[2015] JMCA Civ 53

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 87/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**THE CHILDREN'S ADVOCATE DIAHANN GORDON-HARRISON**	**APPELLANT**
AND	**SYDNEY BARTLEY**	**RESPONDENT**

Written submissions filed by Mrs Jacqueline Samuels-Brown QC for the appellant

Written submissions filed by Miss Catherine Minto instructed by Nunes Scholefield Deleon & Co for the respondent

4 May and 23 October 2015

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PANTON P

[1] The facts, orders and submissions relevant to this appeal have been set out in detail in the judgment of my learned brother Dukharan JA. I agree with his conclusion that this appeal ought to be dismissed. However, I wish to add a few words.

[2] The respondent is a senior public officer. He is a Permanent Secretary. On or about 16 January 2014, a serious complaint was allegedly made against him at the Office of the Children's Advocate. It seems that subsequently he was either instructed or persuaded to proceed on vacation leave. This he did. While on leave, he attempted to travel to the United States of America. However, his attempt was frustrated as he was denied exit from the country on the basis that there was a "Stop Order" in place against him. He was not given the courtesy of being told the reason for the "Stop Order".

[3] A judge of the Supreme Court has granted the respondent leave to apply for judicial review in respect of the "Stop Order". It is hoped that this review will be done without further delay. However, the respondent, as would be expected, wishes to know the nature of the complaint made against him at the Office of the Children's Advocate. Morrison J made an order for the details of the complaint to be disclosed to the respondent. The Children's Advocate is aggrieved by this order; hence, this appeal.

[4] I am content to dispose of this appeal by referring to section 13(3)(f) of the Jamaican Constitution. It provides that every Jamaican and every person lawfully in Jamaica is guaranteed freedom of movement: "…to move around freely throughout Jamaica, to reside in any part of Jamaica and to leave Jamaica". This freedom may only be interfered with or obstructed by action that is authorized by law. For example, where someone is charged with a criminal offence, the court may, as a condition of bail, order that the accused person be not allowed to travel except with the permission

of the court. This, I stress, is only an example. There are other situations, but they all have to be authorized by law.

[5] In the instant case, as will be seen from the details narrated in the judgment of Dukharan JA, it is clear that the "Stop Order" is linked to the complaint allegedly made, and acted on, by the Office of the Children's Advocate. Leave has been granted to challenge the "Stop Order". The respondent is therefore entitled to know the details of the complaint for the purpose of the judicial review which he seeks. He would have been entitled to know them, in any event.

[6] The Children's Advocate does not have any statutory right to withhold such information in circumstances where the respondent's right to freedom of movement has been severely restricted. This point is, in my view, impatient of debate. The Constitution guides us. In my opinion, the appeal is wholly without merit.

DUKHARAN JA

[7] The appellant Mrs Diahann Gordon-Harrison holds the statutory office as the Children's Advocate, which is a Commission of Parliament, established pursuant to section 4 of the Child Care and Protection Act (the Act) for the purposes of protecting and enforcing the rights of children.

[8] The respondent, Sydney Bartley, was the Permanent Secretary in the Ministry of Youth and Culture at the time of the incident which gave rise to this suit. He had been

appointed as such in June 2013, having been employed in the service of the Government of Jamaica since 1990.

[9] In October 2013, the Minister of Youth and Culture, The Honourable Lisa Hanna, advised the respondent that she had received reports that he was entertaining persons, in particular young boys, in the offices of the said ministry late at nights. She asked him to desist. On, or about 16 January 2014, an official complaint was lodged at the Office of the Children's Advocate (the OCA) and officially recorded in the OCA's journal of complaint. The complaint recorded no names but spoke to alleged sexual impropriety by a senior public official against a male child.

[10] Consequent on the report, the OCA commenced investigations in a bid to determine 'how to treat the matter depending on the information gathered during the investigations'. On 17 January 2014, a letter was sent to the Minister from the appellant, advising her that the above complaint was made against her permanent secretary, the respondent. This information was brought to the respondent's attention by the minister. He was told that it was best that he proceeded on leave with a view to early retirement.

