

COMMONWEALTH OF THE BAHAMAS

2021

IN THE SUPREME COURT

PUB/jrv/00021

Public Law Division

IN THE MATTER of Order 53 Rule 3 of the Rules of the Supreme Court

IN THE MATTER of the Constitution of the Commonwealth of The Bahamas

IN THE MATTER of an Application for leave to apply for Judicial Review BY
DARRYL ELMER BARTLETT

BETWEEN

DARRYL ELMER BARTLETT

Applicant

AND

BAHAMAS CIVIL AVIATION AUTHORITY (BCAA)
COMMONWEALTH OF THE BAHAMAS

First Respondent

AND

THE ATTORNEY GENERAL AND THE MINISTER OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF LEGAL
AFFAIRS

Second Respondent

Before: The Hon. Madame Justice Donna D. Newton

Appearances: Bjorn Ferguson for the Applicant

David Whymns, with Kristin Stubbs for the First and Second
Respondents

Hearing Date: 15th June, 2022

Decision Date: 9th March, 2023

RULING

Civil – Judicial Review – Leave to Apply for Judicial Review – Application to set aside leave – Statutory Appeal – Full and frank disclosure – Alternative remedy

On 22nd October 2021, the Applicant sought and was granted Leave to Apply for Judicial Review (the ‘Leave application’) against the decision of the Civil Aviation Authority of The Bahamas to refuse to renew his Airman’s/Pilot’s licence. Both the Leave application and the Affidavit in Support were filed on 29th June 2021. The ex parte summons which commenced the application was filed along with a Certificate of Urgency on 1st July 2021. The hearing of the substantial Application for Judicial Review was scheduled to be heard at a later date. Prior to the coming on of that application, the First and Second Respondents applied to have the leave set aside.

Introduction

1. The First Respondent (“the Authority”) and Second Respondent (The Attorney General and Minister of Legal Affairs) (collectively “the Respondents”) by Summons filed 8th April 2022, applied to have the Leave granted for Judicial Review set aside. The Respondents contend that the Leave should be set aside on the grounds that there exists an alternative remedy available to the Applicant in the form of a Statutory Appeal. Further, the Applicant has failed to make full and frank disclosure during the hearing of the ex-parte application for Leave. The Respondents also seek costs.

2. On 15th June 2022, the Respondents application to set aside the Leave and the substantial Judicial Review application came on for hearing. The application to set aside, was heard first, as the decision would be determinative of whether there would be a subsequent hearing of the substantive Judicial Review application.

Background

3. The Respondents rely on the affidavit of Alexander Ferguson (the “Ferguson Affidavit”) the Acting Director of the Authority, filed on 8th April 2022. The Ferguson Affidavit was also filed in response to the Applicant’s Notice of Motion filed on 1st November 2021. The Motion was for an Order of Certiorari to quash the 24th March 2021 decision of the former Director General of the Authority, Michael Allen, which decision denied the Applicant’s renewal of his Pilot’s licence.

4. The Applicant obtained his Pilot's licence in June 2001. In February 2015 he was convicted and sentenced to 2 years 6 months imprisonment on several counts of possession, conspiracy to possess and importation of dangerous drugs in the Magistrate's Court. The Applicant appealed this sentence and the Court of Appeal granted him bail on the condition that he surrender his Pilot's licence and that he is not issued with a new licence without the approval of the Court. After hearing the Applicant's appeal, the Court of Appeal found that, having regard to the role the Applicant played in the offences and the amount of dangerous drugs involved, his sentence was increased to 5 years.

5. In May 2015 during his incarceration the Applicant's Pilot's licence expired.

6. Three weeks after his release from prison, on 12th December 2019, he applied to have his Pilot's licence renewed.

7. The facts indicate that the Authority, after conducting a background check, discovered the said conviction for drug possession. However, it was not until September 2020 that the Authority advised the Applicant that his renewal application was under review. Subsequently in March 2021 the Applicant applied for leave for Judicial Review and for an Order of mandamus that the Authority renews his Pilot's licence. Further requests were for declarations that the delay in rendering the decision was unreasonable and that the Applicant was being treated with bias.

