In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 201

BETWEEN:

LEYONI JUNOS

Applicant

-and-

THE GOVERNOR OF BERMUDA

Respondent

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: LeYoni Junos appears unrepresented

Dates of Hearing: 11th April 2023
Date of Ruling: 21st April 2023

RULING

Ex parte application for Leave to Appeal against a Decision refusing a renewed application for leave to apply for judicial review – Order 2 rule 3 of the Rules of the Court of Appeal for Bermuda as read with Section 12(2)(a) of the Court of Appeal Act 1964

WOLFFE J:

1. By way of a brief history, on or about the 17th May 2019 the Applicant filed a Notice of Application for Leave to Apply for Judicial Review pursuant to Order 53, rule 5 of the Rules of the Supreme Court 1985 (the "RSC") seeking judicial review of a decision of the Respondent requiring the Applicant to resubmit a complaint that she made against The Hon. Chief Justice Narinder Hargun (the "Chief Justice") to the Judicial and Legal Services Committee ("JLSC"). In a written ruling dated the 8th July 2022 Assistant Justice Delroy Duncan KC (then "QC") refused leave for the Applicant to apply for judicial review and it was this refusal which precipitated the Applicant filing a renewed application for judicial review on or about the 15th July 2022 (pursuant to RSC Ord. 52 rules 3(4) and 3(5))(the "renewed application").

2. On the 2nd February 2023 I heard submissions from the Applicant and Ms. Lauren Sadler-Best (Counsel for the Respondent) in respect of the Applicant's renewed application and in a written decision dated the 10th March 2023 I refused the Applicant's renewed application for leave to apply for judicial review. It is this decision which is now the subject of the Applicant's Notice of Motion for Leave to Appeal dated 29th March 2023 (filed pursuant to Order 2, rule 3 of the Rules of the Court of Appeal for Bermuda ("RCA") as read with section 12(2)(a) of the Court of Appeal Act 1964).

3. The grounds of the Applicant's application for leave to appeal are as follows (stated verbatim):

   (i) That Justice Wolffe erred when he failed to fully and properly consider the Applicant's written, submitted grounds for judicial review, of which there were five grounds in total.

   (ii) That Justice Wolffe erred in his paragraph 34 when he found that the Governor's decision that the Applicant should resubmit a complaint that he, the Governor, was already in receipt of was not unreasonable.

(iii) That Justice Wolffe erred in his finding in his paragraph 15 that the Applicant's submissions relating to the Cayman Islands and Gibraltar were not of assistance.

(iv) That Justice Wolffe failed to address the Applicant's very real and underlying concern of the apparent and inherent bias of the Judiciary on this matter, expressed in the Applicant's original application for judicial review in paragraphs 15 – 16 of her First Affidavit.

4. I will of course address each of these grounds in due course.

The Legal Test for granting Leave to Appeal

5. As illustrated in several recent locally based authorities[1], it is generally accepted that the test to be applied in applications for leave to appeal is that which is enunciated in the case of *Avicola Villalobos v. Lisa SA and Leamington Reinsurance Co. Ltd. [2007] Bda LR 81* which cited the equally instructive case of *The Iran Nabuvat [1990] 1 WLR 1115*. In this regard, Lord Donaldson in *The Iran Nabuvat* stated that:

> *"....no one should be turned away from the Court of Appeal if he had an arguable case by way of appeal"*,
>
> and
>
> *"That is really what leave to appeal is directed at, screening out appeals which will fail."*.

6. It is with strict observance of this test that I will consider the Applicant's leave to appeal.

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[1] St. John's Trust Company (PVT) Limited and James Watlington and others [2021] SC (Bda) 13 Civ (24th February 2021)(decision of Hargun CJ); Apex Fund Services Ltd. and another v. Mr. Mathew Clingerman and others [2020] SC (Bda) 12 Com (18th February 2020)(decision of Subair Williams J); WF (Intervener Applicant), Mahesh Sannapareddy and others v. Brown Darrell Clinic Limited and others [2019] SC (Bda) 18 Civ (1st March 2019)(decision of Subair Williams J); and, David Lee Tucker v. Hamilton Properties Limited [2018] SC (Bda) 21 Civ (6th March 2018)(decision of then Subair Williams A/J).

Ground 1

That Justice Wolffe erred when he failed to fully and properly consider the Applicant's written, submitted grounds for judicial review, of which there were five grounds in total

7. The Applicant's complaint under this ground is that I did not fully and properly take into consideration the grounds on which she sought relief and which are found on the last page of her Notice of Application for Leave to Apply for Judicial Review. Specifically: that the JLSC is unlawful; that the only body that can investigate and advise the Governor as to the removal of a judge from office is a Tribunal which is created by section 74(4) of the Bermuda Constitution Order 1968 (the "Bermuda Constitution"); that it was unreasonable for then Governor His Excellency Mr. George Fergusson (the "Governor") to request that she resubmit her complaint against the Chief Justice to the JLSC; that there was procedural impropriety in the said decision of the Governor; and, that the Governor created a legitimate expectation that her complaint would be investigated by a proper body.

