

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2013/0378

In the Matter of an Application for Leave for Judicial Review

-and-

In the Matter of an Application for an Administrative Order

-and-

In the Matter of the Antigua and Barbuda Constitution Order 1981

-and-

In the Matter of the Police Act Chapter 330 of the 1992 Revised Laws

of Antigua and Barbuda

-and-

In the Matter of a decision by the Commissioner of Police contained in a letter dated 21st May, 2013 to dismiss the Applicant from the Royal Police Force of Antigua and Barbuda

BETWEEN:

KASAMBE CHRISTOPHER

Claimant/Applicant

-and-

THE ATTORNEY GENERAL

1st Respondent

THE COMMISSIONER OF POLICE

2nd Respondent

Appearances:

Mr. Cutie Benjamin for the Claimant/Applicant

Mr. Justin Simon Q.C. for the Respondents

2013: July 25

RULING

- [1] Remy J : This is an application by the Applicant Kasambi Christopher for leave for Judicial Review of a decision by the Commissioner of Police contained in a letter dated 21st May, 2013

to dismiss the Applicant from the Royal Police Force of Antigua and Barbuda. The Commissioner of Police is the 2nd Respondent in this matter.

[2] The facts giving rise to this application are as follows:- Mr. Christopher enlisted as a Police Constable in the Royal Police Force of Antigua and Barbuda on the 12th day of April 2013. He was issued with Force Number 287, and began a two-year probation service. On May 16th 2013, Mr. Christopher was summoned to the office of the Commissioner of Police and was questioned in respect to an incident which took place on June 9th 2010. Two days after the meeting with the Commissioner, Mr. Christopher was ordered to report to the office of the said Commissioner, who asked Mr. Christopher to resign from the Police Force. Mr. Christopher refused to do so. Later that day, Mr. Christopher was handed a letter dated 21st May 2013; that letter dismissed him from the Police Force.

[3] Mr. Christopher seeks judicial review of the decision to dismiss him.

[4] In his Application for leave, Mr. Christopher claimed among other things that:-

- (a) He was not charged with any disciplinary charge nor was he accused of misrepresenting himself to any authoritative body or persons within the ranks of the Police Force.
- (b) He was not given an opportunity to retain Counsel or have anyone present to protect his interest at any hearing of the sudden complaint which the 2nd Respondent made against him.
- (c) He was denied natural justice.
- (d) His constitutional rights have been infringed and he has been denied the protection of the provisions of the Police Regulations.
- (e) The 2nd Respondent misinterpreted the law and acted ultra vires his powers contained in Section 105(5) of the Constitution and the provisions of Sections 12 and 15 of the Police Act.
- (f) The 2nd Respondent has failed to give him any lawful reason for taking such an adverse decision in dismissing him from the Royal Police Force of Antigua and Barbuda.

[5] Mr. Christopher seeks the following relief:-

- (a) An Order of Certiorari to quash the decision of the 2nd Respondent by way of letter dated 21st May 2013, whereby the Applicant was dismissed from the Royal Police Force of Antigua and Barbuda.

- (b) A Declaration that the Applicant is entitled to remain a Constable of the Royal Police Force of Antigua and Barbuda and to be re-instated into the ranks of the Royal Police Force of Antigua and Barbuda.
- (c) A Declaration that the 2nd Respondent has acted outside and beyond the scope of his authority granted to him by Section 105(5) of the Constitution of Antigua and Barbuda and in breach of Sections 12 and 15 of the Police Act.
- (d) A Declaration that the First Respondent incorrectly applied and misinterpreted the provisions of Section 105(5) of the Constitution and the Police Act.
- (e) An Injunction prohibiting the 2nd Respondent whether by himself, his servants, or agents or howsoever otherwise from impeding, interfering or otherwise hindering the Applicant from continuing his service in the Royal Police Force of Antigua and Barbuda.

[6] The hearing of the application for leave was scheduled for the 17th day of July 2013. When the matter came up for hearing, Learned Counsel for the Respondents, Attorney General Justin Simon Q.C., opposed the application. The Court heard oral submissions from Counsel for the parties. At the close of the said submissions, the Court reserved its decision.

[7] Mr. Christopher's application was made pursuant to Part 56 of the Civil Procedure Rules 2000 (CPR), which governs applications for judicial review. Part 56.3 (1) of CPR states that an applicant seeking judicial review must first obtain leave. Part 56.2 (1) states that an applicant seeking judicial review must have "a sufficient interest in the subject matter of the application." Part 56.3(3) and (4) set out what must be contained in the application, including (at Part 56.3 (3) (e)), whether or not an alternative form of redress exists. Part 56.5 states that leave may be refused if the judge considers that there has been "unreasonable delay" before making the application.

