IN THE COURT OF APPEAL
TURKS AND CAICOS ISLANDS

CIVIL APPEAL NO. CL-AP 6/21
(ON APPEAL FROM CL127/20)

Between

THE QUEEN (ON THE APPLICATION OF)

1) ARIYAPUTHIRAN RAVVIKUMAR,

2) THAMBYRASA SRIKANTH,

3) KUGAGNANAM, NESARUPAN

4) VARATHARAJAH SENKEERAN

APPELLANTS

-AND-

1) MINISTER OF BORDER CONTROL, ARLINGTON MUSGROVE

2) DEREK BEEN, DIRECTOR OF IMMIGRATION

3) THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENTS

BEFORE:	**THE HON. MR. JUSTICE C. DENNIS MORRISON P** **THE HON. MR. JUSTICE HUMPHREY STOLLMEYER JA** **THE HON. MR. JUSTICE K. NEVILLE ADDERLEY JA**
APPEARANCES:	**MR. TIM PRUDHOE AND MS. ANDWENA LOCKHART FOR THE APPELLANTS;** **MS. CLEMAR HIPPOLYTE, PRINCIPAL CROWN COUNSEL FOR THE RESPONDENT**
DATE HEARD:	**5 OCTOBER, 2021**
DATE OF DECISION:	**14 OCTOBER, 2021**

J U D G M E N T

ADDERLEY JA

[1]. On 14 October we allowed the appeal in this matter and promised to give our reasons later. These are our reasons.

[2]. The appellants sought disclosure of information from the Turks and Caicos authorities considered by them necessary to prepare applications under S. 82 of the Immigration Ordinance Cap 1.05, to seek asylum in the Turks and Caicos Islands as defined by the United Nations High Commission for Refugees (UNHCR) under the 1951 Convention Relating to the Status of Refugees and related protocols.

[3]. They were among 154 persons on a Haitian sloop, which was intercepted by Turks and Caicos authorities on 10 October, 2019. The group comprised 28 Sri Lankans who speak Tamil, not English, 1 Indian and the remainder Haitian nationals.

[4]. Following their release on 24 August, 2020 after a period of detention, three of the Sri Lankans have duly applied through their attorney for Asylum and their applications are being considered by the Minister responsible. Likewise, the appellants through their attorney indicated in writing their intention to apply for asylum.

[5]. As part and parcel of the decision process the Turks and Caicos Islands Government (TCIG) enlists the assistance of international bodies, such as UNHCR to carry out refugee status determination ("RSD") interviews on each individual and to render Advisory Opinions to TCIG for possible use in determining whether or not a refugee's claim to asylum is bona fide and meets the definition. In making his decision whether or not to grant asylum the Minister may or may not take the report into consideration.

[6]. The appellants advanced various reasons why they should have access to the Advisory Opinions pertaining to them before they prepare their application for asylum, especially

since a copy of the opinion was given to the first three applicants. The respondents contend that for numerous reasons the Advisory Opinions must remain confidential.

THE ACTION

[7]. The action was commenced by originating summons dated 20 October, 2020 for judicial review on behalf of 13 Sri Lankans. Form No. 86A under the Civil Procedure Rules sets out the decision in respect of which relief was sought as:

> "Refusal by the Minister, the Honourable Vaden Delroy Williams, Minister of Border Control and Labour to disclose written advisory opinions already given or yet to be given by the Office of the United Nations High Commission for Refugees ("UNHCR") in respect of the Applicants' respective applications for refugee status under the 1951 Convention Relating to the Status of Refugees ("the Advisory Opinions").

[8]. In oral explanation to the Court's enquiry whether this was a proper judicial review application, counsel clarified that the decision complained of in Form No. 86A[1] was a continuing decision of the TCIG to refuse to make the advisory opinions available, all of which the 2nd Respondent acknowledged to have received.[2]

[9]. The application sought the prerogative order of mandamus. Leave was granted to launch the judicial review application and the application was heard by the Hon. Mr. Justice Carlos Simons ("the Judge").

[1] Under O.53, r.3(8) of the Rules of the Supreme Court
[2] Affidavit of the 2nd respondent dated 18 December 2020 at para 11.

