

**IN THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No: CV 2024-01720**

**IN THE MATTER OF AN APPLICATION BY JAIWANTIE RAMDASS (THE AUDITOR GENERAL OF TRINIDAD AND TOBAGO APPOINTED BY HER EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO PURSUANT TO SECTION 117(1) OF THE CONSTITUTION) FOR ADMINISTRATIVE ORDERS UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998**

**BETWEEN**

**JAIWANTIE RAMDASS**

**(THE AUDITOR GENERAL OF TRINIDAD AND TOBAGO APPOINTED BY HER EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO PURSUANT TO SECTION 117(1) OF THE CONSTITUTION)**

**APPLICANT/INTENDED CLAIMANT**

**AND**

**THE MINISTER OF FINANCE**

**FIRST RESPONDENT/FIRST INTENDED DEFENDANT**

**AND**

**THE CABINET OF THE REPUBLIC OF TRINIDAD AND TOBAGO**

**SECOND RESPONDENT/SECOND INTENDED DEFENDANT**

**AND**

**THE INVESTIGATION TEAM APPOINTED BY THE MINISTER OF FINANCE AND/OR THE CABINET OF THE REPUBLIC OF TRINIDAD AND TOBAGO**

**INTERESTED PARTY**

**Before: The Hon. Mr. Justice Westmin R.A. James**

**Date: June 03, 2024**

**Appearances: Mr. Anand Ramlogan S.C., Mr. Kent Samlal, Ms. Jodie Blackstock instructed by Ms. Natasha Bisram and Ms. Aasha Ramlal and Attorneys-at-Law for the Applicant.**

Mr. Douglas L. Mendes S.C., Mr. Simon de la Bastide and Mr. Jerome Rajcoomar instructed by Ms. Jo-Anne Julien and Ms. Sonnel David-Longe, Attorneys-at-Law for the Respondents.

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## JUDGMENT

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### Background

1. This is an application for leave to apply for judicial review brought by the Auditor General of the Republic of Trinidad and Tobago.
2. The Intended Claimant/Applicant (the Applicant) was appointed as the Auditor General by the President of the Republic of Trinidad and Tobago, Her Excellency Christine Carla Kangaloo, O.R.T.T by instrument of appointment dated 15<sup>th</sup> November 2023.
3. The First Respondent is the Minister of Finance and is a member of the Second Respondent.
4. The Second Respondent is the Cabinet of Trinidad and Tobago established by 75 of the Constitution.
5. The Interested Party is the Investigation Team appointed and/or recommended by the Minister of Finance and approved by the Cabinet to investigate certain matters. The Investigation Team is chaired by the retired High Court Judge Justice.
6. The Court wishes to make clear that the current case does not involve determining the truth of any allegations against the parties involved. It is not concerned with whether there has been any missing money or whether any individual is at fault on which this Court makes no comment. The sole issue at hand is whether the Applicant should be granted permission to seek a Judicial Review of the First Respondent's decision to recommend to the Cabinet to conduct an investigation into the facts related to the Audited Statements.
7. The legislative role of the Auditor General is to annually review and submit reports to Parliament concerning the financial records of Ministries, Departments, Regional Health Authorities, Regional Corporations, State Controlled Enterprises, and Statutory Boards, for which the Auditor General serves as the statutory auditor. The role and functions of the Office of the Auditor General are set out in section 116 of the Constitution of Trinidad and Tobago. Section 116 (6) states that "*in the exercise of his functions under this Constitution, the Auditor General shall not be subject to the direction or control of any other person or authority*".
8. Sections 24 and 25 of the Exchequer and Audit Act Chapter 69:01 (the Act) provide a carefully timetable for the preparation and submission of the Auditor General's Report.

