THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY- SAN FERNANDO

Claim No: CV2016-01485

VIJAY SINGH

Applicant/Intended Claimant

AND

THE OMBUDSMAN

Respondent/Intended Defendant

Before the Honourable Mr. Justice André des Vignes

Appearances:

Mr. Anand Ramlogan, S.C., Mr. Kent Samlal and Ms. Jayanti Lutchmedial instructed by Ms. Alana Rambaran for the Applicant/Intended Claimant

Mr. Elton A. Prescott, S.C. and Mr. Rikki A. Harnanan for the Respondent/Intended Defendant

DECISION

Introduction

1. By ex parte application filed 4th May, 2016, the Applicant sought leave to apply for judicial review of the decision of the Respondent Ombudsman to refuse to provide documents as requested by the Applicant pursuant to **Section 13 of the Freedom of Information Act, Chapter 22:02** (hereinafter referred to as "the FOIA"). The Applicant sought the following reliefs:

    a. A declaration that the Ombudsman is a public authority within the meaning of and as defined by the FOIA and is therefore subject to the FOIA;

b. An order of certiorari to quash the decision of the Ombudsman as set out by letter dated 19th February, 2016 wherein it was held that the Office of the Ombudsman is not a public authority that is subject to the FOIA;

c. An Order of mandamus compelling the Ombudsman to consider the Claimant's FOIA application dated 27th January, 2016 in accordance with the provisions of the FOIA;

d. Costs; and

e. Such further other orders, directions or writs as the Honourable Court considers just and as the circumstances of this case warrants pursuant to **Section 8(1)(d) of the Judicial Review Act.**[1]

2. The Respondent resisted the application for leave for judicial review on the grounds that the Respondent was not a "public authority" for the purpose of the FOIA. However, on 17th November, 2016 the Respondent applied for an order refusing the application for leave on the grounds that the matter was now academic and would serve no practical purpose. This was on the basis that the Respondent provided the requested documents to the Applicant on 11th November, 2016, thereby wholly satisfying the request made to the Respondent under the FOIA.

Brief Facts

3. The Applicant is employed as Forester I in the Forestry Division of the Ministry of Environment and Water Resources. The Applicant alleges that he was bypassed for promotion to the post of Acting Conservator of Forest when two junior employees were promoted to act in the said post in July 2014.

4. On or about August 22nd, 2006 the Applicant was accepted to pursue studies at the University of Guyana at the Faculty of Agriculture and Forestry. However, pursuant to Cabinet Note dated 21st December, 2004, the Applicant was advised against pursuing studies at the said University on the grounds that the degrees offered there were not in accordance with international standards.

[1] See Ex parte Application for leave to apply for Judicial Review filed herein on May 4th, 2016

5. Following that advice and the recommendation of the Minister of Science and Technology and Tertiary Education, the Applicant pursued studies in Resources Recreation and Tourism at the University of Idaho which he completed in August 2009.

6. By letter dated 4th August, 2014, the Permanent Secretary in the Ministry of Environment and Water Resources advised the Applicant that from information received from the Chief Personnel Officer, only officers with a degree in Forestry would be offered an acting appointment.

7. Furthermore, on 20th April, 2015, the Conservator of Forests wrote to the Permanent Secretary in the Ministry of Environment and Water Resources and recommended that the Applicant be considered for acting appointment or promotion as Assistant Conservator of Forests as a result of his degree in Resource Recreation and Tourism. Nevertheless, in or about July 2014, two junior employees employed as Forester 1 were promoted to acting posts of Assistant Conservator of Forest.

8. This situation prompted the Applicant's letter dated 31st March, 2015 to the Respondent. Therein, the Applicant listed in detail his complaint about being overlooked for promotion to the acting post of Assistant Conservator of Forest. This was followed by an acknowledgement letter dated 1st April, 2015 by the Respondent indicating that "*a further response will be forwarded as soon as possible*".

9. Having failed to receive a response from the Respondent, on 27th January, 2016, the Applicant submitted a formal request for information pursuant to **Section 13 of the FOIA** seeking the following:

    a. The entire personal file of the Applicant; and

    b. All correspondence between the Service Commissions Department and/or Ministry of Environment and Water Resources and/or the Respondent and or/office of the Chief Personnel Officer (CPO) and/ any other State agent, entity, person relative to the Applicant's complaint of recognizing the degree in Resource, Recreation and Tourism for the purpose of the Acting Appointment and /or promotion to Assistant Conservator of Forest (ACF).

10. On 19th February, 2016 the Respondent refused the request and indicated, *inter alia*, that it was not a public authority for the purposes of the FOIA and consequently the request was misconceived.

11. The Applicant was dissatisfied with this response and on 1st March 2016, he hand-delivered a pre-action protocol letter dated 23rd February 2016 to the Respondent.

12. By letter dated 13th April, 2016 the Respondent's Attorney-at-Law requested an extension of time to respond to the Applicant's pre-action protocol letter. By letters dated 4th and 11th May 2016, the Respondent's Attorney-at-Law reiterated the Respondent's position that it is not a "public authority" within the meaning of the FOIA.

13. On 4th May, 2016, the Applicant applied for leave for judicial review to challenge the decision as contained in the letter dated 19th February, 2016 that the Respondent was not a public authority within the meaning of the FOIA.