8. However, the contents of my Ruling entirely counter this ground of appeal. In particular:

- As to the lawfulness of the JLSC, whether the only body that can advise the Governor is a Tribunal created under the Bermuda Constitution, and whether the Applicant had a legitimate expectation that her complaint would be investigated by a Tribunal (which was not submitted before me), it can be seen that throughout paragraphs 13 to 34 I actually agreed with the Applicant that the JLSC was not established by the Bermuda Constitution or by statute. However, I also went on to conclude that: (a) this was not fatal to the existence of the JLSC as an advisory body to the Governor which can inquire into judicial complaints, report their findings to the Governor and to make recommendations to the Governor: and (b) that the functions of the JLSC did not in any way usurp or erode the final decision making power of the Governor.

- As to whether it was unreasonable for the Governor to request that the Applicant resubmit her complaint to the JLSC, paragraph 34 sets out my conclusion that the Governor's request was not unreasonable.

- As to whether there was any procedural impropriety in the decision of the Governor, in paragraphs 24 to 33 I concluded that the Guidelines for Judicial Conduct created by then Chief Justice Richard Ground on the 21st July 2006, the formation of the JLSC, and the Judicial Complaints Protocol for Bermuda filled a "glaring lacuna" in the procedure of launching judicial complains in the Bermuda Constitution as it was only concerned with the removal of a judge and no other penalties. To this, I stated that the JLSC actually provided members of the public with a structured process by which a judicial complaint could be made, and further, with a far wider layer of redress than the Bermuda Constitution if their complaint against a judicial officer was sustained.

9. It may be that the Applicant did not agree with my conclusions but this is not tantamount to me not addressing the gravamen of the grounds on which she sought judicial review.

10. I therefore find that Ground 1 is not an arguable ground of appeal and accordingly I refuse leave to appeal this ground.

Ground 2

That Justice Wolffe erred in his paragraph 34 when he found that the Governor's decision that the Applicant should resubmit a complaint that he, the Governor, was already in receipt of was not unreasonable.

11. This ground of appeal simply constitutes a disagreement of the Applicant with my final decision that the Governor's request that she resubmit her complaint to the JLSC was a reasonable one. Of course, it need not be said that paragraph 34 must be read in the context

of the preceding thirty-three (33) paragraphs in order to appreciate why I came to the decision that I did.

12. In any event, Ground 2 is devoid of any factual or legal foundation and it is for this reason that I find that it is not an arguable ground of appeal. Accordingly, I refuse leave to appeal this ground.

Ground 3

That Justice Wolffe erred in his finding in his paragraph 15 that the Applicant's submissions relating to the Cayman Islands and Gibraltar were not of assistance.

13. It should be made clear that I did not state that the Applicant's submissions relating to the Cayman Islands and Gibraltar were not of assistance. My comment was that the Applicant's cited cases of *Hearing on the Report of the Chief Justice of Gibraltar, Privy Council No. 0016 of 2009 [2009] UKPC 43* (the"Gibraltar case") and the *Report of the Tribunal to the Governor of The Cayman Islands –Madam Justice Levers (Judge of the Grand Court of The Cayman Islands), Privy Council Appeal No. 0092 of 2009 [2010] UKPC 24* (the "Cayman case") did not assist me with *"my determination as to whether the Applicant's grounds for judicial review are arguable and have a realistic prospect of success"* (as per paragraphs 14 and 15 of my Ruling).

14. Indeed, in paragraphs 14, 15, 19, 22 and 23 of my Ruling I go on to speak about the extent to which the respective constitutions of Gibraltar and the Cayman Islands were applicable to the arguments ventilated by the Applicant, particularly highlighting the Applicant's point that the hearing of judicial complaints in those jurisdictions, unlike in Bermuda, had constitutional underpinnings. *Ergo*, contrary to the Applicant's above stated ground, I deemed the Applicant's references to Gibraltar and the Cayman Islands to be of assistance.

15. However, I also considered the examples of Australia and the Isle of Man where they have created non-statutory bodies to inquire into complaints against judicial officers. I likened

these non-statutory bodies of Australia and the Isle of Man to the non-statutory origins of the JLSC and from this I concluded that the fact that the JLSC did not emanate from the Bermuda Constitution or statute was not fatal to its existence.

16. I therefore find that Ground 3 is not an arguable ground of appeal and accordingly I refuse leave to appeal this ground.

Ground 4

That Justice Wolffe failed to address the Applicant's very real and underlying concern of the apparent and inherent bias of the Judiciary on this matter, expressed in the Applicant's original application for judicial review in paragraphs 15 – 16 of her First Affidavit.

