicant's Amended Originating Motion is (*sic*) struck out on the grounds that:

(i) The Applicant failed to exercise his right of appeal under section 102 of the Police Act, Chapter 205 and thus failed to comply with the proviso in Article 28(20 of the Constitution.
(ii) The proceedings brought against the Respondent is frivolous and vexatious and is an abuse of the process of this Honourable Court.

2. Further, or in the alternatively an order that the claims as against the Defendants are statute barred pursuant to section 12 of the Limitation Act, Chapter 83."

[8] The respondents filed several affidavits in support of their strike-out summons: (i) the affidavit of Deidre Clarke-Maycock, 26 June 2020; (ii) the affidavit of Chief Superintendent of Police Adrian Strachan, 8 July 2020; (iii) the affidavit of Tiffany Frazier, 9 July 2020; and (iv) the supplemental affidavit of Deidre Clarke-Maycock, 7 July 2020.

Issues

[9] The main issues before the court may be simply stated: (i) whether the court should exercise its discretion to strike out the applicant's motion on the grounds that it is frivolous, vexatious and an abuse of the process of the court; or (ii) in the alternative, whether the claims are statute-barred pursuant to s. 12 of the Limitations Act.

The essential background

[10] I gratefully adopt a brief statement of the background facts as found by Winder J. (as he then was) in the judicial review ruling:

> "The Applicant enlisted in the Royal Bahamas Police Force on 15 December 2003. He has had a very colourful tenure on the Royal Bahamas Police Force. Several incidents and allegations occurred during his tenure. These included:
>
> (1) 9 October 2006, the Applicant was charged before the Magistrates Court with the offence of causing harm. On 11 December 2007, the Applicant was acquitted of the causing harm charge.
> (2) On 24 October 2006, the Applicant was interdicted by the Police Tribunal and charged with an offence, of a "major nature" contrary to the discipline, good order and guidance of the force. The Police Tribunal withdrew this charge on 25 May 2009.
> (3) On 5 July 2009 the Applicant was charged by the police with several indictable offences (including armed robbery). He was arraigned before the Magistrate's Court on 9 July 2009. The matter proceeded to the Supreme Court where he was ultimately discharged in October 2013."

[11] It is the indictable offences mentioned in paragraph 3—two counts of conspiracy to commit armed robbery, two counts of armed robbery, one count of receiving and one count of stealing—that apparently led to the applicant's discharge on 9 July 2009. According to the affidavit of Chief Superintendent Strachan, the applicant was summoned by the Commissioner on 8 July 2009, informed about the allegations and his work ethic, and invited to give reasons why he should continue to serve as a police officer. The affidavit further avers that the applicant did not give any reasons, either verbally or in writing, in response to this request and he was therefore discharged pursuant to s. 26(c) of the Police Act on the grounds that the Commissioner "*considered that the applicant's conduct and work ethic would discredit the Police Force and that his discharge was deemed necessary in the public interest*." The

affidavit also states that the applicant "*opted not to appeal the Commissioner's decision*" and that the records of the Force do not indicate that the COP was ever notified of an appeal against his decision. The affidavit of Tiffany Frazier, a clerk in the office of the Governor General for some 11 years, avers that a "thorough search" revealed that there was no record on file of any application from the applicant appealing the decision of the Commissioner of Police.

[12] The applicant gives a somewhat different account of his meeting with the COP. He says that on that day, he was told by the police that he was being charged with the criminal offences mentioned and taken to Police Headquarters to see the COP, who informed him that he was being dismissed. He states that no reasons were given for his dismissal, and he was later presented with a discharge certificate indicating he was dismissed pursuant to section 26(c) of the Police Act. He says that he was under the impression, based on advice from the lawyers then representing him, that the Commissioner's decision was being appealed. It is only when he never got a response from office of the Governor General in respect of the "appeal" many years later that he filed the application for judicial review.

