IN THE SUPREME COURT OF BERMUDA

Civil Jurisdiction

2008: No.

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE PUBLIC SERVICE COMMISSION REGULATIONS 2001

AND IN THE MATTER OF THE PUBLIC SERVICE SUPERANNUATION ACT 1981

AND IN THE MATTER OF THE DECISION TO APPOINT AN ALIEN TO THE POST OF SOLICITOR GENERAL NOTWITHSTANDING THE APPLICATION OF PHILIP PERINCHIEF TO FILL SUCH POST

BETWEEN:

PHILIP JOHN PERINCHIEF

Applicant

-and-

(1) THE PUBLIC SERVICE COMMISSION
(2) HIS EXCELLENCY THE GOVERNOR
(3) THE ATTORNEY-GENERAL

Respondents

RULING

Date of Hearing: 5, 8 and 9 January, and 3 February 2009

Date of Ruling: 10 February 2009

Mr. Delroy Duncan and Mr. Eugene Johnston, Trott & Duncan, for the Applicant

Mr. Narinder Hargun and Mr. Ben Adamson, Conyers Dill & Pearman, for the Respondents

Introduction

1. This ruling arises from an application for judicial review made by the applicant ("Mr. Perinchief") as against the Public Service Commission ("the Commission"), His Excellency The Governor of Bermuda ("the Governor") and the Attorney-General. The application was filed with the Supreme Court on 3 December 2008, and relates to Mr. Perinchief's unsuccessful application for appointment to the post of Solicitor General.

2. The letter accompanying the application requested an oral hearing in open court to determine whether leave should be granted, and indicated a wish for the oral hearing to be held on an inter partes basis. The matter first came before the Court on 11 December 2008, at which time the respondents were represented by counsel. The matter was then adjourned to 5 January 2009 and both sides then indicated a wish that the matter should proceed on an inter partes basis. The application did, however, take place in chambers.

Background Facts

3. These are taken from Mr. Perinchief's affidavit of 1 December 2008, and from an affidavit sworn by Carlita O'Brien, the secretary to the Commission, on 6 January 2009.

4. In his affidavit, Mr. Perinchief set out his professional qualifications and experience, which included having worked as Crown Counsel, Principal Crown Counsel, and Acting Solicitor General in the Attorney-General's Chambers from June 2000 to October 2006. At that point, Mr. Perinchief was appointed Attorney-General, a post which he held until shortly after the general election in December 2007.

5. The post of Solicitor General was advertised by the Ministry of Justice with a closing date of 12 September 2007, and Mr. Perinchief made application for the post some time thereafter, no doubt after he had ceased to be Attorney-General. After an initial interview which Mr. Perinchief dated about 10 January 2008, Mr. Perinchief was interviewed again on 10 January 2008 by a four person committee whose number included Justice Charles-Etta Simmons. Mr. Perinchief then wrote to the head of the Civil Service, Mr. Kenneth Dill, on 17 March 2008 to enquire as to the outcome of his application. In that letter he indicated that his understanding was that out of approximately eight applicants, amongst whom he was short-listed, he was the only Bermudian applicant.

6. On 16 April 2008, the secretary to the Commission wrote to Mr. Perinchief advising him that he had been unsuccessful in securing the position of Solicitor General. Mr. Perinchief expressed surprise in his affidavit that his application to become Solicitor General had been unsuccessful, and said that in light of the information that he had received, he awaited the appointment of a non-Bermudian. It was not then until late October 2008 that Mr. Perinchief learned that Barrie McKay had been appointed Solicitor General.

7. In fact, as appeared from Ms. O'Brien's affidavit, the Commission made a decision to recommend that Mr. McKay be offered the post of Solicitor General on 7 April 2008, but did not make a recommendation until after Mr. McKay's application had been through the immigration process. That process had been completed when the Commission wrote to the Governor on 12 May 2008, formally recommending that Mr. McKay be appointed, and on 14 May 2008, the Governor formally accepted that recommendation.

