IN THE COURT OF APPEAL **CL-AP 6/2022**

OF THE TURKS AND CAICOS ISLANDS **(on appeal from CL11/2022)**

IN THE MATTER OF sections 5(1) and 8 of the Legal Profession Ordinance

AND IN THE MATTER of an application **JAMES GALE** to be granted limited admission to practise as an Attorney of this Honourable Court for the purposes of civil Supreme Court matter CL88/2021.

Coram: The Honourable Mr Justice Adderley JA, President (Ag.)

The Honourable Mr Justice John, JA

The Honourable Madam Justice Cornelius-Thorne, JA

Appearances: Mr Tim Prudhoe for the Appellant

Ms Clemar Hippolyte of the Attorney General's Office as *amicus curiae*

Hearing date: 10 May 2023

Delivery Date: 24 May 2023

JUDGMENT

ADDERLEY, JA

[1] The Appellant appeals the decision of Agyemang CJ (the 'Learned Judge') whereby she refused an application (the 'Application') for limited admission of Mr James Gale (the 'Appellant') as an Attorney under s. 8 of the Legal Profession Ordinance ("LPO").

[2] In the substantive proceedings CL 88/2021 against the then Director of Immigration Derek Been and the Honourable Attorney General as Defendants Mr Prudhoe raised various constitutional issues surrounding the refusal of the authorities to grant a residence permit to a same–sex spouse. The constitutional issues are similar to those raised in the Privy Council decisions of ***Day and others v the Governor of the Cayman Islands and another*** [2022] UKPC 6 and ***Attorney General for Bermuda (Appellant) v Roderick Ferguson and others (Respondents)(Bermuda)*** [2022] UKPC 5. This appears to be the first time the issues have been raised in the Turks and Caicos Islands.

[3] The final hearing in the substantive proceedings in which the Appellant was to assist was heard in November 2022 before Gruchot J and only his reserved decision remains to be rendered.

[4] The appeal is of an academic character being akin to an appeal on a preliminary point in a substantive matter which has been completed. However following Lord Neuberger's dicta in **Hutcheson v Popdog Ltd** [2011] EWCA Civ 1580, [2012] 2 ALL ER 711 and those of Saunders JA, as he then was, in **Martinus Francois v The Attorney General St Lucia** Civil Appeal No 37 of 2003, the Court has decided to exercise its discretion to entertain the appeal because it raises an issue of some general importance. It is likely that similar applications for limited admission will be made in the future and there needs to be guidance and clarity in the area.

[5] A representative of each of the Bar Council and the Attorney General's Office appeared as *amici curiae* in the court below, but only a representative of the Attorney General's office appeared before us as *amicus curiae*.

The Judge's Decision

[6] In a judgment handed down 29 April, 2022, the Learned Judge decided the issue as follows:

> "24. I would therefore refuse the Application on the basis that the Chief Justice is not satisfied that Mr Gale has demonstrated either the experience in legal practice or expertise in the subject matter of proceedings CL 88/2021 for the purposes of Section 8(1) of the Legal Profession Ordinance."

The Grounds of Appeal

[7] The Appellant raised the following amended grounds of appeal:

(1) Ground 1: The learned judge erred in law in misinterpreting the words 'appearing, acting, or advising in a suit or matter' in s. 8(1) of the LPO.

(2) Grounds 2 and 3: the learned judge erred in failing to consider the only evidence adduced of temporary admissions during the prior ten-year period. The learned judge erred in failing to consider her own approach in CL 88/2021: that is, the paucity of evidence properly-so-called in respect of Mr. Hare KC's (successful) temporary admission.

(3) Grounds 4 & 5: The learned judge erred in fact in finding that the Appellant had 'very little experience' and was without 'any demonstrated expertise'.

(4) GROUND 6 – PLAINLY WRONG

The Application

[8] The application dated 25 February, 2022, by the Appellant was made "…for the purpose of appearing" together with Mr Tim Prudhoe.

[9] The application dated 14 January, 2022, on behalf of Charles Hare QC was for the purposes of "appearing, acting for and advising the Crown..."

[10] I mention Mr Charles Hare's application because the Appellant sought to make a comparison during the course of his argument.

The Law

[11] The admission of an attorney to the Turks and Caicos Bar is governed by sections 4, 5, 6 and 8 of the LPO. The admission of a foreign attorney is governed by section 8.

