

**IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
VIRGIN ISLANDS
(CIVIL)
A.D. 2012**

CLAIM NO. BVIHCV2012/0093

BETWEEN:

ROSAN LAW

APPLICANT

-and-

- (1) HUGH ANTHONY RAWLINS (CHAIRMAN OF THE JUDICIAL
AND LEGAL SERVICES COMMISSION)**
- (2) JUDICIAL AND LEGAL SERVICES COMMISSION**
- (3) WILLIAM BOYD MCCLEARY (GOVERNOR OF THE BRITISH
VIRGIN ISLANDS)**
- (4) THE ATTORNEY GENERAL OF THE BRITISH VIRGIN ISLANDS**

RESPONDENTS

**Appearances: Ms Sheryl Rosan for the Applicant, Ms Maya Barry, Ms Isis
Potter, Crown Counsel for the Respondents**

JUDGMENT

[2012: 17 July, 13 August]

**(Application for leave to apply for an order for mandamus by way of
Judicial Review – CPR Part 56.3)**

[1] Wallbank J (Ag): This is an application by a law firm in the British Virgin Islands, Rosan Law, for permission to apply for an administrative order by way of judicial review for an order of mandamus. This is expressed in an application to be directed towards the Chairman of the Judicial and Legal Services Commission, and that Commission (“JLSC”). The Governor of the Territory and its Attorney General have also been named as Respondents to the application. I directed at a previous hearing that this application for permission should be heard in open court, as it concerned matters of public interest.

[2] The essence of Rosan Law's application is that it has made a wide ranging disciplinary complaint against Additional Magistrate Tamia Richards to the JLSC. The Applicant claims that there has been undue delay amounting to a refusal to act on the part of the JLSC in investigating the complaint, and that the JLSC has unconstitutionally delegated responsibility for handing the complaint to the Department of Human Resources of the Virgin Islands Government. The complaint against the Additional Magistrate was made by way of a letter dated 17 February 2012. I need not – and will not, as it may be that the complaints will ultimately be found to be unmeritorious - go into the detail of the complaints for the purposes of this application. That letter asked for

- (1) an alternative Magistrate to be appointed to deal with matters in relation to Rosan Law and its affiliates, exclusive of Magistrate Valerie Stephens; and
- (2) an investigation to be launched into the matter immediately; and
- (3) Additional Magistrate Tamia Richards to be suspended immediately pending a hearing of inquiry of the allegations made.

[3] Learned Counsel for the Applicant submitted that these are not unorthodox requests, as a precedent had been set in a matter concerning another Magistrate in the Virgin Islands, Magistrate Charmaine Rosan-Bunbury. Learned Counsel for the Applicant explained that Ms Charmaine Rosan-Bunbury is a major shareholder in the present Applicant law firm, Rosan Law. In that matter, submitted Learned Counsel for the Applicant, Magistrate Charmaine Rosan-Bunbury had been suspended pending investigation within seven days of a complaint being made, and that this shows how quickly the JLSC is capable of acting.

[4] I pause here to note that the complaint against Magistrate Charmaine Rosan-Bunbury appears in essence to have been with respect to a single issue. In the present case, the complaint lodged against Additional Magistrate Tamia Richards covers some four main heads, developed by several specific alleged instances, was contained in a letter eleven, singled spaced, pages long, and accompanied by many (unpaginated) pages of attachments. The nature of the behavior complained of is also very different.

[5] The Applicant seeks an order in the following terms:

“ The Applicant, Rosan Law be granted leave to apply for an administrative order for judicial review for an order of mandamus directed to the Chairman of the Judicial and Legal Services Commission and the Judicial and Legal Services Commission to perform their duty as required by section 95 of the Virgin Islands Constitution Order 2007 and the Judicial and Legal Services Commission Rules 1969 and Rule 5(3) as regards control of disciplinary matters pertaining to magistrates and to so

advise his Excellency, the Governor thereon. The First and Second Respondents have failed and or refused to exercise their role as regards disciplinary control over Additional Magistrate, Tamia Richards. The Applicant made a complaint to the Judicial and Legal Services Commission against Ms Richards by letter date 17 February, 2012. The First and Second Respondents by letter date 2nd March, 2012 said the matter was forwarded to the Human Resources department as a matter of course and from whom a response would be forthcoming in due course. No further communication was made to the Applicant from anyone. The Respondents have not dealt with the matter as required by the Virgin Islands Constitution Order 2007 and the Judicial and Legal Services Commission Rules, 1969."

[6] Ms Rosan for the Applicant submits that this Court is not limited to the relief sought and can give leave for the Applicant to seek an administrative order in other terms. She states that the Applicant is simply asking the JLSC to "do its job".