Relief Sought

8. The notice of application for leave sought the following relief:

> "1. A declaration that the Public Service Commission Regulations 2001 ('the Regulations') requires that in a circumstance where a qualified Bermudian

applies for a post in the public service, the PSC cannot lawfully recommend a non-Bermudian person to that post;

2. Further or alternatively, a declaration that it was unlawful for the PSC to take into account the relationship between the Applicant and the incumbent Attorney-General, Kim Wilson, when determining whether the Applicant was fit to be appointed Solicitor General;

3. Further or alternatively, a declaration that the Applicant was, and is, fit to be appointed Solicitor General;

4. Further or alternatively, a declaration that the Governor should have appointed the Applicant Solicitor General because the Applicant was the only Bermudian who applied for such post;

5. Further or alternatively, a declaration that:

   5.1 the committee specifically appointed by the PSC to interview and make a recommendation to the PSC on which person should be appointed Solicitor General ('the Committee') unlawfully recommended Barrie McKay for that post;

   5.2 the PSC unlawfully endorsed the recommendation of the Committee; and

   5.3 it was unlawful for the Governor to appoint Barrie McKay on the recommendation of the PSC;

6 Further or alternatively, a declaration that a member of the judiciary should not have sat on the Committee because such action violates the separation of powers doctrine which is inherent in the Constitution;

7 Damages for the negligence of the Committee and/or the PSC;

8 Alternatively, damages for the misfeasance of each of the members of the Committee and/or each of the members of PSC;

9 An oral hearing in open court to determine whether leave to apply for judicial review should be granted; and

10 Costs."

Grounds for Application

9. The statement of grounds contended that the Commission's failure to recommend Mr. Perinchief to be appointed Solicitor General was unlawful for a number of reasons. First, it was contended that the Commission did not bring its own mind to bear on the appointment, but instead relied upon the recommendation of the interviewing committee ("the Committee"). Whilst acknowledging that it was not unlawful for the Commission to gain assistance in its task from selection panels with special technical knowledge, the grounds nevertheless contended that the Commission had not made its own decision, because had it done so it would not have recommended Mr. McKay. Secondly, it was said that the failure to recommend Mr. Perinchief was in breach of regulation 19 (6) of the Public Service Commission Regulations 2001 ("the Regulations"). Next, it was contended that the Committee had taken into account the relationship between Mr. Perinchief and his successor as Attorney-General, Senator Kim Wilson. Finally, it was contended that the fact that Simmons J had been a member of the Committee was unlawful.

10. In relation to the remedies claimed, the statement of grounds emphasised that Mr. Perinchief did not seek to quash the Governor's decision to appoint Mr. McKay. Instead, he sought the declarations previously identified and damages. In this regard, Mr. Perinchief asked that leave be granted to apply for judicial review on each of the specified grounds, but that the substantive application for judicial review should be split into two parts, the first being to determine whether the relief requested should be granted by the Court, and the second to determine the quantum of any damages payable to Mr. Perinchief.

The Hearing

11. Because the respondents had prepared their skeleton argument when the matter first came before me on 11 December 2008, the grounds for their opposition to the application for leave had been made known to Mr. Perinchief's attorneys by that time. Although Mr. Duncan proceeded on 5 January 2009 with reference to the

statement of grounds previously filed, it does seem to me to be more sensible and practical for me to approach matters with reference to the grounds of objection to the grant of leave, and I would propose to proceed on that basis. For the avoidance of doubt I should make it clear that the other grounds on which Mr. Perinchief relies are accepted as arguable.

The Arguments against the grant of leave

12. I will start by referring to the objections in summary form only, and will then turn to the arguments made on both sides in relation to them. The first objection is that the only proper respondent in this application is the Commission. The second is that the application for damages is bound to fail, on the basis that Mr. Perinchief could not secure an award of damages if the claim had been begun by action. That argument led in turn to objections that the Court would not grant the declaratory relief then being sought. Lastly is the issue of delay, although perhaps by way of postscript, the respondents suggest that their objections do not mean that Mr. Perinchief has no remedy open to him, since the office of the Ombudsman is available to deal with Mr. Perinchief's complaints as to the operation of the Commission. In practical terms, the reality no doubt is that these proceedings are being pursued with a view to Mr. Perinchief securing an award of damages.