9. In accordance with section 24(1)(a) of the Act, the Government, through the Treasury, submitted the Public Accounts to the Applicant on 31<sup>st</sup> January 2024, which was the statutory deadline date. The Public Accounts showed a Statement of Revenue figure of \$61,890,373,020.22 and were signed by the Permanent Secretary of the Ministry of Finance, the Comptroller of Accounts and the Treasury Director.
10. Under section 25 of the Act, the receipt of the Public Accounts by the Auditor General under section 24 of the Act triggers the audit procedure whereby the audit report must be completed and submitted within a period of 7 months after 30<sup>th</sup> September 2023, i.e. by 30<sup>th</sup> April 2024, or such longer period as Parliament may by resolution appoint.
11. On 25<sup>th</sup> March 2024, the Ministry of Finance informed the Applicant that there appeared to be a material misstatement in the Revenue Statement contained within the Public Accounts.
12. On 27<sup>th</sup> March 2024, a meeting was held with officials from the Ministry of Finance and the staff of the Auditor General's Department. On 28<sup>th</sup> March 2024, the Applicant received a memorandum from the Permanent Secretary of the Ministry of Finance which stated:

*"It also seeks your concurrence to allow an amendment to this statement as the variance represents a material amount to the value of **\$3,379,777,908.00** which, if not correctly reported will have far reaching implications. Currently we have reconciled an amount to the value of **\$2,598,130,761.72...**"*
13. On 5<sup>th</sup> April 2024, the Applicant received another memorandum from the Permanent Secretary of the Ministry of Finance which stated as follows:

*"I am confirming that, arising out of our reconciliation process, the variance discovered in the Statement of Revenue for the Financial Year 2023 which was submitted to your Department in January 2024 is **\$2,599,278,188.73...***

...

*We wish to conduct one final check in respect of the remaining balance of **\$780,499,791.27** and accordingly advise that the finalised statements will be submitted to you by the morning of Tuesday April 9<sup>th</sup> at the latest."*
14. On 8<sup>th</sup> April 2024, the Applicant received another memorandum from the Permanent Secretary of the Ministry of Finance which stated as follows:

*"I am confirming that our reconciliation process is complete and the variance in the Statement of Revenue for the Financial Year 2023 is **\$2,599,278,188.73...**"*
15. On 9<sup>th</sup> April 2024 and 11<sup>th</sup> April 2024, the Ministry of Finance attempted to deliver to the Applicant an amended version of the Public Accounts. The Applicant refused to accept the same on the grounds that the audit of the Public Accounts was completed and those accounts were already being printed and bound by the Government printery.

16. On 15<sup>th</sup> April 2024, the Applicant received from the Ministry of Finance via TTPOST TrackPak two sets of Public Accounts for the financial year 2023 under cover of a letter dated 9<sup>th</sup> April 2024 that confirmed the quantum of the variance. One set of the Public Accounts included a Statement of Declaration and Certification dated 31<sup>st</sup> January 2024 showing a Statement of Revenue figure of \$61,890,373,020.22 and the other set of the Public Accounts included a Statement of Declaration and Certification dated 31<sup>st</sup> January 2024 showing a Statement of Revenue figure of \$64,488,503,781.94.
17. By letter dated 9<sup>th</sup> April 2024, the Ministry of Finance confirmed that the total variance was in fact \$2,599,278,188.73.
18. On 15<sup>th</sup> April 2024, the Attorney General issued a pre-action protocol letter to the Applicant calling on her to accept from the Ministry of Finance and consider an amended version of the Public Accounts submitted to her by the Ministry of Finance on 31<sup>st</sup> January 2024. By letter dated 15<sup>th</sup> April 2024, the Auditor General's Department wrote to the Ministry of Finance stating that the Ministry of Finance was free to recall the Public Accounts previously submitted and dated 31<sup>st</sup> January 2024, confirm the Statement of Declaration and Certification previously provided as inaccurate, and provide revised Public Accounts.
19. An amended version of the original Public Accounts (the Amended Public Accounts) with a Statement of Declaration and Certification dated 16<sup>th</sup> April 2024 was delivered to and accepted by the Auditor General on 16<sup>th</sup> April 2024.
20. On 24<sup>th</sup> April 2024, the Applicant submitted her report on the Public Accounts for the financial year ended 30<sup>th</sup> September 2023 to the Comptroller of Accounts, the Minister of Finance, the Permanent Secretary of the Ministry of Finance, the Clerk of the House of the Office of the Parliament, the President of the Senate, the President of the Republic of Trinidad and Tobago and the Speaker of the House of Representatives.
21. A Resolution effectively extending the period of time under section 25(1) of the Act for the submission of the Auditor General's Report to 31<sup>st</sup> August 2024 was debated and passed by the House of Representatives and the Senate on 26<sup>th</sup> April 2021 and on 29<sup>th</sup> April 2024 respectively. The Minister of Finance and the Attorney General made contributions to the debate in the Senate.
22. On 7<sup>th</sup> May 2024, the Minister of Finance announced at a press conference and by way of a media release that Cabinet had approved the composition of a Team recommended by the Minister to investigate the understatement of revenue for the financial year 2023 and related matters, that the Investigation Team will be chaired by retired High Court Judge Mr Justice David Harris and will include Mr. David C Benjamin, a former Auditor General at the Auditor General's Department, and specialist in Information Technology.
23. The media release also stated that the Terms of Reference of the said investigation will include:

- a. What circumstances led to the Understatement of Revenue in the public accounts for the financial year 2023 and what should be done to avoid a recurrence of same;
- b. The efficacy of the new Electronic Cheque Clearing system introduced by the Central Bank of Trinidad and Tobago in 2023;
- c. The efforts made by the officials at the Ministry of Finance and its various Divisions to correct the Understatement of Revenue, and to advise the Auditor General of the Understatement and provide her with an explanation, clarification and further information on same;
- d. What was the response of the Auditor General to the efforts of the public officials described at (c) above and what action was taken by the Auditor General in relation to the Understatement of Revenue in the audit of the Public Accounts for the financial year 2023;
- e. What are the facts in relation to the allegations and statements made by the Auditor General in her Report on the Public Accounts of Trinidad and Tobago including the Addendum and Appendices, with specific reference to the Understatement of Revenue in the public accounts for the financial year 2023;
- f. Any other related matters; and
- g. Findings and Recommendations going forward.

24. The Applicant has since the filing of this case placed before the Court, by Supplemental Affidavit dated 27<sup>th</sup> May 2024, the Terms of Reference of the investigation which was made pursuant to Cabinet Minute No. 850 of May 7, 2024 which considered Note No F(24)123. The Terms of Reference are:

- i) The circumstances that led to the Understatement of Revenue in the public accounts for the financial year 2023
- ii) The efficacy of the new Electronic Cheque Clearing system introduced by the Central Bank of Trinidad and Tobago in February 2023
- iii) The efforts made by the officials of the Ministry of Finance and its various Divisions to correct the Understatement of Revenue, and to advise the Auditor General of the Understatement and provide her with an explanation, clarification and further information on same
- iv) The response of the Auditor General to the efforts of the public officials described at (iii) above and the action taken by the Auditor General in relation to the Understatement of Revenue in the audit of the Public Accounts for financial year 2023
- v) The facts in relation to the allegations and statements made by the Auditor General in her Report on the Public Accounts of Trinidad and Tobago for the Financial Year 2023, including the Addendum and Appendices, with specific reference to the Understatement of Revenue in the public accounts for the financial year 2023
- vi) Any other related matters
- vii) Findings and Recommendations going forward

25. By Ex Parte Application for Leave to Apply for Judicial Review filed on 16<sup>th</sup> May 2024, the Intended Claimant/Applicant (the Applicant) applied to the Court pursuant to Section 6 of the Judicial Review Act, Chapter 7:08 and Part 56 of the Civil Proceedings Rules 1998 as amended for an Order granting leave to apply for judicial review challenging the appointment of the Investigative Team recommended by the Minister of Finance and approved by the Cabinet of Trinidad and Tobago to investigate the role, action and conduct of the Auditor General in relation to “*the understatement of revenue for the financial year 2023 and related matters*”.

