

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN MONTSERRAT

CLAIM NO. MNIHCV2021/0019

**IN THE MATTER of an Application for
Permanent Residence by Sharm Charles**

**IN THE MATTER of an application for
leave for Judicial Review**

**IN THE MATTER of an application for an
Administrative Order**

BETWEEN

Sharm Charles

Applicant

And

The Attorney General

The Governor

Respondents

APPEARANCES

Mr David Dorsett and formerly Mr Warren Cassell for the Applicant.

Ms Renee Morgan and formerly Ms Amelia Daley for the Respondents.

2023: APRIL 03

RULING

On judicial review of application for permanent residence

- 1 **Morley J:** Sham Charles, originally from St Lucia, is a police officer on Montserrat since 2011, currently in the criminal investigation department (CID), and in October 2019, after 8 years on the island, consistent with the immigration rules, he applied for a permit of permanent residence. He paid a fee, appended police certificates of good character from St Lucia and Montserrat, with other documents, and attended in November 2019 a brief interview at the Office of the Deputy Governor (DG)¹.
- a. Nothing happened after.
 - b. Covid restrictions then began in March 2020.
 - c. Pressing for progress, on 31.05.21 the Deputy Governor (DG) wrote his application was still in progress.
 - d. On 18.07.21, Charles sought judicial review of the application process, as it was taking too long.
 - e. Then, on 24.01.22, the DG reported by letter his application has been refused by then Governor Pearce acting on the advice of cabinet, *‘as there are concerns as to whether you are of good character’*, though not saying what or why.
 - f. However, by affidavit filed on 19.01.23, new Governor Tucker said:
 - i. at para 3;
‘I have concluded that cabinet was misinformed in the process of making the initial decisions issued on 24.01.22’;
 - ii. at para 6;
‘It is with regret that I note the former application was made in October 2019, some three years ago, and that the initial decision took two years to deliver.’

¹ The parties and others will be referred to by surname or acronym for ease of reading and no disrespect is intended by not writing out every time full names and titles and the legalese of whether applicant or respondent.

iii. and at paras 7 and 8;

'Because the application was made over three years ago, the information in the application will no longer be current. Therefore Cabinet has requested that the Applicant make a new application....I will endeavor to see that once the application has been submitted, that the application is responded to within one month.'

- 2 The judicial review proceedings commenced on 18.07.21, have led to 20 appearances: in 2021, on 01.10, 13.10, 17.11, 30.12, 13.12, 15.12.21; in 2022, on 24.01, 25.01, 24.03, 10.03, 18.03, 11.07, 15.07, 20.p9, 21.10, 13.12.22; and in 2023, on 20.01, 31.01 and 29.03.23, with adjournment today 03.04.23 for ruling.
- a. The primary purpose of the proceedings from 18.07.21 up to 24.01.22 was in parallel to push for a decision.
 - b. The decision of 24.01.22 said there were concerns about Charles' good character, on which he had not been heard, having filed two certificates of good character, begging whether the process was reviewable by the High Court for breach of the natural justice principle *audi alteram partem*, meaning 'listen to the other side'.
 - c. Leave to review the decision of 24.01.22 was granted unopposed on 10.03.22.
 - d. In the meantime, there was a change of Governor in April 2022, who it was reported to court would review the file, though had much else to consider, and then HM The Queen died, in the end offering affidavit on 19.01.23 as above, so that the decision was set aside.
 - e. On 20.01.23, Counsel Dorsett insisted on arguing judicial review of the now rescinded decision, rather than file a new application, so that trial was fixed for 29.03.23, with ruling today in writing. In particular, Counsel Dorsett wants, with some costs and damages, an order:

....mandating cabinet to render with all convenient speed, and in any event not later than 30 days, lawful advice to the Governor with respect to the Applicant's application to be granted permanent residency.

- 3 There are peculiarities in this case. Montserrat is a happy small community of 5000, often rife with inaccurate intrigue. Charles is a longstanding police officer and it strikes an odd note he cannot have permanent residence owing to concerns as to his character when yet he remains part of the CID, though he is aware of hints at anonymous criticism as can arise for any officer amid so small a population. There has been talk in court of his being secretly 'black-balled', as if in this small community residence is like membership of a 'club', where someone is quietly 'agin 'im'. It is unarguable the application has taken way too long to be decided, between October 2019 and January 2022, and then the process was evidently unfair, in not raising with him character concerns, whatever they may be, so he could answer them.
- 4 However, to the credit of Her Excellency, Governor Tucker has set the decision aside, meaning the court does not have to do it.
- 5 This begs what here is the High Court to review. In theory:
 - a. It can review the delay, as the process has taken from October 2019 to now, and yet to date has not produced an actionable decision; and
 - b. It can review the expectation he should file a new application.
- 6 Concerning delay, the Governor already knows this, expressing 'regret', as per Her Excellency's para 6, so the court does not need to declare it.
- 7 Concerning a new application, it is right the information filed in October 2019 is not 'current', being now 3.5 years old. The question flowing from this is whether it is unreasonable to ask for a new application, in the sense no reasonable administrator would so ask, as in the *Wednesbury* principle. In my