The Leave Threshold

13. It is common ground that the threshold to be considered by a court in relation to the grant of leave is not a high one, and I was referred to the judgment of Ground C J in the case of *Middleton –v- Director of Public Prosecutions* [2006] Bda LR 79, where the Chief Justice said:

> "The requirement for leave is a filter and the threshold for granting leave is not a high one: leave should be granted if on the material then available the court considers, without going into the matter in depth, that there is an arguable case for granting the relief sought by the applicant."

14. As the notes to the White Book indicate, the purpose of the leave requirement is to eliminate at an early stage any applications which are frivolous, vexatious or hopeless, and to ensure that the applicant is only allowed to proceed to a substantive hearing if the Court is satisfied that there is a case fit for further consideration. In this regard, I was also referred by Mr. Duncan to the comments made by Auld L J in the case of *Mount Cook Ltd –v- Westminster Council* (Times Law Reports, 16 October 2003). In that case, Auld L J said:

> "Judges should discourage long hearings in permission applications and not allow the court to be sucked into lengthy and fully argued oral hearings that transform the process from an enquiry into arguability into that of a rehearsal for, or effectively an expedited and full hearing of the substantive claim."

15. Although that passage was drawn to my attention at a very early stage by Mr. Duncan, I fear that the length of the hearing means that the admonition was not followed, and in this regard, counsel did, it seems to me, go into quite unnecessary detail for the purpose of a leave application, particularly in relation to the question whether Mr. Perinchief could secure an award of damages if the claim had been begun by a writ action, and the related question of the immunity afforded to the chairman and members of the Commission by reason of regulation 5 of the Regulations. I will, however, try to ensure that in this ruling, I deal with matters with the threshold test very much in mind, and avoid a rehearsal of the substantive hearing.

Appropriate Parties

16. The application for leave is, as stated at the outset, directed towards the Commission, the Governor and the Attorney-General. Mr. Hargun for the respondents argued that the only proper respondent was the Commission. In relation to the position of the Governor, Mr. Hargun relied upon the comments made by Ground C J in the case of *Caines –v- The Public Service Commission et al* [2008] Bda LR 25, where Ground C J dealt with the position in relation to the

identity of the decision-making body at paragraph 17 of his judgment, in the following terms:

> "The confusion appears to have been introduced by the then counsel for the respondents, and to have been based upon the fact that the Governor is the nominal agency for making appointments to the public service under section 82 of the Constitution. However, that does not give him a discretion or a choice about appointments, for he is obliged to "act in accordance with the recommendation of the Public Service Commission". That mandates him to act as they recommend, subject only to the right to ask them to reconsider once. Moreover, a court is obliged to assume he did act on their recommendation, because that question may not be inquired into by any court. The end result is that it is the Public Service Commission which is the decision making body in respect of appointments within the public service."

17. In his written submissions, Mr. Duncan referred to the Governor's role in the same terms as set out in the above passage, but did not carry on to present any argument as to why the Governor was then an appropriate respondent, given the nature of his role in the appointing process. In my view the position is clear. The Governor had no power to appoint Mr. Perinchief in the absence of a recommendation to this effect by the Commission. Consequently, the proceedings should be directed towards the Commission rather than the Governor, and I would not therefore grant leave to apply for judicial review as against the Governor.