17. There are a multitude of fundamental problems with this ground of appeal. Firstly, any issues about any "apparent or inherent bias" of the Judiciary as a whole, or Duncan AJ, or myself did not featured in the Applicant's written submissions dated the 11th January 2023 and nor were they argued before me on the 2nd February 2023 when the Applicant orally advanced her renewed application for leave to apply for judicial review. Indeed, no factual or legal basis supported by any relevant authorities were put before me for any determination of such issues.

18. Secondly, the jurisprudence is replete with authorities in which it is commonly accepted that allegations of apparent bias of members of the judiciary are serious ones to make and that they should not be made frivolously or without foundation. Therefore, any such allegations should be detailed, unambiguous, and rooted in law. Paragraphs 15 and 16 of the Applicant's First Affidavit sworn on the 17th May 2019 do not satisfy this criteria. So even if I should have had regard to those paragraphs, which I do not accept that I should have, I would not have in any event found that there was any substantiated allegations of apparent or inherent bias of any member of the Judiciary (whether permanent in their post or not). But again, and I must stress my first point, no such bias arguments were placed before me when the Applicant argued her renewed application.

19. Thirdly, if indeed there were any sustainable allegations of apparent or inherent bias of the Judiciary as a whole and myself specifically, then the Applicant could have, and should have, made a formal application for me to recuse myself at the outset of the hearing of her renewed application. The Applicant is certainly well familiar with recusal applications as she made one in respect Duncan AJ and she was successful in making that application. However, I suspect that the Applicant would have taken issue with any appointed judge hearing her judicial review application (even those who may hail from overseas) as that person's appointment would ordinarily need to go through the Chief Justice whom she has made a judicial complaint against, and as well through the Governor (or the office of the Governor) whom she has instituted judicial review against.

20. Fourthly, the balance of the Applicant's comments under this ground relates to what she perceives to be a delay in Duncan AJ reaching his decision and that I did not make any mention of any such delay in my Ruling. It is correct that the Applicant did bring to my attention her concern as to what she thought was a delay in the processing of her application and the delivery of the ruling of Duncan AJ. However, while delay is a factor to be considered in assessing the merits of a judicial review application it primarily pertains to the time in which judicial review proceedings should be brought, and relatedly, whether the Court should entertain any application to extend the period within which the application should be made (in this regard both parties cited the authority of *Darrell v. Board of Inquiry [2010] Bda LR 48*). It was not Ms. Sadler-Best's position that the merits of the Applicant's application for judicial review was brought into question because of any delay in the Applicant instituting proceedings. It is therefore difficult to contemplate how any perceived delay in the processing of her judicial review application or in Duncan AJ reaching his decision would have in any event factored into my decisions on the ultimate issues as to whether I should (a) make a declaration that the JLSC has no legal authority, (b) make an order of mandamus that the Governor appoint a Tribunal as per the Bermuda Constitution, or (c) make a Protected Costs Order in favour of the Applicant. That is, the relief sought by the Applicant.

21. Further, I struggle to see how any allegations of delay, if there was any, relates to Ground 4 which is explicitly couched in terms of the existence of apparent and inherent bias. Even if there was a delay in the Registrar processing her judicial review application and even if there was a delay in Duncan AJ reaching his decision the Applicant did not draw any reasonable nexus between such delay and her allegations of apparent and inherent bias. In other words, the Applicant did not demonstrate that any delay, if there was any, was a manifestation of apparent or inherent bias on the part of the Registrar or Duncan AJ or the Registrar. It must be repeated again though that in her written and oral submissions the Applicant did not advance any substantiated arguments before me at the hearing of her renewed application as to any apparent and inherent bias of anyone whatsoever.

22. It should be noted that during the Applicant's reply to Ms. Sadler-Best's submissions that I sought clarification from the Application as to whether it was her submission that her complaint against the Chief Justice was being "swept under the carpet" because of the three years that had taken for her application for judicial review to be heard. In one breath the Applicant stated that her complaint "was" swept under the carpet because relevant persons were aware of her application for judicial review and because of the Registrar' indication that her file could not be found. However, in another breath, when I asked her further about this the Applicant stridently said that no such contention was put before the Court by her. As a result of the Applicant saying that no such allegation was being made I informed the Applicant that I will not then factor it into my ultimate decision (and I did not).

23. I therefore find that Ground 4 is not an arguable ground of appeal and accordingly I refuse leave to appeal this ground.

Conclusion

24. For the reasons stated above I refuse the Applicant leave to appeal on all grounds set out in her Notice of Motion for Leave to Appeal.

Dated the 21st day of April, 2023

The Hon. Mr. Justice Juan P. Wolffe
Judge of the Supreme Court of Bermuda