

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. BVIHCV 2019/0258**

**IN THE MATTER OF** an application for leave to apply for Judicial Review  
**AND**  
**IN THE MATTER OF** the Constitution of the British Virgin Islands

**BETWEEN:**

**SHAWN HENRY**

**Applicant**

**-AND-**

**THE ATTORNEY GENERAL OF THE BRITISH VIRGIN ISLANDS**

**1<sup>st</sup> Respondent**

**THE COMMISSIONER OF POLICE**

**2<sup>nd</sup> Respondent**

**Appearances:** Ian Wilkinson QC and Reynela Rawlins, Counsel for the Applicant  
Christopher Forde, Crown Counsel for the Respondents

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2019: 2<sup>nd</sup>, 6<sup>th</sup>, 9<sup>th</sup> December  
2020: 15<sup>th</sup> May  
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**DECISION ON APPLICATION FOR LEAVE FOR JUDICIAL REVIEW**

**BACKGROUND**

- [1] **SMITH J:** The Applicant before the Court is a serving police officer at the rank of sergeant in the Royal British Virgin Islands Police Force. He was placed on interdiction 2014 and criminally charged for conspiracy to steal and theft in 2016. In April 2019 he was acquitted. At today's date, the Applicant remains on interdiction. His application for leave for Judicial Review and Constitutional Relief and affidavit was filed on October 4<sup>th</sup> 2019 with a further affidavit being filed on 13<sup>th</sup> March 2020 pursuant to an Order of the Court dated 26<sup>th</sup> February 2020.

- [2] Upon his acquittal he applied to be reinstated as a Police Sergeant and sought to have his items which were confiscated by the Police returned to him. He felt that the responses from the Commissioner were inadequate and left him no other alternative but to apply for Judicial Review of these actions.

### **The Application for Leave**

- [3] This Application is brought pursuant to Part 56 of the Civil Procedure Rules, 2000. The Applicant is challenging, inter alia, the legality of his interdiction by the Second Respondent. This includes the decision of the Second Respondent, made on or about 11<sup>th</sup> April, 2019 that the Applicant should remain on interdiction and that his salary should be cut.

### **CPR 2000**

#### **Who may apply?**

- [4] Rule 56.2 (1) of the CPR provides as follows:
- “An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.
- (2) this includes: – (a) any person who has been adversely affected by the decision which is the subject of the application.”

#### **The person must first obtain leave**

- [5] Rule 56.3 (1) of the CPR provides as follows:
- “A person wishing to apply for judicial review must first obtain leave.”
- (2) An application for leave may be made without notice.
- (3) The application must state –
- (a) the name, address and description of the applicant and respondent;
  - (b) the relief, including in particular details of any interim relief sought;
  - (c) the grounds on which such relief is sought;
  - (d) the applicant’s address for service;
  - (e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;

- (f) details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant;
- (g) whether any time limit for making the application has been exceeded and, if so, why;
- (h) whether the applicant is personally or directly affected by the decision about which complaint is made;
- (i) if the applicant is not personally or directly affected – what public or other interest the applicant has in the matter;
- (j) the name and address of the applicant's legal practitioner (if applicable); and
- (k) The applicant's address for service.

(4) The application must be verified by evidence on affidavit which must include a short statement of all the facts relied on."

#### **Issues the Court is to consider in granting leave**

[6] The issues relevant to the Court's consideration of whether to grant leave are set out below:

- (a) whether the Applicant has the requisite locus standi to make this application;
- (b) whether Judicial Review is available against the Second Respondent;
- (c) whether the Applicant has attained the threshold bar of establishing or raising an arguable case, as set out in the material before this Honourable Court, which has a realistic prospect of success;
- (d) whether there exists any discretionary bar such as delay or any alternative remedy; and
- (e) If any discretionary any exists, whether leave to apply for Judicial Review should still be granted.

#### **Issues to be resolved are:-**

##### **Has the applicant raised an Arguable Case?**

[7] On an application for leave to seek judicial review the test to be applied by the Court is the test as stated by the Privy Council in the case of **Satnarine Sharma v Browne-Antoine P.C. Appeal No. 75 of 2006**. In that case the Privy Council stated the test in the following terms: "*The ordinary rule now is that the Court will refuse leave to claim judicial review unless satisfied that there is an*

*arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy: R v Legal Aid Board Exp. Hughes [1982] 5 Admin L. R623, 628; Fordham Judicial Review Handbook 4th ed. (2004) p.426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application... It is not enough that a case is potentially arguable. An applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen.”*