judgment, it is obviously not unreasonable. To quote Counsel Morgan, '*while we might regret the past, we cannot reverse it*', and though we do not like it, it is a fact the application has become out of date.

- a. For example, part of the process requires a current employment, medical, and financial report, within the six months prior to application, which are circumstances which may have much changed, as appears as required in the formal government application guidance, where inter alia it is expected of an applicant:

'(c) He provides proof that he has been gainfully employed during the six (6) months immediately preceding his application for permanent residence;

(d) He provides proof that he:

- has maintained a savings account with an average monthly balance of at least \$5,000ec during the six (6) months immediately preceding his application; or
- owns real property to the value of at least \$50,000ec;

(e) He produces a Medical Certificate from a Medical Practitioner registered in Montserrat certifying that he is free from all notifiable communicable diseases specified in Schedule I to the Immigration (Health Certificate) Regulations: (a certificate from a Medical Practitioner other than a Medical Practitioner registered in Montserrat may be accepted in exceptional cases at the discretion of the Governor on the advice of Cabinet).'

- b. If the court was to compel the Governor, as Counsel Dorsett wants, to consider the original application of October 2019, it would not be unreasonable then to refuse it on the grounds it is now so old, making

such a court order pointless and of no assistance to Charles, who in the real world simply wants his residency decided, rather than to be impressed with the sophistry of his counsel enjoining battle with government, noting it is counsel's role to try to fix problems, not prolong them. If Charles had reapplied in January, he would already have his decision.

- c. What is theoretically foreseeable is a situation of changed circumstance, arising perhaps, for example, if in 2019 Charles was healthy but in 2023 is not, leading to argument if the original had been processed properly he would have been a resident before a health problem, begging it might be unfair to now refuse a permit which would likely have been granted earlier had the process not been flawed. However, it must be stressed, Charles cannot assume he would have had the permit earlier, and there is no evidence of ill health or other changed circumstance in the paperwork, while Counsel Dorsett refuses to say on enquiry by the court if there will be difficulty filing a fresh application, including as to character.
- 8 In helpful written submissions dated 29.03.23 from Counsel Morgan (none being filed by Counsel Dorsett as required for 15.03.23 by court order of 31.01.23), Counsel Morgan invites dismissal of the application as to declarations in the circumstances as they have evolved, and does not resist Charles should on this action have his costs and modest damages for the regrettable delay leading to a fresh application being required. Counsel Dorset sought \$7500ec in costs and \$2500ec in damages; Counsel Morgan countered with \$2500ec costs and \$500ec damages. While I agree the damages modest, as there is no demonstrable injury arising, to income or wellbeing, or clearly lost opportunity by reason of the delay, though evidently there has been stress and inconvenience, so I will fix these at \$1000ec; but the costs have been larger, chasing a decision, such that I will award \$5000ec; all making a total of \$6000ec; along with repayment to him of the

costs of the application in 2019, as to treasury fee, medical expenses, and any others, to be itemized.

- 9 The Governor's offer to deal with a fresh application within a month amounts to an alternative remedy, such that here judicial review is not a remedy of last resort, which it ought to be, recalling in **Kay v Lambeth Borough Council 2006 2 AC 465** at para 35 where Lord Bingham said:

“... the principle is that if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review.”

- 10 Overall:

- a. the flawed process has been spotted by Governor Tucker, the court is not needed to declare it flawed, the decision of 24.01.22 has been set aside, and a new application is not unreasonable to ask;
- b. while the delay is regrettable it cannot be reversed, so I make no declaration the original application should be considered, as it would now not be unreasonable to deny it as not current;
- c. and so I order the application for judicial review dismissed as to any declaration but Charles shall have \$1000ec damages for delay;
- d. and in my discretion under **rule 64.3 CPR 2000** (as amended), he shall have \$5000ec in costs, and can further recover the itemized cost of the 2019 application;
- e. all payable within one month of receiving the said itemized cost.

- 11 Finally, consistent with the Governor's para 8, I expect Charles will have response within a month of his fresh application.

The Hon. Mr. Justice IC Morley KC

High Court Judge

3 April 2023