[11] The respondent subsequently applied for vacation leave. On 21 February 2014, he boarded an American Airlines flight en route to New York. He was removed from the flight by immigration officers and informed that there was a stop order barring his exit and that investigations were being pursued against him. No further details were provided to the respondent.

[12] The respondent alleged that on 24 February 2014, a general staff meeting was convened in his absence at the Ministry of Youth and Culture where the appellant proceeded to publish the following words:

> "I am from the Office of the Children's Advocate and I am here to conduct an investigation in relation to Sydney Bartley. We will be interviewing all staff members and if you fail to cooperate, criminal proceedings may be taken against you."

The respondent stated that the appellant has yet to disclose to him any details pertaining to the allegations made against him, or even the fact of the investigations and why it was necessary to issue a stop order.

[13] Subsequently, the respondent sought and on 6 May 2014 Straw J granted leave to institute proceedings for judicial review in, inter alia, the following terms:

> Leave to apply for judicial review by way of certiorari to quash the "stop order" which was issued by the appellant, or, which the appellant caused to be issued against the respondent and thereby restricting the respondent's personal liberty and freedom of movement in contravention of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.
>
> Mr Bartley was also granted a stay in relation to any stop order in existence on 21 February 2014.

[14] Straw J, in granting leave, simultaneously refused leave for other reliefs sought by the respondent, namely, to prohibit the appellant from carrying out or continuing to carry out investigations into allegations of sexual misconduct by the respondent, amounting to criminal acts relative to children. This included a narrative of acts alleged to have been committed, name of complainant(s), date, time etc., constituting acts of misconduct being investigated and all documentary evidence gathered relative to the complaints and details of the investigation.

[15] The respondent, on 29 May 2014, filed a notice of application for court orders seeking, inter alia, disclosure, inclusive of (a) the nature of the complaint allegedly lodged against the respondent at the Office of the Children's Advocate on or about 16 January 2014 and officially recorded on or about 20 January 2014. The application was heard by Morrison J on 29 September 2014, wherein he granted orders in terms set out in the formal order. Paragraph 1 of the order states that specific disclosure was to be made. In doing so, the learned judge gave his reason as follows:

> "One of the basic provisions of fairness dictate [sic] that a person against whom a complaint is made must be given sufficient details of those allegations in order to meet the case at the full court hearing."

[16] It is against this background that the following grounds of appeal were filed which are as follows:

> "a. The learned trial judge erred in ordering that the information/material be disclosed to the Claimant.
>
> b. The learned trial judge's findings of law are not applicable to the Respondent's claim for judicial

review as no case has been laid against him by the Appellant.

c. The learned trial judge's findings of law are not applicable to the Respondent's claim for judicial review as the judicial review proceedings were instituted by him and there is "*no case [for him] to meet at the full court hearing*."

d. The material sought to be disclosed is not reasonably necessary for and/or relevant to the Respondent's prosecution of the judicial review proceedings.

e. The application made by the Claimant for disclosure is in essence a repetition of an application made by the said Claimant to a judge of the Supreme Court when leave was being sought. The said application was refused by the said learned judge and is accordingly res judicata as between the parties.

f. The material ordered to be disclosed arises from a sensitive investigation being carried out by the Children's Advocate in accordance with her statutory powers and is accordingly not amenable to disclosure.

g. Pursuant to the Child Care and Protection Act in particular section 7 of the Act, the Appellant is barred from making the disclosures sought.

h. Pursuant to the Child Care and Protection Act in particular section 7 of the Act, the Respondent is not entitled to the disclosures sought.

i. The Respondent is not entitled to the disclosure made by the court.

j. These not being proceedings for the prosecution of an offence pursuant to the Child Care and Protection Act, the Respondent is not entitled to the disclosure sought.

k. The order for disclosure is contrary to common law and statutory provisions for the promotion and

protection of the best interest, safety and well being of children.

l. There is no rule of law which entitles a citizen to material gathered in the course of an investigation where said investigation is not followed by the laying of charges or the institution of civil proceedings in private or in the realm of public law against that individual.

m. It is the law that no citizen is entitled to disclosure of material gathered in the course of an investigation where said investigation is not followed by the laying of charges or the institution of civil proceedings in private or in the realm of public law against that individual."

