

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS  
NEVHCVAP2022/0003

**BETWEEN:**

**MICHAEL J. PREST**

Applicant

and

**[1] MAGISTRATE DISTRICT “C”  
[2] CORPORAL RANDOLPH DIAMOND  
[3] THE DIRECTOR OF PUBLIC PROSECUTIONS**

Respondents

**Before:**

The Hon. Mde. Margaret Price Findlay  
The Hon. Mr. Trevor M. Ward  
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Peter Foster, KC with Ms. Shari-Ann Walker for the applicant.  
Mr. Garth Wilkin, Attorney General with Ms. Simone Bullen-Thompson, Solicitor General for the 1<sup>st</sup> Respondent.  
Mr. Leon Charles for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

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2024: November 11;  
2025: April.10.

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*Application for leave to appeal to his Majesty in Council – Leave as of right - Section 99(1)(c) of the Constitution of Saint Christopher and Nevis – Whether the proposed appeal involves an issue of constitutional interpretation of section 10 of the Constitution – Section 99 (2)(a) of the Constitution of Saint Christopher and Nevis – Whether appeal is of great general or public importance – Section 33(3)(a) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act – Whether the appeal is in a criminal cause or matter – Whether section 33(3)(a) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act contravenes section 10 of the Constitution*

On 21<sup>st</sup> July 2021 Corporal Randolph Diamond (“the second respondent”) swore before a magistrate two information alleging that Michael Prest (“the Petitioner”) committed two offences of fraudulently converting US\$2,530,000.00, which he had received for the use and benefit of Mark Kucher, for his own. Being satisfied with the evidence presented on oath, the magistrate issued a warrant of arrest in relation to each offence pursuant to section 37 of the Magistrates Code of Procedure Act.

On 27<sup>th</sup> August 2021, the Petitioner applied *ex parte* for leave to apply for judicial review, sought orders to quash the magistrate’s decision and an interim order for a stay of execution of the arrest warrants. The judge granted the application for leave and on 10<sup>th</sup> September 2021 at an inter partes hearing, granted the interim reliefs, and ordered that the execution of the arrest warrants be stayed pending the hearing of the judicial review claim.

The Petitioner thereafter filed his fixed date claim for judicial review. On 11<sup>th</sup> November 2021, the respondents subsequently applied to set aside the order granting leave on the basis that the Petitioner was seeking to challenge the basis of the Director of Public Prosecution’s decision to prosecute him and that the Petitioner had alternative remedies available to him in the criminal proceedings. The matter was set for hearing on 18<sup>th</sup> March 2022. On that occasion, the Petitioner sought an adjournment on the basis that his lead counsel was unavailable as he was acting in a judicial capacity in another jurisdiction. The judge refused to adjourn the hearing and determined the matter on paper. Having done so, the judge set aside the leave granted for judicial review and the interim orders and struck out the fixed date claim for judicial review. The judge found that the issues raised were matters best addressed in the criminal justice system and that it would be inappropriate for the court to hear a claim for judicial review on the grounds outlined by the Petitioner.

The Petitioner, being dissatisfied with the ruling of the learned judge appealed. By judgment delivered on 16<sup>th</sup> April 2024 in **Michael J. Prest v Magistrate District “C” et al**, the Court of Appeal dismissed the appeal and held that it had no jurisdiction to hear and determine the appeal.

Being dissatisfied with the decision of the Court of Appeal, by Notice of Petition filed on 7<sup>th</sup> May 2024, the Petitioner sought leave pursuant to sections 99(1)(C) and 99(2)(a) of the Constitution of the Federation of Saint Christopher and Nevis to appeal to His Majesty in Council. The Petition alleges that the Court of Appeal erred in holding that the appeal was in a criminal cause or matter contrary to section 33(3)(a) of the Supreme Court Act and the Petitioner had been denied his constitutional rights to the protection of law pursuant to section 10 of the Constitution of Saint Christopher and Nevis. The Petition also challenges the Court of Appeal’s decision in relation to the substantive grounds of appeal. The applicant contends that the judge’s decision to determine the matter on paper and refusing to grant the adjournment had the effect of denying the applicant the opportunity to rely on legal representation of his choice. The applicant also contends that the Court of Appeal made determinations based on evidence that was before the magistrate but not the judge and further complains that the Court erred in awarding costs.

**Held:** dismissing the petition for Leave to Appeal to his Majesty in Council with no order as to costs and holding that (1) no right of appeal arises under section 99(1) (C) of the

Constitution for leave to appeal to his Majesty in Council as the question involved in the appeal does not involve the interpretation of the Constitution of Saint Christopher and Nevis; and (2) the proposed appeal does not raise an issue of great general or public importance or otherwise such that it should be referred to His Majesty in Council, that:

1. Where leave is sought under section 99(1)(C) of the Constitution as of right, the Court of Appeal's gate-keeping role is to determine whether the intended appeal raises a genuinely disputable question of the interpretation of the constitution. The Court of Appeal's role is to establish whether the asserted right to appeal exists. It is not to consider or determine the merits of the appeal. The issue must have arisen in the appeal, thus making it necessary to focus on the issue on which the Court of Appeal's decision turned. Therefore, this Court must assess whether the Court of Appeal was engaged in interpreting section 10(1) of the Constitution. If the question involved in the appeal is really one of the application of a provision of the Constitution to the facts of a particular case, then the question does not involve the interpretation of the Constitution.

**Alleyn-Forte v The Attorney General of Trinidad and Tobago and others** [1997] UKPC 49 applied; **William Martin v Ursil Peters** ANUHCVP2004/0036 (delivered 17<sup>th</sup> September 2007, unreported) followed; **R v Lewis (Mitchell)** [2007] CCJ (3) AJ. applied; **Frater v R** [1981] 1 WLR 1470 followed; **Joseph v The State of Dominica** (1988) 36 WIR 216 followed.

2. This Court must be astute to ensure that applications for leave to appeal to his Majesty in Council really do involve a genuinely disputable question of interpretation of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal as of right. The Court of Appeal was not engaged in interpreting section 10(1) of the Constitution but with determining whether the underlying proceedings which gave rise to the appeal was from an order in a criminal cause or matter. That issue involved in the appeal was not resolved by, nor did it call for or require the Court of Appeal to engage in, an interpretation of section 10(1) as the Court of Appeal accepted the principles as enunciated in the authorities cited by the Petitioner on the breadth and scope of the due process provisions. To that extent, there is no disputed interpretation of section 10(1) of the constitution.