THE JUDGMENT

[10]. After hearing the matter on Friday, 16 April and 23 April 2021, the Judge in a succinct judgment dated 14 May, 2021 after a review of the arguments on both sides found at paragraph 18 in dismissing the application:

> "I accept that given the way they came into existence and the purpose for which they were produced, the advisory opinions are confidential, and I am not persuaded by Mr. Prudhoe's case law discussion at paragraphs 29-38 of his skeleton argument to the effect that the applicants' right to a fair hearing is adversely impacted by TCIG's adherence to that confidentiality. Having sight of the advisory opinions is not necessary for the preparation of an asylum application, and while the contents might weigh with the 1st respondent in considering an application, there are other sources of information he is obliged to take account of. Besides, an asylum applicant whose application is refused has a right of appeal as described at paragraph 25 of Ms. Hippolyte's submissions."

[11]. He then proceeded to discuss what he referred to as the principles that guide the court's approach to ordering the disclosure of confidential information, and stated that he was much inclined to the discussion of the matter undertaken by Ms. Hippolyte at paragraph 29-38 of her submissions and the balancing exercise principles enunciated in the case of *Alfred Crompton Amusement Machines v Customs and Excise Commissioners (No. 2)* [1974] AC 405, and followed and refined in *Durham County Council v Dunn* [2012] EWCA Civ. 1654.

[12]. He concluded in *20.* that based on the principles and all the foregoing he was of the view that the public interest in protecting the confidentiality of the advisory opinions outweighs the interest of the applicants in disclosure and refused the application for mandamus.

THE GROUNDS OF APPEAL

[13]. The appellants being dissatisfied with the decision of the Judge appealed on various grounds which can be summarized as follows:

(i) The Judge was wrong in law not to take any or any proper account of the fact acknowledged at *7.* of his judgment that 3 Sri Lankans in equivalent positions had been voluntarily provided with the advisory reports relating to them as well as an offer to help with the translation from Tamil to English.

(ii) there being no evidence to support his findings the Judge was wrong in fact and/or law:

(a) to find that the interest of the appellants in having the benefit of the advisory opinions for the purpose of their asylum applications did not outweigh the public interest in maintaining their confidentiality;

(b) to find that the fact of the Advisory Opinions arriving on a confidential basis was sufficient on its own to give rise to confidentiality in the JR proceedings;

(c) to find without any evidence whatsoever from UNHCR or the Respondents that disclosure of the reports would be detrimental to the relationship of the two parties, or that the reports were received in circumstances giving rise to a duty of confidentiality;

(d) the Judge gave no or no proper weight to the evidence that the UNHCR data protection policies are confidential in the main for the protection of the Appellants.

(iii) the Judge was wrong in fact and in law to find that the Appellant's rights to a fair hearing guaranteed under Section 6(8) of the Constitution was not adversely impacted by the refusal of the Respondents to disclose the Advisory Opinions.

DISCUSSION

[14]. From the outset it is apparent that the grounds of appeal have considerable force.

[15]. By consent, on 20 August, 2020 in judicial review proceedings CL 54/20 the 1st respondent agreed to disclose written opinions (14-16 pages each) issued by the UNHCR to Sri Lankans other than the Appellants. He did so and they formed the basis of asylum claims, three of which were submitted on 25 September, 2020. Others were submitted and RSD individual interviews have taken place or are in the process of taking place. As of 27 November, 2020 the 2nd respondent had 13 Advisory Opinions from the UNHCR in its possession[3] which had not been released as of 5 October, 2020[4].

[16]. Ms. Hippolyte in her written skeleton arguments dated 28 September, 2021 set out the following in support of the respondents' position that the Advisory Opinions were received in confidence:

"24. The Advisory Opinions were received in confidence. On the face of the document the words, "Strictly Confidential for the benefit of TCIG Government only" appears[sic] in red.

25. It states further at page 1 thereof "Please be advised that all information provided by UNHCR to the Government of the Turks and Caicos Islands, including personal biographical data, is confidential and should not be further shared with any other party without the consent of the Applicant" [emphasis added].

[3] Affidavit of Derek Been sworn in CL 91/20 & CL 127/20 on 18 December 2020 at para 11.
[4] 1st Affidavit of Mikhail Charles filed in CL127/20 on 20 October 2020 at para 19.

[17]. During the course of her oral presentation, however, counsel for the respondents conceded that there was no evidence to support the findings referred to in paragraph 13 (ii) above. In particular, there was no evidence from UNHCR to support a contention that the Advisory Report was confidential as it related to the appellants.

[18]. Paragraph 18 to 21 of the respondents' submissions on which the Judge apparently relied at *15.* of his judgment is not evidence, nor was any application made to the Judge or this Court to adduce evidence in support of paragraphs 24 and 25 of Ms. Hippolyte's skeleton arguments.

[19]. In the circumstances, there is no evidence on which the trial Judge could base his conclusion (at paragraph 18 of his judgment) that "the advisory opinions are confidential".

