IN THE SUPREME COURT OF BELIZE A.D. 2019

CLAIM NO 761 OF 2019
(BETWEEN
(JULIAN JOHNATHAN MYVETT **CLAIMANT**
(AND
(COMPTROLLER OF CUSTOMS **FIRST DEFENDANT**
(AND EXCISE
(MINISTER OF FINANCE **SECOND DEFENDANT**
(MINISTER OF PUBLIC SERVICE **THIRD DEFENDANT**
(ATTORNEY GENERAL **FOURTH DEFENDANT**

Before: The Hon Justice Westmin R.A. James
Dated: 15th March 2021
Appearances: Ms Audrey Matura for the Claimant
Ms Brianna Williams along with Mr Jorge Matus for the Defendants

DECISION ON LEAVE TO APPLY FOR JUDICIAL REVIEW

1. This Application for permission to Apply for Judicial Review was made on 13th November 2019 and subsequently amended on 24th January 2020.

2. The Application was accompanied by the First Affidavit of the Applicant sworn to 13th day of November 2019 and Second Affidavit of the Applicant sworn to on the 24th January 2020.

3. The Applicant applies for the following orders:

   a. An order granting permission to the Claimant to apply for Judicial Review by way of Certiorari of the decision taken by the Defendants by Circular #22 of 2010 and Circular #39 of 2013 and Circular #7 of 2018 not to promote the Claimant in the process of the restructuring of the Customs and Excise Department, despite promises that the existing customs officers such as the

Claimant would not be prejudiced and left in a lower rank than they would have been under the old promotional system stated in Circular #18 of 2021.

b. An Order granting permission to the Claimant to apply for Judicial Review by way of Certiorari to quash the decision taken by the Defendants against the Claimant who has not benefited from any promotion under the new promotional system.

c. An Order granting permission to the Claimant to apply for Judicial Review by way of Certiorari to quash Circular #22 of 2010 and Circular #39 of 2013 and Circular #7 of 2018 as bring ultra vires the Belize Public Service Regulations 2014 and Section 106(3) the Constitution of Belize.

4. The grounds are threefold (i) legitimate expectation; (ii) irrelevant consideration and (iii) ultra vires.

5. The Applicant began employment with the Customs and Excise Department as a Customs Examiner II, Circular 18 of 2001 changed the criteria for promotion within the Customs and Excise Department. The rules for promotion subsequently changed by Circular 22 of 2010 and according to the Applicant caused officers who held the post of Customs and Excise Clerk I to be promoted over him. The promotion criteria was amended again by Circular # 39 of 2013 to which the Applicant said did not benefit him the same way as others similarly circumstanced. The promotion criteria was further amended by Circular # 7 of 2018 with new requirements.

6. The Applicant indicated that the Comptroller of Customs and Excise promised that none of the customs officer with years of service prior to Circular # 22 of 2010 would be prejudiced and not be promoted.

7. The test for granting leave for judicial review was applied at page 63 of the judgment in **Sharma v Brown-Antoine** [2006] UKPC 57 the Privy Council at paragraph 4 of the judgment stated as follows:

> *"(4) 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: R v Legal Aid Board, Ex p Hughes (1992) *5 Admin LR 623, 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. As the English Court of Appeal recently said with reference to the civil standard of proof in R(N) v Mental Health Review Tribunal (Northern Region)* [2005] *EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:*

> *"… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."*

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 processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] *4 LRC 712, 733."*

8. This test has been consistently applied by the Privy Council and by Courts around the Caribbean (see, for instance, ***Attorney General of Trinidad and Tobago v Ayers-Caesar [2019] UKPC 44***, para [2], where it is described as *"the usual test"*; and ***National Commercial Bank Jamaica Ltd v Industrial Disputes Tribunal and Peter Jennings [2016] JMCA App 27***, para [9], where it is described as "the now well-known test for the grant of leave").

9. The threshold is not considered to be a high one: see ***Maharaj v Petroleum Company of T&T [2019] UKPC 21*** and ***Attorney General of T&T v Ayers-Caesar [2019] UKPC 44.***

10. The Respondent argues that there is no arguable case and the Applicant's case is hopeless. They argued that the decision maker is the Public Services Commission and not the Comptroller of Customs. They argued that even if a verbal promise was made by the Comptroller, it was an unlawful promise.