18. In relation to the Attorney-General, the Crown Proceedings Act 1966 ("the CPA") details the appropriate parties to proceedings against the Crown, which is defined under the CPA to include a Minister, Government Department and Government Board. The Commission is of course a body created by the Bermuda Constitution Order 1968 ("the Constitution"). The performance of its functions are contained in section 84 of the Constitution, which section includes provision for the making of regulations in relation to the business of the Commission. Mr. Duncan argued that the members of the Commission were acting as employees of Government, but it seems to me that that argument completely ignores the manner in which the

Commission is established and operates, namely under the Constitution. The statement of grounds filed with the application for leave sought to distinguish between the roles of the Commission and the Committee. In the case of *Dolding –v- Public Service Commission* [2004] Bda LR 15, Simmons J dealt with the respective roles of the Commission and the committee which it had appointed to assist it in that case in the following terms:

> "I am convinced therefore that the PSC offends no procedural rules in inviting the input of a Head of Department who may choose to involve others in the interview process. It matters not in my opinion whether each member of the panel was selected by the PSC, or with its knowledge and or consent, the crucial issue is that the recommendation made to the Governor should genuinely be that of the PSC."

I respectfully agree.

19. However, as well as contending that the members of the Commission were acting as employees of Government, Mr. Duncan argued that the members of the Committee were individually employed by the Bermuda Government, and that the Government was therefore vicariously liable for their acts or omissions. No doubt important questions can arise as to the role of the members of the Committee, and in this regard, I referred Mr. Duncan during the course of argument to the case of *R –v- Statutory Visitors to St. Lawrence's Hospital ex parte Pritchard* [1953] 1 WLR 1158. However, a review of the relevant text in De Smith's Judicial Review (6th edition) at paragraph 8–040 indicated that the position is perhaps not now as clear as may once have been the case. The paragraph is in the following terms:

> "In a number of cases in which the proceedings of investigating bodies have been impugned (mainly on grounds other than non-compliance with the principles of fairness), the courts have refused to intervene unless the investigation does or can culminate in a determination or order which has binding force or will itself acquire binding force upon confirmation or promulgation by another body or which otherwise controls the decision of that other body. To put the matter in another way, an investigating body is under no duty to act fairly if it cannot do more than recommend or advise

> on action which another body may take in its own name and in its own discretion. This proposition cannot be accepted without qualification. Whilst it would be absurd to impose judicial standards on every body who advises a government department as to the exercise of its executive functions, justice will sometimes demand, as the courts are increasingly recognising, that an investigation preceding a discretionary administrative decision be conducted in accordance with the requirements of procedural fairness."

20. I do, therefore, take the view that Mr. Perinchief should be able to maintain his arguments as against the members of the Committee and in this regard that the appropriate party to the proceedings should be the Attorney-General. That view is taken with the parameters of the threshold test very much in mind.

Damages Claim

21. The argument for the respondents was that the application for damages was bound to fail. It was of course conceded that the court had the power to award damages to an applicant on an application for judicial review, but only if the court were to be satisfied that if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages – see Order 53 rule 7 (1) (b) of the Rules of the Supreme Court 1985 ("the Rules"). As Mr. Hargun submitted, this means that Mr. Perinchief must have been able to secure an award of damages in a writ action, and his submission was that he could not do so because the Commission is immune from legal action by reason of regulation 5 of the Regulations, read together with section 3 (5) of the CPA. The reference to the CPA comes from Mr. Hargun's written submissions, but in his oral presentation he sought to distance himself from this submission, and to rely exclusively on the terms of regulation 5. No doubt it is necessary to look at the terms of both of those provisions. Regulations 5 is in the following terms:

> "The Chairman and any member of the Commission shall have the like protection, privileges and immunities from legal action for anything done or omitted to be done by him in the performance of his function as a judge of the Supreme Court in the performance of his functions as such."

And section 3 (5) of the CPA is in the following terms:

> "No proceedings shall lie against the Crown by virtue of this section in respect of any act by any person while discharging or purporting to discharge any responsibility of a judicial nature which may be vested in him, or while discharging or purporting to discharge any responsibility which may rest upon him in connection with the execution of any judicial process."