[8] I am satisfied that all the requirements set out above with respect to the application have been complied with and that there has been no delay in making the application.

[9] The learned writers of Judicial Review: Principles and Procedure¹ (page 594, paragraph 26.02) state:-

¹ Judicial Review: Principles of Procedure
Oxford University Press 2013
Jonathan Auburn, Jonathan Moffett, Andrew Sharland

"The dual purposes of the requirement for permission are to protect public bodies and the courts from the waste of time and resources that would be occasioned by being required to deal with unmeritorious claims, and to reduce the uncertainty caused by challenges to the lawfulness of decisions of public bodies. Even in cases where permission is granted, the permission stage performs the useful function of providing, at an early stage and at a relatively low cost to the parties, an indication from the court as to the merits of the claim."

[10] In the case of *Sharma v Brown –Antoine* (2007, 1 W.L.R 780), Lord Bingham stated as follows:-

"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 an alternative remedy."

[11] The *Sharma* case thus appears to have set the threshold for the grant of leave in judicial review proceedings. However, as stated by Lord Bingham in the *Sharma* case above, arguability is a test which is "flexible in its application" and cannot be judged without reference to the nature and gravity of the issue to be argued.

[12] The Court will now consider whether the Applicant has shown that he has an arguable case. Among the Grounds of Relief as stated in the Affidavit are:-

At paragraph 31 of the Affidavit - "The Applicant was not given an opportunity to retain Counsel or have anyone present to protect his interest at any hearing of the sudden complaint which the 2nd Respondent made against the said Applicant."

At paragraph 32 of the Affidavit - "The Applicant was denied natural justice in this matter."

At paragraph 34 of the Affidavit - "The 2nd Respondent misinterpreted the law and acted ultra vires his powers contained in Section 105(5) of the Constitution and the provisions of Sections 12 and 15 of the Police Act, Chapter 330."

[13] It is undisputed that the Applicant was on probation at the time of his dismissal. It is apposite to set out the provisions of the Police Act which deal with the issue of dismissal of Police Officers who are on probation. Section 15 of the Police Act states:-

"During the period of probation or any extension thereof the services of any subordinate police or constable may be dispensed with at any time if the Commission considers that he is not fitted, physically or mentally, to perform the duties of his office or that he is not likely to become an efficient and well-conducted police officer; at the end of the period of probation or any extension thereof if his services have not been disposed with he shall be confirmed in his appointment."

[14] In his Affidavit in Response filed on the 15th July 2013, the Commissioner of Police Mr. Vere Browne deposed (at paragraph 12) that:-

"That the issue of a charge for a disciplinary offence as defined in regulation 3 of The Police (Discipline) Regulations did not arise. The Applicant was given an opportunity to explain himself and the issue of retaining Counsel did not arise."

[15] In his oral submissions before the Court, Learned Queen's Counsel Justin Simon contended that Section 15 of the Police Act gives the Commissioner a wide discretion to determine whether a constable must continue in the Police Force during a probationary period. Learned Queen's Counsel further contended that the fact that the Applicant is on probation is indicative of the fact that, notwithstanding that he is a constable, he has not yet met the threshold in respect of time to allow for the confirmation of his appointment. At that threshold, he has a right to be heard.

[16] Mr. Simon stated that he accepts that the Applicant was not charged with respect to the incident of 9th June 2010; that he has no previous criminal convictions. He states however, that with respect to the said incident:-

- (a) The Court should take judicial notice that the ONDCP is the office which deals with money laundering and interdicting with respect to unlawful drugs.
- (b) The Applicant had \$23,000.00 in his possession to purchase a motor bus;
- (c) The Applicant, at paragraph 12 of his Affidavit, admits that while no charges were brought against him, the ONDCP was successful in obtaining an order to seize the \$23,000.00.
- (d) The mere fact that an Order of the Court was made to forfeit the \$23,000.00 indicates that the Applicant was unable to give a sufficient reasonable explanation to a judicial officer. Forfeitures are not automatic and an opportunity would have been given to the Applicant to retain Counsel. Further, the Prevention of Money Laundering Act clearly provides that where a reasonable explanation has been given by the owner of any asset that is sought to be forfeited, no forfeiture ought to be made and the asset will be released to the Applicant/ Owner.

[17] It is the further submission of Learned Queen's Counsel that, in those circumstances, given the overriding responsibility of the Commissioner of Police for the superintendence of the Police Force, given the nature of the duties of the Force, and given the expectations of the public, in respect not only of the Police duties, but also of the character of the individuals who are Police Officers, the Commissioner of Police properly acted under Section 15 of the Police Act. He adds that in the circumstances, the exercise of the Commissioner's discretion cannot and ought not to be questioned.