- [8] In applying the above mentioned test the Applicant must prove on a balance of probabilities:
- (i) That he has an arguable ground for judicial review with a realistic prospect of success; and
  - (ii) The application is not subject to a discretionary bar such as delay or alternative remedy.
- [9] In looking at the test and applying it to this Applicant's case, the Court finds that the Applicant has indeed presented an arguable case on a balance of probabilities. After the Applicant was acquitted on 5<sup>th</sup> April 2019 he contacted the Commissioner of Police and requested that he be reinstated as a Police Sergeant. The second respondent, the Commissioner responded that the interdiction was to remain in force and that the request to be re-instated was to be denied. The Police Commissioner in his letter dated 11<sup>th</sup> April indicated that disciplinary proceedings would be instituted against the Applicant. To date no such proceedings have commenced. In fact, this had not been done and up to the time of the filing of his fixed date claim no such action had been instituted against the Applicant.
- [10] The Counsel for the Respondents submitted that the Applicant had not put forward a good and arguable case and that he had not specified his grievances in detail and that his clients had no idea what was the basis of the claim. In his oral submissions Mr. Ford indicated that *“Although, the Applicant makes bald assertions that the decision was illegal, unjustifiable and unlawful, he does not state how so. The Respondents have no clue of the basis on which the applicant intends to substantiate this argument. As such the Court has nothing on which to base an assessment of an arguable case or a realistic prospect of success”*. As already indicated the Court is of the opposite view. The Applicant's affidavit filed on 4<sup>th</sup> October 2019 and his further affidavit filed on 13<sup>th</sup> March

2020 clearly set out his grievances and how his life has been put on hold, his studies have been hampered with the seizure of his computer, he has not received any increments if indeed increments were paid during the period, he indicated I believe the exact quote to be his life had been “turned upside down” due to his salary being cut and the prolonged interdiction at the hands of the Commissioner. Under the rubric of putting forward a good and arguable case the Court finds that the Applicant has indeed done so.

- [11] The Court has not had the benefit of the reasoning behind the Commissioner’s decision in light of the very important fact that the Applicant was acquitted of all wrong doing on April 2019. The fact that to date no disciplinary hearing has taken place in this Court’s view supports the allegation that the Commissioner’s actions have been irrational and illegal and supports the Applicant’s application for leave to seek judicial review of these actions. If Mr. Henry’s position is correct or substantially so, it would be a sound basis to grant leave for judicial review of the Commissioner’s decisions and actions. I find therefore that on this score Mr. Henry has advanced another good arguable ground with a realistic chance of success.

#### **ARGUABLE GROUNDS WITH REALISTIC PROSPECT OF SUCCESS**

- [12] Following on from satisfying the Court that the Applicant has shown a good and arguable case the Court now must decide whether the case has a realistic prospect of success. The Respondent in his submissions has tried to persuade the Court that the Applicant’s raising of the void letter of interdiction is of no relevance and submits that in serving the interdiction notice on the Applicant on 9<sup>th</sup> October, 2014, the Commissioner correctly relied on section 35 of the 1986 Police Act Cap. 165. This is so as the 2013 amendment was not published in the gazette until 15<sup>th</sup> February 2017 and did not take effect until then. The final letter from the Commissioner dated 11<sup>th</sup> April, 2019 adopted the 2014 interdiction notice after the 15<sup>th</sup> February, 2017 date and did not refer to the new (2013) Police Act. Consequently, the interdiction in the view of this Court is null and void. This is not an issue that can be easily reconciled and has not been by the Respondent’s submissions.

### **The Issue of delay and discretionary bars**

- [13] The presence of the words “or grant relief in any case” in CPR 56.5(1) indicates that CPR 56.5(1) applies to applications for leave to apply for judicial review and also to the substantive judicial review claim for relief. CPR 56.5 looks to certain effects of delay as grounds for refusing leave, or substantive relief, as the case may be. There is no rule in our CPR 2000 that is comparable to the English Order 53, Rule 4 (1) which stipulates that an application for leave to apply for judicial review shall in any event be made within three months from when grounds for the application first arose. Consequently, the absence of any rigid time limit for invoking the supervisory jurisdiction in the British Virgin Islands is salutary, subject of course to the Court’s insistence on reasonable promptness in all the circumstances of each particular case, and rejection of stale claims.
- [14] The case **R v Dairy Produce Quota Tribunal for England and Wales Ex p. Caswell [1990] 2 A.C. 738** is applied. In that case it was held that at the hearing of the judicial review claim, apart from considering the merits of the claim (usually on the grounds of either illegality, irrationality, and or unfairness) the judge may revisit the issue of unreasonable delay where the claim has merit, in determining whether to grant the relief sought. There is no unqualified right to any of the remedies claimed.
- [15] In exercising its discretion as to whether to grant any relief the Court can take into account other factors including that there was unreasonable delay before making the application, whether the claimant acted promptly, or whether it would be detrimental to good administration or cause substantial hardship to the rights of any person, or the Applicant denies that he was guilty of any unreasonable delay, The Applicant in his supporting affidavit filed herein gave adequate explanation for any purported or perceived delay, chiefly relating to the existence of criminal charges being laid against him and his pending trial which was only concluded on 5<sup>th</sup> April, 2019. Thereafter, in the Court’s view as quickly as possible the Applicant sought to resolve the various issues but was not met with any positive results by the Respondent the Commissioner of Police.
- [16] Counsel for the Respondents seeks to persuade the Court that the Applicant acted in a tardy manner and sat on his hands and that the instant application should have been filed as soon as he received his letter notifying him of his interdiction dated 9<sup>th</sup> October 2014. He responds to learned

