IN THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS

CL-AP 11/2022
(APPEAL FROM CL 43/2021)

BETWEEN

THE QUEEN

(ON THE APPLICATION OF

(1) KAJEEPAN, PAINTAMILKAVALAN

(2) RASARATNAM, VARATHARAJ

(3) SIVAPALAN, JESEEPAN SWAPALAN

(4) ARIYAPUTHIRAN RAVVIKUMAR

(5) THAMBYRASA, SRIKANTH

(6) VINOJAN, THEIVENDRAM)

(7) KUGAGNANAM, NESARUPAN

(8) PASKARAN, VITHURSAN

(9) KENGATHARAN, KOKULAN

(10) VARATHARAJAH, SENKEERAN

(11) LOGITHAN, KARUNKARAN, AND

(12) MOIN ALHASHASH)

APPELLANTS

AND

1. HONOURABLE ARLINGTON MUSGROVE, MINISTER OF IMMIGRATION AND BORDER SERVICES (HER MAJESTY'S GOVERNMENT OF THE TURKS AND CAICOS ISLANDS)

2. DEREK BEEN, DIRECTOR OF IMMIGRATION

3. THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENTS

AND

IN THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS

CL AP12 /2022
(APPEAL FROM CL8,42 & 49 OF 2021)

BETWEEN

1. KAJEEPAN, PAINTAMILKAVALAN
2. RASARATNAM, VARATHARAJ
3. SIVALAPN, JESEEPAN SWAPALAN

APPELLANTS

AND

1. DIRECTOR OF IMMIGRATION, DEREK BEEN
2. MINISTER OF BORDER CONTROL, VADEN DELROY WILLIAMS
3. THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENTS

AND

IN THE COURT OF APPEAL OF
THE TURKS AND CAICOS ISLANDS

BETWEEN

1. THAMBYRASA, SRIKANTH
2. VINOJAN, THEIVENDRAM
3. KUGAGNANAM, NESARUPAN
4. PASKARAN, VITHURSAN
5. KENKATHARAN, KOKULAN
6. VARATHARAJAH, SENKEERAN
7. SIVALOGANATHAN, GOUTHAMAN
8. KARUNKARAN, LOGITHAN
9. KUGENTHIRAN, RUPILAN

APPELLANTS

AND

1. DIRECTOR OF IMMIGRATION, DEREK BEEN
2. MINISTER OF BORDER CONTROL, VADEN DELROY WILLIAMS
3. THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENTS

AND

BETWEEN

ARIAPUTHIRAN, RAVIKKUMAR

APPELLANT

AND

1. DIRECTOR OF IMMIGRATION, DEREK BEEN
2. MINISTER OF BORDER CONTROL, VADEN DELROY WILLIAMS
3. THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS

RESPONDENTS

BEFORE: The Hon Mr Justice Adderley JA, President (acting)
The Hon Mr Justice John JA
The Hon Mr Justice Sir Ian Winder, JA

Appearances:

Mr Tim Prudhoe of Stanbrook Prudhoe for the Appellants
Ms Clemar B. Hippolyte, Attorney General's Chambers for the Respondents

Date Heard: 16 January, 2023

Date Delivered: 24th March, 2023

JUDGEMENT

ADDERLEY, JA

1. Appeals CL-AP 11/2022 and CL-AP 12/2022 concern the refusals of applications by summonses issued respectively on 2 February and 3 February 2022 ("the Summonses") seeking disclosure of a "draft Policy" document having particular focus on the right to work for Asylum Seekers ("the draft Policy"). The Summonses were made in High Court matters CL 43/2021 ("the Judicial Review") and in consolidated proceedings CL 8, 42 & 49/2021 ("the Assessment Matter").

2. All of the appellants are asylum seekers without the recognized right to work in the Turks and Caicos Islands ("TCI"). There is an overlap of litigants in **Kajeepaan v Bean** 97 WIR 521 which dealt with the false imprisonment and damages assessment of some of the parties.

3. The Summonses were heard by Simons J ("the Judge") in a combined hearing dated 21 February 2022.

4. On the 22 February, 2022, the Judge dismissed the respective applications by the Appellants for specific disclosure made pursuant to Order 24 rule 7 and under Order 24 rule 7 and 11 of the Civil Rules 2000.

5. Since then, both the Judicial Review and the Assessment Matter have been determined by the Judge. The appellants have not appealed those final decisions.