[7] Ms Rosan submits that the relief requested of the JLSC, and by extension the Applicant's desired order of mandamus, is to allow the Applicant law firm to function, as the Applicant cannot afford to lose its clients due to being treated by Additional Magistrate Tamia Richards in the ways complained of. Ms Rosan submitted that the Applicant has a right to function in this jurisdiction and where the Applicant's income is affected the Applicant has a right to approach the relevant public body for redress.

[8] On 24 February 2012 the Applicant wrote a letter to Additional Magistrate Tamia Richards, with copy to the Governor, the JLSC and Magistrate Valerie Stephens, materially stating as follows:

"A Complaint was lodged with the Judicial and Legal Services Commission (the Commission) against you. An application was also made to the Commission for your removal from matters pertaining to Rosan Law and its affiliates. We hereby give notice that we will not appear in Court on 28th February as we are awaiting the outcome of the Application from the Commission.

As such we request an adjournment date as regards this matter."

[9] This letter was acknowledged by the Department of Human Resources by a letter dated 13 April 2012, with copy to the JLSC, in the following material terms:

"We have received, through the Judicial and Legal Services Commission your letter dated 24th February, 2012 together with enclosures.

Please be advised that we have since referred the matter to the Deputy

Governor, who having considered same, has now instructed us to assist with conduct, and to cause the matter to be placed before the Judicial and Legal Services Commission for consideration.

We will revert to you regarding same, in due course.”

[10] The Judicial and Legal Services Commission responded to the letter of 17 February 2012 by a letter dated 2 March 2012, from the office of its Chairman. This reply acknowledged the complaint and stated in terms:

“Please be informed that all such matters should be forwarded, as a matter of course, to the Department of Human Resources for review and further action, as the case may be. Accordingly I am directed to advise you that the package has been forwarded to the Department of Human Resources, on your behalf, from whom you should expect to receive a response in due course.”

[11] It should be noted that the correspondence address for the JLSC shown in the footer to that letter is stated to be “care of” the Department of Human Resources. The JLSC does not have its own separate correspondence address.

[12] The Secretary of the Judicial and Legal Services Commission, Ms Malcia Leonard, states in an Affidavit filed on 14 May 2012 that the Applicant’s letter dated 17 February 2012 was received by her on 27 February 2012. Ms Leonard attests that an internal process within the Judicial and Legal Services Commission was then commenced.

[13] She attests that the instructions received by the Department of Human Resources from the JLSC, namely to investigate the various allegations and then refer the matter back to the Commission, were in keeping with the JLSC’s normal practice.

[14] The normal practice, she attests, is also for the Department of Human Resources to compile all the information necessary for the JLSC’s consideration of how to treat the complaint and/or by the relevant officer going forward.

[15] In an Affidavit filed on 15 May 2012 Ms Michelle Donovan-Stevens, Acting Director of Human Resources for the Government of the Virgin Islands, also attests that a practice has been developed within the Judicial and Legal Services Commission whereby complaints are channeled to the Department of Human Resources, which would then compile all the necessary material to cause the matter to be considered by the Commission. Then the file would be sent to the Secretary of the Commission, who would then arrange for the matter to be listed on the agenda of a meeting of the Commission.

[16] Ms Donovan-Stevens attests that this complaint was the first of its kind

received by the Department of Human Resources, and that she was unsure how to handle it. Having taken guidance from the Deputy Governor, namely to compile the necessary material for the consideration of the JLSC, she attests that the Department of Human Resources has been actively engaged in compiling the material, and that the Department has written to Additional Magistrate Tamia Richards informing her of the complaint and giving her a timeframe for submitting a response. She attests that once all the relevant material is received, the Department will compile a file and forward it to the Secretary of the Commission for the JLSC's consideration.

[17] Section 94(1) of the Virgin Islands Constitution Order 2007 ("VICO 2007") materially provides for the JLSC to be constituted by the following persons:

- i. the Chief Justice, who shall be Chairman; and
- ii. one judge of the Court of Appeal or High Court; and
- iii. the Chairman of the Public Services Commission; and
- iv. two other members, appointed by the Governor, at least one of whom shall be a legal practitioner.

[18] Section 94(6) of VICO 2007 provides that:

"Any decision of the Judicial and Legal Services Commission shall require the concurrence of not less than three members of the Commission, and the Commission shall take its decisions in such form and manner as it may determine."

[19] Section 94(7) of VICO 2007 provides:

"In the exercise of its functions, the Judicial and Legal Services Commission –

- (a) *shall not be subject to the direction or control of any other person or authority; and*
- (b) *may regulate its own procedure."*

[20] There are no regulations or guidelines which prescribe the manner in which the JLSC is to carry out its functions, other than the steps provided for in section 95 of VICO 2007, which are materially as follows:

"95(1) Power ... to remove and to exercise disciplinary control over persons holding or acting in such offices, shall vest in the Governor, acting in accordance with the advice of the Judicial and Legal Services Commission; but the Governor, acting in his or her discretion, may act otherwise than in accordance with that advice if he or she determines that compliance with that advice would prejudice Her Majesty's service."