**Frater v R** [1981] 1 WLR 1470 followed.

3. The Petitioner's case was that the Court should not apply section 33(3)(a) as to do so would contravene section 10(1) of the Constitution. This concerns the impact that section 10(1) should have on the application of section 33(3)(a) to the circumstances of the case. On a proper analysis, the real issue engaged on the appeal has to do with the application of a constitutional provision to the particular facts of the case. This does not amount to a question involving the interpretation of the constitution.
4. In relation to the issue whether the question involved in the appeal is of great general or public importance, section 99(2)(a) vests a discretion in the Court to grant conditional leave to appeal to the Privy Council in civil matters on one of two bases.

The first is where the Court is of the opinion that the question involved in the appeal is one that by reason of its great general or public importance ought to be submitted to His Majesty in Council; the second is where the matter, though not of great general or public importance, ought otherwise to be submitted to His Majesty in Council. The phrase 'great general or public importance' denotes cases where 'there is a really serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public or has far reaching effect.' Furthermore, the phrase 'or otherwise', caters to the situation where a matter may not qualify as one of great general or public importance, but which, in the opinion of the Court, might require some definitive statement of the law from the apex court.

**Martinus Francois v The Attorney General** SLUHCVAP2003/0007 (delivered 7<sup>th</sup> June 2004, unreported) followed; **Renaissance Ventures Ltd et al v Comodo Holdings Ltd** BVIHCMAP2014/0032 (delivered 3<sup>rd</sup> My, 2016, unreported) followed; **Multibank FX Corporation v Von De Heydt Invest** BVIHCMAP2022/0061 (delivered 5<sup>th</sup> July 2023, unreported) applied.

5. The issue involved in the appeal was identified as whether the appeal is in 'a criminal cause or matter.' The principles relating to the test for determining whether an appeal is in a criminal cause or matter are well settled within this jurisdiction and by highest authority, including the apex court. A 'criminal cause or matter' is one which requires judicial determination at any stage of the proceedings where the subject matter was criminal, and if the cause or matter were carried to its conclusion, might result in a conviction. The Petitioner's complaint concerns the application of these well-established principles to the facts of the case, which does not make the issue one of great general or public importance. There is therefore no genuine dispute on the applicable principles of law underlying the question which the Petitioner wishes to pursue on his proposed appeal as there are no differing views or conflicting dicta from this Court on this issue nor is there any genuine uncertainty surrounding the principle itself. Furthermore, it cannot be said that this issue requires some definitive statement of the law from the apex court.

**Hapgood v Commissioner of Police** AXAHCVAP2020/0003 (delivered 24<sup>th</sup> June 2020, unreported) followed.

6. The appellant has also failed to establish that the appeal ought otherwise to be submitted to His Majesty in Council because the appeal raises a novel point about the constitutionality of section 33(3)(a). It is settled that a decision in a criminal cause or matter is appealable if the decision was given by the High Court in the exercise of its constitutional jurisdiction to hear an application for judicial enforcement or protection of a fundamental right or freedom which was alleged to have been contravened or to have been under threat of contravention. Such a decision is appealable, notwithstanding section 33(3)(a) of the Supreme Court Act which is required to be construed to conform with section 98(b) of the Constitution. It is clear that the issue of the constitutionality of section 33(3)(a) has been previously ventilated and settled by the Court of Appeal, and there is no novelty in the present

challenge, nor any uncertainty as to the constitutional validity of section 33(3)(a) of the Supreme Court Act.

**Michael Glasford and Others v Commissioner of Police and Another** (1995) 48 WIR 117 applied.

## JUDGMENT

[1] **WARD JA:** By Notice of Petition filed on 7<sup>th</sup> May 2024 Michael Prest, (“the Petitioner”), seeks leave pursuant to sections 99(1)(C) and 99(2)(a) of the **Constitution of the Federation of Saint Christopher and Nevis** to appeal to His Majesty in Council. The judgment sought to be appealed is the judgment of the Court of Appeal delivered in **Michael J. Prest v Magistrate District “C” et al**<sup>1</sup> on 16<sup>th</sup> April 2024.

### **Brief Background**

[2] On 21<sup>st</sup> July 2021 Corporal Randolph Diamond (“the second respondent”) swore before the learned magistrate two information alleging that the Petitioner had committed two offences of fraudulently converting US\$2,530,000.00, which he had received for the use and benefit of Mark Kucher, for his own. Being satisfied with the evidence presented on oath, the magistrate issued a warrant of arrest in relation to each offence pursuant to Section 37 of the **Magistrates Code of Procedure Act**<sup>2</sup>, which provides that a magistrate may issue a warrant in the first instance and require ‘such evidence in that behalf as he or she considers necessary to substantiate the matter of the information.’ The warrants have not been executed as the Petitioner is outside of the jurisdiction.

[3] On 27<sup>th</sup> August 2021, the Petitioner applied *ex parte* for leave to apply for judicial review and sought orders to quash the magistrate’s decision to issue the arrest

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<sup>1</sup> NEVHCVAP2022/0003 (delivered on 16<sup>th</sup> April 2024, unreported).

<sup>2</sup> Chapter 3.17 of the Revised Laws of St. Christopher and Nevis.

warrants. The Petitioner also sought an interim order for a stay of execution of the two arrest warrants pending the determination of the application for judicial review and an interim injunction restraining any publication of the existence of the arrest warrants pending the determination of the judicial review application. By order dated 1<sup>st</sup> September 2021, the judge granted the application for leave and scheduled an inter partes hearing for consideration of the injunctive reliefs sought.