22. So Mr. Hargun's argument as developed in his oral submissions was that the terms of regulation 5 gave immunity to the chairman and any member of the Commission for any act or omission done "in the performance of his functions". That, said Mr. Hargun, was the scope of the immunity, and the reference to the immunity granted to a judge of the Supreme Court in the performance of his functions as such covered the standard of the immunity. Accordingly, Mr. Hargun urged that the cases upon which Mr. Duncan relied drawing a distinction between administrative and judicial acts on the part of a Supreme Court judge were of no assistance in relation to the scope of the immunity afforded to members of the Commission.

23. For Mr. Perinchief, Mr. Duncan did not accept that the members of the Commission enjoyed the same immunity as judges of the Supreme Court, notwithstanding the wording of regulation 5. He started his written argument with reference to the position of members of the Committee, saying that each individual member was employed by the Bermuda Government, and that it followed that if members of the Committee were guilty of misfeasance, the Government would be vicariously liable for their actions. In relation to this argument, Mr. Duncan contended that the immunity of the Commission played no part.

24. Mr. Duncan's next argument was that it could not be the case that members of the Commission had absolute immunity from civil suit, and he contended that it would be anomalous if members of the Commission were to have a wider

immunity than that afforded to judges of the Supreme Court. In relation to the nature of that immunity, Mr. Duncan went into very considerable detail and a large number of authorities in relation to the extent of the immunity. I would not propose to embark at this stage upon the degree of analysis of those authorities which will be necessary if this matter goes to trial. Suffice it to say that there is an argument, and it does not seem to me that the leave filter should be applied so as to prevent the argument being run.

Claims for Declaratory Relief

25. The argument in relation to the claims for declaratory relief was in part a consequential argument, premised upon the success of the contention that Mr. Perinchief could not succeed in securing an award of damages. In any event, the first, third and fourth declarations concern the interpretation of regulation 19 of the Regulations, and in relation to this regulation, Mr. Hargun contended that there was no dispute in relation to the proper interpretation of the Regulations. That may be so, but there are clearly issues which arise in relation to the application of the relevant regulation to Mr. Perinchief. The second, fifth and sixth declarations relate to the deliberations of the Committee. I have taken the view that in broad terms Mr. Perinchief should be entitled to make a complaint in relation to the actions of the Committee, and I do not think it right to limit those objections at the leave stage.

Delay

26. The first point to be made in relation to delay is that time starts to run not from the date of a claimant's knowledge, but from the date of the act or decision which is the real basis of the complaint. In this case, that date is 12 May 2008, when the Commission recommended to the Governor that Mr. McKay be appointed to the post of Solicitor General. Hence the application for leave to apply for judicial review (made on 3 December 2008) has not been made within six months from the date when the grounds for the application first arose, such that an application for an extension of time pursuant to Order 53 rule 4 of the Rules is necessary.

27. It is important to bear in mind the terms of the requirement under the rules that an applicant for leave to apply for judicial review must make his application "promptly and in any event within six months from the date when grounds for the application first arose". As is indicated in the notes to the 1999 White Book, the primary requirement laid down by the Rules is that the application must be made "promptly", and this is followed by the secondary provision that the application must in any event be made within six months.

28. Mr. Duncan's primary submission was that there was no delay, by which I understood him to mean that the application had been made in accordance with the secondary provision of the rule. With respect, that submission cannot be properly maintained, and I reject it. Mr. Duncan then submitted that if his primary submission were wrong, the delay was not wilful, so that in those circumstances, he sought an extension.

29. Where an extension is necessary, the Court must consider whether there is "good reason" to extend the period within which the application should be made, and in considering such an application, the Court is required to consider whether the grant of an extension of time would be likely to cause substantial hardship or prejudice, or may be detrimental to good administration. In considering those matters, it is therefore necessary to look at the state of Mr. Perinchief's knowledge in relation to the recommendation of the Commission, with particular reference to what he knew and when he knew it.

30. The starting point is the combination of Mr. Perinchief's letter to Mr. Dill of 17 March 2008 and the letter sent to Mr. Perinchief by the secretary to the Commission on 16 April 2008. Mr. Perinchief's understanding following receipt of that letter was as follows:

    (i) Of eight applicants who had been short-listed, he was the only Bermudian applicant.

