IN THE SUPREME COURT OF BELIZE, A.D. 2022

Claim No. 72 of 2022

BETWEEN

ASSOCIATION OF LICENSED SURVEYORS OF BELIZE **APPLICANT**

AND

MINISTER OF NATURAL RESOURCES

THE COMMISSIONER OF LANDS

LAND SUBDIVISION AND UTILIZATION AUTHORITY

THE ATTORNEY GENERAL OF BELIZE **RESPONDENTS**

BEFORE the Honourable Justice Geneviève Chabot

Date of Hearing: May 23, 2022

Appearances:

Jaraad Ysaguirre, Counsel for the Applicant
Lavinia Cuello and Samantha Matute-Tucker, for the Respondents

DECISION ON APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

1. By Notice of Application dated the 7th of February 2022, the Association of Licensed Surveyors of Belize (the "Applicant") seeks permission to apply for the judicial review of:

    a) The decision of the First to Third Respondents to apply the provisions of section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land*

Utilization Act with a view to having the decision removed into the Supreme Court and quashed;

b) The refusal of the First and Third Respondents to reconsider their decision to apply the provisions of section 4 of the *Land Utilization Act* on subdivisions done pursuant to section 18 of the *Land Utilization Act*; and

c) The refusal of the First to Third Respondents to provide any reasons for their decision to apply section 4 of the *Land Utilization Act* on subdivisions done pursuant to section 18 of the *Land Utilization Act*.

2. The Application is supported by the joint affidavit of Leonard Ysaguirre and Cecil Arnold, both executive members of the Applicant, sworn on the 7th of February 2022.

3. The Applicant claims that the decision of the Respondents to apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act* is unlawful, null and void.

4. The Respondents submit that there has been undue delay on the Applicant's part in seeking leave for judicial review, and that the Applicant has failed to provide any specific instance or decision which is being challenged.

5. The Application is dismissed. The Application does not clearly establish how the grounds for the Application can give rise to the reliefs sought. If the Applicant is challenging a policy, no arguable case has been made that the policy is *ultra vires* or unlawful. If the Applicant is challenging a decision, the Application was filed well after three months following the decision, without any reasons being offered for the delay.

Legal Framework

6. Rule 56.3 of the *Supreme Court (Civil Procedure) Rules*, 2005 requires a person wishing to apply for judicial review to first obtain permission from this Court. Under Rule 56.2, 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. The first step in the analysis is therefore to determine whether the applicant has the required interest to seek judicial review.

7. The second step in the analysis is concerned with the application itself. In *Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)*,[1] the Privy Council laid out what is now referred to as the "usual test"[2] for leave to apply for judicial review:

[1] [2006] UKPC 57.
[2] See for instance Claim No. 43 of 2021 *Ian Haylock v Primer Minister of Belize et al.* at para. 16, citing *Attorney General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44 and *National Commercial Bank Jamaica Ltd v*

(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. For permission to apply for judicial review to be granted, therefore, an applicant must satisfy the Court that they have an arguable case having a realistic prospect of success. The Court must also be satisfied that no discretionary bar, such as delay or an alternative remedy, applies to the case. The threshold to be met under the *Sharma* test is considered to be low,[3] "at a height which is necessary only to avoid abuse".[4]

Industrial Disputes Tribunal and Peter Jennings [2016] JMCA App 27; Claim No. 761 of 2019 *Julian Johnathan Myvett v Comptroller of Customs et al.*at para. 8.

[3] *Maharaj v Petroleum Company of Trinidad and Tobago Ltd (Trinidad and Tobago)* [2019] UKPC 21; *Attorney General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44.

[4] Claim No. 563 of 2021 *Senator Michael Peyrefitte v Minister of Finance et al.* at para. 40.

The *Land Utilization Act*

9. The *Land Utilization Act*[5] is divided into two Parts. Part I is comprised of two preliminary sections: the short title (section 1) and the interpretation section (section 2). Part II is titled "Subdivision and Utilisation" and is comprised of the remaining 17 sections of the *Land Utilization Act*. Section 4 provides as follows:

> 4. A person wishing to subdivide land to which this Act applies shall submit an application to the Land Subdivision and Utilization Authority established under section 9.