- [4] At the subsequent inter partes hearing on 10<sup>th</sup> September 2021, the judge granted the interim reliefs sought and ordered that the execution of the arrest warrants be stayed pending the hearing of the judicial review claim. The matter was adjourned to 18<sup>th</sup> October 2021. The appellant subsequently filed his fixed date claim for judicial review.
- [5] On 11<sup>th</sup> November 2021 the respondents subsequently applied to set aside the order granting leave on the basis that the Petitioner was seeking to challenge the basis of the Director of Public Prosecution's decision to prosecute him and that the Petitioner had alternative remedies available to him in the criminal proceedings. The hearing was scheduled for 18<sup>th</sup> March 2022.
- [6] On 18<sup>th</sup> March 2022, the Petitioner sought an adjournment on the basis that his lead counsel was unavailable as he was acting in a judicial capacity in another jurisdiction. The judge refused to adjourn the hearing and determined that he would consider the matter on the papers. Having done so, he set aside the leave granted to bring a claim for judicial review and the interim orders and struck out the fixed date claim for judicial review. The judge found that the issues raised were matters best addressed in the criminal justice system and that it would be inappropriate for the court to hear a claim for judicial review on the grounds outlined by the applicant.
- [7] The Petitioner, being dissatisfied with the ruling of the learned judge appealed. The three main issues originally emerging for determination at the hearing were: (i) whether the learned judge erred in refusing to grant the Petitioner's application for

an adjournment of the hearing and determined that the matter be heard on paper, (ii) whether the learned judge applied the wrong principles in exercising his discretion to set aside leave and (iii) whether the learned judge made findings of fact which were not supported by evidence.

[8] On conclusion of the hearing of the appeal, the Court of Appeal of its own motion invited written submissions from the parties on whether the Court had jurisdiction to determine the appeal. The Court directed that the parties file submissions on the effect of section 33(3)(a) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**<sup>3</sup> and subsequently received those submissions. Section 33(3)(a) provides that:

“(3) No appeal shall lie under this section—  
(a) from any order made in any criminal cause or matter;...”

[9] The preliminary issue arising for consideration therefore was whether the appeal was from an order made in a ‘criminal cause or matter’. The resolution of this issue would determine whether the Court of Appeal had jurisdiction to entertain the appeal.

[10] Having considered those further submissions, the Court held that the proceedings brought by the applicant were not collateral to the exercise of the criminal jurisdiction but related to the decision of the magistrate to issue the warrants of arrest pursuant to section 37 of the **Magistrate’s Code of Procedure Act**. The direct outcome of the judge’s decision refusing to quash the arrest warrants is that it may lead to the arrest of the applicant, his trial and his possible punishment for the alleged offences by the criminal court. For those reasons the Court of Appeal concluded that the appeal was an appeal in a ‘criminal cause or matter’ and fell within the ambit of the prohibition contained in section 33(3)(a) of the **Supreme Court Act**. Accordingly, the Court held that it had no jurisdiction to hear and determine the appeal and added ‘[t]his finding brings an end to this appeal.’

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<sup>3</sup> Chapter 3.11 of the Revised Laws of Saint Christopher and Nevis.

[11] However, Thom JA purported to express obiter opinions on the substantive grounds of appeal but concluded that she would have dismissed all of them in any event.

### **The Petition**

[12] The Petition alleges at paragraph 11 that the Court of Appeal erred in holding that the appeal was in a criminal cause or matter contrary to section 33(3)(a) of the **Supreme Court Act** when it was not because the appeal arose from a decision of the High Court denying leave to apply for judicial review and was therefore not an appeal of an order made in a criminal cause or matter. It is contended that in coming to this decision the Court of Appeal followed English decisions which adhere to the notion of parliamentary supremacy rather than relying on decisions which adhere to constitutional supremacy. It is further said that the effect of the Court of Appeal's decision is that the Petitioner has been denied his constitutional right to protection of the law pursuant to Section 10 of the **Constitution of Saint Christopher and Nevis**. There is therefore a question of great general or public importance as to whether section 33(3)(a) is in contravention of section 10 of the Constitution, as its effect is to deny access to the courts in the circumstances of this case.

[13] At paragraph 12, the Petitioner also challenges the Court of Appeal's decision in relation to the substantive grounds of appeal. It is said that the effect of the decision is that by determining the matter on paper and refusing to grant the adjournment the Petitioner was denied the opportunity to rely on legal representation of his choice. Paragraph 13 contends that the Court of Appeal made determinations based on evidence that was before the Judge but not before the magistrate. Paragraph 14 complains that the Court of Appeal erred in awarding costs contrary to Part 56.11(6) of the **Civil Procedure Rules 2000** when it made no finding that the Petitioner had acted unreasonably in making the application or acted unreasonably in the conduct of the application.



[14] The affidavit in support of the Petition repeats these challenges to the Court of Appeal's decision at paragraphs 17 to 20.

[15] I have set out the basis on which leave is sought as outlined in the Petition because during the course of oral submissions, Mr. Foster KC articulated another challenge to the Court of Appeal's decision which forms no part of the Petition. In particular, he sought to argue that the Court of Appeal did not at all engage with the argument that section 33(3)(a) was in contravention of section 10(1) of the Constitution on the basis that no constitutional claim was made in the Court below and the issue did not arise in the appeal. It was submitted that the Court of Appeal erred in adopting this approach.

[16] I am satisfied that no such challenge is contained in the Petition, and no arguments in relation to this particular challenge can be found in the Petitioner's written submissions. In any event, it is clear that the assertion is factually incorrect. The Court did not side-step the constitutional point. While it is true that the Court of Appeal at paragraph 31 'noted' that no constitutional proceedings were brought by Mr. Prest in relation to breach of the provisions of section 10(1) and while the Court thought it 'of note' that in the fixed date claim which the Petitioner filed pursuant to leave which was granted *ex parte*, he made no mention of breach of any of his constitutional rights, the Court nonetheless went on to consider the impact of section 33(3)(a) on constitutional rights. The Court of Appeal's reasons for concluding that resort to section 10(1) of the Constitution did not avail the Petitioner are set out at paragraph [33]:

"[33] The right to personal liberty is not an absolute right. The Constitution itself outlines circumstances in which the right may be infringed such as by a warrant of arrest. The processes of the criminal justice system inevitably impact constitutional rights, as in this case the right to liberty, a warrant of arrest having been issued. The mere fact that a constitutional right has been impacted and the judge errors (sic) in his decision on review does not mean that a right of appeal is automatic. **Lawrence** makes it clear that where the matter in which it arose is a criminal cause or matter, section 33(3)(a) prohibits such an appeal. An appeal lies in relation to a person who has been convicted of a criminal offence. The rationale for this is as explained

by Dame Janice Pereira CJ in **Hapgood** as referred to earlier. Section 10(1) is of no assistance to Mr. Prest's case."