- [18] By way of response , Learned Counsel for the Applicant Mr. Steadroy Benjamin submitted that "it is unfair, unconscionable and irrational" for the authorities to refer to a matter in June of 2010 after the Applicant was enlisted in 2013 and seek to dismiss him , based on that matter which took place in 2010. Learned Counsel further contended that "it cannot be right" that the "High Command" is unreasonably exercising a discretion to dismiss the Applicant for something that happened three years ago, after the Applicant had been subjected to three interviews with the Defendant prior to his enlistment and after he was examined and found to be a suitable candidate. Mr. Benjamin re-iterated what was contended by the Applicant in his application; namely that the Applicant should have been given an opportunity to be represented.
- [19] The law is settled that judicial review proceedings will lie against the decisions of public bodies where such decisions are illegal, irrational or are procedurally unfair. The requirement of procedural fairness is another way of saying that the decision must not be in breach of natural justice.
- [20] The law is also settled that the principles of natural justice apply even to police officers on probation. – see the Court of Appeal decision of Joseph Jno. Lewis and the Commissioner of Police et al - Civil Appeal No. 11 of 2003, Commonwealth of Dominica. In that case, Saunders J.A. cited the House of Lords decision of Chief Constable of North Wales v Evans , where the headnote reads, among other things, that " the chief constable's decision to force the resignation of the respondent was vitiated by his erroneous assumption that he had an absolute discretion and by his total failure to observe the rules of natural justice in not giving the respondent the opportunity to refute the allegations on which the chief constable relied."
- [21] In light of the authorities, the Court respectfully disagrees with the submission of Learned Queen's Counsel that the Applicant's right to be heard only arises on the date of confirmation of his appointment. While it is true that the Commissioner of Police has a wide discretion in the exercise of his powers, he does not have an absolute discretion. He cannot exercise his powers in breach of natural justice. At the risk of repetition, the principles of natural justice apply even to police officers on probation.
- [22] At paragraph 31 of his Affidavit, the Applicant stated that he was not given an opportunity to retain Counsel or have anyone present to protect his interest at any hearing of the sudden complaint made against him.

- [23] With respect to Section 15 of the Police Act, It was further submitted by Learned Counsel Mr. Benjamin that that Section states that the power to dispense with the services of a subordinate police officer or constable is to be exercised by the Commission, namely, the Police Service Commission and not by the Commissioner of Police. He further added that the Commission is to consider whether the said officer "is not fitted, physically or mentally, to perform the duties of his office or that he is not likely to become an efficient and well-conducted police officer," and that dismissal during probation must therefore be limited to circumstances where the Commission considers that a Police officer "is not fitted physically or mentally to perform the duties of the office." He stated that having observed the Applicant during the two years of training, then the authority would have an informed opinion that that officer is not likely to become an efficient and well-conditioned Police Officer. He stated that Learned Queen's Counsel did not urge the Court that the Applicant was associated with any shady characters since the date of his enlistment, or that the Applicant was subject to any disciplinary action. Mr. Benjamin opined that, from the date that he was enlisted, the Applicant exhibited no conduct which indicated that he would not be likely to become an efficient police officer.
- [24] Mr. Benjamin also submitted that the Commissioner purports to act under Section 105(5) of the Constitution. He stated that Section 105 (5) of the Constitution deals with appointments of Police Officers; that this must be read subject to Section 107 of the Constitution which deals with appeals in disciplinary cases.
- [25] In his rebuttal to the above submissions of Mr. Benjamin, Learned Queen's Counsel Justin Simon referred the Court to Section 105(1) of the Constitution.
- [26] The Court finds it apposite to set out the relevant provisions of Section 105 of the Constitution referred to by Counsel for the parties.
- [27] Section 105(1) states:-

"Subject to the provision of this section, the power to appoint persons to hold or act in offices in the Police Force (including appointments on promotion and transfer and the confirmation of appointments) and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission :

Provided that the Commission may, with the approval of the Prime Minister and subject to such conditions as it may think fit, delegate any of its powers under this section to any one or more of its members or to the Commissioner of Police."

[28] Section 105(5) states:-

"The power to appoint persons to hold or act in offices in the Police Force below the rank of Sergeant (including the power to confirm appointments) and, subject to the provisions of Section 107 of this Constitution, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such person from office shall vest in the Commissioner of Police."

