

Appeal against a decision of the Royal Court, whereby the Appellant was refused leave to apply for judicial review of (1) statements made about him in the reasons given for a decision of the First Respondent and (2) the publication and proposed re-publication of those statements by the Second Respondent.

**[2021]GCA067**

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY  
ON APPEAL FROM THE ROYAL COURT**

**CIVIL DIVISION APPEAL No. 549**

**10 December 2021**

**BEFORE:**

**James McNeill QC, President  
Lord Anderson of Ipswich KBE QC  
Timothy John Le Cocq QC, Bailiff of Jersey**

**BETWEEN:**

**ROBERT VARLEY**

**APPELLANT**

**and**

**THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL**

**FIRST RESPONDENT**

**and**

**THE STATES OF GUERNSEY**

**SECOND RESPONDENT**

**The Appellant in Person  
Advocate E Bamber for the First Respondent  
Advocate P M Grainge for the Second Respondent**

**JUDGMENT**

**ANDERSON JA:**

This is the judgment of the Court.

1. Robert Varley (“the Appellant”) appeals a decision of the Royal Court (Howard Edward Roberts OBE QC, Lieutenant Bailiff) by which he was refused leave to apply for judicial review of (1) statements made about him in the reasons given for a decision of the First Respondent (“the Tribunal”), and (2) the publication and proposed re-publication of those statements by the Second Respondent (“the States”).

**Summary of events**

2. The chronology is exhaustively and helpfully set out in the judgment under appeal at [2]. The main points may be summarised as follows:
- a. By a decision of 5 October 2020 (“the Tribunal’s Decision”) the Tribunal ruled that Katherine Hitchins, Head of Corporate Department at the Guernsey law firm Babbé LLP where she, like the Appellant, was a salaried partner, had been unfairly and constructively dismissed and discriminated against on the basis of her sex.
  - b. In the Extended Reasons for its decision, which the parties have referred to as its Reasons, the Tribunal found on the constructive dismissal claim that the firm’s handling of a sexual assault allegation made against Mrs Hitchins by the Appellant in 2018 had been characterised by “*serious process issues*” and had helped to precipitate her resignation (2.18).
  - c. Though he did not give evidence to the Tribunal, the Appellant asked it by email of 27 February 2020 to consider whether the hearing or part of it might be held in private. Having heard the parties, the Tribunal communicated to the Appellant on 4 March its refusal either to sit *in camera* or to redact the Appellant’s name. In the event the Appellant was referred to on multiple occasions in the Reasons, in terms to which he took and continues to take strong objection.
  - d. The Reasons were published on a website operated by the States on or about 9 October 2020, before being taken down on 12 October 2020 pending consideration of legal objections raised by the Appellant. They have remained down since, save for a period between 2 March and 12 March 2021 when they were re-published by the States. Media reporting and social media comment however followed publication: we were shown a front-page article from the 13 October edition of the Guernsey Press which repeats many of the findings relating to the Appellant that he identifies as serious and damaging. The Reasons remain down, though we were told that there is no current undertaking in relation to possible future re-publication.
  - e. The Appellant on 2 November 2020 lodged what purported to be a notice of appeal of the Tribunal’s decision under the Employment Protection (Guernsey) Law 1998. On 2 February 2021, the Royal Court (Roberts, Lieutenant Bailiff) determined after the trial of a preliminary issue that the proceedings could not properly be characterised as an appeal because the Appellant was not a “person aggrieved by a decision or award of the Tribunal on a question of law” for the purposes of s.25(1) of that Law, and therefore lacked standing to appeal. The proceedings were accordingly dismissed.

- f. The Appellant issued a judicial review letter before action on 3 February 2021, the day after the dismissal of his attempted appeal. As a litigant in person, he required leave under rule 90 of the Royal Court Civil Rules 2007 before he could serve a summons for judicial review on the Respondents: this was applied for on 15 February and granted on 1 March 2021.
- g. On 9 March the Appellant served his application for judicial review on the Respondents and (as the Lieutenant Bailiff had rightly required as a condition of leave under Rule 90) on Mrs Hitchins and Babbé LLP as interested parties. On 12 March he lodged the application at the Royal Court, and on the same day was granted an interim order requiring the States to remove the Reasons from their website.
- h. The application for leave to apply for judicial review was heard on 26 March 2021, and leave was refused on 13 April 2021 by the judgment under appeal.

### **The claim for judicial review**

- 3. The claim for judicial review has its origins in various references to the Appellant in the Tribunal's Reasons. These were collectively characterised by the Appellant as "*serious and damaging statements*" against him, to which he had been given no opportunity to respond.
- 4. What the Appellant described as the most serious and damaging finding against him was the comment at 2.18 of the Reasons, as part of its summary findings that:

"RV, motivated by frustration, revenge or possibly anger makes an allegation of sexual assault that appears, given the timing, to be maliciously motivated and is judged as false by [Babbé LLP's] investigation in May 2018."

Other elements of the Reasons that the Appellant denied and found objectionable included, but were not limited to, the "*overt hostility*" that he is said to have displayed to Mrs Hitchin becoming his line manager from as early as 2017 (2.4), his own "*considerable influence over the mode and reach of the investigation*" (2.8) and his attempts to negotiate an exit package from the firm (2.9). He further objected to (but did not deny) references to his medical status (2.5) and salary (3.17).