[17] A further related observation is that during oral submissions, Mr. Foster sought to argue that section 33(3)(a) also contravenes sections 2 and 3 of the Constitution thus engaging the court's enforcement jurisdiction under section 18 of the Constitution. I make the same observation as above that these constitutional provisions were not relied on in the appeal; they are not pleaded in the Petition or referred to in the affidavit in support and are not addressed in the Petitioner's written submissions.

[18] In short, the only constitutional provision invoked in the appeal and in the petition is section 10. This Court will therefore confine itself, as it must, to consideration of the grounds pleaded in the Petition and matters advanced in the Petition in support of the stated grounds.

### **Discussion**

[19] Appeals to the Privy Council are governed by the **Saint Christopher and Nevis Appeals to the Privy Council Order, (formerly, the West Indies Associated States (Appeals to Privy Council) Order 1967**<sup>4</sup>. Section 3 provides that an appeal shall lie to His Majesty in Council from decisions of the Court given in any proceedings originating in the State in such cases as may be prescribed by the Constitution. Section 4 provides that an application for leave to appeal should be made by motion or petition within twenty-one days of the date of the decision appealed.

### **The Constitutional provisions**

[20] Since the Appeals to the Privy Council Order directs attention to the Constitution to ascertain the prescribed cases in which leave to appeal to His Majesty in Council may be obtained, it is necessary to consider the provisions of the Constitution which

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<sup>4</sup> See: Saint Christopher and Nevis Modification of Enactments Order 1983, SI No 882 of 1983.

the Petitioner invokes to ground the present application. They are sections 99(1)(c) and 99(2)(a).

[21] Section 99(1) provides that an appeal shall lie from decisions of the Court of Appeal to His Majesty in Council as of right in the following cases:

- “(a)...
- (b)...
- (c) final decisions in any civil or criminal proceedings that involve a question as to the interpretation of this Constitution.”

[22] The provision of the Constitution which the Petitioner submits is in need of interpretation is section 10(1), which guarantees the right to protection of the law:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

[23] The other limb on which the Petition is hung is Section 99(2)(a) of the Constitution, which provides:

“(2) Subject to section 36(7), an appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases:

- (a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council...”

[24] I will examine each constitutional provision in turn.

#### **The Petitioner’s submissions – section 99(1)(c)**

[25] On behalf of the Petitioner, Mr. Peter Foster KC submitted that section 33(3)(a) of the Supreme Court Act is in contravention of section 10 of the Constitution of Saint Christopher and Nevis as ‘the effect of the decision of the Court of Appeal dated 16<sup>th</sup> April 2024 is that the Petitioner has been denied access to the courts in the circumstances of this case.’ The right to protection of the law encompasses the right of every citizen of access to the courts and other judicial bodies established by law

to prosecute and demand effective relief to remedy any breaches of their constitutional rights Section 33(3)(a) infringes the Petitioner's rights to access the Court and to demand effective relief to remedy the potential breach to his constitutional right to freedom of liberty and to freedom of protection of the law.

**The 1<sup>st</sup> respondent's submissions – section 99(1)(c)**

[26] The Attorney General submitted that the appeal does not involve a genuinely disputable question of interpretation of the Constitution because—

- (i) The Applicant's Fixed Date Claim did not contain a claim for breach of constitutional rights or a claim asking the Court to interpret the Constitution.
- (ii) The Appellant's grounds of appeal did not refer to any breach of constitutional rights.
- (iii) Assertions of constitutional breaches were raised in submissions before the Court of Appeal and dismissed by the Court of Appeal.
- iv) There was no claim or appeal in relation to a breach of any constitutional right therefore the argument which the claimant seeks to make cannot assist him.

**Discussion - Leave as of right - Section 99(1)(c)**

[27] It is important at the outset to have in mind the scope of the Court's remit where a Petition for leave to appeal to His Majesty in Council is as of right. Where leave is sought under section 99(1)(c) of the Constitution as of right, the Court of Appeal's gate-keeping role is to determine whether the intended appeal raises a genuinely disputable question of the interpretation of the constitution. This principle was stated in the Privy Council judgment in **Alleyn-Forte v The Attorney General of Trinidad and Tobago and others**.<sup>5</sup> The Board stated:

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<sup>5</sup> [1997] UKPC 49 at para 486.

“An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this *is* required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case...”

[28] The principle articulated in **Alleyn-Forte** forms part of the jurisprudence of the Eastern Caribbean Supreme Court and was adopted and applied by the Eastern Caribbean Court of Appeal in **William Martin v Ursil Peters**<sup>6</sup>. Rawlins CJ as he then was stated—

“[26] The essence of the foregoing statements by the Privy Council in **Alleyn-Forte** is that where an applicant for conditional leave states that he is entitled to leave as of right on the ground that the appeal raises a genuinely disputable issue that involves a question of constitutional interpretation, a court of appeal should ensure that the appeal really raises such a question so that it genuinely falls under a section [99(1) (c)] type provision.”

[29] In other words, the Court of Appeal’s role is to establish whether the asserted right to appeal exists. It is not to consider or determine the merits of the appeal. Thus, the first issue for this Court is whether by virtue of section 99(1)(c) of the Constitution the Petitioner has an appeal as of right to His Majesty in Council. The answer to this question turns on whether the appeal involves a question of the *interpretation* of the Constitution.

[30] In **R v Lewis (Mitchell)**<sup>7</sup>, the Caribbean Court of Justice had to construe Section 6(c) of the Caribbean Court of Justice Act 2003 which provides as follows:

“An appeal shall lie to the [Caribbean Court of Justice] from decisions of the Court of Appeal as of right in the following cases ... (c) in any civil or criminal proceedings which involve a question as to the interpretation of the Constitution ...”

[31] The applicant had been convicted of murder. However, the Court of Appeal quashed his conviction, substantially on the basis that the applicant had not received a fair trial because the application for the recusal of the trial judge should not have been

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<sup>6</sup> ANUHCVP2004/0036 (delivered 17<sup>th</sup> September 2007, unreported).

<sup>7</sup> [2007] CCJ (3) AJ.

made in the presence of persons who subsequently became jurors. This was held to make the trial unfair because the jury had been prejudiced against the accused by what had been said by counsel on both sides in the presence of the jury before their selection. The Crown appealed to the CCJ as of right under section 6(c) of the Caribbean Court of Justice Act 2003 asserting that the Court of Appeal's conclusion that the applicant had not received a fair trial was based on a wrong interpretation of what was meant by the phrase 'fair hearing' in section 18(1) of the Barbados Constitution. That section provides:

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[32] Two issues arose before the CCJ: (1) whether by virtue of section 6(c) the Crown had a right of appeal to the CCJ; and (ii) if yes, whether the case involved a question as to the interpretation of the Constitution.