26. The Applicant seeks the following reliefs:

(i) A declaration that the decision (recommended by the Minister of Finance and approved by the Cabinet of Trinidad and Tobago) to appoint an Investigative Team to investigate, make findings and recommendations and report to the Minister of Finance within two (2) months on the following matters (“**the said matters**”):

- What was the response of the Auditor General to the efforts of the public officials described at (c) above and what action was taken by the Auditor General in relation to the Understatement of Revenue in the audit of the Public Accounts for the financial year 2023;
- What are the facts in relation to the allegations and statements made by the Auditor General in her Report on the Public Accounts of Trinidad and Tobago for the Financial Year 2023, including the Addendum and Appendices, with specific reference to the Understatement of Revenue in the public accounts for the financial year 2023;
- Any other related matters pertaining to same;
- And make findings and recommendations in relation to same

is unfair and illegal, null and void and of no legal effect;

(ii) An order of certiorari to remove into this Honourable Court and quash the decision (recommended by the Minister of Finance and approved by the Cabinet of Trinidad and Tobago) to appoint the Investigation Team to investigate, make findings and recommendations and report to the Minister of Finance within two (2) months on the said matters;

(iii) A declaration that the investigation of the said matters by the Investigation Team appointed by the Minister of Finance and approved by the Cabinet is unfair and illegal;

- (iv) A declaration that the Applicant/Intended Claimant has been treated unfairly and contrary to the principles of natural justice in breach of Section 20 of the Judicial Review Act Chapter 7:08;
  - (v) A declaration that the investigation into the statements made by the Auditor General in her Report on the Public Accounts of Trinidad and Tobago for the Financial Year 2023, including the Addendum and Appendices, with specific reference to the understatement of revenue in the public accounts for the financial year 2023, is in breach of section 116 of the Constitution.
  - (vi) That the Defendant pay the Claimant's costs certified fit for Senior and Junior Counsel and an instructing attorney on an indemnity basis;
  - (vii) Such further and/or other such other orders, directions or writs as it considers just and as the circumstances may warrant in the interest of justice in accordance with section 8 (1) of the Judicial Review Act.
27. This Court ordered that the proceedings be served on the Intended Respondents. The parties agreed that the Court should first determine whether leave should be granted before considering other matters. The Court ordered the parties to file written submissions on the issue.

### **Applicable Law**

28. The test for granting leave for judicial review was applied at page 63 of the judgment in ***Sharma v Brown-Antoine [2006] UKPC 57*** the Privy Council at paragraph 4 of the judgment stated as follows:

*“(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:*

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

*to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”*

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

29. The threshold is not considered to be a high one: see **Central Bank of T&T v Maritime Life (Caribbean) Limited [2022] UKPC 37; Maharaj v Petroleum Company of T&T [2019] UKPC 21** and **Attorney General of T&T v Ayers-Caesar [2019] UKPC 44**.
30. I remind myself that I am not determining the substance of the case within these judicial review proceedings. I am determining the lawfulness of the decision-making process.
31. While the Court must not lightly refuse a litigant permission to apply for judicial review if the law is clear and there is no arguable case, there is no reason for the Court to go further. The application for leave ensures that the administration of public bodies is not adversely affected dealing with frivolous and vexatious applications and allows the court to refuse an applicant from proceeding with an unmeritorious application.
32. Based on the existing authorities, for this Court to grant the Applicant leave the Applicant is therefore required to establish that they have an arguable ground for judicial review, that has a realistic prospect of success, and which is not subject to any discretionary bar such as delay or an alternative remedy.
33. There is no procedural bar or alternative remedy raised in this case. The Respondents argue that there is no arguable case and the Applicant’s case is hopeless while the Applicant says she more than crosses the threshold.
34. The grounds are threefold (i) Bias; (ii) Duty to Act Fairly and (iii) “Further unfairness – legal representation.” There was no argument raised in relation to ground (iii) by the Applicant and so is taken as no longer pursued.

