CL 83/2023

IN THE SUPREMER COURT

TURKS AND CAIOS ISLANDS

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW, Ord 53, r.6

THE KING

And

THE REGISTRAR OF THE SUPREME COURT

THE CHIEF JUSTICE OF THE SUPREME COURT

THE ATTORNEY GENERAL

Respondents

Beryn Duncanson

Dr. John T. Mc. Mahan

Paul M. Matthews

Seraphine Duncanson

Jacques Gascon

Lee Goudie

Karen Higgs

Joseph J. Higgs

Samuel Belizaire

Brochelle Duncanson

James O. Turnbull

Applicants

And

East Wind Development Company Ltd

William Dean Reeves

Richard Arthur

Jeffrey Herman

Ronnie Moore

John Fleming

Willian Maddox

Interested Parties

Before: The Hon. Mr. Justice Davidson Kelvin Baptiste (Ag.)

Mr. Beryn Duncanson for the applicants.

Ms. Clemar Hippolyte for the respondent.

Conrad Griffiths KC and Devonte Smith for the Interested Parties.

Heard: 21 June 2024

Delivered: 24 June 2024

1. **Baptiste J (Ag):** This is an application for leave to apply for judicial review in respect of decisions allegedly made by the Registrar of the Supreme Court and or the Chief Justice to:

    (a) publish in the TCI online newspaper a backdating of the appointment of Mr. Justice Selochan; and

    (b) list the subject cases with the said newly appointed judge, in breach of the spirit of the Court of Appeal's directions of 7 June 2023, without any consultation with the applicants' counsel, and such decisions were effected by way of emails around the 6 to 9 June 2023.

2. The application is opposed by the respondents and the Interested Parties. Affidavit evidence has been filed in support of and in opposition to the application. The court also heard oral submissions from counsel for the parties.

3. As a matter of background, as taken from the 1st affidavit of Khadija Mac Farlane sworn to on 18 June 2024, on behalf of the respondents, these proceedings have their genesis in two civil matters: CL 150/22 and CL 97/22. CL 150 /22 is an Originating summons filed by the applicants to recover alleged unpaid legal fees said to be due to the first named applicant's firm. The interested parties filed an interlocutory summons

to strike out the Originating Summons. The related matter CL 97/22 is an appeal filed by the first named applicant against the decision of the Registrar of Lands not to register cautions over divers parcels of land belonging to the first named Interested Party. The two matters were listed to be heard together as they concerned the same parties and were premised on the same facts.

4. The matter was fixed for hearing before Justice Gruchot on 14 and 15 March 2023. The first applicant made an unsuccessful application for Justice Gruchot to recuse himself, a general recusal. The applicants then made an application for leave to appeal the recusal decision and for a stay of proceedings. Justice Gruchot granted leave to appeal but denied the application to stay the proceedings. The applicants appealed Justice Gruchot's refusal to recuse himself on the ground of apparent bias and invited the court to consider the application for a stay of proceedings.

5. The Court of Appeal heard full arguments from the parties on the stay application on 6 June 2023 and adjourned the matter to the following day to allow the court time to fully consider the matter. On resumption, the court was unable to reach a decision on the stay application pending appeal. The Court ordered a temporary stay of the Orders of 6 April 2023 and directed that the matters listed before Justice Gruchot: CL 150/22 and CL 97/22 be transferred to another judge of the Supreme Court.

6. Paragraph 2 of the Court of Appeals' order of 7 June 2023 stated that: *Pending the Court's ruling on the Notice of Motion for a Stay, the matters before the Supreme Court in Action No CL 150/2022 and CL 97/2022 may be transferred to any other judge of the Supreme Court.*

7. Justice Selochan was appointed a judge of the Supreme Court on 24 March 2023 and his appointment was to take effect on 1 June 2023. The Instrument of Appointment erroneously referred to His Lordship as *"Christopher Selochan"*. The First Notice of Appointment of Mr. Justice Selochan appeared in the Gazette dated 7 April 2023. His Lordship was formally sworn in as a judge on 2 June 2023 and a formal Press Release was issued on that day.

8. Justice Selochan's correct name is Chris Selochan and not Christopher Selochan. When the error was discovered, the appointment of Christopher Selochan as a judge of the Supreme Court was revoked and a new instrument of appointment was made by the acting Governor appointing Chris Selochan as a judge for a period of three years effective 1 June 2023.