[33] The CCJ resolved the first issue in favour of the Crown. In relation to the second issue, the CCJ adopted the following approach in answering the question whether the case involved a question as to the interpretation of the Constitution:

"[35] ... The question still remains, however, whether what the Court of Appeal was about in this case, was interpreting the expression 'a fair hearing' as opposed to applying it to the particular facts of the case.

[36] The answer to this question becomes a lot clearer if we focus on the issue on which the Court of Appeal's decision turned." (Emphasis added).

[34] Having examined the Court of Appeal's judgment and the issues which engaged the Court of Appeal, the CCJ held that the Court of Appeal was not engaged in interpreting section 18(1) of the Constitution even though it had spoken of it twice in the judgment as if it involved a process of interpretation. The Court held:

"The question was whether what was said was apt to create that bias and did not involve an 'interpretation' of s 18(1)."

- [35] The CCJ cited the case of **Frater v R**<sup>8</sup>, in which the Privy Council made a distinction between a case where the question involved an interpretation of a provision of the Constitution as distinct from cases where the question that did arise was the application of the plain and simple words of the Constitution to the particular facts of the case.
- [36] A similar distinction was drawn by the Privy Council in a case out of the Eastern Caribbean jurisdiction: **Joseph v The State of Dominica**<sup>9</sup>. Section 106(1) of the Constitution of Dominica is in identical terms as section 99(1)(c) of the Saint Christopher and Nevis Constitution. The particular provision of the Constitution, the interpretation of which was said to be involved in the proceedings was, as in the case of **Lewis**, the fair hearing guarantee under section 8(1). The Court of Appeal had granted conditional leave to appeal on the basis that a question of the interpretation of the Constitution was involved.
- [37] The Privy Council, in dismissing the appeal, observed that whether a case has received a 'fair hearing' within the meaning of section 8(1) of the Constitution is not a question of interpretation of that enactment. It is a question of the application of these words to the facts of the particular case. In so concluding the Board cited approvingly its earlier decision in **Frater v R** where the Board dismissed an appeal purporting to be made as of right under section 110(1) of the Constitution of Jamaica where Lord Diplock expressed the opinion that while the application of the particular constitutional provision might have been in issue, no question as to its interpretation properly arose.
- [38] I derive the following propositions from these authorities. The requirement in section 99(1)(c) of the Constitution that the question be involved in the appeal, means that the issue must have arisen in the appeal, thus making it necessary to focus on the issue on which the Court of Appeal's decision turned. Thus, this Court must assess

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<sup>8</sup> [1981] 1 WLR 1470.

<sup>9</sup> (1988) 36 WIR 216.

whether the Court of Appeal was engaged in interpreting section 10(1) of the Constitution. In other words, did/does the question involved in the appeal involve a genuinely disputable interpretation of section 10(1)? If the question involved in the appeal is really one of the application of a provision of the Constitution to the facts of a particular case, then the question does not involve the interpretation of the Constitution.

### **The issue in the Court of Appeal**

[39] The Court of Appeal framed the issue in the following way at paragraph [17]:

“The central issue which arises is whether this appeal is in “a criminal cause or matter”.

[40] In my view, Mr. Foster is correct to say that no constitutional issue in relation to section 33(3)(a) could have arisen until the Court of Appeal raised section 33(3)(a) as an issue. It was when the Court of Appeal raised section 33(3)(a) as a possible bar to its jurisdiction to entertain the appeal, and when faced with the prospect that section 33(3)(a) might shut him out of the Court of Appeal, that the Petitioner asserted its incompatibility with section 10(1) in submissions before the Court of Appeal.

[41] The judgment records the Petitioner’s submissions on the issue involved in the appeal at paragraph [26]:

“Mr. Foster KC submitted that the judicial review application before the learned judge involved constitutional principles of the protection of the law, liberty, natural justice and procedural fairness. Where a constitutional right is threatened such as the right to liberty which is central to this case as Mr. Prest’s right to liberty is threatened by the warrants of arrest having been issued in error by the learned magistrate, the Administrative Court is clothed with jurisdiction to protect those rights.” [The Court then set out passages from the CCJ decisions of **The Maya Leaders Alliance et al v Attorney General of Belize** and **Solomon Marin Jr v R**<sup>10</sup> on which the Petitioner relied for to define the scope of the protection of the law.]

[42] The Court then continued at paragraph [30]:

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<sup>10</sup> [2015] CCJ 15 (AJ).



“There is no dispute relating to the principles stated by the CCJ in the decisions cited above. The gravamen of learned King’s Counsel submission is that there must be a right to appeal where the court below has erred in protecting the right to liberty. The warrants having been wrongfully issued, and the learned judge having failed to set them aside, there must be a right to appeal. In so far as section 33(3)(2) (sic) seeks to prohibit an appeal against such a wrong, it is inconsistent with the Constitution.” (Emphasis added).

- [43] In my view, the Court of Appeal was not engaged in interpreting section 10(1) but with determining whether the underlying proceedings which gave rise to the appeal was from an order in a criminal cause or matter. That issue involved in the appeal was not resolved by nor did it call for or require the Court of Appeal to engage in an interpretation of section 10(1). Indeed, the Court of Appeal accepted the principles as enunciated in the authorities cited by the Petitioner on the breadth and scope of the due process provisions. To that extent, there is no disputed interpretation of section 10(1) of the constitution.
- [44] The Petitioner’s case was that the Court should not apply section 33(3)(a) as to do so would contravene section 10(1) of the Constitution. In other words, his case is concerned with the impact that section 10(1) should have on the application of section 33(3)(a) to the circumstances of this case. The authorities are clearly and consistently to the effect that where on a proper analysis the real issue engaged on the appeal has do with the application of a constitutional provision to the particular facts of a case, this does not amount to a question involving the *interpretation* of the Constitution.
- [45] Taking heed of the remarks of Lord Diplock in **Frater v R** at p.1470, this Court must be astute to ensure that applications for leave to appeal to the Privy Council that invoke provisions equivalent to section 99(1)(c) really ‘do involve a genuinely disputable question of interpretation of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to [His] Majesty in Council as of right.’