8. The Authority claimed to become aware of the ex parte application on 24th March 2021. Michael Allen, then Director General wrote to the Applicant denying the request for renewal on the ground that he was not considered a fit and proper person to be issued the Pilot's licence as required by section 21 of the Civil Aviation Act (CAA) 2021.

9. Following the denial, the Applicant lodged an appeal with the Authority on 30th April 2021 pursuant to section 44 of the CAA, which is an appeal to the Director General against enforcement actions. On 3rd June 2021, Mr. Allen responded to the appeal advising the Applicant that section 44 was not applicable to his appeal and that his appeal was also lodged out of time.

10. The Applicant subsequently filed an Application on 1st July 2021 for Leave to Apply for Judicial Review regarding the refusal of the Pilot's licence. It is against this background that the instant application was filed.

Submissions

11. Counsel for the Applicant in support of his application submitted that the Authority has failed to comply with section 21(3) CAA which provided that

“where any information pursuant to subsection (1) is to be taken into consideration by the Director General that may be prejudicial to a person, the Director General shall disclose that information to the person and give that person a reasonable opportunity to make a written or oral representation, either by himself or some other person, unless such information ought not to be disclosed in the public or national interest”.

and in so doing, he submitted, the Authority has acted illegally.

The Authority he submitted, only considered the ‘fit and proper’ criteria listed in section 22 (2)(c) CAA and not the entirety of section 22 CAA. In the circumstances, he stated, the Applicant was denied natural justice.

12. Counsel for the Applicant argued that his client was not allowed a reasonable opportunity to make written or oral representation in objection to the decision to deny the renewal of his Pilot's licence. Further, he claimed, the delay in rendering the decision was unreasonable, irrational and constituted an abuse of power and /or the process; and does not constitute proper public administration.

13. Notwithstanding the arguments proffered on behalf of the Applicant, the Respondents submitted that the Applicant has failed in his duty to the Court to provide material disclosure. Counsel explained that in the Applicant's affidavit in support of his Leave application, facts were omitted which had a direct impact on the length of time that it took the Authority to determine the renewal application. The omitted facts directly impacted whether the Applicant should have pursued the current claim for Judicial Review. There was nothing illegal, unreasonable or irrational in the decision to deny the renewal of the licence.

14. In his affidavit evidence the Applicant explained how he came to be without his licence, which was obtained in June 2001 and expired in May 2015. Prior to the expiration of that licence he was convicted in the Magistrates Court **“for drug related offences and sentenced to 5 years imprisonment”**. The Applicant avers that in or around 12th December 2019 he applied to have his pilot’s licence renewed. While the Authority’s former Director General, Mr. Allen, confirmed receipt of the renewal application the Applicant did not receive any response to emailed inquiries as to the status of his application until 28th January 2021. The Applicant stated that on 9th February 2021 his Counsel also wrote the Authority enquiring on the status of his renewal application.

15. Mr Bartlett in his supporting affidavit explained that the denial has directly affected his ability to earn a living as he is unable to perform his chosen profession. Moreover, he claimed that the application for renewal was not considered in accordance with the CAA 2021.

16. The Respondents identified the issues for consideration in this application as:

- a) Should the Leave be revoked due to lack of full and frank disclosure and or that an alternative remedy exists for the Applicant.
- b) Alternatively, if the Leave is upheld; was the delay in making the decision to grant or revoke the application unreasonable or an abuse of power?
- c) Was the decision of the [Authority] illegal, irrational or procedurally improper?
- d) Was the Applicant denied access to Natural Justice?
- e) Should the former Director General’s decision be upheld?

17. The threshold for Leave is low, therefore at this stage of the proceedings the only viable issues appear to be the issue mentioned at **“a”** that is, should the Leave be revoked due to lack of full and frank disclosure or that an alternative remedy exists for the Applicant.

18. The issues at **“b”** through **“d”** which include the Applicant’s assertion that the Authority should consider the entirety of section 22 CAA rather than the fit and proper criteria at section 21(3) may be considered if there is a substantive Judicial Review hearing.

19. In support of their application Counsel for the Respondents, referred to Order 53 Rule 1 of the Rules of the Supreme Court (RSC), which mandates that no application for judicial review shall be made unless the applicant obtains Leave of the Court to do so. They also submit that even where an alternative remedy exists, in exceptional circumstances, the Court may still grant leave for the applicant to apply for judicial review, as per *R v Secretary of State for Home Department ex parte Swatti 1986 1 WLR 477*. Lord Donaldson stated:

“By definition, exceptional circumstances defy definition, but where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.”