11. The Respondents argued that the 2nd and 3rd Defendant along with the Public Services Commission all acted lawfully and the Circulars have been executed to address the human resource issues within the department and having the department concerns being considered by the Minister of Public Service and the generation of a criteria that best suits all or most officers in a manner that is fair and just. They also argued that judicial review is an improper mechanism to challenge the memorandum as it is of a legislative character. Lastly, they argued that the Applicant was promoted so there was no arguable case.

12. The Applicant argues that there was clear representation by the 1st Defendants to him that the provisions of Circular #18 of 2001 would apply to him and that subsequent changes to the rules for promotion within the Customs and Excise Department would not have prejudiced him. The Applicant also pointed out that there are numerous examples of officers initially a part of the group to which the Applicant belongs who were promoted and their promotions made retroactively. The Applicant also argued that the decision not to promote the Applicant was done based on Circulars that had the force of law.

13. I do not agree with the Applicant that because the promises if found to be illegal cannot be the basis of legitimate expectation. There is sufficient evidence provided that person within the group to which the Applicant applied were promoted in accordance with those promises. Further the Minister of Public Services himself indicated that he was looking into the matter and the Circular provided for the special consideration of the officers.

14. I agree with the submissions of the Applicant that there is an arguable case for which leave should be granted.

Unreasonable delay

15. The Respondent has argued that the application is out of time and should not go any further. The Respondent argued that Circular # 22 of 2010, that is, August 23, 2010 was amended by Circular #39 of 2013 dated 20th December 2013 and further amended by Circular #7 of 2018 dated 27 February 2018. As a result, the Respondent argued that the Applicant should have brought the claim within 3 months of that date and so it is out of time by at least 21 months and 9 years for the latest. The Respondent argued that the Claimant has waited and sat on his rights to pursue the instant Application for Permission to Apply for Judicial Review.

16. The Respondent also submitted that the application is also counter to good administration as it is not in the public interest to have the Circulars be kept in suspense as to their legal validity for any longer period of time than is absolutely necessary. They argue to do so counters good administration more than a decade after the initial memorandum came into effect.

17. The Respondent also argued that to grant leave to the Applicant to bring a Judicial Review claim, excessively out of time, would cause substantial hardship to or substantially hardship to or substantially prejudice the rights of other persons employed at the Customs and Excise Department. They argued that a total of 83 officers who have received increased benefits or have been promoted or upgraded under the scheme would be affected and some 20 persons have already retired. They went to argue that it would have a prejudicial effect on half of all Customs Personnel and create chaos and mal administration.

18. The Respondents relied on the case of ***Reynolds v AG*** by Madam Justice Griffith in support of their contention that there was unreasonable delay.

19. The Applicant submits that there was no undue delay in the circumstances and maintained the delay was reasonable, and in any event, delay was caused by the acts and/or omissions and assurances of the Respondents and/or its agents. The Applicant argues that the Circulars were revised over the years and adjustments were made each time. The Applicant also argues that even after its application to the Court, there was another person a similar person in his position was granted relief and their appointment made retroactive.

20. The Applicant also argued relying on ***R v London Borough of Harrow ex p Carter [1994] 26 H.L.R. 32*** that it would have been premature to commence Judicial Review proceedings where the possibility of a resolution between the parties "remain alive." The Applicant argues that the Respondent by its own admittance were still trying to address the grievances of officers in like position over the years.

21. The Applicant further submitted relying on ***Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5*** and ***R v (on application of Croydon Property Forum Ltd) v Croydon LBC [2015] EHC 2403*** that the Respondents have not established that there would be any substantial hardship by extending the time for the Applicant to make the application in relation to the decision not to promote the Applicant. They further argued that this is a great issue of public interest, and as such, the court would wrong to exercise its discretion to reject the application on the grounds of delay.

22. Under CPR 56.5, it states that:

> *"56.5 (1) In addition to any time limits imposed by any enactment, the judge may refuse permission to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.*
>
> *(2) When considering whether to refuse permission or to grant relief because of delay the judge must consider whether the granting of permission or relief would be likely to –*
>
> > *(a) cause substantial hardship to, or substantially prejudice, the rights of any person; or*

(b) be detrimental to good administration.