[46] For the foregoing reasons, this limb of the Petition must fail.

**Does the proposed appeal raise an issue of great general or public importance or otherwise – section 99(2)(a)**

[47] Section 99(2)(a) vests a discretion in the Court to grant conditional leave to appeal to the Privy Council in civil matters on one of two bases. The first is where the Court is of opinion that the question involved in the appeal is one that by reason of its great general or public importance ought to be submitted to His Majesty in Council.

[48] A body of authorities emanating from this Court has explained in clear terms how this provision should be interpreted. In **Martinus Francois v The Attorney General**<sup>11</sup> it was held that the phrase ‘great general or public importance’ denotes cases where ‘there is a really serious issue of law; a constitutional provision that has not been settled; an area of law in dispute, or a legal question the resolution of which poses dire consequences for the public or has far reaching effect.’ A principle of law may be said to be unsettled where, though established by this court, there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself.

[49] In further elucidating the phrase and the applicable principles, this Court in **Renaissance Ventures Ltd et al v Comodo Holdings Ltd**<sup>12</sup> instructs:

“[10] ... Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application. Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given too harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial

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<sup>11</sup> SLUHCVP2003/0007 (delivered 7<sup>th</sup> June 2004, unreported).

<sup>12</sup> BVIHCMAP2014/0032 (delivered 3<sup>rd</sup> May, 2016, unreported).

discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.

[11] It follows as well that the question of law which is said to be of great general or public importance must genuinely arise from the way the case was decided in the Court of Appeal. The question must be 'involved' in the appeal. Such a question cannot arise if it was not raised on the appeal, or if the principle of law which the applicant wishes to have settled by the highest court has not been put in doubt.”

[50] The second basis on which this Court may exercise its discretion to grant conditional leave to appeal is where the matter, though not of great general or public importance, ought otherwise to be submitted to His Majesty in Council. The jurisprudence of the Eastern Caribbean Court of Appeal is settled on what this alternative basis means.

[51] The phrase ‘or otherwise’ caters to the situation where a matter may not qualify as one of great general or public importance, but which in the opinion of the Court might require some definitive statement of the law from the apex court. The phrase encompasses not only matters of strict law but can also extend to situations where the Court is satisfied that there are good grounds for submitting the relevant matter for consideration by the Privy Council, such as where there is some reasonable doubt as to the correctness of the Court’s decision. In such an instance, however, the discretion to grant conditional leave should be exercised sparingly and with great care, mindful that it is not the function of the Court of Appeal to determine the correctness of the matters sought to be appealed but the Privy Council’s: **Multibank FX International Corporation v Von De Heydt Invest**.<sup>13</sup>

[52] The foregoing statement of principles and approach are those which this Court must adopt in seeking to exercise its discretion judicially, pursuant to the jurisdiction conferred upon it by section 99(2)(a) of the Constitution, for, as this Court in **Pacific**

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<sup>13</sup> BVIHCMAP2022/0061 (delivered 5<sup>th</sup> July 2023, unreported).

**Wire & Cable Company Limited v Texas Management Limited et al<sup>14</sup>**

admonishes, exercising the discretion judicially 'requires that this court should, as a general rule, strive to act consistently in applying the test to grant leave so that it is in accordance with current practice and that of other courts of appeal whose discretion is under the equivalent rules, bearing in mind that the jurisdiction of our highest court of appeal is being invoked.'

[53] The issue for this court under section 99(2)(a) is therefore whether the question involved in the appeal is one of great general or public importance or otherwise such that leave should be granted to appeal to His Majesty in Council.

[54] The Petitioner's written submissions contend that:

"Since the issue relates to the Court of Appeal's interpretation of Section 33(3)(a), it is submitted that this is an issue of great public importance. The Court of Appeal determined that based on Section 33(3)(a), that challenging the decision of a Magistrate to issue a warrant ultimately amounts to an appeal of a criminal cause or matter... The decision of the Court of Appeal respectfully has resulted in a decision that has contravened Section 10 of the Constitution. Therefore, a grave issue of public importance has arisen as to whether Section 33(3)(a) is in contravention to Section 10."

[55] In relation to the 'or otherwise' limb, the Petitioner submitted at paragraphs 19 and 20 of his written submissions that "in the alternative, the Petitioner ought otherwise to be granted permission to appeal to His Majesty in Council. The Court of Appeal erred in determining that this was an appeal of a criminal cause or matter under Section 33(3)(a) ECSC Act and therefore erred in determining that it did not have jurisdiction to hear the appeal."

[56] The Attorney General countered that 'the question of whether a judicial review challenge to a Magistrate issuing a criminal warrant is a criminal matter or cause, whilst important, is settled law. This application is simply an attempt to bypass that

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<sup>14</sup> BVIHC VAP 2006/019 (delivered 6<sup>th</sup> October 2008, unreported).

statutory and trite jurisprudential restriction on multiplicity of appeals of orders in criminal matters or causes.’

### **Discussion**

[57] The Court of Appeal held that the appeal before it was in a criminal cause or matter. It based its conclusion on a line of authorities from this jurisdiction where the appeal court has applied the equivalent of section 33(3)(a) to cases where appeals were lodged challenging decisions made in judicial review proceedings of decisions made in underlying criminal proceedings. The Court of Appeal also had regard to cases out of the United Kingdom where the equivalent of section 33(3)(a) has been interpreted at the level of the Privy Council and the Supreme Court.

[58] While it is not the role of this Court on this Petition to decide whether the Court of Appeal was right in its conclusion on this issue, our role requires us to satisfy ourselves that the requirements of section 99(2)(a) are met.

[59] As previously indicated, the issue involved in the appeal was identified as “whether this appeal is in ‘a criminal cause or matter’”. The Petitioner contends that the Court of Appeal was wrong to conclude that it was because the appeal arose from a decision of the High Court denying leave to apply for judicial review and was therefore not an appeal of an order made in a criminal cause or matter.

[60] In my view, it is only necessary to refer to the decision in **Hapgood v Commissioner of Police**<sup>15</sup>, in which the learned Pereira CJ, undertook a survey of a number of cases within the jurisdiction of the Eastern Caribbean Supreme Court which engaged this very issue.