### **Initiation of the Investigation**

35. The Applicant seeks to challenge the existence of the investigation as being unfair ab initio. The Applicant alleges that it is so for two reasons: (i) it constitutes unlawful political interference with the Auditor General’s role, contrary to s. 116(6) of the Constitution; and (ii) It is unlawful because it was initiated unfairly and is tainted by bias. This Court will look at each in turn.



*The investigation is illegal/ultra vires*

36. The Applicant alleges that the effect of section 116(6) of the Constitution which provides 'in the exercise of his functions under this Constitution the Auditor General shall not be subject to the direction or control of any other power or authority' and section 136 which provides that the sole mechanism by which the Auditor General can be removed from office is by the President following the advice of a Tribunal duly appointed by the President to investigate the question of the Auditor General's removal from office. The effect is that the office of the Auditor General is insulated from political interference.
37. The Applicant alleges that a politically initiated investigation into the Applicant's conduct is likely to impact the way in which she performs her functions. If such a thing is permitted, it will have an effect which is contrary to the intention of section 116(6) and the requirement that the Auditor General perform her functions without control or influence from anyone. It is an impermissible and unlawful interference with her office by the Executive.
38. The Applicant has indicated that the office of the Auditor General is akin to that of a Judge when one looks at section 116(6) and the similar provisions for removal from office. She alleges that her office is an important check and balance on the executive and like Judges she is a watchdog and must act independently fairly and fearlessly in the discharge of her constitutional duties. She therefore argues that the Executive's involvement in the removal of the Auditor General from office is the maximum interference of the Executive in the affairs of the Auditor General which can be tolerated and so anything that goes further disrupts the balance of power. She therefore argues that the Executive in the form of the Minister, the Prime Minister or the Cabinet more widely engaged in a preliminary investigation or inquiry into the manner in which the Auditor General discharges her functions, goes too far.
39. The Applicant relies on the statements of Justice Kokaram as he then was in ***The Law Association of Trinidad and Tobago v Dr. Keith Rowley the Prime Minister of Trinidad and Tobago CV2019-03989*** where he observed at paragraph [56] that the possibility for the Prime Minister to initiate the section 137 removal process is 'a very contentious power susceptible to abuse' and that 'it is questionable whether such a process triggered by the Executive is suitable for our modern democracy.' The Applicant further placed before the Court that Justice Kokaram indicated that 'Having regard to the constitutional provision, the importance of the independence of the Judiciary, the delicate balance of accountability and independence, the rule of law being upheld by a Judiciary that is free and untangled from abuse of power by the Executive, the section 137 involvement of the Prime Minister may go too far. The Prime Minister effectively has a whip in hand always over the Chief Justice.' The Applicant relied on the dicta of Kokaram J was that there is a delicate balance in power between the Executive and Judicial office holders, and the involvement of the Executive in the

procedure for removal of Judges, on its own, already risks going too far and disrupting that balance. It is essential that Judges are able to exercise their public function without fear of political reprisal.

40. The Applicant also relied on Kokaram J's dicta as to the ability of the Prime Minister to conduct 'pre-investigation enquiries' when he said that the Prime Minister must inform himself of the relevant facts, if required to do some probing or investigation so as to establish that the allegations are not merely fanciful or hopelessly groundless. In doing so however, the Prime Minister is not conducting a fact finding exercise and is not engaged in an adversarial process or develop the investigation skills of a sleuth.' The Applicant argues that this establishes that if the Prime Minister were to conduct a preliminary fact-finding investigation, that would go too far and the investigation in this case is an interference by the Executive of the office of the Auditor General, just as it would be for Judicial office holders.
41. This Court wishes to first note that the Applicant unlike Judges is herself a part of the Executive the same branch of government as the First and Second Respondent. Judges are a part of a separate arm of the State for which Constitutional protections are given expressly and impliedly through the doctrine of separation of powers. The removal of a Judge requires a higher standard and due to the separation of powers the involvement of a different branch of the State, the Executive, has to be evaluated differently. Therefore, while the Intended Applicant who in her function and the way she is to be removed from office may have some similarities with a Judge, she is not a Judge in a separate arm of the State.
42. Section 136(8) of the Constitution states "A decision that the question of removing the officer from office ought to be investigated may be made at any time— (a) in the case of the Ombudsman, by resolution of the House of Representatives; and (b) *in any other case, by the President either on his own initiative or upon the representation of the Prime Minister.*" As specified in that section "the question of removing the officer from office ought to be investigated" is to be initiated in a certain way. This section does not state that the only investigation into an office holder or investigation by the Executive is to be the question of removing the officer from office. This cannot be an arguable position or arguable reading of this section. It is to first be noted that there is no allegation here nor does the Terms of Reference include an investigation as to whether the Applicant ought to be removed from office or whether the Applicant misconducted herself or whether the Prime Minister should recommend the investigation of the Applicant to the President.
43. This issue as to who can conduct an investigation into officer holders was also evaluated by the Court of Appeal and Privy Council in the case of ***Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago (Trinidad and Tobago) [2018] UKPC 23 ('CJ v LATT')***. The Privy Council which is binding authority on this Court in evaluating who can conduct an investigation into actions of the Chief

