JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO: 148/07

BEFORE: THE HON MR. JUSTICE SMITH, J. A.
THE HON. MR. JUSTICE HARRISON, J. A.
THE HON. MISS JUSTICE G. SMITH, J. A. (Ag.)

BETWEEN	BARRINGTON GRAY	APPLICANT
AND	THE RESIDENT MAGISTRATE FOR THE PARISH OF HANOVER	1ST RESPONDENT
AND	THE ATTORNEY GENERAL	2nd RESPONDENT
AND	DR. DONALD K. DUNCAN	INTERESTED PARTY
AND	ROBERT HENDRICKS	INTERESTED PARTY

Winston Spaulding, Q.C., John Vassell Q.C., Harold Brady, Julianne Mais-Cox and **Cindy Lightbourne** instructed by **Brady & Company** for the applicant.

Nicole Foster-Pusey, Director of State Proceedingsand **Lisa White, Crown Counsel** for the Respondents.

Abraham Dabdoub, Gayle Nelson, and **Winston Taylor** instructed by **Gayle Nelson & Co** for **Dr. D.K. Duncan**

16th , 17th, and 19th October, and 23rd November, 2007

SMITH, J.A.:

This is an application for permission to appeal the order of Mrs. Marva McIntosh, J. made on the 3rd day of October, 2007 whereby she refused leave to apply for judicial review.

The applicant, Mr. Barrington Gray, was a candidate in the recent General Elections. On the 1st day of October, 2007 he filed in the Supreme Court a Notice of Application for Leave to Apply for Administrative Orders. By this Notice the applicant sought the following:

> "(a) Leave to apply for Judicial Review to order the magistrate to count and include in his final tally of votes for the candidates ballots which were improperly rejected by the Resident Magistrate in examining and recounting the ballots in the Polling Divisions 3, 35,42A, 43, 71, 72 and 81 on the grounds that the initials of the Presiding Officers were not on such ballot papers contrary to Section 44(4) of the Representation of the People Act ("the Act").
>
> b) Leave to apply for Judicial Review to prohibit the magistrate from issuing declaration pursuant to section 48(7) of the Act without including in the total number of votes cast for each candidate ballots improperly rejected in Polling Divisions 3, 35, 42A, 43, 71, 72, and 81.
>
> c) An Interim Order pursuant to Rule 55. 3(b) of the Civil Procedure Rules 2002 that the grant of leave operate as a stay of the Magisterial Recount until hearing of the application or further order of the court."

In an affidavit in support of his application for leave to apply to judicial review, Mr. Gray stated:

> "(1)...
>
> (2)...
>
> (3) Pursuant to a request made by Mr. Robert Hendricks, a registered voter, a Magisterial Recount was scheduled to commence at the Lucea Resident Magistrates Court in Hanover before Resident Magistrate, George Burton and the Magisterial Recount

commenced on Friday, September 21, 2007 with the counting of ballots in Polling Division 1.

(4) That on counting the ballots found in the box for Polling Division 3, 25 ballots discovered in that box revealed that the counterfoils on each of those ballots were torn off below the perforation point thus removing from each ballot the initials of the Presiding Officer. Nevertheless the torn off sections including the counterfoils were placed in the envelope and were available before the Resident Magistrate. Of the 25 ballots 12 votes were for me and 13 for Dr. Donald K. Duncan, the Magistrate accepted these ballots as valid votes.

(5) That subsequent to the count of the ballots in Polling Division 3 ballots with counterfoils which were torn off below the perforation point thus removing from each ballot the initials of the Presiding Officer were discovered in six Polling Divisions, namely, Polling Divisions 35, 42A, 43, 71 and 81.

(6) That in relation to paragraph 5 above the Magistrate rejected these ballots on the basis that the official mark of the initials of the Presiding Officer was not on each ballots because of the tearing off of the top portion of these ballots below the perforation. That in an Affidavit of Dr. Duncan sworn to on the 26th day of September, 2007 in Claim No. E 2007/ 03796. Dr. Duncan confirmed that the ballots referred to in paragraph 5 above were in fact rejected and stated at paragraph 30 as follows:

> 'That when court resumed the Magistrate stated clearly that after much consideration he is ruling to reject all ballots that were found which did not have printed thereon that required by law the name of the Constituency or Polling Division No. or space for the Presiding Officers initials, all comprising the Official Mark as there was nothing on the ballot to indicate they were supplied by the Presiding Officer."