[29] Section 107 in so far as is relevant, states:-

"107 (1) – This section applies to -

- (a) any decision of the Governor-General acting in accordance with the advice of the Public Service Commission, or any decision of the Public Service Commission, to remove a public officer from office or to exercise disciplinary control over a public officer (including a decision made on appeal from or confirming a decision of any person to whom powers are delegated under section 100(2) of this Constitution).
- (b) ...
- (c) ...
- (d) any decision of the Police Service Commission to remove a member of the Police Force from office or to exercise disciplinary control over such a member under section 105(1) of this Constitution.
- (e) if it is so provided by Parliament, any decision of the Commissioner of Police under subsection (5) of section 105 of this Constitution, or of a person to whom powers are delegated under subsection (6) of that section, to remove a police officer from office or to exercise disciplinary control over a police officer;
- (f) ...

[30] At the permission or leave stage of proceedings for judicial review, the Court is not expected to go into the matter in any depth. What the Applicant must show is that he has sufficient interest in the matter to which the application relates and that he has an arguable case, namely one which is not hopeless or groundless. In light of the foregoing, the Court is of the view that the Applicant Mr. Christopher has achieved these requirements and that he does have an arguable case. Accordingly, leave is granted to him to file for Judicial Review.

[31] The Court will now deal with item 4 of the Relief sought by the Applicant, namely:-

"An injunction is granted prohibiting the Second Respondent whether by himself, his servants, or agents or howsoever otherwise from impeding , interfering or otherwise hindering the Applicant from continuing his service in the Royal Police Force of Antigua and Barbuda."

[32] With reference to the above item of relief, the Court notes that:-

(a) The letter written by the Commissioner to the Applicant stated, among other things, "I hereby dismiss you from the Royal Police Force of Antigua and Barbuda with effect from 12:00 noon on Tuesday 21st May, 2013". That letter was dated the 21st May 2013 and was delivered to the Applicant on the same day - 21st May, 2013.

(b) The application for leave for judicial review , in which the above relief was sought, was filed on the 12th June 2013 and came up for hearing on the 17th July 2013.

[33] In his submissions before the Court, Learned Queen's Counsel Justin Simon contended as follows with respect to the above item of relief:-

(a) He accepts that the Applicant was enrolled as a Police constable, that he has no previous criminal convictions, that he has written and passed the Police Force Entrance examination, and was assigned to the Police Training School to receive instructions in respect of his duties as a Police officer.

(b) The training school has continued its courses; the Applicant would have missed from 22nd May 2013 to 17th July 2013. In those circumstances, the probability of the Applicant graduating from the training school is virtually nill.

[34] Learned Queen's Counsel submits that the injunction sought at this stage ought not to be granted.

[35] Learned Counsel Mr. Benjamin accepts that the training course is almost ended. He added that, acting as Attorney-at-Law on behalf of the Applicant, he wrote to the Commissioner of Police on the 27th May 2013 asking that the Applicant be re-enlisted forthwith. No response was forthcoming. He accepts that there are only two more weeks left for the training course , but contends that the Commissioner failed to act on the letter which was written on the 27th May 2013.

[36] In addressing the above issue of the grant of injunctive relief sought by the Applicant, the Court must not lose sight of the fact that, on an application for judicial review, the Court is not entitled to consider the merits of the decision. Judicial review is not an appeal from a decision; it is a review of the manner in which the decision was made. In other words, judicial review is concerned, not with the decision, but with the decision-making process.

[37] In the case of Chief Constable of the North Wales Police v Evans (the Evans case) referred to in paragraph 20 above, the House of Lords had to consider whether the chief constable had acted unlawfully and in breach of his duty under Regulation 16(1) of the Police Regulations 1971 (of the U.K.) That regulation is pari materia with Section 15(1) of the Police Act of Antigua and Barbuda. In the Evans case, the Court held, inter alia as follows:-

"On the question of the appropriate remedy, the respondent was entitled at least to a declaration that the chief constable had acted unlawfully and in breach of his duty under reg 16 of the 1971 regulations. However, although an order of mandamus to reinstate the respondent was the only satisfactory remedy in consequence of that breach of duty , to make such an order would be impractical and might border on a usurpation of the powers of the chief constable by the court....."

[38] The Court takes guidance from the above decision, and declines to grant injunctive relief at this stage.

[39] The Court must give regard to Part 56.4(g) of CPR. The said rule states that where the application is for an Order (or writ) of prohibition or certiorari, the Judge must direct whether or not the grant of leave operates as a stay of the proceedings. In all the circumstances of the instant case, the Court is not persuaded that a stay should be granted.

My Order is as follows:-

1. Leave is granted to the Applicant to apply for Judicial Review.
2. The Applicant is to file his Fixed Date Claim and evidence on Affidavit in Support within 14 days.
3. The 1st hearing of this matter is adjourned to the 30th day of September, 2013 at 9 a.m.



Jennifer A. Remy

High Court Judge