Justice stated at paragraph [24] that the Law Association was in the same position “as any other body or individual” which might wish to inquire into such allegations and reach such conclusions as it could upon the evidence available to it.” Therefore the highest Court has indicated that the law is that the procedure set out in the Constitution for the removal of an office holder is not the only way in which an officer holder can be investigated. The Applicant has accepted this proposition in their Submissions in Reply.

44. As the authorities show, Judges and no less than the Chief Justice who can be persons considered in a more “protected” branch can be “investigated” by the Executive or any other body, ipso facto the Applicant can as well. This is not considered interference with the job of the officer holder as the authorities show they do not need to participate as any such investigation, the investigation is not binding on that individual or any investigation under the Constitution for their removal.
45. The Applicant sought to distinguish this case on the basis that the person carrying on the investigation was the LATT not the Executive. Unfortunately that is not a distinguishing factor in favour of the Applicant for several reasons. Firstly, the Privy Council did not limit the ability to investigate to a private/public body especially when they said “any other body or individual” therefore the Privy Council was laying down a general rule rather than one specific to the Law Association. Secondly, if a Judge’s actions with higher constitutional protection can be investigated by entities not a part of the three branches of the State, then surely the Executive can indeed investigate itself.
46. This would make perfect sense as the reading of these sections by the Applicant would mean that officer holders like the Applicant would be immune from investigation by the police, another member of the Executive, from investigating crimes alleged to have been committed by an office holder while in office. It would also prevent the Executive from investigating processes of the Executive that touch and concern office holders. It would also insulate office holders from any investigation of their actions which includes unlawful actions. This would also result in an absurdity that entities like the media, are able to investigate the actions of a public official like the Applicant and not the Executive, the branch of the State to which the office holder belongs.
47. The Applicant submitted that to allow any body or individual to investigate the Applicant or allow the Investigation here by Executive would be allow the Executive to exert direction or control over the Applicant. I disagree, not every action can constitute interference in the functions of an office holder or a direction to the officer holder in the conduct of their duties. In this case, having regard to the remit of the Investigatory Team and its terms of reference, it was clear that the process moving forward was not a disciplinary one in relation to the Applicant but an investigative one. The remit of the Investigation Team is a broader investigation involving other stakeholders including the Central Bank of Trinidad and Tobago and the Ministry of Finance and a fact finding

exercise not telling the Applicant what to do or exert control over her or her office. That is clearly within the remit of the Minister and Cabinet to be able to advise itself in the formulation of policy including legislative policy and reform as necessary.