[17] The orders sought are:

a. The order made by Morrison J for disclosure as particularized herein be set aside.

b. Costs to the appellant for this appeal and the hearing of the application at first instance.

[18] Mrs Samuels-Brown QC, for the appellant, in her written submissions, submitted that the order made by Morrison J was at the very least pre-emptive, as the disclosures, as sought and ordered, could not properly precede the court's determination of the propriety of the procedures adopted by the appellant and a determination as to whether the OCA's action requesting the stop order attracts certiorari orders. It was submitted that, in any event, judicial review was ordered in terms limited to the issues of the power to issue the stop order against the respondent and the disclosure was not necessary for the determination of whether the OCA had the authority to act as it did in requesting the stop order.

[19] Learned Queen's Counsel submitted that disclosure was essentially a repetition of orders sought by the respondent but was denied by Straw J, when the respondent's application for leave was heard. That decision of Straw J was not challenged by the procedure mandated by the Civil Procedure Rules (CPR) and the respondent ought not now to be allowed to do so. Counsel argued that, as between the parties and for the purposes of this continuing application, the matter is *res judicata*.

[20] Counsel further submitted that section 7 of the Child Care and Protection Act (the Act), as well as paragraphs 19 and 22 of the First Schedule to the Act, make it clear of the duty of secrecy and confidentiality in the treatment of reports and conduct of investigations into such reports of the breaches of the rights of children and misconduct relative to such children. Counsel further submitted that the procedural and substantive law do not allow for the disclosure sought by the respondent being granted either at the leave stage or subsequent to leave. What was being sought by the respondent, and which was granted by the learned judge was a mandatory injunction which was not permissible in these proceedings. The respondent is seeking orders for disclosure of material relative to the subject of the Children's Advocate's investigation. Counsel argued that it is trite law that, as a general principle, while an investigation proceeds there is no right of disclosure or "natural justice" rights, as would apply in judicial or quasi-judicial hearings. This is indicated only if, and when the person is charged. Counsel relied on the cases of **Herring v Templeman** [1973] 3 All ER 569 and **Moran v Lloyds (a Statutory Body)** 1981 WL 186799.

[21] Counsel for the respondent Miss Catherine Minto, in her written submissions, submitted that the grounds of appeal filed, can be addressed under three issues as follows:

Issue 1 – Ground e

Was the application for specific disclosure res judicata as between the parties?

[22] Counsel submitted that it was evident from the Straw J's reasoning that the dismissal of the application was not intended to be a final adjudication of the issue on its merits. The learned judge was concerned that the application for disclosure was premature, as it was being sought before leave to apply for judicial review had been granted. Counsel relied on the case **R v Secretary of State for the Home Department** [2010] EWCA Civ 727 where it was held:

> "Whatever may be the position at an earlier stage, once permission has been granted to apply for judicial review there is an obligation on the Secretary of State to make proper disclosure …" (at para 50)

[23] Counsel further submitted that it was extremely doubtful that the doctrine of *res judicata* in its several forms, apply in the judicial review context, as the court was not so much concerned with resolving the dispute between the parties, but with the wider public duty in the administration of justice. It was the contention of counsel that the question of issue of estoppel does not and cannot arise in judicial proceedings. Counsel cited several cases including **R v Lancashire County Council ex parte Huddleston**

[1986] 2 All ER 941 and **R v Secretary of State for the Environment ex parte Hackney London Borough Council** [1984] 1 WLR 592 in support of her submissions.

Issue 2 – Grounds a, b, c, d, l and m

> **Was the disclosure ordered reasonably necessary for the just adjudication of the matter? Is there some rule of law barring disclosure in this case, and is disclosure only permissible where the appellant has caused charges to be laid?**

[24] Counsel submitted that the disclosure being sought by the respondent can be found in the CPR. Rule 10.5 provides that the defendant has a duty to set out all the facts on which it relies to dispute the claim and must identify in or annex to the defence any document which is necessary to the defence. Counsel submitted that the appellant was required to disclose the facts and any document she had in her possession.