- 5. Six grounds were advanced in the Appellant's application for judicial review, four against the Tribunal and two against the States:

- a. Ground 1: the Tribunal infringed the Appellant's right to private life (including the protection of both social and professional reputation) under Article 8 of the European Convention on Human Rights ("ECHR").
  - b. Ground 2: the Tribunal acted *ultra vires* when it made findings relating to the Appellant in a dispute between his employer and another employee.
  - c. Ground 3: the Tribunal's findings against the Appellant were perverse, irrational and *Wednesbury* unreasonable.
  - d. Ground 4: the Tribunal failed to comply with the principles of natural justice when it made serious and damaging findings against the Appellant without first giving him the chance to rebut those allegations.
  - e. Ground 5: the States infringed the Appellant's rights under Article 8 of the ECHR by publishing (on or around 9 October 2020) and then re-publishing (on 2 March 2021) the Tribunal's Reasons.
  - f. Ground 6: the States' re-publication of the Tribunal's Reasons on 2 March 2021 was perverse, irrational and *Wednesbury* unreasonable.
6. In addition to interim and final orders requiring the States to remove the Reasons from their website and not to re-publish them, the Appellant sought an order against the Tribunal quashing the Reasons or ordering them to be re-published with the deletion of references to him. Damages pursuant to s.8 of the Human Rights (Bailiwick of Guernsey) Act 2000 were also sought against the States in respect of the Appellant's costs dealing with an SRA investigation, medical expenses and harm to his reputation.

### **Judgment of the Royal Court**

7. The Lieutenant Bailiff in the judgment under appeal dealt thoroughly and at length with the issues that were raised before him. For present purposes it is not necessary to give a full summary of the Royal Court's reasoning, and we record at this stage only its conclusions which were as follows:
- a. The Tribunal is not above the law and could properly be named as a respondent to judicial review proceedings: those responsible for it should indicate how it wished to be identified in such proceedings ([3]).

- b. If leave were granted, it would not include leave to pursue any claim for damages ([4(c)]).
- c. The Applicant (as all parties agreed) had sufficient standing to bring proceedings for judicial review ([15]).
- d. As to arguability:
  - i. The Applicant’s case against the Tribunal for the issuing of the Reasons was “*sufficiently arguable that, all other things being equal, it should proceed to determination at a full hearing*” – in particular, it would seem, because in passages such as that cited at [4] above, the Reasons “*went well beyond recording information*” and the necessity of including such text would need to be determined at any hearing ([16]).
  - ii. The Applicant’s case against the States for publication of the Reasons in October 2020 had no realistic prospect of success, since the States had no reason not to follow their usual practice in terms of publication ([17]).
  - iii. The Applicant’s case against the States for re-publication of the Reasons in March 2021, when the States knew of the Applicant’s intentions with regard to judicial review, was “*sufficiently arguable that, all other things being equal, it should proceed to determination at a full hearing*” ([17]).
- e. Judicial review would not necessarily lack utility, because it could not be said that the outcome would be no different should the Applicant establish his case ([18]).
- f. Interference with good administration was not a reason to refuse permission ([19]).
- g. Though Mrs Hitchins had written to the Royal Court on 11 March 2021 to say that she would be deeply concerned, and extremely adversely affected, if the Appellant “*was allowed to interfere with the Tribunal’s conclusions*”, the level of any interference with her rights or prejudice to her had not been established on the materials before the court to a degree that should lead to a refusal to grant leave ([20]).
- h. Though Mrs Hitchins had written in the same letter that the Appellant’s challenge constituted “*a degree of harassment and victimisation that continues to pose a genuine danger to myself and especially my mental health and wellbeing*”, that statement could not found a refusal to grant leave ([21]).

- i. Though the States had suggested that the Appellant could have challenged the decision of the Tribunal on 3 March 2020 not to hear the matter *in camera* and not to redact his name, the Appellant did not have an alternative remedy such as would justify a refusal to grant leave ([22]).
- j. As to the issue of delay and promptness (which the Lieutenant Bailiff described as “*the key area of challenge*” and considered at [6]-[13] and [23]-[28]):
  - i. There was a delay of five months between the Tribunal’s decision on 9 October 2020 and the lodging of the application for judicial review on 9 March 2021.
  - ii. The only segment of that delay which the Appellant could and should reasonably have avoided was the period of approximately two weeks between 3 and 16 February 2021 ([27]).
  - iii. However, the Appellant’s abortive attempt to bring an appeal, which had occupied the period between 2 November 2020 and 2 February 2021, was not a good reason for delaying the institution of judicial review proceedings, which could have been simultaneously commenced with the appeal ([28]).
  - iv. There was, in addition, clearly some prejudice to Mrs Hitchins (though its extent could not be known without a hearing), “*which becomes greater as the delay becomes greater*” ([28]).
- k. Leave to apply for judicial review was thus refused on the basis that the Appellant had not instituted proceedings against the Tribunal promptly ([29]), and that a review of the States’ decision to re-publish the Reasons on 2 March 2021 “*would be otiose and of no utility*”.

### **Grounds of appeal**

8. By Notice of Appeal dated 3 June 2021, the Appellant advances four grounds of appeal, which are in essence that the Royal Court erred in:
  - a. its approach to the issue of delay/promptness;
  - b. dismissing at [17] as unarguable the challenge to the States’ decision to publish on around 9 October 2020;
  - c. declaring at [28] that a challenge to the States’ decision to re-publish on 2 March 2021 would be otiose and of no utility; and