10. Section 18 excludes from Part II of the *Land Utilization Act* certain types of subdivisions. Section 18 provides as follows:

> 18. This Part shall not apply –
>
> *(a)* where the divided portion of any land is transferred to the owner of any land abutting on the subdivided portion; or
>
> *(b)* where the divided portions are to be alienated to the transferor's wife or children and each parcel of land so alienated or devised is provided with a right of way.

The Parties' Submissions

Applicant's Submissions

11. In its brief submissions, the Applicant says that it has an arguable case that the Respondents' decision to apply the provisions of section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act* is unlawful, null and void. The Applicant submits that the Respondents require an application form to be submitted for subdivisions being done pursuant to section 18 of the *Land Utilization Act*, which provides evidence of the indefinite implementation of the "decision/policy" of the Respondents. The Applicant also argues that these application forms provide evidence that the functions conferred on the Land Subdivision and Utilization Authority by the *Land Utilization Act* are being exercised by other persons who have no legal authority to do so.

12. The Applicant claims that it has made several attempts to resolve the current issue with the Respondents before making this Application. The Applicant says that there is no other alternative remedy available.

[5] Cap. 188, revised ed. 2020.

13. With respect to delay, the Applicant submits that the Court should consider that it is not challenging a mere one-off decision of the Respondents in exercising any statutory functions. Rather, it is challenging a continuous policy that requires that an application be submitted for subdivisions done pursuant to section 18 of the *Land Utilization Act*. The Applicant asserts that the time limit of three months to apply for judicial review ought not to apply as there is a continuous violation of section 18.

Respondents' Submissions

14. The Respondents assert that the Applicant has unduly delayed these proceedings as it did not file its application for judicial review until February 7th, 2022, despite its own evidence demonstrating that the decision being challenged was made in May 2021 and that the Applicant was aware of the decision since June 2021. The Applicant has not submitted any good reasons for this delay, nor applied for an extension of time to seek judicial review.

15. The Respondents note that the Applicant has failed to provide any specific instance or decision which is being challenged. Judicial review is a challenge to the way in which a decision has been made, not an evaluation of the conclusion reached. Although at one time the Surveys and Mapping Section was responsible for the administration of section 18 of the *Land Utilization Act*, there is nothing in this legislation that prevents the Minister for Natural Resources from exercising his discretion to assign this function to the Physical Planning Section. The Respondents add that they must guard against abuse of the exemptions falling under section 18, and have thus implemented a system to ensure that section 18 is not misused to bypass the general requirements in the *Land Utilization Act*. Proof has always been required to demonstrate that a subdivision survey is being done for the purposes set out in section 18.

Analysis

16. This Court's decision to deny permission to apply for judicial review rests on the following three grounds: 1) the Application is misconceived and does not clearly establish how the grounds for the Application can give rise to the reliefs sought; 2) if the Applicant is challenging a policy, no arguable case has been made establishing that the policy is *ultra vires* or unlawful; and 3) if the Applicant is challenging a decision, the Application was filed well after three months following the decision, without any reasons being offered for the delay.

The Application is misconceived

17. Under Rule 56.3(3) of the *Supreme Court (Civil Procedure) Rules*, 2005, an application for permission to apply for judicial review shall state, among other information, the relief sought and the grounds on which such relief is sought. For permission to apply for judicial review to be granted, the grounds must be capable of giving rise to the relief sought.

18. The Application is conceived as a challenge to decisions of the administration. Specifically, the Applicant challenges the decision of the First to Third Respondents to apply the provisions of section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act*; the refusal of the First and Third Respondents to reconsider that decision; and the refusal of the First to Third Respondents to provide any reasons for that decision.