[25] Counsel further submitted that an order for disclosure in judicial review proceedings is usually unnecessary as public authorities are expected to, and generally do, approach judicial litigation in an open handed manner in the fulfillment of their "duty of candour". Counsel submitted that the appellant has not been operating as is expected of a public authority. Counsel argued that factual disputes do not normally need to be resolved by the court in judicial review proceedings. However, the position is different where the application calls into question the proportionality of a public authority's interference with a constitutional right. In such cases, disclosure of key documents was essential if the court is to perform a careful and accurate evaluation of the facts which formed the basis of, or reason for the decision made by the public authority, and in this case the stop order. Counsel relied on the case **McNicholls v**

Judicial and Legal Service Commission TT 2007 HC 215 and **Ferguson and Galbaransingh v The Attorney General of Trinidad and Tobago** CV 2010-4144 delivered 23 May 2011.

[26] Counsel submitted that where the application called into question the proportionality of a public authority's interference with a constitutional right, disclosure was heightened. Counsel relied on **Tweed v Parades Commission for Northern Ireland** [2006] UKHL 53. Counsel further submitted that in light of the guidance from the authorities, the order of Morrison J ought to be upheld. The learned judge, counsel submitted, exercised his discretion appropriately, and considered the fairness to the respondent in having his counsel provided with all the relevant facts pertaining to the allegations and which influenced the appellant in arriving at her decision to have a stop order issued.

Issue 3 – Grounds f, g, h, i, j and k

Does the Act allow the Children's Advocate to make disclosures of the kind sought by the respondent?

[27] Counsel has challenged the appellant that section 7 of the Act, bars the appellant from making the disclosure sought, even if ordered by the court. Counsel submitted that the appellant must first satisfy the court that a child's interest was in fact adversely affected. The respondent has challenged this and maintains that he assaulted no one and there was in fact no victim. The appellant has no statement from any child or his parent or guardian. Counsel further submitted that this was an express precondition as mandated by section 13(1) and (5) of the First Schedule of the Act. This pre-condition

was important, as it would have confirmed the existence of a child whose interest was affected and prevented a fishing expedition which has occurred in this case. Counsel further submitted that the only statements collected by the appellant are from employees of the ministry, none of whom has any connection with any alleged victim.

[28] Counsel further submitted that the very provisions on which the appellant relies to ground her investigative power, provides for disclosure to the respondent. In her affidavit of 3 March 2014, filed in opposition to the application for leave, the appellant asserted that her investigations were conducted pursuant to the First Schedule of the Act of which paragraphs 13 and 16 are the relevant provisions. Counsel further submitted that paragraph 13 mandates that the investigations should commence with a statement from the child or his parent/guardian. There is no such statement in this case. No aspect of the process of investigation undertaken by the appellant conformed with paragraphs 13 or 16 of the First Schedule.

[29] In reply to the respondent's submissions, Mrs Samuels-Brown submitted that the special statutory provisions of the Act supercede any provisions relative to disclosure at common law or by virtue of statute. The substantive provisions of the Act cannot be circumscribed or limited by the procedural provisions for disclosure in the CPR. She further submitted that the cases cited and relied on by the respondent are distinguishable.

Analysis

[30] As counsel for the respondent stated, the grounds of appeal can be addressed under three issues. The first issue was whether the application for specific disclosure was *res judicata* as between the parties (ground e). It was the contention of the appellant that procedural and substantive law does not allow for the disclosure being sought by the respondent being granted either at the leave stage or subsequent to leave. In refusing disclosure, Straw J said at paragraphs 53 of her judgment:

> "There is no basis for the court to rule that he would be entitled to request … the Children's Advocate to compelled to disclose the information and documents **requested at such a preliminary stage of investigations**." (Emphasis added)

However, in citing Sir John Donaldson MR in **Lancashire County Council ex parte Huddleston** on this point, Straw J found that:

> "In this case there are "cards" to be turned over by the Children's Advocate … Certainly, there is no document containing any stop order before the court, but this is at a stage where Mr. Bartley could not apply for any disclosure …."

It is clear that Straw J recognized that at the leave stage disclosure would not be granted. However, she made it clear when she concluded at paragraph 65, quoting from Sir John Donaldson MR in **Lancashire**, that there was an obligation on public authorities to "explain fully what they have done and why they have done it … to explain fully what has occurred and why".