Queens Counsel that it is not proper to say that the Applicant did not apply as far back as the date of the first interdiction letter because he believed that such an application would be premature.

- [17] Let us examine the timelines. The Applicant received his first letter from the Police Commissioner on **9<sup>th</sup> October 2014** stating that the interdiction was to take effect immediately. His items and documents (no longer subject to this application) were seized on **30<sup>th</sup> January 2015**.
- [18] On **30<sup>th</sup> March 2015** he received another letter from the Commissioner of Police restricting his access to RVIPF premises while the criminal investigation Operation Lucan was on going. On **4<sup>th</sup> April 2016** the Applicant was arrested and charged for conspiracy to commit theft and other charges. He was kept in custody until **9<sup>th</sup> May 2016** when he was granted bail at the High Court. On **26<sup>th</sup> May 2016** the Applicant received another letter from the Commissioner of Police informing him that his salary would be cut to three quarters of the normal sum. On **5<sup>th</sup> April 2019**, Justice Persuad upheld a no case submission in favour of the Applicant thus acquitting him of all charges. In paragraph 40 of his first affidavit the Applicant indicated that he applied to become a gazetted officer but that his application was denied by the Commissioner of Police.
- [19] On **11<sup>th</sup> April 2019** the Applicant received a letter from the Commissioner of Police indicating that he would remain on Interdiction and that disciplinary matters would be looked into against him (not withstanding that fact that he had been acquitted of all charges against him).
- [20] The Applicant filed his application for leave to apply for Judicial Review on **4<sup>th</sup> October 2019**. While it is regrettable that the Criminal trial took years from the date of his arrest to commence, would it have been prudent for the Applicant to have sought leave for Judicial Review of the Commissioner's actions before the culmination of the Criminal trial bearing in mind the fundamental fact that the interdiction was based on the investigations being made into alleged criminal conduct of the Applicant? I think not. When one considers the timelines this Court does not consider there to have been an unreasonable delay in the circumstances which would bar the Applicant from seeking leave to review the actions of the Second Respondent.

- [21] Further, in examining the timelines it appears as if the respondent too, was awaiting the outcome of the criminal trial but since its culmination has done nothing with regard to the disciplinary proceedings to be instituted against the Applicant. It is also the view of this Court that the threshold requirement which the applicant must meet for leave to institute judicial review proceedings as set out in the case of **Sharma v Brown-Antoine** has been met. In that case the Privy Council had this to say; *"It is noteworthy that a finding of unreasonable delay in pursuing an application for leave to institute judicial review proceedings may, however, prevent an applicant from pursuing an arguable ground for judicial review even though it may have a realistic prospect of success"*.
- [22] The Court finds that the grant of leave would not in any way be detrimental to good administration in this case nor would it cause substantial hardship or prejudice to the rights of any person. I find that the delay in this case is not a bar to the grant of leave.
- [23] This brings me to the final point regarding whether the Attorney General is a proper party to these proceedings.
- [24] When these proceedings were filed it was apparent that a number of constitutional reliefs were being sought. In the Applicant's further affidavit filed on 13<sup>th</sup> March 2020, it is apparent that these constitutional claims have now fallen away. Counsel for the Commissioner of Police quite rightly points out that the actions complained of were attributable to the Commissioner of Police and not the Attorney General.
- [25] In an application for judicial review, the Court is concerned with the validity of a decision of a particular public authority, servant and/or agent and the process by which the said decision has been made and in this case it is that actions of the Commissioner of Police. The scrutiny and considerations center on whether he acted in a biased manner, failed to take into account relevant considerations, acted irrationally, illegally or exercised his discretion appropriately. The outcome of such a challenge affects the decision-maker and in the case at bar the decision maker is quite clearly the Commissioner of Police and not the Attorney General. This issue was visited in the St Lucian case of **Colville Walcott vs. The Licencing Authority, The La Çlery Mini-Bus**