- d. indicating at [4(c)] that if leave were granted, it would not include leave to pursue any claim for damages.
9. The Tribunal, in a Respondent's Notice dated 16 June 2021, maintains that neither the Tribunal, its Convenor nor its members have power to amend the Tribunal's Reasons as sought by the Appellant, and states that "*the three members of the Tribunal are the most obvious First Respondent*".
10. The States, in an Amended Respondent's Notice dated 28 October 2021, appeals the rulings of the Royal Court that:
  - a. the Appellant had an arguable case to challenge the States' decision to re-publish the Reasons on 2 March 2021 (judgment, [17]); and
  - b. that the only segment of the five-month delay that the Appellant could and should reasonably have avoided was between 3 and 16 February 2021 (judgment, [27]).
11. It will be noted from the above that the matters in issue on this appeal, while still broad, are more confined than was the case below. In particular:
  - a. It remains common ground that the Appellant has standing to apply for judicial review; and it is no longer contested that the Tribunal is in principle susceptible to judicial review ([7(a)] and [7(c)] above).
  - b. There is no challenge to the Royal Court's finding that the Appellant's case against the Tribunal for the issuing of the Reasons is sufficiently arguable so that, all other things being equal, it should proceed to determination at a full hearing ([7(d)(i)] above). It is common ground, in other words, that the Appellant has raised an arguable case against the Tribunal.
  - c. It is not submitted that lack of utility or interference with public administration are sufficient reasons to refuse permission ([7(e)] and [7(f)] above).
  - d. No challenge is made to the Royal Court's assessment that while there was clearly some prejudice to Mrs Hitchins, the level of that prejudice had not been established to a degree that should lead to a refusal to grant leave ([7(g)] and [7(h)] above).
  - e. It is not suggested that the Appellant had an alternative remedy in the form of an opportunity to challenge the Tribunal's ruling of 3 March 2020, such as would justify a refusal to grant leave ([7(i)] above).

## Leave to apply for judicial review: procedure

12. Before turning to the appeal, it may be helpful to summarise the procedure that governs applications for leave to apply for judicial review in this jurisdiction.

13. The origins and development of judicial review in Guernsey were explained by the Court of Appeal (Collas B, with whom McNeill and Martin JJA agreed) in Litchfield v Director of Environmental Health and Pollution Regulation [2014] GLR 175 in the following terms:

“29 The first Guernsey case permitting the remedy of judicial review was the Court of Appeal decision in Bassington v. H.M. Procureur in which the court stated (1997–99 GLR 180, at para. 45):

“We consider it to be a mark of a modern civilized polity that it is prepared to afford the means whereby the private citizen can challenge those administrative decisions which affect his or her private rights.”

In the aftermath of that historic decision, there was some concern that the court might be inundated with applications for judicial review but those concerns have proved to be unfounded and as a result the remedy has not developed to any great extent.

30 There are no rules of court detailing the procedure to be followed when making application but following the decision of Day, Lieut. Bailiff in O.G.H. v. Island Dev. Cttee. Practice Direction No. 3 of 2004 was issued which gave ‘guidance’ to those seeking the remedy of judicial review. It directed that every such claim shall be instituted by issuing a summons in accordance with the Rules of Court before tabling a cause in a Friday Ordinary Court in the normal way. It provided as follows:

‘2. The Cause must:

(a) seek permission to proceed with the claim for judicial review contained therein;

(b) name the defendant and all other parties considered to have a sufficient interest in the subject matter of the claim.

3. The usual Notice of the proposed tabling of the Cause shall be given to the defendant and other parties named therein by service of a summons in accordance with the Rules.

4. The claim shall include:

(a) details of the decision which it is sought to review;

(b) a detailed statement of the grounds for bringing the claim for judicial review;

(c) details of the remedy being sought (including any interim remedy); and

(d) a statement of the facts relied upon, together with details of any prior communications in respect of the claim with the defendant and any interested party.

5. The facts contained in the statement, or such of them as is appropriate, must be verified by a supporting affidavit which shall exhibit such relevant documents as are then reasonably available.
6. Claimants are reminded that they are under a duty to make full and frank disclosure of all material facts, that proceedings must be instituted promptly, and they must satisfy the Court that they have sufficient interest in the subject matter complained of.'

Paragraph 7 of the Practice Direction concluded with the following:

'The presiding judge will give such directions as he sees fit with regard to the conduct of the proceedings and the participation of the parties therein. Defendants and other named parties are not to assume that any participation will be necessary on their part, other than responding to the initial summons, until so informed or requested by the Court.'

- 31 The final sentence of para. 7 of the Practice Direction implies that the presiding judge may dismiss the application without hearing from the respondent(s) and in that regard it mirrors the Civil Procedure Rules, r.54.4, the purpose of which is 'to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration' (see para. 54.4.2 of the White Book).
- 32 In Guernsey, the formalities that should be followed before a summons can be issued are such that it should not be possible for a claim to be commenced if it is not fit for further consideration by the court. Where the complainant is legally represented, the advocate will have regard to the terms of his oath and of the requirements of Practice Direction 3 of 1990 and will not sign the summons if there is no arguable cause. Any unrepresented litigant must obtain leave of the Bailiff pursuant to r.90 of the Royal Court Civil Rules 2007. Application is made to the Bailiff ex parte enclosing two copies of the summons. It is highly unlikely that a Bailiff would grant leave to issue a summons seeking permission to apply for judicial review if the case was so defective that after service on the respondent it could be dismissed on the papers ex parte at the leave stage. Thus, there should be very few cases where an application for permission to seek judicial review does not proceed swiftly to being considered inter partes.
- 33 Then the question will arise as to whether the application for leave is taken as a preliminary point or is heard at the same time as the application for substantive relief. The reason for introducing a requirement to seek leave was explained by Day, Lieut. Bailiff in the O.G.H. judgment, where he said:  
  
'34. The first step which this Court should take, on receipt of an application for judicial review, apart from considering the question of the locus of the applicant (and other interested parties), is to determine whether it is right to allow an applicant to proceed to a full hearing for judicial review so as to remedy its complaints. This Court's jurisdiction to proceed in such a summary way is based not only on Rule 55, but also on its historic power to treat causes as *privilégiées* and its inherent jurisdiction to do justice, which requires *inter alia* that the Court's time is not wasted on unworthy matters. Thus this Court should adopt the permission (formerly leave) stage present in equivalent proceedings in England and Wales.'"