[61] In **Hapgood**, the appeal was against the judgment of a High Court Judge on a judicial review claim filed by the Commissioner of Police against the magistrate in respect of his decision not to continue the preliminary inquiry into the offence of

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<sup>15</sup> AXAHCVP2020/0003 (delivered 24<sup>th</sup> June 2020, unreported).

manslaughter alleged to have been committed by Mr. Hapgood, in Mr. Hapgood's absence, whom he found had voluntarily absented himself from the hearing and from the jurisdiction of Anguilla. The Commissioner of Police took the preliminary objection that the Court had no jurisdiction to hear the appeal having regard to the prohibition contained in section 29(2) of the **Eastern Caribbean Supreme Court (Anguilla) Act**. That section is in pari materia with section 33(3)(a). Thus, the issue before the Court of Appeal was whether Mr. Hapgood's appeal was from an order made in a criminal cause or matter, from which no appeal lay to the Court of Appeal under the Act. The preliminary objection was upheld and the appeal dismissed on that basis.

[62] In arriving at its conclusion, the court reviewed a number of authorities in which this issue had been previously canvassed. It is beneficial to set out the relevant passages:

"[11] The principles which govern the question of whether an order was made in a 'criminal cause or matter' have been the subject of a number of judicial pronouncements from this Court. Mr. Fay, QC referred the Court to the decision of **Michael Glasford and Others v Commissioner of Police and Another**<sup>16</sup>, where Sir Vincent Floissac CJ considered that there appeared to be three preconditions to an order being one made in a criminal cause or matter. His Lordship stated:

'The principles which govern the question whether an order was made in a criminal cause or matter were authoritatively stated in the decisions of the House of Lords in *Re Clifford and O'Sullivan* [1921] 2 AC 570 and *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147. According to these decisions, there appear to be three pre-conditions to an order being in a criminal cause or matter. The first pre-condition is that, at the time of the filing or hearing of the application on which the order was made, a charge of crime punishable by a fine, imprisonment or otherwise had been or was about to be preferred against the applicant or some other person. The second pre-condition is that the application involved consideration of that charge of crime. The third precondition is that the direct outcome or result of the application was or might have been the applicant's or other person's trial and possible conviction and punishment by a court or tribunal having or claiming jurisdiction to try, convict and punish for that crime.'

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<sup>16</sup> (1995) 48 WIR 117.

[12] The above principles in **Glasford** were later restated in **Attorney General of Antigua and Barbuda and Another v Lewis (Artland)**.<sup>17</sup> In that decision, Floissac CJ approved the following statement of Viscount Simon in *Amand v Home Secretary and Another*:

'It is the nature and character of the proceedings in which [the relief] is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do, the matter is criminal.'

[13] More recently, the principles espoused in **Glasford** and applied in **Lewis** were followed in **George Finton DeBourg v Chief Magistrate and Another**<sup>18</sup>. In **DeBourg**, this Court dismissed the appellant's appeal in circumstances where he sought judicial review of the decision of the Chief Magistrate to commit him for trial and the decision of the Director of Public Prosecutions to indict him. At paragraph 15 of the judgment, Michel JA reasoned thus:

'The judgment sought to be appealed before this Court was made on an application for judicial review of a decision made by a magistrate to commit the appellant to stand trial for certain criminal offences and by the DPP to indict the appellant for the offences. The judgment satisfied the three preconditions set out by Sir Vincent in *Glasford* and applied by him in *Lewis*, in that - (1) at the time of the hearing of the application for judicial review, criminal charges were preferred against the appellant; (2) the application had to have involved some consideration of the criminal charges for which the appellant was committed and indicted; and (3) the direct outcome or result of the dismissal of the application for judicial review was the possible trial and conviction of the appellant for the offences.' "

[63] As **Hapgood** and the authorities reviewed therein clearly demonstrate, the interpretation of section 33(3)(a) and its equivalent counterparts within the jurisdiction of the Eastern Caribbean Supreme Court is long settled. Equally clear is that the cases speak with one voice as to the test for determining whether a matter is in a criminal cause or matter. There is therefore no genuine dispute on the applicable principles of law underlying the question which the Petitioner wishes to pursue on his proposed appeal as there are no differing views or conflicting dicta, nor is there any genuine uncertainty surrounding the principle itself.

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<sup>17</sup> (1995) 51 WIR 89.

<sup>18</sup> GDAHCVAP2012/0017 (delivered 7<sup>th</sup> April 2017, unreported).

[64] Furthermore, it cannot be said that this issue requires some definitive statement of the law from the apex court. I say this because it is evident that our court's previous decisions on this issue have been directly influenced by judgments from the Privy Council and Supreme Court which considered the UK equivalent. The following paragraphs in **Hapgood** cogently illustrate his.

"[19] It is noteworthy that the meaning of the phrase 'a criminal cause or matter' was recently considered by the Supreme Court of the United Kingdom in **R (Belhaj) v Director of Public Prosecutions and another (No.1)**. Belhaj concerned judicial review proceedings against a decision by the Director of Public Prosecutions not to prosecute. The UK Supreme Court, quoting **Woodhall**, stated that a 'criminal cause or matter' is one which requires judicial determination at any stage of the proceedings where the subject matter was criminal, and if the cause or matter were carried to its conclusion, might result in a conviction. This is entirely consistent with the approach adopted by the Court in **Glasford**.

[20] Furthermore, earlier this year, the guiding principles on this issue were comprehensively reviewed and recapitulated by the Supreme Court of the United Kingdom in **Re McGuinness (Attorney General for Northern Ireland and others intervening)**<sup>19</sup> in construing a like provision as section 29(2) of the Act which, like many of our laws, were inherited by or adopted in the former colonies of the United Kingdom. Liverpool JA made this observation in **Glasford** in explaining the guidance to be found in the English decisions in construing the words 'criminal cause or matter'. Critically, Liverpool JA emphasised the highly persuasive force of those authorities in construing the similar provision of the supreme court legislation enacted across the length and breadth of the states and territories within the jurisdiction of the Eastern Caribbean Supreme Court. At paragraph 45 of the decision, Lord Sales elaborated on the meaning of the phrase 'criminal cause or matter' in the following terms:

"Amand remains the leading decision at the highest level regarding the meaning of the phrase 'criminal cause or matter' in the context regarding rights of appeal. Three points may be made about it. First, the 'wide' interpretation of the phrase is required to direct attention to the nature of the underlying proceedings in which the High Court is asked to intervene, rather than focusing on the abstract categorisation of the proceeding in the High Court itself. Secondly, as Lord Wright put it 'the word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself'. It is not sufficient for the underlying proceedings to relate to a subject-matter which might be described as 'criminal' in a broad sense, the proceeding itself has to be criminal in nature. Thirdly, in

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<sup>19</sup> [2020] 2 WLR 510.



order for the proceeding (in respect of which an application is made to the High Court to intervene) to be a criminal matter the two conditions identified by Viscount Cave must be satisfied, so that it can be said that the applicant is put in jeopardy of criminal punishment by the proceeding; and such jeopardy has to be 'the direct outcome' of the proceeding."