**Association and The Honourable Attorney General<sup>1</sup>** by my sister Judge Wilkinson J where she said at paragraph 41:

“So were the Authority and the Attorney General proper parties to the suit? It is settled law that judicial review proceedings can only be conducted against the decision maker - see HCVAP2009/021 **Quorum Island (BVI) Limited v. Virgin Islands Environmental Council and the Minister of Planning**. In that’s case it was held that:- Prerogative or “Crown side” proceedings are not civil proceedings under the laws of the Virgin Islands. There is no provision in the laws of the Virgin Islands that require the Attorney General to be a necessary or proper defendant in prerogative type proceedings.”

[26] However, the Attorney General may be a necessary and proper party in civil proceedings against the Crown, by virtue of section 13 of the Crown Proceedings Act. The proper defendant in prerogative proceedings is the person or authority whose decision is challenged; in the present case, the Minister.

[27] Further in **Richard Frederick et al vs. The Comptroller of Customs and the Attorney General<sup>2</sup>** another case from St Lucia it was held by Justice of Appeal Janice George Creque as she then was that:-

*“Whereas the Civil Procedure Rules 2000 (“CPR 2000”) define civil proceedings to include judicial review and applications to the court under the Constitution of any member state or territory, it does not follow as a matter of principle that all proceedings brought against a public officer, such as the Comptroller, are civil proceedings for the purposes of the CPA. The CPR 2000 recognizes public law proceedings as peculiar specie of civil proceedings which fall outside the ambit of the ordinary type of civil proceedings contemplated by the CPA and provides a regime of rules in Part 56 which are applicable only to proceedings of this kind.”*

[28] A claim form seeking constitutional redress must be served on the Attorney General in accordance with CPR 56.9(2). And it follows that the Attorney General must be a party to the claim. This does not however preclude other persons being joined as defendants. In the **Richard Frederick case**, the acts complained of are those of the Comptroller of Customs. Power is given to the Court to direct that the Comptroller be heard whether or not he was named and served as a party to the proceedings. Having been made a defendant, there was no legal basis and otherwise no good reason for holding that the Comptroller could not be

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<sup>1</sup> SLUHCV 2010/078

<sup>2</sup> HCVAP 2008/037

heard or could only be heard through the Attorney General". The Attorney General was removed as a party to those proceedings in that case

## **CONCLUSION**

[29] In the premises the Court hereby grants to the Applicant leave to seek Judicial Review against the actions of the second respondent. The Applicant agreed to abandon some of his claims set out in the draft order dated 4<sup>th</sup> October 2019 and I refer to his further affidavit date 13<sup>th</sup> March 2020. The Court therefore grants leave to the Applicant to seek Judicial Review for the following reliefs:-

## **ORDER**

[30] It is hereby ordered that the Applicant be granted leave to seek the following reliefs:

- I. A declaration that the Applicant was improperly interdicted by the 2<sup>nd</sup> Respondent or, alternatively, that the 2<sup>nd</sup> respondent acted ultra vires in interdicting the applicant under section 35 of the Police Act Cap 165;
- II. A declaration that the 2<sup>nd</sup> Respondent acted illegally, irrationally and improperly in withholding a quarter of the applicant's salary;
- III. A declaration that the 2<sup>nd</sup> Respondent acted illegally, irrationally and improperly in failing to pay to the Applicant the relevant increments or usual increases in his salary in accordance with the Police Regulations; if indeed any increments/increases were paid by the Government for the relevant period;
- IV. A declaration that the 2<sup>nd</sup> Respondent acted illegally, irrationally and improperly in withholding a quarter of the Applicant's salary; after he was acquitted of all criminal charges on 5<sup>th</sup> April 2019;
- V. An order of certiorari quashing the decision of the 2<sup>nd</sup> Respondent to have the Applicant remain on interdiction after his acquittal of the criminal charges against him;

- VI. An order of mandamus directing the Respondents to reinstate the Applicant to his substantive post as a sergeant of Police with the Royal Virgin Islands Police force with full pay;
- VII. The Attorney General is hereby removed as a party to these proceedings;
- VIII. That the Applicant apply for a court hearing date via the E-Portal within 14 days of the date of this Order;
- IX. That costs be costs in the claim.

**Ann-Marie Smith**  
**High Court Judge**  
**Dated: 25<sup>th</sup> May 2020**

**By the Court**

**Registrar**