[12] Section 4 gives the power of the Chief Justice to admit a person to the Bar; section 5 sets out the qualifications for admission and section 6 sets out the application procedure.

[13] Section 8 deals with the limited admissions which is the subject matter of this appeal. It provides as follows:

> "8(1)"Subject to this section, any person who possesses the qualifications specified in section 5(1) or is exempted under section 4(3), and who has come or intends to come to the Islands for the purpose of appearing, acting **or** advising in a suit or matter, may be admitted as an Attorney by the Chief Justice." [**emphasis added**]

8 (2) An application for the admission of such person under this section may be made by an attorney enrolled in the islands who shall satisfy the Chief Justice that he has instructed such person and that such person has come or intends to come to the Islands for the purpose of appearing, acting, **and** advising in that suit or matter." [**emphasis added**]

The Construction of section 8

[14] The Appellant argued in his skeleton arguments that, read together, there are effectively three independent preconditions for limited admission. The applicant must:

(a) Possess the qualifications set out in section 5 or be exempt under s. 4(3)

(b) Be a person 'who has come or intends to come to the Islands for the purpose of appearing, acting **or** advising in a suit or matter

(c) Be instructed by an attorney enrolled in the Islands

[15] He submitted that although section 8(2) uses the conjunctive 'and', there is no obvious policy reason which would prohibit granting limited admission to an applicant who only intended to come to the Islands for the purpose of advising in a suit or matter and that the Learned Judge was wrong in her interpretation that the limited admission had to be for the purpose of "appearing, acting, **and** advising.

[16] He relied in his written submissions on the comments made by Foster J in **In the Matter of Certain Applications for Limited Admissions, as an Attorney at Law** [2009 CILR 41] where he said at [6] "…appearing, acting or advising in the matter concerned…"

must be the purpose of the person proposed to be admitted coming to the Cayman Islands…"

[17] Our attention was not drawn to any provision in the Caymanian law equivalent to section 8(2) in the LPO.

[18] Ms. Hippolyte submitted that the insertion of the word "or" in section 8(1) and the insertion of the word "and" in section 8(2) was a deliberate act of Parliament, and not a mistake. Notwithstanding that section 8(1) sets out disjunctively as correctly identified by Foster J the purpose for which the person seeking limited admission may be admitted; section 8(2) mandates that the person "…shall satisfy the Chief Justice…that such person has come or intends to come for the purpose of appearing, acting **and** advising" in the suit or matter.

[19] We agree with the latter construction that placing of the word "or" in section 8(1) and replacing that with the word "and" in section 8(2) must be presumed to be a deliberate act of Parliament and reflects its intention.

[20] We are therefore of the opinion that the Learned Judge was right where she stated at [18] of her judgment:

> "While section 8(1) in describing the duties of a person to be granted limited admission uses the disjunctive "or", which would suggest that the person may be doing any one of these: "appearing, or acting, or advising", the consideration with which the Chief Justice must be exercised in order to admit under section 8(1) is contained in section 8(2), which unlike section 8(1) uses the conjunctive "and", and therefore would suggest that the sponsoring attorney must satisfy the Chief Justice that the person is in a position to do all three, which is "appear, act and advise".

[21] Ground one that the Learned Judge erred in law in misinterpreting the words 'appearing, acting, or advising in a suit or matter' in s. 8(1) of the LPO is therefore dismissed.

[22] There was no dispute that the Appellant appears to have the qualifications for general admission. Those qualifications are set out in s. 5 of the LPO namely:

> "5(1)
>
> (a) (i) has been called to the bar or admitted as a solicitor or an attorney in some part of the Commonwealth or the Republic of Ireland; or
>
> (ii) has obtained a Certificate of Legal Education from the Council of Legal Education of the West Indies; or
>
> (iii) has obtained a Diploma of Legal Practice from an institution approved by the Law Society of England and Wales; or
>
> (iv) is qualified to practice as an attorney under regulations made under s. 30; and…"

[23] Section 30 of the Legal Profession Ordinance provides as follows:

> "The Chief Justice, after consulting the Bar Council and with the approval of the Governor in Council, may make regulations for the better carrying out of the provisions of this Ordinance and may prescribe anything that may be prescribed and, in particular, without derogating from the generality of the foregoing may make regulations— (a) …..; (b) …….; (c) …….
>
> (d) *prescribing the manner of application for limited admission for the purposes of section 8*;
>
> (e) …….; (f) …….; (g)…….; (h)…….; (j)…...; (k)…….;

[24] It is not in dispute that no Regulations have been promulgated under s. 30.