(2) Before exercising the powers vested in the Governor by subsection (1), the Governor may, acting in his or her discretion, once refer the advice of the Judicial and Legal services Commission back to the Commission for reconsideration by it.”

[21] The Applicant submits that the Respondents’ wrongful acts occurred at a point before the JLSC advised the Governor, thus before the first stage provided for by section 95(1).

[22] The Applicant filed its application for permission to apply for judicial review on 30 March 2012, claiming that it had received no further response since 2 March 2012. The Applicant claims that “significant time has passed” and that the Respondents “refuse or fail to perform their duty under Section 95 of the Virgin Islands Constitution Order 2007 and the Judicial and Legal Services Commission Rules 1969 and [have] failed to inform the Applicant of the reason for this refusal or failure to do so.” Ms Rosan submitted that there had been no further action on the part of the Respondents in the intervening time before the hearing and that this was further evidence of a failure or refusal to act.

[23] The Applicant further asserts that the Respondents’ reaction to the complaint was unlawful, unconstitutional, and ultra vires, on grounds that the Department of Human Resources is not a body empowered by the Virgin Islands Constitution Order 2007 to deal with disciplinary complaints against Magistrates.

[24] The Applicant claims it has met the requirements of CPR 56.3 for Mandamus and that no alternative form of redress exists.

[25] I am satisfied that the procedural requirements of CPR 56.3 have been made out, thus that this does not present a difficulty for the Applicant’s application.

[26] I have also considered whether the Applicant has locus standi or “sufficient interest” to make this application. I am not convinced that it does, although with regard to those aspects of the complaint which are framed in such a way as to portray an element of personal focus by Additional Magistrate Tamia Richards against the Applicant, on balance I think the Applicant probably does have sufficient interest to seek judicial review, certainly for the purposes of this preliminary review stage. However, there are other substantive aspects which are determinative of the application, such that this question does not require detailed consideration.

[27] There is one generalized complaint against Additional Magistrate Tamia Richards, that, as it was something reported in the press, is a matter not concerning the Applicant, namely she had used the word “pyassing” in Court. This is, so I understand, a locally used “familiar” term with an allegedly derogatory element to its meaning. Additional Magistrate Tamia Richards has

claimed that it has Spanish origins and is not derogatory. I understand it is one of those concepts the meaning of which it is easier to sense from its sound than to define, and that it is close in meaning to similar terms used in other parts of the world, such as “barpion oximation” (in Cypriot English usage), or “wodging” (as derived from Antipodean English), which, though not offensively vulgar, in a colloquial or familiar context are used to deprecate tomfoolery. I mention this as Learned Counsel for the Applicant astutely placed on record that the Applicant was citing this merely as an illustration of conduct by Additional Magistrate Tamia Richards and that the Applicant was not treating this as a ground as part of its intended application for judicial review. Had she done so I would have had no hesitation in finding that the Applicant had no standing to force a complaint, merely reported in the press and of such tenuous nature, to be dealt with through judicial review proceedings.

[28] Concerning whether alternative forms of redress are available, having considered the subject matter of the complaints in this case, it appears to me that many, if not all, of the specific instances identified by the Applicant are examples of the Applicant not being content with the manner in which Additional Magistrate Tamia Richards exercised her powers of case management and substantive jurisdiction, and thus to fall within the ambit of matters capable of being reviewed on appeal. In other words, that an alternative form of redress may well exist. This is not to say that upon consideration by the JLSC all the complaints will necessarily be considered as meritorious. Although on their face some of the complaints appear to stem from a lack on the part of the Applicant of appreciation that a degree of deference to the Magistrate’s power and authority over her Court are required on the part of litigants and Counsel, and further, that this complaint follows curiously close in time upon the decision against the present Applicant’s major shareholder Ms Charmaine Rosan-Bunbury in Claim No. BVIHCV2011/0157, such that questions about the motivation for the complaint may well beg themselves (and indeed they may of course have an entirely reasonable justification), for present purposes this Court must treat these complaints as warranting serious investigation by the JLSC. As such, this Court should be, and is, vigilant to see that the Respondents properly fulfill their statutory and/or constitutional functions. Thus for the purposes of this decision I shall assume that alternative forms of redress is not available, if indeed such redress is required.