(3) An application for permission to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

23. The Judicial Committee of the Privy Council in ***Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5*** provides the most up to date exposition of the concept of delay in Judicial Review proceedings. Their Lordships stated

"37. The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether an application has been made promptly or with undue or unreasonable delay.

…

Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.

38. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest. ….

39. If prejudice and detriment are to be excluded from the assessment of lack of promptitude or whether a good reason exists for extending time, the law will not operate in an even-handed way. It is not controversial in these proceedings that, even where there is considered to be a good reason to extend time, leave may

nevertheless be refused on grounds of prejudice or detriment. By contrast, if, without taking account of the absence of prejudice or detriment, it is concluded that there is no good reason for extending time, leave will be refused and their absence can never operate to the benefit of a claimant."

24. Therefore, in deciding promptness, the considerations of prejudice and detriment are relevant issues and bears on whether an extension of time is to be granted.

25. Further the Privy Council approved the approach of Jamadar JA, as he then was, that when considering whether there is a good reason for extending time, the Court must take account of a broad range of factors. This includes but not limited to the merits of the application, the nature of the flaws in the decision-making process, whether or not fundamental rights are implicated and the public policy considerations, to the extent that they may be relevant. Justice Jamadar said:

> *"Of significance in this analysis, is that this wholistic interpretation reveals that it is erroneous to treat the 'good reason' explanation in subsection 11(1) as restricted to whether or not there is good reason for not meeting the statutory time standards or for any delay. A more purposive and expansive reading, driven by the constitutional values identified and the primary purpose and intention of judicial review in public law, permits an interpretation of 'good reason for extending the period' to include a broader range of considerations. Including but not limited to the subsections 11(2) and 11(3) factors, as well as matters such as the merits of the application, the egregiousness of any alleged flaws in the decision-making process, whether or not breaches of fundamental rights are implicated, and whether there are any compelling public interest and/or public policy considerations. Thus, while it is material to inquire whether there is good reason for the failure to file an application for leave within the prescribed time or for any delay, it would be wrong in principle to consider this, or even the issue of an extension of time per se, as a necessary threshold condition." (para 48)*

26. The Privy Council also specifically stated at para 47 that while prejudice or detriment will normally be important considerations in deciding whether to extend time, there will undoubtedly be circumstances in which leave may

properly be refused despite their absence. One example might be where a long delay was wholly lacking in excuse and the claim was a very poor and inconsequential one on the merits, such that there was no good reason to grant an extension.

27. In considering the issue of unreasonable delay by the Applicant, I lean on the Privy Council's decision in the case of ***The Honourable Patrick Manning and 17 others vs Chandresh Sharma*** [2009] UKPC 36 where a delay of four years before making the Judicial Review application was not considered to be unreasonable in the circumstances of that case which involved a continuing breach.

28. I take into consideration the following factors;

    i. The Applicant's particular matter was still in consideration even after his institution of proceedings as seen in letter dated 9th April 2016 and 20th October 2017 and 20th November 2019;
    ii. The Respondents do not deny the allegations of the Claimant that these promises were made;
    iii. The Respondents had indicated that the policy would be reviewed periodically and that they would address those who lost the opportunity to move up to Senior Customs Examiner;
    iv. The allegation that other persons even after the case had been filed had anomalies in their situation rectified by the Respondents
    v. That the case raises issues of constitutional implications including discrimination;
    vi. That the Respondent would not suffer any prejudice by the grant of the extension;
    vii. There are currently only two persons to whom this issue applies and so would not cause chaos in the system;
    viii. Good Administration would dictate that if statutory instruments are being passed and amended contrary to the law then the rule of law would dictate that the Court review it.

29. I therefore hold that the Applicant's delay in bringing this application to Court was not unreasonable, having regard to his evidence. I accept his evidence on that issue.

30. Having regard to all the above I will grant leave for the Applicant to file for Judicial Review within 14 days failing which the Applicant is prevented from filing a claim for Judicial Review without the leave of the Court.

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Westmin R.A. James
Justice of the Supreme Court (Ag)