14. There remains neither a Law nor Rules of Court governing judicial review in Guernsey, with the result that the applicable procedural guidance continues to be derived from Practice Direction No. 3 of 2004 (“the Practice Direction”), cited above, and from the decisions of the courts themselves. As Collas B noted in Litchfield at [36]:

*“When considering applications for judicial review, the Guernsey courts look to the well-established principles in English law for guidance while recognising that in the absence of any specific Rules of Court, we have more flexibility in procedural matters than might be the case in England”.*

While flexibility has its advantages, Rules of Court may also provide a degree of welcome certainty to litigants and practitioners. Judicial review in England, though originally developed by the courts, has increasingly been influenced by rules made since the Practice Direction was issued. For example, changes to the CPR in July 2013 reduced the time limits for bringing claims in planning cases, and introduced a truncated procedure for cases judged on the papers to be totally without merit; a number of other special time limits apply; the Criminal Justice and Courts Act 2015 introduced a requirement that the High Court refuse to grant a remedy, or permission to apply for judicial review, if it considered it highly likely that the defendant’s conduct in the matter in question would not have affected the outcome for the applicant; and a Judicial Review and Courts Bill, intended to make provision for non-retrospective and suspended quashing orders, is currently before the House of Commons. Whether developments of this nature should be reflected in Guernsey practice, influenced as they are by a framework of rules devised for England and without parallel in Guernsey, is a question to which there is no simple or uniform answer.

15. The requirement in English law of permission to apply for judicial review (still referred to in Guernsey, following the former English terminology, as leave to apply for judicial review) is described in The Hon. Sir Michael Fordham’s *Judicial Review Handbook* (7<sup>th</sup> edn., 2020 at 21.2) as follows:

*“The permission stage filters out judicial review claims (a) whose grounds are not properly arguable with a realistic prospect of success, (b) which lack materiality under the statutory HL:NSD (highly likely: not significantly different) test or (c) in respect of which it is appropriate to refuse permission on the basis of a ‘discretionary bar’ (such as delay, prematurity or an alternative remedy).”*

The statute referred to at (b) is of course a United Kingdom measure, but the remainder of that paragraph accurately characterises the purpose of the leave stage in Guernsey. As indicated in paragraph 7 of the Practice Direction, the leave stage can also be a useful case-management opportunity, allowing the court to deal with ancillary issues and applications and to make directions for the ongoing conduct of the proceedings.

16. Reference has been made before us, as it was below, to the so-called “Beloff grounds”, as enumerated in the Jersey Law Review by Michael Beloff QC, the distinguished public lawyer and former Senior Ordinary Judge of this Court, and cited by Day LB in Old Government House Hotel Limited v President of the Island Development Committee and Mighty Mouse Limited, Judgment 58/2003 of 9 December 2003 at [39]:

“The main common feature of public law remedies is that they are discretionary in nature: they can be refused on grounds of delay; lack of utility; interference with good administration or with the rights of third parties; improper conduct by the applicant; or the existence of an available alternative remedy.”

It remains the case that the remedies provided for in public law are discretionary and may be refused on any of those grounds. The Beloff grounds are not however to be treated as an obstacle course which must be successfully negotiated before leave to apply for judicial review can be granted. The force and materiality of such grounds may not be fully understood until evidence and submissions are complete; and given that public law is concerned as much with the identification of public wrongs as with the vindication of private rights (Fordham, at 1.2.8), doubts over the eventual availability of remedies may in any event not be a sufficient basis to frustrate the grant of leave to apply for judicial review.

17. It is incumbent on the judge considering an application for leave, whether on the papers or at a hearing, to give effect to any “knock-out blow” (in the conventional phrase) that may be administered by a putative respondent to a ground advanced for judicial review, and to identify any other reason why it is apparent, on the materials before it, that a case should not proceed to a final hearing. The judge should not however be too zealous a gatekeeper. The overriding purpose of the leave stage, in the words of Day LB, endorsed by the Court of Appeal in Litchfield, is to ensure that “*the Court’s time is not wasted on unworthy matters*”. As it was put by Hickinbottom LJ in the English Court of Appeal:

“The whole purpose of requiring permission to be obtained would be defeated if the court were to go into the matter in depth at that stage, the proper place for full exploration of the evidence and argument ordinarily being at the substantive hearing of the claim which has been shown to be arguable at the permission stage.”

(R (Wilson) v Prime Minister [2019] EWCA Civ 304; [2019] 1 WLR 4174 at [68]).

18. While this advice applies particularly in relation to the issue of arguability, the strength or otherwise of a case on the merits may also affect the judgment to be made on other factors, including the significance and possible consequences of any delay on the part of an applicant for judicial review. The judge hearing a permission application may in addition lack the information to come to a fully considered judgment on other issues, including the existence

or extent of detriment to good administration or prejudice to third parties which may themselves be highly material factors in assessing the consequences of any delay.

19. Where the question of whether to grant permission is difficult or uncertain, a sensible middle way is often for the court seized of an application for permission to order a “rolled-up hearing” at which argument on leave and on the substantive application are listed for hearing at the same time. Once the issues have been argued out, the court can determine them as seems most appropriate. That was the course alluded to in Litchfield at [33] and taken by the Royal Court (McMahon DB) in Groucutt v Minister of the Environment Department of the States of Guernsey [2015] GLR 406, at [2]. As this Court said in Litchfield at [35]:

“In order to ensure that a case is dealt with justly, the judge will have to consider all relevant factors and may conclude that a preliminary hearing at the leave stage might be unjust and hence inappropriate especially where a separate hearing at the leave stage may only add to the costs and expense for the applicant and delay in reaching a final conclusion, without achieving any reduction in court time or other appreciable benefit.”