JURISDICTION

6. Since the matters have been disposed of, the Respondents have raised the issue of whether this Court ought to accept jurisdiction to hear the appeal against those dismissals.

7. In the Judicial Review a Notice of Motion for Judicial Review had been issued by the Appellants in CL 43/21 on 21 May 2021 seeking various orders including:

> "1. An order of certiorari, quashing the First and/ or Second Respondent's directive as set out in IS96 Temporary Admission forms issued to the 1st-2nd and 9th-12th Applicants prohibiting them from working pending their temporary admission to the Turks and Caicos Islands;
>
> 2. An order for mandamus, requiring the First and/ or second Respondent to state expressly any applicable policy or policies as may be reflected in the emailed refusal of permission for gainful employment of asylum seekers as contained in the Second Respondent's email (Been)/Prudhoe and Hon. Musgrove timed 4pm on 7 May 2021 and which is stated (in relevant part);
>
> 3. A declaration that the Respondent's refusal whether by the IS96 Temporary Admission forms and/or such applicable policy or policies as may yet be made known to permit the Applicants to work pending the determination of their asylum applications and/or s.86(1) asylum appeals is contrary to their rights to the protection of the law under Clause 6(8) of the TCI Constitution;
>
> 4. An order of mandamus that the Applicants be permitted to work in the Turks and Caicos Islands pending the determination of their applications for asylum and /or s.86(1) [Immigration Ordinance] asylum appeals;
>
> 5. Further and/or other relief, including declarations as appropriate.

8. The present applications are anchored around a statement in the Witness Statement of Derek Been Director of Immigration filed in the Assessment Matter and signed January 2022 [83] which reads as follows:

> "83: In December 2021, the Cabinet considered a draft Policy with respect to Asylum and having particular focus on the right to work for Asylum Seekers. The paper was deferred as there were various issues identified which had to be reassessed in light of the local circumstances existing in the Turks and Caicos Islands, prior to the implementation of the proposed policy."

9. Mr. Prudhoe argued that there was an inference that the paragraph must have been put in the Witness Statement in the Assessment Matter for a reason, and he speculated that the reason was to drive down the figure of the assessment.

10. Mr. Been's Witness Statement predates the application for specific disclosure. When asked by the Court if the appellant cross-examined Mr. Been on his Witness Statement, Mr. Prudhoe's answer was in the negative.

11. But Mr. Been states in paragraph 2 of his Witness Statement why he made the statement:

> "I make this Witness Statement to set out facts which are necessary for the Court to consider in relation to this action" [the Judicial Review Action]. Therefore the stated purpose of paragraph 83 was to inform the Court of the fact, among other facts given in the statement, that a draft policy had been placed before Cabinet but it was deferred. Self-evidently if it was deferred it could not have been used to make its decision on the matter and could not be relevant.

12. Furthermore, it is evident that the reason why the appellant could not cross-examine on it was that the respondent did not rely or attempt to rely on the contents of the document.

13. Lord Bridge of Harwich made the following statement in the case of **Ainsbury v Millington** [1987] 1 W.L.R. 279 at 381 letter B:

> "…It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law where there is no dispute to be resolved."

14. The Respondents say that the Court ought not to hear the case because the proceedings relating to the action having been completed there is no longer a *lis* between the parties and the Court would be engaging in a moot or academic exercise.

15. The wording of the order seems to anticipate a *lis* between the parties and that the matter has not yet been disposed of. Order 24 rule 7 refers to documents which "relates to one or more of the matters in question in the cause or matter" and Order 24 rule 13(1) states that no order would be made unless the Court is of the opinion that production is necessary either for disposing fairly of the cause or matter or for saving costs [underline added]. If the matter is already disposed of it seems to beg the question how can production be necessary?

16. However, Winder, JA speaking for the majority in **Kajeepaan** pointed out at [33] that both the majority and Mottley P (speaking for the minority) all accepted that the Court may, in appropriate cases, hear an appeal notwithstanding it may be considered academic or moot. He made reference to Lord Neuberger's statement in **Hutchinsin v Popdog Ltd** [2011] EWCA Civ 1580, [2012] 2 ALL ER 711 where he stated that the discretion can be exercised in either of 2 instances:

> (1) in an exceptional case; or
>
> (2) where
>
> > (i) the court is satisfied that the appeal would raise a point of some general importance;
> >
> > (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced;
> >
> > (iii)The court is satisfied that both sides of the argument will be fully and properly ventilated

17. The Appellant argued that disclosure is necessary because it was necessary to help the Court make a decision in the Judicial Review case and it is necessary because the draft policy was relied on by the respondents.