9. The present proceedings relate to allegations by the applicants that the appointment of Justice Selochan was improper and that the learned judge was wrongly assigned to preside over matters involving the applicants and the Interested Parties. The applicants allege that the Court Administration including the Chief Justice and the Registrar of the Supreme Court have acted improperly and ultra vires their powers in a conspiracy to backdate the appointment of Justice Selochan.

10. The application for leave to apply for judicial review is supported by the affidavit of Beryn Sigurd Duncanson dated 21 June 2023 and filed 23 June 2023. The affidavit states in essence that:

    (i) On 7 June 2023, the Court of Appeal ordered a temporary stay and ordered the subject matter to be transferred from Justice Gruchot to another judge.

    (ii) The President Mr. Adderley further gave verbal directions that: *"Counsel shall forthwith seek to have the matter transferred to another judge. The substantive proceedings concern a breach of contract, with possible limitation and fraud issues, manifestly capable of being handled by another judge. Mr. Duncanson has represented to the Court that he consents to any other judge hearing the matter. In fact, the most recent appointment which took effect on 1 June has been designated by the C[hief] J [ustice] as a Generalist Jurisdiction Judge and he or any other judge can hear the matter subject to their calendars."*

    (iii) Whether and when it is ever appropriate to for an administrative authority to "back date" any document (in this case an instrument of appointment by some four months, nor simply a matter of days or weeks). On the face of the subject appointment announced in the TCI Sun online newspaper, according to the Chief Justice's Press Release, that it was signed by the outgoing governor Mr. Nigel Dakin on the 13th February 2023, but the public announcement of the new judge was not notified until 4 months later on 6 June 2023. And I have been unable to current date to locate any Gazette of the said Instrument in February 2023 or otherwise comporting with an original appointment of 13th February 2023 as procedurally required under our Constitutional process [implicit in the Governor's appointment such as under s 82].

    (iv) What I have managed to locate is a very recent Gazetted notice out only this past week or so in the Gazette issue for 9th June 2023 and the apparent instrument of the subject judge's appointment by the Acting Governor Ms. Anya Williams purportedly dated 2 June 2023.

11. In his oral submissions, Mr. Duncanson argues that the decision being challenged is the decision which assigned Justice Selochan to the applicants' matters, in the face of the clear decision of the Court of Appeal of 7 June 2023. The direction given was that all is cases should be assigned to another judge. At that time Justice Selochan did not exist as a judge of the Supreme Court. Paragraph 2 of the Order is limited to an existing judge.

12. Mr. Duncanson asserts that the appointment of Mr. Justice Selochan is procedurally improper and Wednesbury unreasonable and he was not properly appointed and the applicants have never accepted his jurisdiction. Learned counsel posits that at the time of the appointment there was a clear direction from the Court of Appeal that the matter be transferred to any other judge of the Court. It is a judge within the jurisdiction. You cannot backdate judicial appointments; it is illegal. The decision to assign Justice Selochan to the case is Wednesbury Unreasonable, illegal and procedurally improper.

13. Mr. Duncanson states that the heart of his complaint is that the decision by the Chief Justice and or the Registrar to list his multimillion-dollar matter before a judge without prior judicial experience was simpliciter unreasonable and improper and essential to his complaint for judicial review. On the very face of it, the appointment was backdated.

14. Ms. Hippolyte, counsel for the respondents, invites the court to examine the evidence and make a determination as to whether the applicants have met the threshold for leave to apply for judicial review. Learned counsel argues that with respect to illegality, the allegations raised are very serious. The more serious the allegations, the stronger the evidence must be. It is not enough to raise a potentially arguable case on a mere speculative basis. The applicants are obliged to satisfy the court that they have brought a case which satisfies the threshold.

15. With respect of the appointment of Justice Selochan, Ms. Hippolyte points out that the Instrument of Appointment indicates that he was appointed a judge for three years from 1 June 2023. In the body of the instrument, the name "Christopher" appears. The appointment was revoked consequent upon an error in the judge's name to reflect the correct name "Chris". Another instrument was issued reflecting the judge's correct name. There was no backdating of any appointment. The instruments of appointment on their face are clearly valid. The evidence in support of the challenge does not meet the threshold for the grant of leave.