20. Counsel for the Respondents also relied on the dicta of Charles J in *Cable Bahamas Ltd. v Utilities Regulation and Competition Authority [2021] PUB/jrv/0027* in which the Learned Judge, on an application for Leave, pointed out that each case will be determined on its own peculiar facts and circumstances. In the *Cable Bahamas* case the dicta of Winder J (as he then was) in *Lacroix v Stipendiary & Circuit Magistrate Derrance Rolle-Davis et al [2013] 3 BHS J. No. 68* details at paragraph 46 what is required in such applications:

“This case falls without the category of “exceptional circumstance”, and as Glidewell LJ in *R v Hallstrom, ex p W [1958] 3 All ER 775* at 789,790 said;

‘Whether the alternative statutory procedure would be quicker, or slower, than procedure by way of judicial review, whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a Court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available.’

21. Counsel for the Respondents referring to their additional ground, submitted that the Applicant did not provide full and frank disclosure to the Court relative to his drug convictions which he had a duty to make. He explained that the Applicant failed to mention the fact that the Court of Appeal extended the two year sentence imposed by the Magistrate to five years. In light of this, he submitted, the Court is entitled to refuse the application for judicial review. He relied on the case of (*R v Secretary of Home Department [2007] EWHC 3103 Admin* and *Brink’s Mat Ltd*

v Elcombe [1988] WLR 1350) which explained that it is imperative that the applicant in such cases makes full and frank disclosure of all facts known to him or which should have been known to him.

Alternative Remedy

22. Counsel further argued that there is an alternative remedy available to the Applicant under Section 44 CAA. To support this contention he relied on the case of *R (on application of Norfolk Meat Traders Ltd.) v Great Yarmouth Magistrates Court [2017] EWHC 1775 (Admin)*. Counsel for the Respondents in his submissions explained that there are examples in case law as to why judicial review is not always the most appropriate starting place for an aggrieved party. In the instant matter as in *Norfolk Meat Traders Ltd v Great Yarmouth Magistrates Court*, there is a statutory remedy available to the Applicant.

23. Counsel for the Respondents also argued that the Authority was acting within its prescribed functions under section 4(1)(d) of the Civil Aviation Authority Act 2021 (CAAA) when the renewal application was considered and denied. The functions of the Authority under the said section are:

(d) to issue, renew, suspend or revoke certificates, licenses, permits, approvals, registrations and such other requisite authorizations as necessary under this Act, the Civil Aviation Act and any operating regulations.

24. On the facts of the instant case, the Respondents submitted, that the Applicant does not fit into the category of exceptional circumstances. Counsel for the Respondents reiterated that the Authority provides an appeals process and it is within those provisions that the merits of the dispute should be considered.

Analysis & conclusion

25. There has been no challenge as to whether the Applicant has met the other requirements for Leave, which are, whether he has sufficient interest in the matter and whether he acted promptly. As such I take it these are conceded.

26. It is undisputed that the Director General of the Authority has statutorily defined powers under section 16(1)(c) of the CAAA 2021 to ‘**grant, revoke, suspend, vary or impose conditions on an aviation document.**’ The Applicant

challenged the way in which these powers that are vested in the Director General, were exercised in reaching his decision.

27. Nevertheless, whenever a party moves the Court ex parte it is incumbent upon him to ensure that all of the relevant facts are disclosed so that a fair determination of the matter can be made. The principles relied on in the English Court of Appeal case of **Brink's Mat** (on injunctive relief), by Counsel for the Respondents, are of fundamental consideration in matters of judicial review. Those principles can be summarized as follows:

- i. it had been the plaintiffs' **duty to make full and frank disclosure** of the material facts when applying;
- ii. material facts are those **which it is material for the judge to know in considering the application; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers;**
- iii. the duty of disclosure applied to material facts known to the plaintiffs and any additional facts which would have been known had proper inquiries been made the applicant;
- iv. the extent of those inquiries depended on all the circumstances of the case;
- v. it should be ensured that the plaintiffs were deprived of any advantage derived from a breach of the duty of disclosure;
- vi. **the question whether a fact not disclosed was sufficiently material to justify the immediate discharge of the injunction depended on the importance of the fact to the issues to be decided; and**
- vii. The court has a discretion to continue the order, notwithstanding proof of material non-disclosure which justifies the discharge of said order.