The relevant legal context

[13] Before looking at the principles governing strike-out actions, it is necessary to refer to several statutory and constitutional provisions which provide the legal context to the claims. The Police Act, 1965, Ch. 205 (now repealed) provided in material part as follows:

> "26. Subject to the provisions of the Constitution, a police officer of or above the rank of inspector may be discharged by the Governor-General acting in accordance with the advice of the Police Service Commission, and a subordinate police officer or constable may be discharged by the Commissioner, when he—[…]
>
> (c) is considered by the Commissioner unlikely to become or has ceased to be an efficient police officer or for any reason his discharge is deemed necessary in the public interest;" […]

Section 102 provided:

> "Any police officer aggrieved by a decision of the Commissioner given under the provisions of section 26, 50(2) or 50(30 of this Act may appeal to the Governor-General within seven days after such decision, and the Governor-General shall, in determining any such appeal, act in accordance with the advice of the Police Service Commission."

<u>Striking out principles</u>

The Rules

[14] Order 18, r. 19 of the *Rules of the Supreme Court* 1978, (R.S.C. 1978), so far as material to the application, provides as follows:

> "19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or

> (d) it is otherwise an abuse of the process of the court,
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[15] A similar power inheres under the inherent jurisdiction of the Court to stay or dismiss actions which are vexatious, frivolous or otherwise an abuse of the process of the Court: see "The Supreme Court Practice 1997", Vol. 1, at para. 18/19/18; *Reichel v Magrath* (1889) 14 App. Cas. 665).

[16] No evidence is admissible under Order 19(1)(a) (Ord. 18, r.19(2). But when an application is made under the inherent jurisdiction of the Court, or on any of the other grounds, all the facts can be gone into, and affidavits are admissible: *Willis v Earl Howe* [1893] 2 Ch. 189, pp. 551, 554.

Scandalous, frivolous or vexatious

[17] Cases coming under the umbrella of scandalous, frivolous or vexatious include, for example, cases which are obviously unsustainable and or spurious, cases brought to harass or embarrass a party, and cases which were viable when instituted but by reason of subsequent events have become doomed to failure ("The Supreme Court Practice 1997" ("The White Book"), at paras. 18/19/15). However, a pleading or matter will not be struck out solely because it is scandalous or unnecessary, unless the allegations are also irrelevant and to allow them to stand would incur useless expense and involve the parties in unnecessary argument (*Willouby v Eckstein* [1936] 1 All ER 650). The court has also struck out cases under this rule where it was clear that the defendant intended to avail themselves of a limitation defence (*Ronex Properties v. John Laing Construction Ltd.* (1983) QB 398).

Abuse of process

[18] Abuse of process can take many forms and concerns pleadings which involve the improper use of the court's machinery, such as the institution of proceedings for improper or collateral purposes, the bringing of concurrent proceedings in different courts, or attempts to litigate matters already decided ("*res judicata*") or which should have been litigated in previous proceedings (see *Hunter v Chief Constable of West Midlands Police* [1982] AC 529*).*

<u>Limitation Act</u>

[19] The other ground relied on by the respondents is the special limitation protection available to public authorities under s. 12 of the Limitation Act. That provides in part as follows:

> "12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.
>
> (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof."

General principles relating to striking out

[20] The most firmly established and oft-repeated of these is that the jurisdiction to strike out ought to be sparingly exercised and is only intended for plain and obvious cases. This is because striking out applications are often described as draconian in nature, since they have the potential of denying a party the right to trial. This principle has been consistently applied by our courts: see, for example, *B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans) [2017] 1 BHS J No. 28*, per Charles J (as she then was, now Snr. J.) [para. 7, 8]; and *Sandy Port Homeowners Association Limited v Bain [2015] 2 BHS J. No. 102*, per Crane-Scott JA [para. 14,18].

[21] Importantly, it has also been held that claims seeking relief under Article 28 of the Constitution (i.e., raising issues of fundamental rights) are not immune from the strike-out jurisdiction of the court under *RSC Ord. 18, R. 19*, or in the exercise of the Court's inherent jurisdiction (see *Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al.*, Privy Council Appeal No. 53 of 2005 (see paras. 11-13).

[22] There, in response to an argument that constitutional claims were not amenable to the Court's strike out jurisdiction under Order 18, r. 19(1)(a), their Lordships said (at paras. 11-13):

> "…the Court of Appeal was right to direct itself that claims should only be struck out in plain and obvious cases and, of course, courts should look with particular care at constitutional claims, constitutional rights emanating from a higher law. But constitutional claims cannot be impervious to the strike out jurisdiction and it would be most unfortunate if they were. It cannot be right that anyone issuing proceedings under article 28 of the Constitution is guaranteed a full hearing of his claim irrespective of how ill-founded, hopeless, abusive or vexatious it may be."