(ii) He became aware that he had been unsuccessful in securing the position of Solicitor General on 16 April 2008.

(iii) He then expected that a non-Bermudian would be appointed to the post.

(iv) In late October 2008, he learned from a former colleague at the Attorney-General's Chambers that Mr. McKay had been appointed. In fact, he learned from that conversation that Mr. McKay had begun employment more than three months earlier.

31. Against that background, one must inevitably ask the question what good reason could there be for Mr. Perinchief's lack of action. It is clear from sub-paragraph (iv) above that if Mr. Perinchief had made his enquiry in July, he would have learned that Mr. McKay had been appointed and was at work. Mr. Perinchief would have appreciated the need for an immigration application to be processed, given his understanding that he was the only short-listed Bermudian applicant. Mr. Perinchief would no doubt also have appreciated the likely time frame for such an application to be processed. But most significantly, Mr. Perinchief must or should have appreciated the need to act promptly and in any event within six months of the date of the Commission's recommendation. Mr. Perinchief had referred in his affidavit to his involvement in public law cases including reviewing the decision-making powers of administrative bodies. He was not in the position of a lay client, unaware of the provisions of the Rules.

32. Mr. Duncan sought to meet the delay point in part by relying on the fact that Mr. Perinchief did not seek an order of certiorari, but merely a declaration. Mr. Duncan also relied upon the fact that regulation 4 of the Regulations meant that the communication from the Commission to the Governor was privileged, so that Mr. Perinchief had no means of learning when the Commission had made its recommendation to the Governor. But I do not think that it follows that Mr. Perinchief is entitled to wait without making any form of enquiry for a substantial period, until he learned, by a conversation with a former colleague, that Mr. McKay had by then been employed for more than three months. Even the nature

of the late October conversation prompts further questions. If it was a chance encounter, would Mr. Perinchief have continued to do nothing if the chance had not arisen? If it were the result of a conscious act on Mr. Perinchief's part, why did that act not take place at an earlier date?

33. In this regard it is important to bear in mind the terms of the declarations sought, which in relation to Mr. McKay are to the effect that his appointment was unlawful. It does seem to me to be detrimental to good administration for declarations to be made in relation to a senior legal officer many months after his appointment was made. Taking all the relevant circumstances into account, I do not think that Mr. Perinchief's conversation with a former colleague in late October 2008 constitutes "good reason" for an extension of time within which to take judicial review proceedings. That conversation was more than 6 months after Mr. Perinchief had been informed that his own application had been unsuccessful, and he did nothing during this 6 month period. Mr. Perinchief must or should have appreciated that the appointment of a non-Bermudian would be made during this period, as his affidavit indicated he anticipated. I do not see how that constitutes compliance with the duty to act promptly, and I do not accept that Mr. Perinchief's lack of knowledge of the appointment when it was made constitutes good reason for the grant of an extension of time, when taken together with his lack of action during the period in question.

34. I therefore find that the application by Mr. Perinchief was not made within the time frame provided for in the Rules, and I decline to grant an extension of time within which to make application for judicial review on the basis that no good reason has been advanced for doing so. It follows that I must, and I do, refuse Mr. Perinchief's application for leave to issue judicial review proceedings.

Costs

35. As indicated at the outset, Mr. Perinchief chose to proceed on an inter partes basis, but the position would no doubt have been the same if leave were to have been granted ex parte and then set aside on an inter partes basis. Since the outcome is that leave to issue judicial review proceedings has been refused, it would seem to me that costs should follow the event, and that the respondents should therefore be entitled to their costs. I will therefore make that order on nisi basis, with liberty to Mr. Perinchief to apply for the matter of costs to be argued, within 14 days, failing which my order nisi will become absolute.

Dated this day of February 2009.

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Hon. Geoffrey R. Bell
Puisne Judge