48. The factual matrix in this case I think from the Applicant's own evidence, it is reasonable for an investigation of some sort. The Applicant's own findings and statements indicate that the Ministry of Finance recognised there were errors of billions of dollars of public funds. The circumstances and procedures for submitting amended reports and the Applicant's serious allegations of other public officials of backdating Accounts are matters of serious public importance. The ability of the Applicant to verify Accounts and conclusions within her Report are of extreme concern to anyone much less the Executive. Just as the Applicant was entitled to do her own enquiries raise her concerns about the actions of other public officials, make conclusions in her Report and about members of the Executive so too can another part of the Executive look into the facts surrounding the issue which may include her actions and conclusions.
49. Further, the Applicant pursuant to her duties has highlighted serious issues in relation to public accounts and would no doubt want any error in procedure or substance not be repeated. The Applicant would also want those public servants, public officials to evaluate their processes and make the relevant changes. What other way to achieve this than to have an investigation by an independent committee? This would not be meaningful if the interaction with the Applicant's own department and the facts surrounding her responses, findings and conclusions cannot be considered.
50. This Court therefore holds that it is not an arguable case that an investigation which touches and concerns the Applicant can only be done pursuant to section 136 of the Constitution. This Court also finds that that it is not an arguable case that the investigation constitutes unlawful interference with the Auditor General's role, contrary to s. 116(6) of the Constitution.

#### *Bias*

51. The Applicant's second basis for judicial review is that the initiation of the investigation by the Minister was unlawful and void ab initio because it was initiated unfairly and is tainted by bias. The Applicant does not allege that the Investigators are biased or that the manner in which the investigation is being or will be conducted is biased but that the recommendation to Cabinet to have an investigation was biased due to (i) statements by the First Respondent, (ii) the fact that he has recommended the investigation, (iii) selected the members of the Investigation Team, (iv) set the terms of reference for the investigation, (v) has required that the investigation make findings as to the Applicant's conduct and report to him and (vi) is responsible for determining and paying the remuneration for the investigators.

52. The Respondent argues on the other hand that the rule against bias does not apply to the decision of the Minister to recommend the investigation or to Cabinet's decision to cause an Investigation to be carried out. Further, they argued that there was no actual bias in this case on the evidence.
53. I accept the authorities that the Applicant has cited to the Court which all indicate that the principles of natural justice and fairness may apply to investigations even when their findings are not binding on anyone. However, these authorities are not applicable to the present case because the Applicant is not challenging the procedures of the Investigation Team or how the investigation will be carried out but as indicated above the claim was against the Minister's recommendation to Cabinet.
54. The Minister of Finance and Cabinet derives their power from section 75 of the Constitution and as Acting Prime Minister from section 78(1) of the Constitution. The Applicant has agreed that in initiating this investigation the First Respondent was exercising a discretion vested in him by the Constitution to take actions for the general direction and control of the Government. These decisions as to what is required in the general direction and control of the country are not a judicial or quasi-judicial act but rather power delegated by the Constitution and the people as a whole. Therefore, the recommendation for the initiation of an Investigatory body was within the law and the purview of the First Respondent and the Cabinet's power.
55. The Applicant has argued that the Minister has the duty to act fairly and since he was motivated by bias and as such the recommendation is void ab initio. While I agree that the Minister must act fairly, the Applicant is not the only person to whom he must act fairly as there are other persons to whom he also owes such a duty. Further, the Applicant's reasoning suggests that the Minister would essentially be like a judge, whose involvement in a case would seem biased to an objective and well-informed observer. However, this argument fails to consider that the duty to avoid bias and maintain impartiality is context dependent. This duty, like other rules of procedural fairness, can vary to suit the specific context of the decision-maker's activities and the nature of their functions: See *Imperial Oil v Quebec [2003] SCJ No 59 para [31]*
56. The rules of procedural fairness do not need to be followed in all government decision making. The duty does not attach to every decision of an administrative character as many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. There is no authority or rule that the Applicant pointed to that establishes that a Minister must possess the independence and impartiality of a Judge in making a recommendation to Cabinet for an inquiry or that in making such a recommendation he was determining legal rights and liabilities of the Applicant.
57. In the case of *No P 075 of 2018 The LATT v CJ* all of the Judges of the Court of Appeal and the Privy Council found that the LATT, which sought to conduct an investigation