18. The Respondents reply that on the evidence both assertions are incorrect, it does not fall in the exception class, and the first 2 limbs of the Neuberger test have not been satisfied in that it does not raise a point of general importance and the Respondent does not agree to it proceeding.

19. The judicial review proceedings and the assessment proceedings having come to an end, this is distinguishable from the facts in **Kajeepaan**. In that case Winder JA identified outstanding issues which showed that the case had not been disposed of, namely:

> "(a) the determination of the issue of the lawfulness of the detention
> (b) the claim for freestanding constitutional relief
> (c) claims for compensation for unlawful detention whether in this case or in the future;
> (d) the issue of costs; and
> (e) the fragile voluntary release and the possibility that the Appellants might find themselves in detention in the future"

20. The Appellants argued that in this appeal, the Summonses concern, as set out above, a Draft Policy still unreleased, relating to the rights of immigrants seeking asylum to work in TCI. They argue that the Appellants would benefit from an opportunity to make comments in respect of such a draft policy but its importance to future immigrants seeking asylum in TCI is also obvious. This is particularly so, they argue, as applications for asylum in TCI appear to take, by any indication from the Appellants' applications, an inordinate amount of time to be resolved. Additionally, there has been no consultation with the public regarding the Draft Policy.

21. The Appellants argue that given the scope of the Draft Policy and potential impact on immigrants seeking asylum in TCI whether the Draft Policy should be disclosed, in the circumstances, is a matter of exceptional importance and should be treated with by the Court of Appeal for that reason.

22. However, all of the authorities relied on by the appellant are distinguishable from this case. In **Kajeepaan** Winder JA, with whom John JA agreed, as the majority, decided that the appeal should proceed because of outstanding issues which the applicants had not had an opportunity to ventilate. In **KMG International NV v DP Holding SA** BVIHCMAP2017/0013 the issue was

concerned with the principles of *forum non conveniens* a very important public law issue to litigants making use of renowned commercial court system in the BVI. In **Ya'axche' Conservation Trust v Sabido (Chief Forest Officer)** (2014) 85 WIR 264 the issue was that of statutory interpretation of great significance to the protection of the environment in Belize, especially those areas that had been declared protected areas under various statutes.

23. There is nothing exceptional about these applications; they are the garden variety applications for specific disclosure and the proceedings in which the issue was alive have been completed. It is quintessentially a private law matter of certain asylum seekers pursuing a right to work while their applications are being considered. It could not be a matter of public policy; and there is no evidence of an established policy under which the authorities' powers and the applicants' rights, if any, could be ascertained and enforced. If there was it would probably have been raised in the action. It certainly cannot be done from an unsettled draft policy document on which the respondent has not sought to rely and which cannot be applied to the Plaintiffs, who are therefore not prejudiced by its existence.

24. In the absence of a duty to consult, no public interest can be served by disclosing a draft policy which may be changed in material respects later. There is no important point of construction that needs clarification for future cases, it does not involve a constitutional point that has not been settled, or an area of law in dispute or a legal question the resolution of which poses dire consequences for the public. The latter criteria for identifying matters of general public importance are taken from obiter remarks by Saunders J A, as he then was, in **Martinus Francois v The Attorney General St Lucia** Civil Appeal No 37 of 2003 which are consistent with the House of Lords and Privy Council authorities cited by counsel.

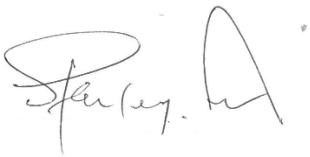
25. On the facts of this case, accepting jurisdiction for an appeal will engage the Court in a purely speculative exercise. The issue of jurisdiction was not raised in the Court below, but Ms. Hippolyte now submits that on the authorities, the facts of this case, and for the reasons outlined above the Court ought not to entertain the appeal. We agree.

26. In our judgment that is sufficient to dispose of this putative appeal so it is not necessary for the Court to engage the merits of the issues of relevance, public interest immunity, and waiver which were dismissed by the judge.

27. Costs shall follow the event to be taxed if not agreed.

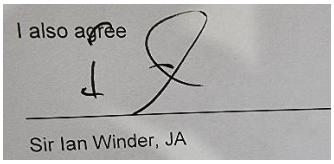
Adderley JA, President (Ag.)

I agree



John, JA

I also agree



Sir Ian Winder, JA