[20]. Moreover, as observed by the learned President in this context, the consent of the applicant must refer to the consent of the appellants. The confidentiality is clearly for the benefit of the appellants also and it is untenable to argue that they are not entitled to have the Advisory Opinions disclosed to them.

[21]. The above observations alone are enough to allow the appeal.

OTHER REASONS

[22]. The appeal should also be allowed on principle.

[23]. The Judge did not clearly identify and analyze the evidence upon which he made his findings of fact, and although he referred to authorities and to principles, it was not clear enough what his understanding of the principles were on which he relied.

[24]. For example, the Judge found that there was no breach of natural justice in failing to disclose the Advisory Opinions to the appellants. There was affidavit evidence from

multiple sources that the Advisory Opinions could be taken into account in the Minister's decision making[5]. They therefore passed the relevancy test mentioned by Kay LJ in *Durham County Council*[6] namely "train of enquiry" points which are not merely fishing expeditions**.** The Judge relied on *Durham County Council***.**

[25]. Since the respondents appear to rely on public interest immunity or its equivalent, it was for them to assert exemption from disclosure[7], and to show that withholding the reports was necessary. This appears to be the ratio in *Durham County Council* where it states:

> "Secondly, if the relevance test is satisfied, it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection. Thirdly, any ensuing dispute falls to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose rights would require protection, Fourthly, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary. Fifthly, in some cases the balance may be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or other such order. Again, the limitation or restriction must satisfy the test of *strict necessity*" [emphasis added].

[26]. Although the appellants do not have a right to amnesty, since the respondents have agreed to hear their case in accordance with the law set out in S. 82 to S. 84 of the Immigration Ordinance, they are bound to act fairly in accordance with the rules of natural justice as guaranteed by S.6 (8) of the Constitution.

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[5] Affidavit of Derek Been sworn 18 December 2020 in Action No. CL. 91/20 and CL 127/20 at paras 16 and 19; See also, 1st Affidavit of Mikhail Charles filed on 20 October 2020 in action No. CL 127/20 at para 12 – 14.
[6] *Durham County Council v Dunn* [2012] EWCA Civ 1654 at para 23.
[7] *Durham County Council,* para 23

[27]. After making the application on behalf of the asylum seeker, counsel is allowed to attend a hearing on the application but is not allowed to participate. It seems that in such case the principles of natural justice make it a necessary ingredient for a fair hearing that the appellants know the case against them as reflected in the Advisory Opinion, so that counsel could have an opportunity to meet it in his application. If the authorities have any apprehensions, they could strictly limit the disclosure to the applicant and his counsel only.

[28]. Had the evidence such as there was been analyzed more thoroughly and the correct legal principles applied the ineluctable conclusion should have been that in the absence of any statutory provision to the contrary, failure to disclose the Report to the particular applicant would result in a breach of natural justice in his case. No reasonable tribunal could conclude otherwise.

[29]. Ms. Hippolyte argued that there was no breach of natural justice or the Constitution because the Appellants had a right to appeal the Minister's decision to the Governor. The possibility of an appeal was no answer to the objection. That would come after the rejection and there appears to be no guarantee that the Report would be made available for such an appeal[8]. It is also noted that while under S.89 of the Ordinance the Governor may make rules for the hearing of appeals from the refusal of the grant of asylum, no rules have yet been promulgated.

SUMMARY

[30]. As previously stated, at *20.* of his judgment the Judge concluded that based on the principles he was of the view that the public interest in protecting the confidentiality of the advisory opinions outweighs the interest of the applicants in disclosure, and refused the application. He did not condescend to elaborate on what he considered those principles to be or whether his conclusion was evidence based. He further did not point to evidence

[8] In answer by counsel for the respondents to a question by the Court

which demonstrated, consistent with the principle expressed in *Durham County Council v Dunn* on which he relied, that it was strictly necessary to withhold the Opinions.

CONCLUSION

[31]. Counsel for the Respondents was gracious enough to concede that the conclusions were not supported by evidence. Nor was it clear enough on which principles the Judge relied.

[32]. For all the reasons set out above we allowed the appeal, set aside the judgment, and ordered the TCIG to release the Advisory reports to the respective appellants pursuant to their applications in the judicial review application within 14 days of the date of judgment. We understand that additional foreign help has been engaged to re-interview the Appellants. If the Appellants join issue with that it may give rise to a separate application before another panel.

Dated this 26th day of October, 2021

/s/ K. Neville Adderley, JA

I agree.

/s/ C. Dennis Morrison, P

I also agree.

/s/ Stollmeyer, JA