16. With respect to the competence of the judge, Ms. Hippolyte asks the court to take judicial notice of the fact that the process of appointment or qualification is not being challenged. Section 77 (4) of the Constitution is not being challenged. Ms. Hippolyte submits that the judge was well qualified to consider the matter involving the applicants. The assignment of judges to hear matters is not the function of the Court of Appeal. There is no evidence to substantiate any wrong doing by the Registrar in assigning the matter to Mr. Justice Selochan, who was a new judge and whose calendar would have been able to accommodate the matter. There is no evidence to support any conspiracy between the Chief Justice and the Registrar. There are no particulars of this alleged conspiracy. Ms. Hippolyte submits that the threshold for the grant of leave has not been met and the court should not exercise its discretion to grant leave.

17. Mr. Griffiths KC adopts the Crown's position and states that the purpose of leave is to ferret out unmeritorious cases. Mr Griffiths notes that the appointment of Justice Selochan is not being challenged; what is challenged is a press release and to listing the

matter for trial before Justice Selochan. What is being challenged is an alleged backdating. Mr. Griffith KC submits that there is no backdating. The 2 June appointment does not backdate the appointment. It states that the appointment takes effect on a certain date.

18. This being an application for leave to apply for judicial review, it engages the well - established principles germane to such an application. In **Sharma v Antoine [2006] UKPC 57**, paragraph 14 (4) the Board stated that the ordinary rule is that the court will refuse leave to claim judicial review unless satisfied that there is arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. Arguability cannot be judged without reference to the nature and gravity of the issues to be argued. It is a test which is flexible in its application. It is not enough that the case is potentially arguable: an applicant cannot plead potential arguability to *"justify the grant of leave to issue proceedings upon a speculative basis which it is hoped that the interlocutory process of the court may strength"*.

19. With respect to arguability, the Board cited with approval **R (N) v Mental Health Tribunal (Northern Region) [2005] EWCA Civ 1605** paragraph 62:

> "... the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities ... Thus the flexibility of the standard lies in the strength or the quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

20. It is an important principle that judicial reviews are not entertained if they serve no useful purpose. Judicial review must serve a useful purpose. There must be a live issue between the parties that require a final remedy and, while the Administrative Court reserves a discretion to determine an academic claim where there is a public interest in doing so, the circumstances in which it will do so are rare: **The Queen on the application of All About Rights Law Practice and Lord Chancellor [2021] EWHC 3048 (Admin)** paragraphs 12 and 27.

21. In **Council of Civil Service Unions v Minister of Civil Service [1984] UKHL 9**, Lord Diplock identified the three general grounds for judicial review. The well - known principles on which a decision can be impeached are: illegality, procedural impropriety and irrationality or Wednesbury unreasonableness. The burden of establishing that a decision is Wednesbury unreasonable is notoriously heavy.

22. Irrationality or Wednesbury unreasonableness applies to a decision that is so outrageous in its defiance of logic, or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. The first limb focusses on the decision - making process, whether the right matters have been taken into account in reaching a decision. The second issues focuses on its outcome – whether

even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle without necessarily excluding the former: **Braganza v BP Shipping Limited and another [2015] UKSC 17** at 24. The test of irrationality will be satisfied if it can be shown that it was one which no sensible person who had applied his mind to the question to be decided could have arrived at.

23. Illegality as a ground for judicial review, means that the decision maker must understand correctly the law that regulates his decision - making power and must give effect to it.

24. It is well settled that the threshold for the grant of leave to apply for judicial review is low. The Court is concerned only to examine whether the applicant has an arguable ground for judicial review having a realistic prospect of success. And is not subject to a discretionary bar such as delay or alternative remedy. The low threshold would usually not be met *"if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed":* see **Attorney General v Ayers - Caesar [2019] UKPC 44** at paragraph 2.

25. The question for my determination is whether there is an arguable ground for judicial review having a realistic prospect of success. I am cognisant that arguability cannot be judged without reference to the nature and gravity of the issues to be argued. Further, the more serious the allegations the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Evidence is not found in arguments of counsel, but in the affidavit evidence furnished in support of the leave application. Although serious allegations have been made by the applicants, in respect of the respondents, an examination of the evidence in support of the application for leave provides no support for the allegation of any backdating of the appointment of Mr. Justice Selochan.

