REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. C.V. 2007-03180

BETWEEN

STEPHEN LEWIS

Claimant

AND

THE COMMISSIONER OF POLICE

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Ms. Marissa Ramsundar holding for
Mr. Anand Ramlogan for the Claimant

Mr. Renie Singh for the Defendant

D E C I S I O N

Introduction

1. On the 3rd September 2009, the Intended Claimant filed an application for permission to apply for judicial review. The Intended Claimant is challenging the Intended Defendant's continued failure and/or refusal to determine his request made under the *Freedom of Information Act 1999* ("FOIA").

2. The general rule applicable to such applications is that the Court will not grant permission to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy[1].

3. The intended Defendant contends that the Intended Claimant is barred by reason of undue delay as well as the availability of an alternative means of access to the information sought under the FOIA. Therefore, the Respondent submits that the Court should refuse the application.

4. I am satisfied that the Intended Claimant has an arguable ground of judicial review with a realistic prospect of success. Although there was delay on the part of the Intended Claimant in making the application, I find that there is good reason for extending the period within which the application shall be made. I also find that there was no suitable alternative remedy available to the Intended Claimant. Accordingly, for the reasons hereafter set out, I grant the Intended Claimant permission to apply for judicial review.

The FOIA Application

5. The FOIA gives to members of the public the right, subject to exceptions, to access information in the possession of public authorities. By S. 15 the public authority is mandated to take reasonable steps to notify the applicant, as soon as practicable but in any case not later than 30 days after the day on which the request was made, of the approval or refusal of his application. This does not mean that the public authority is compelled to provide the information sought, within 30 days. What it means is that *"the public authority has a maximum of 30 days to examine the request,*

[1] *Sharma v Brown-Antoine* [2007] 1 WLR @ 780 @ Para

determine whether any exemption applies or whether the supply ought to be deferred, and to notify the applicant accordingly."[2]

6. On 24th October 2008, the Intended Claimant submitted two written requests to the Intended Defendant for access to the following documents:

   (i) Copies of any station diary extract, reports and investigation conducted at the San Fernando Police Station concerning a report for use of obscene language, involving the Intended Claimant, allegedly made on 13th and 14th April 2006, at the San Fernando General Hospital.

   (ii) Copies of all station diary extracts, prisoner log, visitor log, feeding log and/or any other document pertaining to the Intended Claimant on 27th and 28th April 2006, from the Marabella Police Station.

   The Intended Claimant said[3] that he had reason to doubt the authenticity and veracity of certain documents that the Attorney General disclosed, in a pending claim[4] that he has against the AG which had been set for trial on the 26th January 2010. He therefore wished to obtain these documents so that he could ascertain whether they supported his claim.

7. The Intended Defendant received the applications on 29th October 2008. He responded to the request by letter dated 16th January 2009, that is, 84 days after the request for information was made, and provided a copy of an extract taken from the Identification Parade Register of the Marabella Police Station. The Intended Claimant states, and it is not disputed, that

[2] See *Devant Maharaj v Statutory Authorities Service Commission* HCA 1302 of 2005 per Aboud J. @ p.24

[3] See Para 7-8

[4] CV 2007-01952

he received this letter some time in April 2009[5]. The letter, which was signed by the Assistant Commissioner of Police, Anti-Crime Operations, stated as follows:

> *"Request for access to official documents in relation to Stephen Lewis*
>
> *With reference to the subject matter, I am to inform that the information requested that are available is an extract from the identification parade register which is appended."*
>
> No other documents were provided. The letter did not explain why the other documents that were requested were not provided and it did not say whether they would in fact be provided. In my respectful view, this letter cannot be described as a S. 15 approval or refusal.

8. On 1st May 2009, the Intended Claimant's Attorney at Law wrote to the Intended Defendant, acknowledging receipt of the 16th January 2009 letter, and asked that its client be furnished with all the documents that he requested in his 24th October 2008 application. The Intended Defendant did not respond to this letter. Similarly, there was no response to another letter from the Intended Claimant's Attorney, dated 20th July 2009, which forewarned the Intended Defendant that judicial review proceedings would be instituted against it if a decision was not made on its client's request and/or if the documents were not provided.

9. Accordingly, on 3rd September 2009, the Intended Claimant filed an ex parte application for permission to bring judicial review proceedings against the Intended Defendant on the ground that the Intended Defendant has failed and/or refused and/or omitted to perform its statutory

[5] The Intended Claimant could not recall the exact date.

duty under S. 15 of the FOIA. He is seeking, inter alia, the following reliefs:

"1. A declaration that the Defendant breached its statutory duty in section 15 of the Freedom of Information Act (FOIA) to take reasonable steps to enable an applicant to be notified of the approval or refusal as soon as practicable but in any case not later than 30 days after the day on which the request is duly made.