ANALYSIS AND DISCUSSION

Parties' submissions

[23] The respondents argue that the applicant's attempt to issue constitutional proceedings some 9½ years after his discharge directly flouts s. 12 of the Limitations Act. In this regard, they rely on the line of cases which hold that where a limitation can be successfully invoked, the court can strike out the action as being frivolous, vexatious or an abuse of process: *Riches v Public Prosecutions* [1973] 2 All ER 935 (CA); *Ronex Properties Ltd. v John Laing Construction Ltd.* [1983] Q.B. 398, and *Girten v. Andreu* [1988] BHS J. No. 164.

[24] They do not all need to be referenced, but in the latter, Sawyer CJ, cited with approval the earlier cases on the point and said [para. 20] that:

> "I think it is now trite law that where it is clear from the statement of claim that the cause of action arose outside the correct period of limitation and it is clear that the defendant intends to rely on the limitation defence and there is nothing before the court to suggest that the plaintiff could escape that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the court."

[25] On the abuse of process point, they argue two main points. Firstly, that the current action was brought substantially on the same grounds upon which the 2015 judicial review action was

based. In this regard, they refer to the judicial review ruling where the grounds were set out as follows (para. 8 of ruling):

> "(i) procedural impropriety: The Commissioner of Police breached the fundamental rules of natural justice as the Applicant was not given a fair hearing prior to making any decision regarding the employment and affiliation with the Royal Bahamas Police Force;
>
> (ii) Irrationality: The Commissioner of Police irrationally exercised his discretion in discharging the Applicant."

[26] Secondly, they contend that the application is in contravention of the proviso to article 28(2), which provides that the court shall not exercise its powers to adjudicate on fundamental rights issues unless satisfied that "*adequate means of redress are or have not been available to the person concerned under any law*." In support of this proposition, they assert that the application failed to exercise his right to the statutory (and constitutional) appellate procedure provided to appeal the decision of the Governor-General, and that there was no excuse for this as he would have had constructive notice of his right of appeal (*Knowles v. Attorney-General of the Bahamas* [1999] BHS J. No. 67.

[27] They also reiterate the point that constitutional applications have no special innoculation against strike-out applications (see *Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al., supra).*

[28] The applicant made several submissions in response to the arguments of the respondents. With respect to the Article 28(2) abuse of process point, the applicant contends that neither the appeal process under 102 of the Police Act nor the judicial review application would have provided adequate means of redress, since neither provided for the recovery of any damages. Hence, as damages are being claimed for the first time in the constitutional action, it cannot be categorized as an abuse of process. In this regard, counsel placed some reliance on the case of *Lacroix v Stipendiary & Circuit Magistrate Derence Rolle-Davis* [2013] 3 BHS J. No. 68, which basically affirms the rule that in exceptional cases, the court would grant leave for judicial review even where a statutory remedy had not been pursued if the latter did not provide an effectual remedy. I will say at once that I think reliance on this case in the context of the constitutional application, is misplaced.

[29] Next it is argued that on the date the applicant was discharged (8 July 2009), the 1965 Police Act had been repealed by the 2009 Police Force Act (which it is said commenced on the 1 April 2009), and therefore no reliance could be placed on section 26(c) for the discharge nor on s. 102 as providing a right of appeal. In the alternative, the applicant contends that even if the 1965 provisions were still in force at the time of his discharge, he was operating under the belief that his attorney had filed an appeal to the Governor-General, and his immediate remand for a period of two months following his criminal charges prevented him taking any further actions to pursue his appeal.

[30] The applicant did not address any written submissions to the limitation issue. But I did raise with counsel during the course of the hearing the question of whether the limitation periods applied to constitutional motions (drawing their attention to the Caribbean Court of Justice ("CCJ") case of *Edwards v. The Attorney General* [2008] CCJ 10 (AJ)) 09), and invited counsel to lay over any additional authorities in that regard. Mr. Dorsett argued, in oral submissions,

that he did not think the limitation period applied to constitutional motions, but no authorities were lodged with the court on this point.