26. The respondents' evidence is that Justice Selochan's appointment was made by the Governor acting on the advice of the Judicial Service Commission and was initially gazetted on 7th April 2023. The notice referred to the appointment of "Christopher Selochan" on 24 March 2023 for a term of three years from 1 June 2023. Justice Selochan's first name is "Chris" and not "Christopher". The error in the original appointment was corrected on 2 June 2023, when the appointment of 24 March 2023 was revoked and by the issuance of a new instrument of appointment also dated 2 June 2022. The new appointment correctly refers to "Chris Selochan".

27. Justice Selochan was appointed by the Governor on the advice of the Judicial Service Commission. There has been no judicial review challenging his appointment. The relief claimed in the judicial review proceedings does not challenge the Governor's appointment. The allegation of a conspiracy to backdate his appointment does not have a realistic prospect of success.

28. The applicants allege that Justice Selochan was improperly assigned to hear matters involving the Mr. Duncanson and the interested parties, purportedly against the order of the Court of Appeal on 7 June 2023 and against the rules of natural justice. This allegation does not disclose an arguable ground of judicial review having a realistic prospect of success. I agree with the respondents that the listing of matters is an administrative decision and nothing is disclosed justifying a challenge to a listing decision, especially where the Court of Appeal intimated that that was a clear option.

29. In my judgment, the Court of Appeal's oral ruling of 7 June 2023, clearly envisages that Justice Selochan (or any other judge apart from Justice Gruchot) could be appointed to hear the matters involving Mr. Duncanson and the Interested parties. The Court of Appeal in its ruling specifically referred to the fact that a judge had been recently appointed as a general jurisdiction Judge. The Court stated:

> "This is really the decision of the Court of Appeal on this matter. The Court has not been able to reach a decision overnight. Accordingly, the Court will grant a temporary stay pending the decision or until the matter is transferred to another judge whichever comes first. Counsel shall forthwith seek to have the matter transferred to another judge. The substantive proceedings concern a breach of contract, with possible limitation and fraud issues, manifestly capable of being handled by another judge. Mr. Duncanson has represented to the Court that he consents to any other judge hearing the matter. In fact, the most recent appointment which took effect on the 1st of June has been designated by the Chief Justice as a General Jurisdiction Judge and he or any of the other judge can hear the matter subject to their calendars".

30. This is clearly a reference to Justice Selochan as he was the only Supreme Court Justice appointed at that time. Further, the Court of Appeal stated: *The Court informed him [Mr. Duncanson] that another judge had recently been appointed and had been designated by the Chief Justice as a general jurisdiction judge*. At paragraph [28] the court further stated: *Pursuant to the decision of this court that the matter could be transferred to any other judge*. It was transferred to Selochan J.

31. In my view there is nothing disclosed in the evidence which shows any action by the Registrar inconsistent with the proper performance of his duties. No procedural impropriety has been disclosed. The Court of Appeal made clear that the matter could properly be listed before Justice Selochan, although this was a matter for the Court's administration. With respect to the Chief Justice, the applicants have adduced no evidence of impropriety. The allegations of conspiracy are totally devoid of an evidential basis.

32. I note the observation of the Privy Council that wider questions of the public interest may have some bearing on whether leave should be granted, but if the court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose

of the matter at that stage: **Attorney General of Trinidad and Tobago v Ayers – Caesar [2019] UKPC 44**, paragraph 2. In my view, this is such a case.

33. In my judgment, the applicants have not met the threshold for the grant of leave to apply for judicial review. In the circumstances, the court refuses leave to apply for judicial review, as there is no arguable ground of judicial review having a realistic prospect of success.

34. In any event, no useful purpose would be served by the grant of leave to apply for judicial review. The Court of Appeal itself envisaged that the matters could be transferred to Justice Selochan.

35. The order of the court is that the application for leave to apply for judicial review is dismissed. The respondents and Interested Parties are awarded their costs on an indemnity basis, to be taxed if not agreed within 21 days.

The Honourable Mr. Justice Davidson Kelvin Baptiste

Judge of the Supreme Court (Ag.)