2. An order of mandamus to compel the Defendant to make a decision on the Claimant's FOIA request within seven (7) days hereof whether his application has been approved or refused in accordance with section 15.

3. Alternatively or additionally a declaration that the Claimant is entitled to access the requested information pursuant to his application dated the 24th day of October 2008 under the FOIA."

10. I heard the application inter partes on 14th and 19th January 2010. The only evidence before the court was the Intended Claimant's affidavit which was filed in support of the application on 3rd September 2009. In opposing the application the intended Defendant has raised the following issues:

    (i) whether there was undue delay on the part of the Intended Claimant in making the application;

    (ii) if there was delay, whether the court should grant an extension of time within which the application shall be made; and

    (iii) whether the intended Claimant had an alternative means of access to the information sought under the FOIA.

<u>There was delay in making the application</u>

11. S. 11 of the *Judicial Review Act* addresses the question of delay in making an application for judicial review. The first three subsections provide as follows:

*"**11.** (1) An application for judicial review[6] shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*

(2) The court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.

(3) In forming an opinion for the purpose of this section, the Court shall have regard to the time when the application became aware of the making of the decision, and may have regard to such other matters as it considers relevant."

12. The rule against delay in making an application for judicial review is also to be found in Rule 56.5 of the *Civil Proceedings Rules 1998.* The Rule states as follows:

*"**56.5** (1) The judge may refuse leave or to grant relief in any case in which he considers that there has been unreasonable delay before making the application.*

(2) Where the application is for leave to make a claim for an order of certiorari the general rule is that the application must be made within three months of the proceedings to which it relates.

[6] The phrase "an application for judicial review" should be read as referring to an application for leave to apply for judicial review: See *Fishermen and Friends of the Sea v EMA* Civ. App. No. 106 of 2002 per Nelson J.A. at p. 12.

(3) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to-

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b) be detrimental to good administration."

13. The effect of S. 11 of the *Judicial Review Act* and CPR, Rule 56.5 is that an application for judicial review must be made promptly and in any event within three months of the date when grounds for the application first arose. The ground on which the present application is made is that the Intended Defendant is in breach of its duties under S. 15 of the FOIA in that it failed to inform the Intended Claimant of the status of his application within 30 days of the request being made. Accordingly, the grounds for the application would have first arisen when the 30 day time limit expired, that is, on 24th November 2008. Counsel for the Intended Defendant submitted that the grounds for the application first arose in April 2009 (at the latest 30th April 2009) when the Intended Claimant received the 16th January 2009 letter from the Intended Defendant. That submission ignores the fact that the critical date is when the grounds of the application first arose, which in this case must be when the 30 days time limit imposed by section 15 expired.

14. Since the grounds for the application first arose on 24th November 2008, it means that the application should have been filed at least 3 months thereafter, that is to say, by 24th February 2009. The application was in fact filed on 3rd September 2009, and was therefore 6 months and 10 days out of time. Counsel for the Intended Claimant contended that there was no delay because the breach by the Intended Defendant of S. 15 of the FOIA is a continuing breach. In support of this submission Counsel relied on ***The Honourable Patrick Manning and 17 others v Chandresh***

Sharma.[7] However, Counsel for the Intended Defendant submitted that it is not relevant to the question of delay that the breach is continuing. As will be discussed later on in this judgment, the fact that the breach is continuing will be one of the factors that the court may take into account in deciding whether or not there is good reason to extend the time within which the application is to be made[8]. In respect of the question of delay, however, it is the date when grounds for the application first arose that is relevant.

15. Accordingly, I therefore find that there was a delay of 6 months and 10 days in making the application. The issue that the court must now address is whether there are good reasons for extending the period within which the application for leave can be made.

There is good reason for extending the period within which the application shall be made.

16. What amounts to a "good reason" for granting an extension of time will depend on the circumstances of each case. In ***Abzal Mohammed v Police Service Commission***[9] Kangaloo J.A. identified the following as some factors which may be taken into account: (a) length of delay; (b) reason for delay; (c) prospect of success; (d) degree of prejudice; (e) overriding objective that justice is to be done; and (f) importance of the issues involved in the challenge.

17. In ***R v Secretary of State for Trade and Industry***, *ex p Greenpeace*[10] Maurice Kay J. asked: *"(i) Is there a reasonable objective excuse for applying late? (ii) What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which*

[7] Privy Council Appeal No. 22 of 2008.
[8] *Chandresh Sharma v the Honourable Patrick manning and Others* Civ. App. No. 144 of 2005
[9] Supra
[10] [1999] All ER (D) 1232

would be occasioned if permission were now granted? (iii) In any event, does the public interest require that the application should be permitted?"