More specifically, in cases where issues of prejudice or detriment to good administration are identified by a defendant in the context of delay, a rolled-up hearing has the advantage that *“full consideration can be given to issues of extension of time, prejudice and detriment, on the basis of evidence filed by the parties”*: Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5 at [41].

20. Accordingly, and though each case must be considered in the light of its own particular circumstances, it is useful to bear in mind that the function of the leave hearing is to filter out cases unworthy of occupying the time of the Court, and that in borderline cases the interests of justice (including the expeditious resolution of judicial review applications) will often be best served by ordering a rolled-up hearing where issues relating to permission and substance can be considered together and in the round.

### **Application against the Tribunal**

#### Proper respondent

21. By the time the appeal reached us it was not in dispute that the Employment Discrimination Tribunal (or its Convenor, or the Panel from which its members are drawn) was in principle susceptible to judicial review: the only outstanding issue for our consideration was the identification of the appropriate respondent.

22. The Tribunal addressed this issue in its Respondent's Notice and submitted, in its written argument before us, that the most logical candidate was neither the Employment and Discrimination Panel (comprising all panel members from which the Convenor or Deputy Convenor may appoint members to sit as a Tribunal), nor the Convenor of the Tribunal, but rather the specific Tribunal (comprised of three panel members) convened to hear and determine the claim brought by Mrs Hitchins.
23. We consider that the respondent is most simply and appropriately named as the Employment and Discrimination Tribunal, the body constituted by section 2 of The Employment and Discrimination (Guernsey) Ordinance 2005, whose members are appointed from the Employment and Discrimination Panel provided for by section 1. It is evident to any interested observer that the composition of the Tribunal (like that of any tribunal whose decision might be appealed or which is susceptible to judicial review) will vary from case to case, and we see no reason to personalise the description of the Tribunal, whether by reference to its Convenor or to the specific members who were convened to hear the case in question.

Arguability of claim against the Tribunal

24. The Lieutenant Bailiff considered the Appellant's case against the Tribunal to be "*sufficiently arguable that, all other things being equal, it should proceed to determination at a full hearing*". That finding echoes his earlier refusal, in his judgment of 2 February 2021 on the Appellant's s.25 appeal at [20], to rule out the possibility that a tribunal might conclude that "*Mr Varley's common law and/or Human Rights Law rights might have been in some way infringed by publication of some of the text in the Extended Reasons document*".
25. As to Ground 1 summarised at [5] above, it appears from such cases as Vicent del Campo v Spain in the European Court of Human Rights (Application 25527/13, judgment of 6 November 2018) and TYU v ILA Spa Ltd. (EA-2019-000983-VP, a judgment of Heather Williams QC sitting as a Deputy High Court Judge in the Employment Appeal Tribunal, handed down on 16 September 2021, after the judgment under appeal) that the Article 8 rights of non-parties may be engaged by strongly critical comments in tribunal decisions, requiring those reputational and/or privacy rights to be balanced against countervailing rights to open justice and freedom of expression. Linked to these issues is the extent to which the Appellant was in a position to anticipate and answer the criticisms of the Tribunal, a fact-dependent question which is the subject-matter of Ground 4. These are issues concerning the fundamental rights of the individual, which are not denied to be arguable in the context of the present case.

26. That is not to say that each of the individual grounds summarised at [5] above necessarily meets the threshold of arguability: Ground 2 in particular could be read as a plea, which might kindly be described as ambitious, that any finding by a Tribunal relating to a person other than a party is *ultra vires* and so impermissible. The Appellant however indicated before us that the reach of Ground 2 was not intended to be so far-reaching; and since the Tribunal does not ask us on this appeal to exclude particular grounds from any grant of leave on the basis of non-arguability, we say no more on that subject.

#### Delay/promptness

27. The issue of promptness was the key issue before the Royal Court. It formed the sole basis on which leave to apply for judicial review of the Tribunal was refused, a refusal which the Appellant challenges in his first ground of appeal. The Lieutenant Bailiff's full exposition of the applicable case law at [6]-[13], incorporating lengthy citations from key judgments such as Litchfield and Maharaj and restated in summary at [23]-[24] of the Royal Court's judgment, relieves us from the obligation to repeat that exercise, and allows us to concentrate on the crucial issues in dispute.

28. The starting-point is paragraph 6 of the Practice Direction, which states simply and without specifying any time limit that "*proceedings must be instituted promptly*". There is an obvious contrast with the more structured approach of the law of England, which requires that "*the claim form must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose*" (CPR 54(5)(1)), but which allows that period to be extended where there is good reason for doing so: R v Dairy Produce Quota Tribunal for England and Wales, ex p Caswell [1990] 2 AC 738, per Lord Goff at 746-747.

29. The contrast to which we have drawn attention is however more apparent than real. The strong influence of English law in the development of judicial review in Guernsey is apparent from the comment of this Court in Litchfield (at [54]) that "*a period of three months may be considered an appropriate guide as to what is meant by 'promptly'*", even though (as is certainly the case in England, particularly but not exclusively in those planning and other cases where the three-month backstop has been reduced to six weeks) "*there may be cases which are so urgent that even a delay of three months may be too long*".