[31] The authorities make it clear that disclosure ought to follow the grant of leave. In **R (on the application of I) v Secretary of State for the Home Department** Mumby LJ said at para 50:

> "Whatever may be the position at an earlier stage, once permission has been granted to apply for judicial review there is an obligation on the Secretary of State to make proper disclosure …."

[32] It seems clear, in my view, that the appellant's investigations were still at a preliminary stage when the respondent applied for leave before Straw J. There was no final judgment on the issues to be determined as between the parties. It is therefore my view that *res judicata* does not apply in this case.

> **On the second issue, was the disclosure ordered reasonably necessary for the just adjudication of the matter? Is there some rule of law barring disclosure and is disclosure only permissible where the appellant has caused charges to be laid?**

[33] As stated previously, it is the appellant's contention that the procedural and substantive law do not allow for disclosure either at the leave stage or subsequent to leave. According to the appellant, Morrison J issued a mandatory injunction which is not permissible in these proceedings.

[34] In judicial review matters the court has the same case management powers as with any other claim under the CPR. Rule 10.5(1) provides that a defendant has a duty to set out all the facts on which it relies to dispute the claim. In the instant case, disclosure of documents is necessary for the court to make an accurate evaluation of

facts which forms the basis of the decision to issue the stop order. It would seem that the OCA, being a public authority, ought to make full disclosure. The authors of De Smith's Judicial Review (7th Edition 2013, chapter 16, section 4 paras 16 - 027) summarized this duty thus:

> "… once a claim for judicial review is afoot, the defendant public authority is subject to the "duty of candour". The duty of candour requires that the process of judicial review be "conducted with all the cards faced upwards on the table" and acknowledges that "the vast majority of the cards will start in the authority's hands."

This duty continues until the proceedings are resolved.

[35] In **Graham v Police Service Commission and the Attorney General of Trinidad and Tobago** [2011] UKPC 46, it was stated at paras 18 and 19:

> "18 It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision…
>
> 19 … The existence and rationale of the duty are not to be equated with procedural rules and practices concerning the burden of proving facts on leading evidence. Its purpose is to engage the authority's assistance in supervising the legality of its decisions: to uphold those which are lawful, and correct those which are not."

Likewise, in **Belize Alliance of Conservation NGO v Department of the Environment and Anor** [2004] UKPC 6, [2004] Env LR 761 (PC), Lord Walker stated at paragraph 86:

> "It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."

[36] It seems clear from the authorities that the order for specific disclosure granted by Morrison J was correct. The learned judge, in my view, exercised his discretion. What was important was that the respondent sought an order for the information to be disclosed in a sealed envelope to counsel and the court. The respondent was barred from leaving the island based on a stop order. Surely, for the purpose of judicial review, the respondent ought to know the particulars of the date of the alleged offence, victim etc. which led to the stop order.

[37] On the third issue, the appellant objected to disclosure on the basis that it is not in the best interest or welfare of the child and that section 7 of the Act bars any such disclosure even if ordered by the court.

[38] There is no evidence that the appellant has any statement from a child or parent/guardian. Section 13(1) and (5) of the First Schedule of the Act states:

> "13-(1) Subject to the provisions of this paragraph, the Children's Advocate may conduct an investigation into a complaint made by a child, that -
>
> (a) the child's rights have been infringed by any action taken by a relevant authority; or

(b) the child's interests have been adversely affected by any such action.

…

(5) A complaint under this section may be submitted orally or in writing by –

(a) the child, his parent, guardian, next friend or person in *loco parentis*; or

(b) where the child is unable to act for himself by reason of infirmity, or for any other cause or has died, his personal representative, or a member of his family, or any other suitable person."

[39] I agree with counsel for the respondent that section 13 is a pre-condition and it would have confirmed the existence of a child, whose interests were affected. The appellant failed to comply with section 13, which is the section from which she derives her power of investigations. It is quite strange that in her affidavit of 3 March 2014, in opposition to the application for leave, she relied on section 13 of the First Schedule. The appellant in her report to the Director of Public Prosecutions conceded that her investigations failed to unearth any evidence to support any charges.

[40] Based on the foregoing, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

SINCLAIR-HAYNES JA (AG)

[41] I have also had the privilege of the draft judgment of my brother Dukharan JA and I agree with his reasoning and conclusion.

PANTON P

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.