[21] Additionally, Lord Sales explained that in determining whether an order was made in a 'criminal cause or matter', what is of concern is the nature of the proceedings which underlie those in the High Court. At paragraph 77 of **McGuinness**, His Lordship stated that: "This involves asking the question in relation to the proceedings which underlie those in the High Court: are they proceedings 'the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so'...and 'which, if carried to [their] conclusion, might result in the conviction of the person charged and in a sentence of some punishment'? If so, the proceedings in the High Court to challenge such criminal process will be categorised as 'a criminal cause or matter', taking their character from the nature of those underlying proceedings."

[22] It is made plain by **McGuinness**, like the earlier authorities, that an order is one made in a 'criminal cause or matter' if the nature and character of the proceedings in respect of which relief was sought in the High Court was criminal and the direct outcome of the proceedings in the High Court is the possibility that criminal proceedings would continue against the appellant which could lead to his conviction and sentence. Therefore, in determining the Commissioner of Police's preliminary objection, what concerned this Court was the nature and character of the proceedings which the learned judge reviewed, instead of the nature of his review."

[65] In my view the principles relating to the test for determining whether an appeal is in a criminal cause or matter are well settled within this jurisdiction and by highest authority, including the apex court. In truth, the Petitioner's complaint is the application of these well-established principles to the facts of this case. This does not make the issue one of great general or public importance.

[66] The Petitioner further contends that the effect of the Court of Appeal's decision is that the Petitioner has been denied his constitutional right to protection of the law pursuant to Section 10(1) of the Constitution of Saint Christopher and Nevis and for that reason the issue is one of great general or public importance. Mr. Foster in oral

submissions contended that this is the first time that section 33(3)(a) has been challenged for incompatibility with the Constitution.

[67] Since the Petitioner has included the Saint Christopher and Nevis case of **Glasford** among its list of authorities, it cannot have escaped notice that an alternative argument was raised in that case that if the order made by the High Court were held to have been made in a criminal cause or matter then what was then section 31(1)(a) of the Supreme Court Act, (now 33(3)(a)), would be inconsistent with the provisions of section 98(b) of the Constitution, and to that extent would be void.

[68] Section 98(b) provides that an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the case of final decisions given in the exercise of the jurisdiction conferred on the High Court by section 18, which provides judicial redress for the enforcement of fundamental rights and freedoms outlined in sections 3-17 of the Constitution. Liverpool JA in his concurring judgment addressed this argument squarely at page 133 and concluded firmly: 'I would therefore hold that section 31(1)(a) of the Supreme Court Act of St. Kitts-Nevis is not unconstitutional.'

[69] There is no reasonable basis to suppose that the current section 33(3)(a) will attract a contrary conclusion today, and it makes no difference that in the present case the constitutional provision invoked is section 10(1), since essentially the same argument is being raised here, namely that section 33(3)(a) denies access to the court by denying a right to appeal where the appeal is in a criminal cause or matter. For completeness on the issue of the constitutionality of section 33(3)(a) and its forerunner, Floissac CJ, explained in **Glasford** that there will be circumstances where a right of appeal would lie even though the appeal was in a criminal cause or matter. Applying the case of **US Government v Bowe**<sup>20</sup>, Floissac CJ stated:

“**US Government v Bowe** acknowledges that a decision in a civil or criminal cause or matter is constitutionally appealable if the decision was given by the High Court in the exercise of its constitutional jurisdiction to hear an application for judicial enforcement or protection of a fundamental right or

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<sup>20</sup> [1989] 3 All E.R. 315.

freedom which was alleged to have been contravened or to have been under threat of contravention. Such a decision is appealable., notwithstanding section 31(3)(a) of the Supreme Court Act which is required to be construed to conform with section 98(b) of the Constitution.”

[70] The Court went on to hold that the judge’s refusal of the bail application was not such a decision as an application for bail did not pre-suppose a contravention of the applicant’s fundamental right to personal liberty; nor does imprisonment because the fundamental right to liberty is not an absolute right and imprisonment does not necessarily signify the violation of that fundamental right.<sup>21</sup>This is the same point the Court of Appeal was making in its treatment of the constitutional argument in relation to section 10(1) at paragraph [33] of its judgment. In other words, the Petitioner had not asserted in the Court below or the Court of Appeal that the issuance of the arrest warrant, allegedly without an evidential foundation, (not section 33(3)(a) which could not concern the court below) contravened the Petitioner’s right to the protection of the law.

[71] Having regard to the foregoing, it is equally very clear that the issue of the constitutionality of section 33(3)(a) has been ventilated and settled by the Court of Appeal, and there is no novelty in the present challenge, nor any uncertainty as to the constitutional validity of section 33(3)(a) of the Supreme Court Act.

[72] For all the foregoing reasons I would hold that the proposed appeal does not raise an issue of great general or public importance, nor should it otherwise be referred to His Majesty in Council.

**Disposition:**

[73] Accordingly, for all the foregoing reasons, this Court holds that: (1) that no right of appeal arises under section 99(1) (C) of the Constitution for leave to appeal to his Majesty in Council as the question involved in the appeal does not involve the interpretation of the Constitution of Saint Christopher and Nevis; and (2) the

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<sup>21</sup> 1995 48 WIR at page 122 para j.

proposed appeal does not raise an issue of great general or public importance or otherwise, such that it should be referred to His Majesty in Council.

[74] The application for Leave to Appeal to his Majesty in Council is dismissed with no order as to costs.

I concur.  
**Margaret Price Findlay**  
Justice of Appeal

I concur.  
**Gerard St. C. Farara**  
Justice of Appeal [Ag.]



**By the Court**

A handwritten signature in blue ink, appearing to read "A. Shepherd", is written over a horizontal blue line.

**Chief Registrar**