19. The reliefs sought are consistent with a challenge to an administrative decision. The Applicant seeks the following reliefs:

    a) An Order quashing the Respondents' decision to apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act*;

    b) A declaration that provisions of section 4 of the *Land Utilization Act* do not apply to subdivisions done pursuant to section 18 of the *Land Utilization Act* and/or a declaration that subdivisions done pursuant to section 18 of the *Land Utilization Act* do not need to be done by way of an application;

    c) A permanent injunction restraining the Respondents whether by themselves, their servants or agents or whosoever until the conclusion of the trial of this claim or further order from in any way acting upon their purported decision to apply section 4 of the *Land Utilization Act* on subdivisions done pursuant to section 18 of the *Land Utilization Act*;

    d) An order of certiorari to remove into the jurisdiction of the Supreme Court for the purposes of being quashed the decision of the Respondents to apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act*;

    e) Costs.

20. However, the grounds for the Application are vague and do not clearly establish how they are capable of giving rise to the reliefs sought. The grounds, as stated in the Notice of Application, are the following:

a) The decision to apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act* is unlawful, null and void;

b) The Respondents have refused requests from the Applicant to reconsider their decision and properly apply the provisions of the *Land Utilization Act*;

c) There is a serious issue to be tried;

d) The Applicant has sufficient interest in the subject matter and its members are directly affected by the decision of the Respondents; and

e) The Applicant fears that unless restrained the Respondents, their servants, and their agents will take steps to continue to enforce its decision to the detriment of the Applicant, its members and their business interests.

21. The grounds for the Application are deficient in several ways. First, the grounds for the Application do not clearly identify the nature, the date, and the decision-maker of each of the decisions being challenged. Second, the grounds for the Application do not clearly identify the basis upon which it is claimed that the decisions are "unlawful, null and void". Third, and most importantly, the Application conflates the challenge of a decision with the challenge of a policy.

22. The Applicant seeks to challenge "decisions" of the Respondents in relation to section 18 of the *Land Utilization Act*. However, it is clear from the joint affidavit in support of the Application, the Applicant's Skeleton Arguments filed on request by the Court, and counsel's oral submissions that what the Applicant is seeking is a review of the outcome of the decisions, namely the adoption of the alleged policy to apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act*. A judicial review is a challenge to the way in which a decision has been made, not of the rights and wrongs of the conclusion reached. The Applicant did not make any submissions in relation to the way in which the Respondents' decision to allegedly apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act* has been made. The Application is therefore misconceived and deficient as a challenge to an administrative decision.

23. A policy of the administration can be challenged through judicial review proceedings, even in the absence of any decision being made under that policy. The lawfulness of the policy must be at issue. As explained by the Federal Court of Canada:

> [29] […] the jurisprudence is clear that ongoing policies that are unlawful or unconstitutional are "matters" that can be challenged at any time under s 18.1(1) of the *Federal Courts Act*. An applicant can discretely challenge a policy for its

> legality and can do so in the absence of a decision applying and or interpreting that policy. That is, challenging the lawfulness of a policy can be a distinct circumstance from challenging a decision based on a policy.[6]

24. This Application could, and should have been conceptualized as a judicial review of the Respondents' alleged policy to apply section 4 of the *Land Utilization Act* to subdivisions done pursuant to section 18 of the *Land Utilization Act*. The Application should have clearly set out the grounds for the Applicant's contention that the policy is unlawful, and provide for the appropriate relief. The Applicant failed to do so. This Application is therefore also misconceived and deficient as a challenge to a policy.

25. While the misalignment of the reliefs sought and the grounds for the Application is sufficient to dismiss this Application, even if the Application had been properly conceived as either a challenge to a policy or a challenge to the way in which the decisions were made, the Application suffers from incurable deficiencies which would in any event have resulted in its dismissal.

No evidence of unlawfulness of policy

26. The Applicant was unsuccessful in establishing an arguable case that the policy is unlawful. The Applicant's case is that the Respondents require an application for the approval of subdivisions done under section 18 of the *Land Utilization Act*. The Applicant also challenges the fact that the applications for section 18 subdivisions are processed by the Physical Planning Section instead of the Land Subdivision and Utilization Authority.

27. Section 18 of the *Land Utilization Act* removes certain types of subdivisions from the regular process set out under section 4 of the *Land Utilization Act*. None of the provisions in Part II of the *Land Utilization Act* apply "where the divided portion of any land is transferred to the owner of any land abutting on the subdivided portion" or "where the divided portions are to be alienated to the transferor's wife or children and each parcel of land so alienated or devised is provided with a right of way".