28. As determined in the **Brink's Mat** case it is imperative that during the hearing of any ex parte application, that the Applicant makes full and frank disclosure to the Court of the material facts. The Applicant's closet must be "**laid bare**" as it were. The material facts should be decided by the Court and not as

opined by the Applicant or his legal advisers. If the Applicant is allowed to cherry pick what to place before the Court, he may choose only what he believes to be beneficial to his case. In doing so he may withhold information that the Court may objectively use to determine the material facts.

29. I find that the Applicant's affidavit did not omit any substantial and/or significant details as to how he came to be without a Pilot's licence. The Applicant averred that he had been convicted and sentenced to five years imprisonment for **'drug related offences'**. His licence expired in May 2015 during his incarceration, which he acknowledged. The Applicant omitted to state that the **"Court of Appeal"** increased his two year sentence to five years due to the role they considered him to have played in the crime.

30. Adapting the principle outlined in the Brink's Mat case that:

"the question whether a fact not disclosed was sufficiently material to justify the immediate discharge of the injunction depended on the importance of the fact to the issues to be decided";

I do not find those omitted facts were sufficiently material to the facts in issue to justify setting aside the Leave that was previously granted.

31. I find that there has not been any relevant non-disclosure in this matter, the Applicant has in the circumstances complied with his duty to make full and frank disclosure during the Leave application. As explained in the case of Brink's Mat in reliance on (*R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514*):

"Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. ...

"...when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant ... a second injunction if the original no-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed." Per

Glidewell L.J. in Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc., ante, pp.1343H-1344A.”

32. Further, there is an **alternative remedy** available to the Applicant with the Authority that has not been pursued to completion, as alleged by the Respondents. In the Authority’s letters of 3rd June 2021 and 15th July 2021, the Applicant was advised to review his position and lodge an appropriate statutory appeal. The Respondents have submitted in reliance on the case of **Swatti** that the Applicant has no exceptional circumstances that could be used by the Court to allow the Leave to Apply. However, it is of note that the Applicant does not plead exceptional circumstances in the Leave Application. In any event the appeals procedure is addressed at sections 34 and 33(2)(c) of the CAA respectively which state:

Section 34 – Objection to proposed decision

(1) The holder of an aviation document who has received notice that the aviation document has been –
(c) revoked,
may object to that decision in accordance with section 33(2)(c), and as specified in the notice.

Section 33(1-2) – Notice of decision

(1) Where the Director General –
(c) has revoked an aviation document;
he shall issue a written notice in accordance with this section.
(2) The notice shall –
a) notify the person directly affected by the action or proposal referred to in paragraph (3) of that action or proposal;
b) inform that person of the grounds for the action or proposal;
c) specify a date by which submissions may be made to the Director General in respect of the action, which date shall not be less than twenty-one days after the date on which the notice is given.

33. The above statutory provisions read together clearly show that the Director General is to specify a date to allow for written submissions within twenty one days of the Applicant being issued an adverse decision. It is incumbent on both parties to follow the appropriate appeals procedure as prescribed by the CAA. The

appeals route with the Authority should have been exhausted before any further consideration is given to the Applicant in the Supreme Court. However, the proper process was not followed by the Authority. There is no evidence that the Applicant was afforded proper notice and provided a date when he could address the Authority on the renewal pursuant to section 33(2)(c). Even if it is accepted that the Applicant applied under the wrong provision a decision was rendered and as such he was entitled to have his appeal heard by the Authority.

34. I agree with Counsel for the Applicant that he was wrongly advised that his appeal should have been lodged under Section 44. This is not the appropriate section.

35. As stated, the threshold is low and I am satisfied that the Applicant has met the standard required to obtain Leave to apply for Judicial Review. The Respondents' application to set aside the Leave is therefore dismissed.

36. The Applicant's Judicial Review Application should be heard on the merits.

37. There will be no order as to costs.

DONNA NEWTON

Justice