(7)...

(8)...

(9)...

(10)...

(11) That the Resident Magistrate had no evidence before him on which it was or could be concluded that the ballots in these Polling Divisions were not the ballots supplied by the Returning Officer to the Presiding Officer and which were duly counted by the Presiding officer at the close of the polls and returned to the Returning Officer who duly counted them at the final count and which were presented to the Resident Magistrate to be the subject of the recount.

(12) That I am advised by the Attorneys-at-law, Brady & Co. and do verily believe that the Magistrate has acted unlawfully and ***ultra vires*** the provisions of Section 44(2) of the Representation of People Act. Consequently having unlawfully rejected 84 ballots, those votes of electors who voted, 58 votes for me and 26 for Dr. Duncan, would alter the final total and could affect the outcome and effectively disfranchising the relevant voters in that he improperly rejected ballots for reasons other than those prescribed by law.

(13) That a previous application was made to the Honorable Court in E 03796 of 2007 and was dismissed. An appeal from that dismissal was heard and dismissed by the Court of Appeal. I exhibit hereto marked **"BGI"** for identity a copy of my application by way of Fixed Date Claim Form together supporting Affidavits which were not signed as well as Dr. Duncan's Affidavit."

The learned judge below in refusing leave to apply said:

"The arguments advanced that the Resident Magistrate was acting ultra vires is not accepted by this court as the Resident Magistrate was not acting outside the powers conferred on him by the Representation of the People Act. "

Further the learned judge said:

> "Judicial Review is a discretionary remedy. Normally when there are other means of challenging the actions of the Court below then this Court will not be quick to grant judicial remedy.
>
> The test of leave is argurability (sic) – to grant the relief sought in this application on the grounds set out to the Court would necessitate the ballots revoked be subpoenaed for the Court to examine them in order to determine whether or not they were improperly rejected."

The learned judge refused leave to appeal to this court.

The applicant now seeks the permission of this court to appeal. The application for permission to appeal went before Harris J.A. who on the 5th day of October, 2007 pursuant to Rule 1.8(7) of the Court of Appeal Rules 2002 directed that the application be heard by the court. Harris J.A. also prohibited the Resident Magistrate from continuing the recount until the determination of the application for permission to appeal.

The general rule is that permission to appeal in civil cases will only be given if the court considers that an appeal will have a real chance of success- see Rule 1.8(9).

The question then is whether or not the applicant has satisfied the court that he has a real chance of success on appeal. In refusing leave for judicial review Mrs. McIntosh, J. held that the Magistrate was not acting outside the powers conferred on him by the Representation of the People Act (ROPA).

Mr. Spaulding Q.C. for the applicant submitted that the learned judge misapplied the legislation to the facts before her. The issue for consideration, he submitted, was essentially whether the Magistrate's rejection of the ballots in issue was in accordance with ROPA. He referred to section 44(2) of ROPA and contended that the real question was whether there was evidence that the ballots were supplied by the Presiding Officer. He referred to the order of the learned judge below and the reasons therefor and submitted that the learned judge misdirected herself in relation to the law and the test applicable to an Application for leave to apply for Judicial Review.

Mr. Vassell Q.C. in support of Mr. Spaulding Q.C. contended that, on the evidence of the Resident Magistrate, it is clear that he rejected the ballots in question primarily on the ground that the presiding officer's initials were not on them. The Magistrate in so doing made an error of law in the course of reaching his decision whether to accept or reject the ballots and prima facie certiorari will issue to quash that decision. He cited ***R v Cripps exparte Maldoon and Others*** [1984] 2All ER 705 2All ER 705; ***Re Racal Communications Ltd*** [1980] 2 All ER 634; de Smith, Wolfe and Jowell Review of Administrative Action 5th Edition para. 5-033 et seq in support of his contention that it is certainly arguable that the learned judge fell into error in refusing leave for judicial review of the magistrate's decision.