30. Nor, as it seems to us, would it be appropriate for the one-stage Guernsey test be applied with greater rigidity than the two-stage English test. The concept of promptness in the Practice Direction is not limited by a three-month backstop, and so without special provision may be extended beyond three months in a case where that is appropriate. As this Court expressed the point in Litchfield at [55], directly after the passage just referred to: "*Where there has been delay, the court will have to examine the reasons for the delay and the*

*burden will be on the applicant to show that it can be explained for good reasons.*” The single word “*promptly*” in the Practice Direction is understood flexibly, as a rough proxy for the two-stage English test, and as such the factors that are material to the application of the English test are potentially material also in the Guernsey context.

31. Two such factors may be of particular relevance to this case.
32. The first such factor (or pair of factors) is the significance of detriment to good administration, and prejudice to third parties, in determining whether proceedings have been brought with sufficient promptness. The Royal Court at [19] was dismissive of the suggestion that the Appellant’s delay in applying for judicial review had interfered with good administration; and in relation to the issue of prejudice at [20], having taken account of a letter written by Mrs Hitchins to the court, it concluded that

“the level of any interference or prejudice is not established on the materials presently before the court to a degree that should lead, in the exercise of my discretion, to a refusal to grant leave for the Applicant to pursue a case which I have already found to be [a] case sufficiently arguable that, all other things being equal, it should proceed to determination at a full hearing.”

Relevant to that conclusion, no doubt, was the Appellant’s point that the amendments he sought to the Tribunal’s Reasons would not re-open the conclusions of the Tribunal on Mrs Hitchins’ case, nor threaten the award of compensation that was made to her. The Royal Court added at [27] that while there was clearly some prejudice to Mrs Hitchins, which becomes greater as the delay becomes greater, the extent of that prejudice “*would require a substantive hearing to establish*”.

33. Speaking “*quite independently of the particular provisions and scheme of the legislation in Trinidad and Tobago, as a matter of principle*”, the Privy Council held in Maharaj at [36]-[39] that:
- a. The presence or absence of prejudice or detriment is likely to be a key consideration (or the predominant consideration) in determining whether an application has been made promptly or with undue or unreasonable delay ([36]-[37]).
  - b. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay ([37]).

- c. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review ([38]).
  - d. If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way, because “*if, without taking account of the absence of prejudice or detriment, it is concluded that there is no good reason for extending time, leave will be refused and their absence can never operate to the benefit of a claimant*” ([39]).
34. For essentially these reasons, the Privy Council accepted at [43] the submission that “*far from constituting an insulated residual discretion, considerations of prejudice and detriment are capable of being of key relevance to the issues of promptitude and extension of time*”. It also acknowledged that:

“While prejudice or detriment will normally be important considerations in deciding whether to extend time, there will undoubtedly be circumstances in which leave may properly be refused despite their absence. One example might be where a long delay was wholly lacking in excuse and the claim was a very poor and inconsequential one on the merits, such that there was no good reason to grant an extension.”

That passage is striking not so much for its acknowledgment that leave may be refused despite the absence of prejudice and detriment as for the somewhat extreme nature of the hypothetical example chosen to illustrate the point (“*wholly lacking in excuse ... very poor and inconsequential one on the merits ... no good reason*”).

35. It is true that these formulations were crafted for a two-stage test such as that which applies in England (and Trinidad and Tobago), and that, as the Lieutenant Bailiff observed at [7], there is no two-stage process as a matter of Guernsey law. The thrust of the Privy Council’s observations however applies just as strongly in either scenario. If the presence or absence of prejudice and detriment is relevant to both elements of a two-stage test, it must be relevant also to the flexible single-stage test which is their functional equivalent. To allow promptness to be assessed under paragraph 6 of the Practice Direction without reference to the absence of prejudice or detriment, as the Lieutenant Bailiff appeared to envisage at [7], would involve precisely the injustice which the Privy Council identified and sought to avoid at [39] and indeed at [43]: the treatment of prejudice and detriment as “*an insulated residual discretion*” rather than as factors capable of being centrally relevant to the issue of whether proceedings for judicial review are brought within time.

36. The second factor is the potential for the courts to show flexibility in favour of litigants who have behaved “*sensibly or reasonably*”, so long as prejudice to others has not been caused. As was noted by Woolf LJ (as he then was) in R v Commissioner for Local Administration, ex p Croydon London Borough Council [1989] 1 All ER 1033, 1046 (a post-3 month case, as the Lieutenant Bailiff noted at [8]):

“While in the public law field it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53 r4 and section 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused ... the court will not rely on those provisions to deprive a litigant who has behaved sensibly or reasonably of relief to which he is otherwise entitled.”

37. In relation to that passage, which was approved by the Privy Council in Maharaj at [29], the Lieutenant Bailiff commented:

“I completely agree that a person who has behaved sensibly and reasonably should not be denied relief to which he is entitled by reason of a ‘technically’ applied strict time limit; but there is no such time-limit in Guernsey law, technical, strict or otherwise.”

However, contrary to the Lieutenant Bailiff’s implication, the absence of a three-month time limit in Guernsey law does not mean that Woolf LJ’s words are without application here. As a warning against an overly strict or mechanistic approach to the issue of delay, those words seem to us to have the same relevance whether the three-month period is treated as an extendable backstop (as in England) or an appropriate guide (as in Guernsey).

38. For these reasons, and notwithstanding the different formulations of the test in the two jurisdictions, both of the factors which we have identified appear to us to apply in Guernsey in much the same way as they do in England. To the extent that the Royal Court in [7] and [8] of the judgment proceeded on a different understanding, we find that it erred in law.