[25] In the absence of Regulations and in light of the paucity of evidence how should the Chief Justice exercise her discretion? As is commonly done by judges where no local precedent exists in the jurisdiction, she chose to look at other jurisdictions to see how they dealt with the matter, not as persuasive authority but as a source of what may be relevant considerations. She looked to the jurisdictions of Bermuda and the Cayman Islands as well as making her own inferences from the evidence at hand.

[26] She also considered the input of the local Bar Council. This was relevant because on the evidence in a letter to the Bar Council dated 23 March, 2022, from Mr. Prudhoe, between 2016 and 2020 the vast majority of the files relating to temporary admittance contained a notation on the file stating “letter of no objection by the Bar Council”. This note indicates that the Bar Council was consulted before approving the temporary admissions.

[27] Furthermore, she took guidance from other jurisdictions in particular the ruling of Foster J (Ag.) **In the Matter of Certain Applications for Limited Admissions, as an Attorney at Law** [2009 CILR 41] and the reasoning of Smellie CJ in the case of **In the Matter of Various Applications for the Grant of Limited Admission as an Attorney-at-Law of the Cayman Islands** [2015] (2) CILR 338 both cases from the Cayman Islands.

[28] As stated in paragraph 5 of the judgment the Learned Judge also read the affidavit of Edward Claude, a paralegal in Mr Prudhoe’s chambers who brought to the attention of the Court evidence about the legal regime surrounding limited admissions in Anguilla, Antigua

& Barbuda, Belize, Bermuda, the British Virgin Islands, Grenada, Montserrat, St Kitts & Nevis, St Vincent and the Grenadines, the Cayman Islands, Jamaica and The Bahamas. She also read the affidavits and made the statement at [6]: "The Court has carefully considered the evidence and the parties' submissions".

[29] The Learned Judge also considered objections of the Bar Council who appeared as *amicus curiae* by its president Mr. Selvyn Hawkins. Its main objections were that Action CL 88/2021 was not sufficiently complex as to warrant a foreign counsel, the members of the local Bar should be empowered to tackle cases such as these, and that the applicant had no seniority or particular expertise in "appearing, acting, or advising" in cases such as CL88/2021. She interpreted the gravamen of Bar Council's submissions to be that members of the local Bar should be empowered to tackle such cases, and that when limited admission is granted it should be reserved for attorneys who bring enhanced expertise, for example Queen's Counsel (now King's Counsel), and not just another Junior Counsel. It was an argument that did not find disfavour with her but not one on which she was inclined to rest her decision.

[30] Mr. Prudhoe made heavy weather of the fact that the result of research, as evidenced by an Affidavit of Andwena Lockhart filed 12 April 2022 in Action No. CL 11/2022, showed that there were as many as 142 applications for temporary admittance over the last 10-year period between 2012 and 2022, and none appeared to have dealt with specialist expertise and experience.

[31] Upon enquiry by the Court, both counsel agreed that there were no judgments and no transcripts in those 142 cases, and it is not possible to discern the basis upon which they were temporarily admitted. It would therefore not have been possible for the Learned Judge to have carried out any useful analysis of that evidence to

inform the exercise of her discretion. The Appellant also made comparison of the process to admit Mr. Ivan Hare QC, a foreign attorney who appeared for the Attorney General in the same case impossible.

[32] In any event the Appellant had no standing to question the validity of the process through which Mr Hare KC was taken in order to be admitted.

[33] Grounds 2 and 3 that the Learned Judge erred in failing to consider the only evidence adduced of temporary admissions during the prior ten-year period are therefore dismissed.

Experience in Legal Practice or Expertise

[34] Was it a proper exercise of the Learned Judge's discretion to conclude that Mr Gale did not possess the experience in legal practice and expertise to be admitted in relation to Action CL88/2021?

[35] From the evidence of his curriculum vitae exhibited to his affidavit dated 31 January, 2022, if Action CL 88/2021 was a matter involving commercial law such as freezing injunctions, arbitration, fraud, decentralized finance or blockchain technology it might have been different, but the appellant has nothing approaching constitutional law in his training or experience in his 6 years of practice at the Bar.