[29] In terms of the nature of the relief sought on this application, namely permission to apply for an order of mandamus that the Respondents should perform its duty, this is clearly an appropriate way in which the relief should be framed. It should remain firmly in sight that although the Applicant asks for certain specific reliefs from the JLSC, the Applicant seeks to come to this Court not for an order that the JLSC and Governor should grant that relief, but for an order that these Respondents should do their duty. This way of framing the intended order is perfectly proper. In this way, there is not here any contravention of the established principle that it is not the role of the High Court

in judicial review proceedings to substitute its decision for that of the original decision maker (see ***De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th Edition, paragraph 16-008***).

[30] I do not agree that the involvement of the Department of Human Resources is unconstitutional, or otherwise ultra vires the powers of the JLSC or unlawful.

[31] First, the JLSC has been conferred an express power by section 94(7) VICO 2007 to regulate its own procedure.

[32] Secondly, it is clear that the Department of Human Resources function was not charged with making substantive decisions on the outcome of such a complaint, which is the role of the Governor upon the advice of the JLSC. The Department's function is merely to gather the necessary information and materials, to collate it into a file, and then transmit it to the JLSC so that the latter can properly consider the matter and provide the statutorily requisite advice to the Governor. If the Department had been asked to make substantive decisions instead of the JLSC the position could well be different, but that is not the case here.

[33] Thirdly, the evidence is clear that the JLSC has no correspondence office address of its own, and that correspondence is formally channeled to the JLSC "care of" the Department of Human Resources, whose own office resources are available to assist the JLSC in carrying out its functions as required.

[34] It is wholly unrealistic to suppose that the members of the JLSC, most, and quite possibly all, of whom have other full time occupations which entail high offices and commensurate heavy responsibilities, pressures and burdens which far exceed those encountered in private civil life, should perform all their own information gathering and logistical administrative work, and themselves conduct all the JLSC's correspondence and communications.

[35] Learned Counsel for the Applicant submitted that the Department of Human Resources is now claiming to be responsible for disciplinary matters. On the facts before the Court taken as a whole I do not agree that this is the case.

[36] The involvement of the Department of Human Resources in this matter thus does not ground any meritorious complaint as being unconstitutional, ultra vires or unlawful, and this allegation appears to be both hopeless and misconceived.

[37] Consequently the Court accepts that, contrary to Learned Counsel for the Applicant's submissions, Ms Donovan-Stevens, as Acting Director of the Department of Human Resources, was duly authorized to make her affidavit on behalf of the Respondents, and that this Court should take her evidence into account.

[38] Concerning the allegations of delay or refusal to act as warranting permission in this case, I have had regard to the following principle: “*Latitude will also often be given to a public body with respect to the manner and extent of their performance of their bodies, particularly where resources are insufficient to satisfy all claims upon them; in these circumstances, judicial enforcement tends to be limited to situations in which reasonable efforts to perform had not been made.*” (see **De Smith, ditto, paragraph 16-010** and **R v Inner London Education Authority, ex p. Ali (1990) 2 Admin. L.R. 822**)

[39] Having considered the nature of the complaint, the considerable number and significant gravity of allegations comprised in it, the volume of materials submitted by the Applicant to the JLSC in support and the fact that this is the first complaint of its type administered by the Department of Human Resources, as well as the evidence filed on behalf of the Respondents, that the complaint is actively being dealt with, it appears most evident that reasonable efforts have been and are being made to deal with the complaint.

[40] As the complaint is already actively being dealt with in accordance with the procedure set out in section 95 of VICO 2007, an order of mandamus is unnecessary, and an application for judicial review is inappropriate in the present circumstances.

[41] On the facts as put in evidence to date I consider that an application for judicial review will not succeed, as being hopeless as well as misconceived. The application is therefore dismissed.

Costs

[42] This application was heard in open Court *motu proprio*. That said, the hearing was relatively long, and a significant part of the time was taken up by Learned Counsel for the Applicant reading the letter of complaint dated 17th February 2012 into the record, as she submitted that it was necessary, until she was stopped doing so. This Court does not consider that this was a proper use of either the Court’s process nor the Court’s time. Such time was further tested by the fact that the Applicant had not produced a conveniently tabulated and paginated bundle for the hearing, despite the Court’s indication at the preceding hearing of the matter that this would be desirable. I am also mindful that the Respondents’ Counsel was put to considerable work preparing measured and proportionate submissions for this hearing, and that the latter’s delivery was made all the more difficult by not infrequent untimely interruptions from opposing Learned Counsel.

[43] The Court therefore awards costs to the Respondents, assessed in an amount of US\$1,400.00, to be paid by the Applicant by 30th September, 2012 unless otherwise agreed.

A handwritten signature in blue ink, appearing to read 'G Wallbank', is positioned above the printed name.

Gerhard Wallbank
Acting High Court Judge