Court's Findings

[31] I must confess that several of the applicant's arguments in opposition to the strike-out are rather novel and difficult to follow. For example, the claim that the constitutional application does not amount to an abuse of process simply because the applicant is asserting for the first time a claim for damages must be rejected out of hand. To begin with, damages are generally not recoverable in respect of unlawful administrative actions and, in any event, it is incorrect to assert that damages were not available in the judicial review application. Damages can be recovered in judicial review proceedings if the pleaded facts would also substantiate a separate common law or statutory cause of action (see *Bruno Rufa v Regina & William Pratt* [SCCivApp. No. 131 of 2016], per Crane-Scott, JA, para. 112-114). But it is beyond the pale that the applicant's judicial review claim was "*grossly and inexcusably*" out of time (as found by the Judge), and therefore the issue of whether or not a claim could have been made for damages is academic.

[32] The assertion that the respondents relied on repealed provisions of the Act is also mistaken. Counsel for the respondents pointed out that, in fact, the 2009 Act did not come into force prior to his discharge (on the 1 April 2009, as alleged by the applicant), but on the 4 January 2010 (S.I. 112 of 2009). The point is misconceived in any event, since (as mentioned) s. 26 (c) was re-enacted as 21(c) and s. 102 as 21(2) in the new Act.

[33] I agree with counsel for the respondent, however, that the limitation periods, whether general or the special limitation period for public authorities, do not necessarily apply to constitutional applications. Sawyer C.J. adverted to this in *Davis v Attorney General of the Commonwealth of the Bahamas* [1994] BHS J. No. 132, when she referred counsel to the decision in *Thomas D'Arcy Ryan v. Attorney General* [1976] where it was held, *inter alia*, that the Public Authorities Protection Act (as it then was) did not apply in respect of constitutional applications, as the Constitution itself contained no limitation period.

[34] The position was made very clear in the later Privy Council case of *Durity v. Attorney General* [2003] 1 LRC 210, where their Lordships emphatically rejected the argument by the Attorney General that the applicant's claims for various declarations that his suspension as a magistrate contravened the provisions of the constitution was statute-barred by the provisions of the Public Authorities Protection Act, which imposed a one-year limit from bringing actions against public authorities. The Privy Council said as follows [para.30]:

> "The rights and freedoms recognised and declared in s. 4 are not to be abrogated, abridged or infringed by any law except as *expressly* provided in Chapter 1 of the Constitution or in s. 54(amendment of the Constitution); see s. 5. Clearly, the inherent jurisdiction of the High Court to prevent abuse of its process applies as much to constitutional proceedings as it does to other proceedings. And the grant or refusal of a remedy in constitutional proceedings is a matter in respect of which the court has a judicial discretion. These limitations on a citizen's rights to pursue constitutional proceedings and obtain a remedy from the court are inherent in the high Court's jurisdiction in respect of alleged contraventions of constitutional rights and freedoms. But the Constitution itself contains no express limitation period for the commencement of constitutional proceedings. The

> court should therefore be very slow indeed to hold that by a sidewind the initiation of constitutional proceedings is subject to a rigid and short time bar."

[35] However, this is not the end of the matter. In the speech above and later on in the judgment, their Lordships made it clear that the fact that specific or inflexible time limits for initiating actions might not apply to constitutional actions does not oust the inherent jurisdiction of the court to dismiss or strike out for abuse (see, also, *Maurice Glinton and Leandra Esfakis v. Rt. Hon. Hubert A. Ingraham, et al., supra.*), especially in circumstances where relief by ordinary action is or was available. Their Lordships continued:

> "[35]…When a court is exercising its jurisdiction under s. 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse of process or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established. On this it is sufficient to refer to the much repeated cautionary words of Lord Diplock in *Harrikissoon v A-G* (1979) 31 WIR 348 at 349. An application made under s. 14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process.
>
> [36]...In the present case Sinanan J held this was the position regarding Mr. Durity's application for constitutional relief in respect of the commission's decision to suspend him from office. The commission made this decision in August 1989. It was over five years later that Mr. Durity first sought to challenge this decision. As already noted, the Court of Appeal refused an application by Mr. Durity to amend his judicial review proceedings to introduce such a challenge. Given the lapse of time and absence of explanation, that decision by the Court of Appeal was plainly correct."