39. We further consider that those errors were material to the Royal Court’s disposal of the application before it. Notably:

- a. The Royal Court’s view that promptness could be considered “*without taking account of the absence of prejudice or detriment*” ([7]) may well, as Mr Varley submitted to us, have inclined the Lieutenant Bailiff to refuse leave for lack of promptness rather than referring the issue to a rolled-up hearing. The Lieutenant Bailiff expressly acknowledged after all, at [27], that the extent of prejudice to Mrs Hitchins would require a substantive hearing to establish. Alternatively, had he

wished to decide whether to grant leave on the basis of the evidence before him, the apparently low levels of detriment to good administration and prejudice to third parties that he identified at [19] and [20] should, on a proper application of the test in Maharaj, have been considered, in the various formulations of the Privy Council, “*highly relevant*”, “*a key consideration*” or even a “*predominant consideration*”.

- b. The Royal Court’s apparent rejection of Woolf LJ’s comment that flexibility should be shown to litigants who had behaved sensibly or reasonably, at least in the absence of prejudice to others, must also have informed its approach to the issue of promptness and delay. Rightly in our view, the Lieutenant Bailiff acknowledged the speed with which Mr Varley explored the options that could have been open to him, and was critical only in the respects identified below. The application of Woolf LJ’s approach, coupled with the correct application of the Maharaj approach to detriment and prejudice, may have persuaded him either to grant leave or to order a rolled-up hearing.

40. The Lieutenant Bailiff’s analysis at [26] of the steps taken by Mr Varley, which is not challenged on appeal, may be summarised as follows:

- a. The Appellant “*probably has marginally the better argument on whether he ought to have taken preventative steps in 2020*”: what happened (or did not happen) before the impugned decision was taken cannot possibly evidence delay in pursuing a judicial review of that decision ([25]).
- b. The Appellant “*acted very promptly*” on first learning of the Reasons on Friday 9 October 2020, in that his then Counsel made his concerns known to the Tribunal and to the States on the following Monday 12 October.
- c. It is “*understandable*” that the Appellant took no further action immediately thereafter, given that the States forthwith removed the Reasons from its website, and that the Tribunal considered representations made on 15 October before advising on 20 October that it had no power to withdraw its decisions or take substantive steps in respect of them.
- d. The period between 20 October and 2 November, when the Appellant served an 11-page notice of appeal under s.25 of the Employment Protection (Guernsey) Law 1998, was not one of unreasonable delay: he was seeking to exhaust his possible legal remedies, albeit under the misapprehension (as the Lieutenant Bailiff subsequently found) that an appeal under s.25 was an option to a non-party.

- e. The Appellant “cannot be criticised for the effluxion of time” between 2 November 2020 and 2 February 2021, when judgment on his appeal was handed down.
- f. By now a litigant in person, he contacted the Greffe “extremely promptly” on the following day, 3 February, regarding the process for applying for leave for judicial review, and issued a letter before action to both Respondents on the same day (to which the Tribunal responded in predictable terms on 11 February).
- g. The Appellant “left it until 16<sup>th</sup> February” to file a Rule 90 application for leave to proceed in person, which is “an unexplained delay, even if only of a few days”.
- h. Leave to proceed in person was issued on 1 March, and following some confusion over documentation, confirmed on 5 March: the judicial review application was served on 9 March 2021.

41. The upshot was, in the view of the Royal Court, that while the five-month time lapse between the communication of the Tribunal’s decision to the Appellant and the commencement of judicial review proceedings was to be characterised as a delay, “the only segment of that delay which ... the Applicant could and should reasonably have avoided is between 3<sup>rd</sup> and 16<sup>th</sup> February 2021, approximately two weeks” ([27]). The Lieutenant Bailiff did not elaborate on how much of that delay could sensibly have been avoided, given that the failure of the appeal route was made apparent only on 2 February. We note that within two weeks of that date the Appellant, who was no longer legally represented, had sent a letter before action and then drafted and served on the Tribunal, the States and two interested parties a draft application under Rule 90, summons, cause form and statement of material facts.

42. At [28] of the Royal Court’s judgment, reference was made to

“the Applicant’s choice (whether or not on legal advice is immaterial) to seek to appeal against passages in the Extended Reasons under section 25 of the EPL, which option I held to be unavailable to him as a non-party to the Tribunal proceedings, without simultaneously commencing judicial review proceedings when, a month or so after the impugned decision, time for prompt action under the Practice Direction was clearly running and there was an obvious risk that the EPL ‘appeal’ proceedings would not be disposed of within the ball-park three-month time laid down by the Guernsey courts as the maximum within which judicial review proceedings ought generally to be commenced.”

It was concluded that the Appellant had not shown that his decision to bring an appeal was a good reason for delaying the institution of judicial review proceedings.