Mrs. Foster-Pusey, Director of State Proceedings, in the Attorney General's Office, submitted that permission to appeal in civil cases should only be given if the court considers that there is a real chance of success – Rule 1.8(9) of the Court of Appeal Rules 2002. She cited ***Swain v. Hillman and Another*** [2001] 1 All ER 91 where Lord Woolf explained that the word "real" means that the prospect of success must be realistic rather than fanciful. The learned Director of State Proceedings adverted to the Orders that the applicant sought in the Court below, what the court below was required to determine, the alternative remedies available, the exercise of the learned judge's discretion, the evidence before the judge, the relevant statutory scheme and decided cases. Having examined these Mrs. Foster-Pusey submitted that the decision of Mrs. McIntosh J. was correct and that an appeal did not have a real prospect of success.

Some of the authorities cited were ***Tanfern Ltd. v Cameron – McDonald and another*** [2000] 2 All ER 201(the court's approach to application for permission to appeal); ***Millicent Forbes v Attorney General*** SCCA 29/05 delivered December 20, 2006 (the role of the judicial review court); ***R v Alvan S. Williams ex parte Seth George Ramocan*** [1993] 30 JLR 223; ***Re Willman 33 D.L.R*** (2d) 92; ***R v The R.M for St. Andrew ex parte Owen Stephenson*** [1980] 17 JLR 264 and Section 44(6) of the Act.

Mr. Dabdoub, for Dr. Duncan, adopted the submissions of Mrs. Foster-Pusey. He submitted that the question whether or not the Resident Magistrate

properly accepted or rejected the ballots is a matter for the Election Court and not for judicial review. He referred to para. 5 of the Magistrate's affidavit and contended that the Magistrate was not satisfied that the ballots in question were issued by the Presiding Officer. The correct procedure to challenge this decision, he argued, is by way of an Election Petition.

Further, he submitted that the second application for leave was an abuse of the court's process. He cited ***Johnson v Gore Wood and Co*** [2001] 1 All ER 481; [2001] 2 WLR 72. He also referred to Rule 56. 5(3) of the Civil Procedure Rules 2002 (CPR) and submitted that the second application for leave was contrary to this Rule.

In his reply Mr. Vassell. Q.C. submitted that the second application was not a renewal of the first but an indication that the first was abandoned because of the procedural problem which the learned judge pointed out. He examined the cases cited by counsel for the other parties and submitted that some were distinguishable and some supported the applicant's contention.

Mr. Spaulding Q.C. in his reply argued that the authorities cited were premised on the basis that a return had been made. A return is necessary for a petition, he submitted.

Section 44(2) of ROPA provides:

> "(2) In counting the votes the presiding officer shall reject all ballot papers –

(a) which have not been supplied by him; or

(b) which have not been marked for any candidate; or

(c) on which votes have been given for more than one candidate; or

(d) upon which there is any writing or mark by which the voter could be identified, other than the numbering by the presiding officer in the cases hereinbefore referred to, but no ballot paper shall be rejected on account of any writing, number or mark placed thereon by any presiding officer."

Section 48 (3) provides that the Magistrate shall not "reject any ballot paper by reason merely of the presiding officer's failure to affix his initials to such ballot paper." The applicant claims that the Magistrate rejected certain ballots because the presiding officer's initials were not on them.

What is the evidence?

It is convenient to repeat para 6. of Mr. Gray's affidavit:

"6) That in relation to paragraph 5 above the Magistrate rejected these ballots on the basis that the official mark of the initials of the Presiding Officer was not on each ballots [sic] because of the tearing off of the top portion of these ballots below the perforation. That in an Affidavit of Dr. Duncan sworn to on the 26th day of September, 2007 in Claim No. E 2007/03796. Dr. Duncan confirmed that the ballots referred to in paragraph 5 above were in fact rejected and stated at paragraph 30 as follows:

'That when court resumed the Magistrate stated clearly that after much consideration

> he is ruling to reject all ballots that were found which did not have printed thereon that required by law the name of the Constituency or Polling Division No. or space for the Presiding Officers initials, all comprising the Official Mark as there was nothing on the ballot to indicate they were supplied by the Presiding Officer."