[36] It is conceivable that he could be a suitable candidate for consideration in a different type of case in the future. But it is evident having regard to the requirements of section 8(2) of the LPO that the Appellant is not a suitable candidate for Action CL88/2021. As an

appellate court we are unable to conclude that the Learned Judge was clearly wrong in making the following finding at [14]:

> "In this case, the Applicant has almost 6 years standing in the Bar of England and Wales, without any demonstrated expertise in the area of the case at hand, and nothing else to speak for him, save that he possesses legal qualifications from prestigious institutions. This does not, in my opinion, qualify him to be admitted for a limited purpose within the intendment of Section 8."

[37] In paragraph 23 of her judgment the Learned Judge left the door open for the sponsorship of a suitable candidate.

[38] Grounds 4 & 5 that the Learned Judge erred in fact in finding that the Appellant had 'very little experience' and was without 'any demonstrated expertise' are therefore dismissed.

Need for Regulations under section 30 (d) of the LPO

[39] During the course of argument and the discussion of the law in other jurisdictions, it became clear that there is a need to give consideration to promulgating regulations in accordance with section 30(d) to prescribe the manner of application for limited admission for the purposes of section 8.

[40] Criteria can and should be set out to protect the legal profession. The regulations could have the policy objective of protecting the growth and development of expertise at the local Bar and developing the jurisprudence in all areas of the law in this jurisdiction.

[41] The Learned Judge reminded herself that some of the circumstances that can feature in the exercise of the Chief Justice's

decision, drawing primarily on cases from the Cayman Islands,[1] include the difficulty or complexity of the matter, the resources and support available to the particular attorney-at-law who has instructed the person proposed to be admitted and the availability of local lawyers.

[42] Other considerations included the importance of adequate safeguards to protect the growth and development of the local Bar, the need to prevent the outsourcing of legal work save in exceptional cases, the applying party's need for adequate legal representation taking account of the nature and complexity of the case, the expertise of counsel seeking admission, whether their work is being conducted in or from within the TCI and their involvement in the conduct of the litigation.[2]

[43] Suitable regulations will facilitate the protection and development of the legal profession and the ends of justice and commerce in the jurisdiction.

CONCLUSION

[44] In **Grant v Grant** (Action No. CL-AP 1/2021) handed down in this Court on the 28 April, 2023, at [21] we referred to a statement of Lord Kerr in the case of **In the Matter of B (a Child) (FC)** [2013] UKSC 33 where he summarized the principle governing the role of an appellate court in reviewing a discretion exercised by a judge. He stated at [112]:

> " Where what is under review by an appellate court is a decision based on the exercise of discretion, provided the decision-maker has not failed to take into account relevant

[1] Foster AG. J **In the Matter of Certain Applications for Limited Admissions, as an Attorney at Law** [2009 CILR 41]

[2] Smellie CJ in the case of **In the Matter of Various Applications for the Grant of Limited Admission as an Attorney-at-Law of the Cayman Islands** [2015] (2) CILR

> matters and has not had regard to irrelevant factors and has not reached a decision that is plainly irrational, the review by an appellate court is at its most benign. Truly, in that instance, an appellate court which disagrees with the challenged decision of the judge will be constrained to say, even though we would have reached a different conclusion, we cannot interfere."

[45] Similar principles have been expressed in the authorities cited by Ms Hippolyte namely, **Hadmor Productions Ltd and Others v Hamilton and Others [1982]** 1 All ER 1042 at 1046, at 1046, per Lord Diplock, **Scherer and another v Counting Instruments Ltd and another [**1986] 2 All ER 529 the English Court of Appeal **and Dufour v Helenair Corporation Limited (**1996) 52 WIR 188 per the learned Chief Justice Sir Vincent Floissac, as he then was.

[46] On the authorities this court could only interfere with the Learned Judge's discretion if it is satisfied that the Learned Judge misunderstood the law or the evidence before her; misconceived the facts before her which can be shown to be demonstrably wrong; or that she arrived at a decision that no judge, having regard to his or her duty to act judicially, could have arrived at. We are not of that view.

[47] Therefore GROUND 6 – PLAINLY WRONG is hereby dismissed.

[48] For all the above reasons we dismiss the appeal. Since Ms Hippolyte is appearing *amicus curiae* we make no order as to costs.

[49] We wish to thank both counsel for their assistance, and Mr Prudhoe for raising this important issue.

Adderley JA, President (Actg.)

I agree

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John, JA

I also agree

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Cornelius-Thorne, JA