43. Notably, however, the Lieutenant Bailiff, who had himself written the judgment holding that the Appellant lacked standing to appeal, did not suggest that the Appellant was at fault for bringing his s.25 appeal, that he should have predicted the outcome, or that the Appellant's position on standing (which was rejected only on the basis of a long and closely-reasoned judgment) was obviously misconceived. Indeed by finding that the only segment of the five-month delay which the Appellant could and should reasonably have avoided was the short period in early February, the Lieutenant Bailiff appears to have accepted that it was not unreasonable for the Appellant to have brought the appeal in all the circumstances.
44. As we understand it, the Lieutenant Bailiff's criticism of the Appellant in this regard was not for appealing but for failing simultaneously to lodge judicial review proceedings, presumably as an insurance policy against the failure of his appeal. In argument before us, neither Advocate Bamber for the Tribunal nor Advocate Grainge for the States could recall an occasion in this jurisdiction in which judicial review proceedings had been protectively lodged alongside a related appeal. Mr Varley told us, believably, that it was hard enough to work up one set of proceedings to a short timescale, without having to work up two simultaneously. For these reasons, we do not consider that the Appellant acted unreasonably when he did not lodge judicial review proceedings simultaneously with his appeal.
45. It is also instructive to consider what is likely to have happened had the Appellant taken this course. Advocates Bamber and Grainge agreed that if simultaneous appeal and judicial review proceedings had been lodged in November, one or other of those proceedings would inevitably have been stayed pending determination of the other. Since judicial review is a remedy of last resort, Advocate Bamber may well have been correct to suggest that it is the judicial review proceedings that would most likely have been stayed pending resolution of the appeal. Accordingly, while this unorthodox course might have absolved the Appellant from criticism for lack of promptness, it is hard to see that it would have significantly advanced the process of judicial consideration.
46. Taking all these factors into account, we find that the Royal Court was wrong to refuse the Appellant leave, on the grounds of his delay in applying for judicial review, to present what it rightly considered to be an arguable case for infringement of his fundamental rights. Notwithstanding the considerable discretion that must be accorded to a first-instance court in this area, we consider that the decision to refuse leave was materially affected by the two errors of law that we have identified and that the Lieutenant Bailiff was wrong to conclude that in the circumstances that were then before him the Appellant had not made the application for judicial review promptly. The Royal Court should either have ordered a rolled-up hearing at which issues relating in particular to detriment and prejudice could have been more fully investigated, or simply granted leave to apply for judicial review.

Substituting our own discretion for that of the Royal Court, we order that leave to apply for judicial review be granted.

47. Before turning to the case against the States, we make two further observations.
48. First, in relation to the issues of detriment and prejudice, we recognise that the evidence is not at this stage comprehensive and that it remains possible that something will yet emerge which has a bearing on the grant of relief, should the Appellant succeed in his judicial review. As the Privy Council said in Maharaj at [41], echoing Caswell at 747G:

“ ... even if leave is granted without full consideration of issues of prejudice and detriment resulting from delay, these may still be a bar to relief at the substantive hearing.”

That is the case here also.

49. Secondly, our decision that the Appellant applied “*promptly*” for judicial review in the particular circumstances of this case, notwithstanding the fact that five months elapsed between the decision complained of and the lodging of his application, should not be taken as any sort of liberty for those who sleep on their rights, or as a departure from the comments of this court in Litchfield on the issue of promptness, cited at [29] above. Among the factors relevant to our decision are the generally expeditious manner in which the Appellant has proceeded: we note that the essential reason why he did not lodge judicial review proceedings earlier was the belief, which was not unreasonable though it did not find favour in the Royal Court’s judgment on his appeal, that he was exhausting the appropriate remedy for vindicating the fundamental rights on which he seeks to rely.

### **Application against the States**

50. The conclusions we have come to on promptness apply, *mutatis mutandis*, to the claim against the States in relation to its initial publication of the Tribunal’s reasons on or around 9 October 2020.
51. The Royal Court however refused the Appellant leave to apply for judicial review also on the basis that the claim under this head was not arguable. It saw force in the assertion that in making this initial publication, the States was “*merely acting as a conduit*”, found at [17] that the States “*had no reason whatsoever in October 2020 not to follow their usual practice in terms of publication*”, and considered that this element of the challenge therefore had no realistic prospect of success.

52. The Appellant by his second ground of appeal contests this conclusion. He points out that s.6 of the Human Rights (Bailiwick of Guernsey) Law 2000 provides that it is unlawful for any public authority to act in a way which is incompatible with a Convention right, submits that publication of the Tribunal's Reasons constitutes such an act, and contests the proposition that by choosing to act as a mere conduit, the States puts itself in a more favourable position than would be the case had it applied its mind to the question of publication. The Appellant refers also to new evidence which it was claimed establishes that the States (in the person of the secretary to the Tribunal) was aware both of the contents of the Reasons and of the Appellant's concerns about them, prior to their issue by the Tribunal. The States objects to the admission of new evidence and denies that it can be deemed to have constructive knowledge of the contents of the Reasons as a result of any knowledge the Secretary may have had.
53. We express no opinion as to the merits or otherwise of these rival contentions, but having heard a flavour of the rival arguments consider this claim to be sufficiently arguable to proceed to a substantive hearing. It is not the purpose of the permission stage to bottom out the arguments in all their detail, but we have had regard to the position as it relates also to re-publication and consider that the "*mere conduit*" point advanced by the States, though it may well have force as the Royal Court acknowledged, cannot be declared with confidence at this stage to be a "knock-out blow".
54. The claim against the States for re-publication on 2 March 2021 was, conversely, expressed to be arguable by the Royal Court at [17], and notwithstanding the brief submissions of the States to the contrary, we decline to disturb that assessment. The Royal Court described as "*legalistic*" the submission that the re-publication did not amount to a separate decision but was merely the ending of a moratorium initially granted, in consultation with the Tribunal, on 12 October 2020. Whether or not that is so the submission does not at this stage appear conclusive, in relation either to arguability or delay, and looking at the matter in the round it seems to us right that this claim should also be before the court which will consider the substance of the Appellant's application for judicial review.
55. We decline, finally, to order that leave should be refused to pursue the Appellant's statutory claim in damages, as the Lieutenant Bailiff indicated at [4(c)] that he would have done had he decided to grant leave. It is for the court which determines the application for judicial review to decide which if any remedies should be awarded, and we are aware of no basis either in precedent or in principle for withholding that discretion at this stage from the court which will, if it reaches the issue of remedies, do so with the benefit of full argument on all aspects of the case.

## Conclusion

56. We accede to this appeal and grant leave to the Appellant to apply for judicial review. We invite the parties to agree an appropriate order, and will hear any consequential applications when this judgment is handed down.