28. Apart from exempting these types of subdivisions from the process under section 4, section 18 of the *Land Utilization Act* is silent as to how these subdivisions should be processed. The Applicant attached to the 2nd Affidavit of Leonard Ysaguirre documents that purport to be applications for approval under sections 18(a) and 18(b) of the *Land Utilization Act*. The Applicant did not clearly explain how filling out these forms amounts to making an application under section 4. The Respondents assert that they require proof to demonstrate that a subdivision survey is being done for the purposes set out in section 18 so as to guard against abuse of the exemptions. There is nothing in the *Land Utilization Act* to prevent the

[6] *Browne v. Canada (Attorney General)*, 2021 FC 389 at para. 29.

Respondents from requiring information for the purpose of establishing entitlement to the exemptions at section 18.

29. In addition, the Applicant's suggestion that the Respondents are acting *ultra vires* by processing exemptions under section 18 through the Physical Planning Section instead of the Land Subdivision and Utilization Authority is puzzling. The Land Subdivision and Utilization Authority is established under section 9 of the *Land Utilization Act*, which is located within Part II of the *Land Utilization Act*. Subdivisions under section 18 are removed from the process under Part II of the *Land Utilization Act*. Therefore, it is specifically contemplated that exemptions under section 18 of the *Land Utilization Act* are *not* to be processed by the Land Subdivision and Utilization Authority. The Applicant has not demonstrated that the Physical Planning Section does not have the authority to process exemptions under section 18 of the *Land Utilization Act*.

Unreasonable delay in challenging the decisions

30. The Applicant challenges three decisions of the Respondents in relation to section 18 of the *Land Utilization Act*. As previously noted, the Applicant failed to provide any date for the decisions being challenged.

31. From the Applicant's own admission, it knew by June 4th, 2021 that the Respondents had put new requirements in place.[7] This Application was filed on February 8th, 2022, some 8 months later and was deemed by the Applicant to be "urgent". No reasons have been offered to explain why the Applicant waited 8 months before filing the Application, and why the Application needed to be considered with urgency.

32. In its Skeleton Arguments, the Applicant seeks to justify its failure to file the Application sooner by stating that it is challenging not "a mere one-off decision of the Respondents in exercising any statutory function rather it is a challenge to a continued policy". Thus, argues the Applicant, "the question of delay is not applicable and ought not to detain the Court as to whether permission should be granted". The Applicant relies on the decision in *R v Rochdale Metropolitan Borough Council Ex Parte Schemet*[8] in support of its contention that delay ought not to lead to the rejection of an application challenging a change in policy.

33. The difficulty with the Applicant's argument is that up until that point, it had framed its case as a challenge to the Respondents' *decisions* to implement a policy, to reconsider the implementation of the policy, and to refuse to provide reasons for the policy. Having to overcome the discretionary bar of delay, the Applicant now reframes its case as a challenge to the policy itself. The Applicant cannot have it both ways. It cannot reframe its case to circumvent rules that are inconvenient to it. At the very least, the Applicant could have

[7] Joint affidavit of Leonard Ysaguirre and Cecil Arnold at para. 7(d).
[8] [1994] ELR 89.

provided some justification for the delay. It could also have requested an extension of time to make this Application. Having done neither, the Court has no choice but to conclude that the Application was impermissibly delayed.

Conclusion

34. While the threshold is low, the requirement to establish an arguable case on which to ground an application for permission to apply for judicial review is not a mere technicality. An application must clearly demonstrate how the grounds for the application can give rise to the relief being sought. A proper basis must also be put forward to persuade the Court that the claim has a reasonable prospect of success. Failure to do either will lead to permission being denied.

IT IS HEREBY ORDERED:

(1) The Application is dismissed.

(2) Costs are awarded to the Respondents and shall be agreed upon by the parties. Should the parties be unable to agree, they may apply to this Court for a ruling on costs.

Dated June 22, 2022

Geneviève Chabot
Justice of the Supreme Court