18. There has been no explanation by the Intended Claimant of the delay. In fact, at Para G. of his ex parte application he expressly states: *"There has been no delay in making this application for Judicial Review as the breach by the proposed Defendant is a continuing breach to render a decision on the said application and or provide the requested information."* Certainly, in my opinion, it was incumbent on the Intended Claimant to give an explanation and provide good reasons why the court should exercise its discretion under S. 11(1) of the J*udicial Review Act*.[11] In light of the Intended Claimant's failure to explain the delay, Mr. Singh submitted that the court should not extend time. But, an explanation for the delay is not a threshold condition to be met before the Court will exercise its discretion to grant an extension of time.[12] There are other factors that the court must consider, namely (i) whether there are good reasons for extending time; and (ii) whether the grant of relief would cause substantial hardship to, or substantially prejudice the rights of any third parties or would be detrimental to good administration[13].

19. In ***Chandresh Sharma v The Honourable Patrick Manning and Others***[14], Mr. Sharma applied to the Court for leave to apply for judicial review in respect of the Respondents' failure to perform the statutory duty imposed under S. 7(4) of the FOIA. Part II of the FOIA (which includes section 7) came into force on April 2001 and Mr. Sharma's application for judicial review was made almost four years after the coming into force of section 7. One of the grounds on which the application was resisted was that there was delay in the making of the application for leave and there

[11] *R v Warwickshire County Council, ex p Collymore* [1995] ELR 217 @ 228F-G
[12] *Abzal Mohammed v Police Service Commission* Civ. App. No. 53 of 2009
[13] *Judicial Review Act* S. 11(2)
[14] Civ. App. No. 144 of 2005

was no material placed before the Court to justify an extension of time. Justice Jones agreed with the Respondents and found that there was no evidence upon which her discretion to extend time could be exercised. The Court of Appeal, who were upheld by the Privy Council[15], found that the fact that what was alleged was a continuing breach of a continuing duty as well as the fact that the grant of relief would not cause substantial hardship or prejudice to other persons or be detrimental to good administration, provided good reason to extend the time for the making of the application.

20. In the instant case, the intended Defendant's duty under S. 15 of the FOIA to notify the Intended Claimant/Applicant of the status of his application, does not cease after the 30 day period for so doing expires. It continues until the applicant has been notified that his application has been approved or refused. The Intended Claimant received the 16th January 2009 letter (which I have found was not a S. 15 approval or refusal) "sometime in April 2009" (at the latest 30th April 2009). This was 84 days after the FOIA application was made. There is therefore no question that the Intended Defendant has breached S. 15 of the FOIA. On 1st May 2009, the Intended Claimant's Attorney wrote to the Intended Defendant requesting that all the documents that he sought under the FOIA application be sent to him and reminding them of their duty under S. 15 of the FOIA. This was followed by another letter approximately 2 months later, on 20th July 2009, forewarning that judicial review proceedings would be instituted against them if the Intended Claimant's requests were not complied with. The Intended Defendant failed to respond to any of these letters and continues to be in breach of S. 15 of the FOIA. It was approximately 2 months subsequent to the 20th July 2009 letter being sent that the Intended Claimant made the application on 3rd September 2009. Although the application was made outside of the statutory three (3)

[15] Privy Council Appeal No. 22 of 2008 @ Para 21.

month period from the date when the grounds for the application first arose, the evidence does not suggest that the Intended Claimant sat on his rights.

21. Further, it is not apparent to me that there would be substantial hardship to or prejudice to third party rights or that it would be detrimental to good administration if the Court were to grant permission to the Intended Claimant to make this application. Mr. Singh submits that no useful purpose would be served if the reliefs sought by the Intended Claimant were to be granted because the documents were lost. He argued that the letter of 16th January 2009 implies that the documents were lost. I respectfully disagree with Counsel's interpretation of the 16th January letter. The letter states that of the documents requested only the Identification Parade Register was available. In my view, it is not implicit in that statement that the other documents were unavailable because they were lost. In any event, if the documents were in fact lost, the Intended Defendant was required by S. 23 of the FOIA to say so in clear and unambiguous language in the 16th January 2009 letter.