[36] Although the PC came to a different outcome in *Durity*, based on the peculiar facts of that case, I find their observations as to delay and lack of explanation to be apposite to the case at bar. One of the troubling aspects of this claim is that the applicant has not even attempted to explain the lengthy period of delay in commencing these proceedings. To the extent any explanation is proffered, it is only to explain the failure to file a statutory appeal against the decision of the COP after his discharge.

[37] The applicant says that he was remanded in custody and denied bail for about two months, and that after obtaining bail he was advised that an appeal had been made and he was awaiting a response. He then says that after being acquitted of the offences (which was October 2013) he filed an application for judicial review. In fact, the judicial review proceedings were not filed until 14 January 2015. There was no explanation for the "inexcusable" delay (as was found by the Court) in filing the judicial review proceedings, and none at all is proffered for the lapse of time between the dismissal of those proceedings in January 2016 and the institution of constitutional proceedings in January 2019.

[38] I also find that there is merit in the respondents' contention that the current claim replicates and does not significantly enlarge on the claims raised in the judicial review proceedings. It is notable that the motion does not even specify any of the fundamental right provisions which are said to have been breached. Of the five declarations sought, the first three are in respect of

alleged failures to (i) follow due process rights, (ii) the right to a fair hearing; and (iii) a violation of the presumption of innocence, all of which are said to be protected by the Constitution. The other declarations are for procedural irregularity and unlawfulness, and are quintessentially administrative law challenges. In point of fact, the alleged failure to follow due process and to provide a fair hearing were grounds which had also been taken in the judicial review proceedings.

[39] In my opinion, the claimed violation of the presumption of innocence does not necessarily raise any constitutional rights issues. The affidavit of Superintendent Strachan avers that the decision to discharge was not contingent on the criminal charges, but was based on the character and work ethics of the applicant. In this regard, it is to be noted that the applicant had earlier disciplinary issues, as noted in the judicial review ruling. Further, section 26(c) clearly gives the COP a wide discretion to discharge a subordinate officer, and while this must be done in accordance with administrative fairness, it need not be based on the eventual outcome of any criminal or other charges. In *Davis (supra),* Sawyer CJ set aside a discharge certificate which was based on criminal charges of which the officer was later acquitted. But that was a judgment based on admissions, where the defendants admitted that the charges were the sole basis for the discharge. In fact, the learned CJ herself recognized that subsection 26 (c): "*…is wide enough to encompass a number of situations—e.g., a drunken police officer or one who is absent many times when he's rostered on duty on or one who is remanded in custody for say a period in excess of 7 days because of a criminal charge*." Therefore, if the application was not discharged solely on the basis of the criminal charges, no issue of presumption of innocence arises.

[40] I endorse and I am guided by the principle espoused by the Privy Council in *The Rt. Hon. Hubert Ingraham v. Glinton and Esfakis* (*supra)* that courts should look with particular care at constitutional claims before striking out, as constitutional rights emanate from a higher order. I also accept that the limitation periods do not apply in a strict sense to constitutional applications. But these principles do not entitle a person who has legitimate grounds for thinking that his or her fundamental rights have been contravened to take a leisurely, dilatory approach to vindicating constitutional rights. Such rights can be procedurally defeated by undue delay on the grounds of abuse of process, or as a contravention of the constitutional principle itself that precludes recourse to the constitution where other adequate means of redress are or "*have been available*" under any law.

[41] The applicant had available to him a statutory right of appeal, remedies in administrative law (which were pursued well out of time and which, as stated, could conceivably have included a claim for damages), and he could also have brought an action at common law for breach of contract, etc. None of these was pursued, or timeously pursued. And, even if the breach of a fundamental right could be established here—and I entertain some doubts in this regard—the delay in seeking redress has been inordinate and there has been no explanation (much less a cogent one) for it.

[42] Taking all of these factors into consideration, I would exercise my discretion to strike out the motion as an abuse of the process of the court, as the applicant had available adequate redress by timely application of which he did not avail himself, and he has offered no reason for the delay in making this application.

CONCLUSION AND DISPOSITION

[43] For the reasons given above, I rule that the constitutional application at this late stage is an abuse of the process of the court, and I would accordingly accede to the respondents' application to strike it out, although not based on any limitation grounds. Costs are awarded to the respondents to be taxed if not agreed.

Klein, J.

30 November 2023