into the Chief Justice, a member of the Judiciary, was not determining any right or liabilities of the Chief Justice and so was not in the conduct of its investigation subject to the same standards of impartiality that is demanded of judges, decision makers, or even prosecutors. The Court of Appeal unanimously held that the procedural fairness and the rule against bias did not apply to the LATT. The Privy Council agreed with this analysis. In ***CJ v LATT (supra)*** the Board at paragraph [35] The Board agreed that the investigation by the LATT cannot be equated with a judicial or quasi-judicial determination of legal rights and liabilities to which the conventional rules of natural justice apply. If in those circumstances with respect to the investigation of a Chief Justice did not require the same procedural guarantees or impartiality more so, the recommendation to have an investigation into the actions of the Auditor General could not have a higher threshold.

58. In this case, the Minister used a discretionary power for the purposes of the recommending an Investigation. It can be agreed between the parties that there was a serious matter of public importance that required investigation and that choice fell within the discretion assigned to him by the Constitution in the performance of his duties to recommend to Cabinet. The Minister had to choose among doing nothing, carrying out the necessary investigations himself or recommending another body to carry out the Investigation. The Minister in making his choice at the time was not performing an adjudicative function in which he was acting as a sort of Judge. The Minister was not determining the Applicant's rights and liabilities nor was the Minister making findings of fact in doing so and even if he made such preliminary determinations, it was not binding on the investigators. On the contrary, he was performing his functions of management and application of the Executive power. The Minister was performing a mainly political role which involved his authority, and his duty, to choose the best course of action, from the standpoint of the public interest. It is also to be noted that the Minister's recommendation was just that a recommendation that was accepted by the Cabinet and there was no finding or determination of the matter under investigation. While the Minister may have made the recommendation, made recommendations of the individuals and proposed the terms and responsible for same, there is no evidence that the Minister nor the Cabinet pre-determined the matter rather, they are seeking the investigation to determine the facts and advise themselves. I will also add that on the evidence the investigation also concerns the investigation of the Minister's own Ministry and himself and is not necessarily targeted at the Applicant.

59. Having regard to the context, which includes the Minister's functions viewed in their entirety, the concept of impartiality/bias governing the work of the courts did not apply to his decision to make the recommendations. The Minister's motive in the recommendation of the investigation may be varied, that may be to vindicate the members of the public service in his Ministry, to vindicate himself, to determine circumstances which led to this error or ascertain whether the players in this scenario acted appropriately and what could be done to prevent this from happening again.

Those considerations can be all reasons he proposed the investigation but it does not mean his recommendation was illegal or that he was biased against the Applicant or the matter was pre-determined. After all, the investigation has not yet been completed. I therefore. Also do not believe that the Minister had to recuse himself from the decision of Cabinet to make this an independent investigation. As stated, there is no allegations that the persons or the procedure of the Investigation Team was biased.

60. Having regard to the above I do not need to look at the statements of the Minister to determine whether they show actual bias as I have already held that the Minister could be motivated by a number of reasons for the recommendation and that aspect of procedural fairness does not apply to his recommendation. I would note the Applicant like the First Respondent herself has made preliminary determinations and made statements and conclusions about other members of the Executive without the same procedural fairness that she is seeking. "
61. I urge both the First Respondent and the Applicant to choose their words carefully regarding each other and the situation at hand, to avoid undermining their respective offices or each other in the public's view, whom they serve. As public officials, their actions are subject to scrutiny and comment, which should not always be perceived as an attack. This investigation presents an opportunity to establish the facts of this serious matter, highlighted and brought to the public's attention, which is of significant public interest. It provides a chance for all parties to be heard and to formally document their positions and determine the best way forward.
62. Therefore, I do not find that it is an arguable case that the Investigation could be void even if the Minister had a bias.
63. Having regard to the above I therefore would refuse leave.
64. To the Court it is understandable why the Applicant brought this case. The Applicant feels attacked and is seeking to maintain the independence of her office. Having regard that the costs in these circumstances will be to the State from the State and we are at the Leave Stage I would make no order as to costs.

/s/Westmin James  
Westmin R.A. James  
Judge