22. Accordingly, in light of the fact that what is alleged in this case is a continuing breach of a continuing duty as well as the fact that there is no evidence before me, and it is not self-evident, that substantial hardship to or prejudice to third parties or detriment to good administration will be caused if leave is granted to the Intended Claimant, I am of the opinion that there is good reason for extending the time for making the application. In the words of Kangaloo J.A.: *"delay alone without prejudice or detriment is not sufficient to preclude an otherwise worthy applicant of permission."*

23. This now leaves the issue raised by Counsel for the Intended Defendant that the Intended Claimant had an alternative means of access to the

information sought under the FOIA and that, on that basis, the application should be refused.

There is no alternative remedy available to the Intended Claimant

24. The approach of the Courts is that, save in the most exceptional circumstances, the jurisdiction to grant judicial review will not be exercised where other remedies are available and have not been used.[16] This is reflected in Section 9 of the *Judicial Review Act* which provides as follows:

> *"The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances".*

25. The Intended Defendant has argued that the *Civil Proceedings Rules* provided an alternative way of obtaining the information that the Claimant requested under the FOIA and that accordingly, the Court should refuse to grant permission to the Claimant to apply for judicial review because there was a suitable alternative remedy.

26. Counsel for the Intended Claimant did not dispute that the requested information could have been obtained under the CPR. In fact, she candidly admitted, in response to my enquiry, that an application for specific disclosure of a certified copy of the station diary extract was made in the related matter and an Order was made for such disclosure. The Intended Defendant failed to comply with the Order and on the 21st November 2008, Mr. Justice Stollmeyer (as he then was) directed that any pre-trial application must be filed and served by the 27th February 2009. However, the Intended Claimant failed to make any such application within the time

[16] *R v Ministry of Agriculture, Fisheries and Food, ex p Live Sheep Traders Ltd.* [1995] COD 297.

stipulated or at all and that is why the application was made under the FOIA. She contended, however, that the fact that a parallel remedy existed under the CPR for obtaining information does not preclude the Intended Claimant from accessing documents under the FOIA, because the FOIA is an independent avenue for obtaining information in the hands of public authorities.

27. The question that arises is this – should the fact that the Claimant had an alternative means under the CPR of obtaining the information requested under the FOIA be construed as an alternative procedure to question, review or appeal the impugned decision? I think not.

28. The Intended Claimant is challenging the Intended Defendant's continued failure and/or refusal to determine his request made under the FOIA and the Intended Claimant is entitled to make an application for judicial review in respect of that failure and/or refusal of the Intended Defendant to determine his request as required by the FOIA. Although there existed an alternative means of access to the information by an application for specific discovery in the related matter, in my opinion that process is not "*an alternative procedure to question, review or appeal"* the failure and/or refusal of the Intended Defendant to discharge his statutory duty under the FOIA.

29. Part 28 of the CPR provides an independent and separate method of compelling a party to an action to disclose documents or to carry out a search for documents and to disclose any document located as a result of that search. Although the Intended Claimant had the opportunity to pursue an application for specific disclosure, any such application would not have been "*an alternative procedure to question, review or appeal*" the Intended Defendant's breach of statutory duty. I agree with Justice Jones' interpretation in ***Chandresh Sharma v The Cabinet of Trinidad and***

Tobago[17] that the word "question" as used in S. 9 of the *Judicial Review Act* must be interpreted in the context of the words "review" and "appeal" immediately following it, that is to say, “to challenge”. I also agree with Counsel for the Intended Claimant’s submission that it would be inconsistent with the object of the FOIA, namely “*to extend the right of members of the public to access to information in the possession of public authorities”* limited only by exceptions and exemptions specified in the FOIA, for this Court to equate an alternative means of access to information with an alternative remedy to challenge, review or appeal a decision of a public authority as contemplated by section 9 of the Judicial Review Act. I therefore find that there was no suitable alternative remedy available to the Intended Claimant to challenge the failure and/or refusal of the Intended Defendant to discharge his statutory duty.

There is an arguable ground for judicial review that has a realistic prospect of succeeding

30. It is not in dispute that the Intended Defendant had a duty under S. 15 of the FOIA to notify the Intended Claimant of the approval or refusal of his FOIA request, within 30 days of the application being made. It is also not in dispute that the Intended Defendant is in breach of its continuing duty under the section. I therefore find that the Intended Claimant has a realistic prospect of succeeding in his claim.

[17] HCA 854 of 2005 @ p. 7

Disposition

On the 28th July 2010, Counsel for the Intended Claimant advised the Court that the related matter has been heard and determined. As a consequence, Counsel for the Intended Claimant indicated she did not intend to pursue the application for judicial review.

In the circumstances, since it would be academic for this matter to proceed, I will grant leave to the Intended Claimant to withdraw the application with no order as to costs.

Dated this 28th day of July 2010.

André des Vignes
Judge

Rene Mc Lean
Judicial Research Assistant