The Magistrate in his affidavit has this to say:

> "5. At a later stage in the recount counsel for both candidates made submissions concerning whether the ballots should or should not be counted. I decided to make my ruling. I examined the law and heard submissions from both sides. I was also referred to Parker's Law and Conduct of Elections. I thought that the whole exercise of voting should be in the interest of an honest, fair and accurate election process. I looked at the ballots which, due to their irregular tearing, were without their accompanying top portions i.e "official marks" the name of the Constituency, the polling division number, the polling date and/or the initials of the presiding officer. I was and I remain of the view that without this accompanying portion of the ballots and official marks there would be no way of properly or accurately identifying the ballots with their constituencies. I therefore decided to reject all ballots in that condition unless I saw the presiding officer's initials on the remaining portion of the ballot. In those circumstances where the presiding officer's initials were present I felt satisfied that the ballots would have or could have been issued by the presiding officer who initialed them. I also accepted the ballots if they reflected the constituency polling division number on the stub of the ballots even if the initials of the presiding officer was absent."

It seems clear to me that on the evidence the Magistrate did not propose to reject any ballot merely because the presiding officer's initials were absent. The magistrate said he was not satisfied that the ballots which were without the

name of the constituency, the polling division number, the polling date and the initials of the presiding officer were issued or supplied by the presiding officer. We agree with the leaned judge that on the face of the record the Magistrate was not acting outside the powers conferred on him. Accordingly the judge was correct in refusing leave for judicial review. Indeed, as the learned judge said, any allegation of error in the magisterial recounting process may be the subject of an election petition.

Mrs. McIntosh J. also stated that judicial review is a discretionary remedy and that normally where there are other means of challenging the actions of the tribunal the court would be reluctant to grant judicial review. This in our view is a correct statement of law. Section 44(6) provides a four stage process for the determination of objections to ballot papers. It reads:

> "6) The presiding officer shall keep a record on the special form printed in the poll book of every objection made by any candidate, or his agent or any elector present to any ballot paper found in the ballot box, and shall decide every question arising out of the objection. The decision of the presiding officer shall be final, subject to reversal on the final count by the returning officer or on a recount under section 47 or on petition questioning the election or return; and every such objection shall be numbered, and a corresponding number placed on the back of the ballot paper and initialled by the presiding officer."

We agree with Mr. Vassell Q.C. that this does not oust the supervisory jurisdiction of the Supreme Court. However, we think that, in light of this provision

for the decision of the presiding officer to be rectified by the returning officer and for the returning officer's decision to be challenged by a magisterial recount and for the magisterial recount to be challenged on petition in the Election Court that the Supreme Court would be very slow to intervene.

As Mrs. Foster-Pusey submitted, in these circumstances the election petition is arguably the appropriate redress. Further, as the learned judge below said, to grant the relief sought on the grounds stated would necessitate the court examining the ballots rejected in order to determine whether or not they were properly rejected. This would indubitably lead to the Supreme Court taking over the process of recounting which is the statutory responsibility of the magistrate. Mrs. Foster-Pusey submitted, correctly in my view, that where the Resident Magistrate has been entrusted with a discretion the court cannot require that that discretion be exercised in any particular way, it can only require that the exercise of the discretion be made lawfully. On judicial review the court cannot determine whether decisions validly made are right or wrong on their merit.

Finally, Rule 56.5(3) states:

> "No application not involving the liberty of the subject or a criminal cause or matter may be renewed after a hearing."

It is not disputed that a previous application was made by the applicant. This previous application was heard and refused by the learned judge. The judge's

decision was appealed. The appeal was dismissed. We cannot agree with Mr. Vassell Q.C. that in those circumstances the first application could be said to have been abandoned. **Interest reipublicae ut sit finis litium** (it concerns the state that lawsuits be not protracted).

For the above reasons we conclude that in our view, the applicant does not have a real chance of success. Accordingly, the application for permission to appeal is refused. The order of Harris, J.A. is now at an end. The order of McIntosh, J. is affirmed.

HARRISON, J.A:

I agree.

SMITH, J.A. (Ag.)

I agree.

ORDER

SMITH, J.A.:

The application for permission to appeal is refused. The order of McIntosh, J. is affirmed.