14. By Notice of Application filed 7th November 2016, the Respondent objected to the application for leave on the basis that the Respondent was not a public authority within the meaning of the FOIA. The following day, Attorney-at-Law for the Respondent wrote indicating that they were willing to provide the requested documents, without prejudice to their legal position.

15. Under cover of a letter dated 10th November, 2016, the Respondent delivered the requested documents to the Applicant on 11th November 2016. On 17th November, 2016, the Respondent applied for an order refusing the application for leave on the grounds that the matter was now academic and would serve no practical purpose as it had already provided the requested documents to the Applicant.

16. The Applicant's Attorney- at-law resisted this application on the grounds that there were still live issues to be tried since the grounds and reliefs claimed were primarily hinged on whether the Respondent was a public authority that is subject to the provisions of the FOIA.

Issues

17. The following issues arise for determination:

    a. Whether the Respondent's provision of the requested documents has rendered academic the proceedings between the parties?

b. If so, whether there exists a good reason in the public's interest for the Applicant to pursue the application?

Disposition

18. After careful consideration of the reliefs claimed, the evidence submitted and the authorities relied on by the parties, I am of the opinion that the subsequent provision of documents by the Respondent to the Applicant has rendered the proceedings academic and the evidence adduced by the Applicant does not establish that there is a good reason in the public's interest for granting the application for leave. Accordingly, the application for leave to apply for judicial review is hereby dismissed.

Analysis

Issue 1: The Respondent's subsequent provision of the requested documents has rendered academic the proceedings between the parties

19. The authors of **De Smith, Woolf & Jowell on Judicial Review of Administrative Action**[2] defined a hypothetical question as "*a question which needs to be answered for a real practical purpose, although there may not be an immediate situation on which the decision will have practical effect*." An academic question on the other hand is "*one which need not be answered for any visible practical purpose, although an answer would satisfy academic curiosity."*

20. The decision of the House of Lords in **R v. Secretary of State for Home Department Ex parte Salem,**[3] is instructive on the issue at hand. Therein, a Libyan national after arriving in the United Kingdom applied for asylum and was granted temporary admission and social security benefits. Without informing the applicant, the Home Office internally recorded that the applicant's request for asylum had been refused and the matter had been determined. Later, the Benefits Agency informed the applicant that his income support had been stopped because of information received from the Home Office that his application for asylum had been refused. The Applicant applied for judicial review of the Secretary of State's failure to inform the Department of Social Security that his claim for asylum had been recorded and determined. The Judge refused leave. The Court of Appeal granted leave but dismissed the substantive

[2] Fifth Edition, para 20-016 at p. 812-813
[3] R v. Secretary of State for Home Department Ex parte Salem, [1999] 1 AC 450

application. The applicant then appealed to the House of Lords. However, following an appeal by special adjudicator the applicant was granted refugee status. The issue then arose whether the appeal to the House of Lords should continue.

21. The House of Lords dismissed the appeal. Although agreeing that a question of statutory construction did arise, the House of Lords held, *inter alia,* that academic appeals should not be heard unless there is a good reason in the public interest for doing so. Accordingly, the unusual facts of the case did not appear to provide a good basis for deciding as a matter of general principle when an asylum claim was "determined".

22. In arriving at its conclusion, the House of Lords had regard to and applied the dictum of Viscount Simon in **Sun Life Assurance Company of Canada v. Jervis** [1944] A.C. 111, pp. 113-114 where the learned judge stated:

> *"I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way . . . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.*"

23. Further, the House of Lords echoed the sentiments of Lord Bridge of Harwich in **Ainsbury v. Millington (Note) [1987] 1 W.L.R. 379, 381** where his Lordship noted:

> "*...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 when there is no dispute to be resolved...*"

24. Although the decisions in **Sun Life** (supra) and **Ainsbury** (supra) were given in the context of disputes concerning private law rights between the parties, the principles that emerged remain applicable to the area of public law. In public law, however, the discretion of the court to hear academic matters must be exercised with caution. The court must be satisfied that there is a good reason in the public's interest for doing so.[4]

[4] Ibid at p.457

25. In my opinion, based on the fact that the Applicant has already been provided with the requested documents by the Respondent, embarking upon the consideration of the relief sought, namely, whether or not the Respondent is a public authority within the meaning of the FOIA and an order of certiorari to quash the decision of Respondent that it was not a public authority subject to the FOIA, serves no practical purpose and will have no practical effect. In light of this, proceeding with this application is academic.

Issue 2: The evidence adduced by the Applicant does not establish that there exists a good reason in the public's interest for the Applicant to pursue the application

26. According to Lord Slynn in **Salem** (supra), the Court must adopt a cautious approach when deciding whether to grant declaratory relief in matters that are academic and/or hypothetical between the parties since the Court will not allow litigation to proceed that is hypothetical in the sense that there is no necessary factual foundation for the point in issue. He went on to state that nonetheless, the Court may exercise its discretion to hear such matters if there is a good reason in the public's interest for doing so.

27. In his Affidavit in reply filed on 5th December, 2016 in opposition to the Respondent's Application filed on 17th November, 2016, the Applicant contended that his application was not academic and that citizens were entitled to know whether the Respondent was a public authority within the meaning of the FOIA. In support of his contention, he relied on (a) his submission on the said 5th December, 2016 of an application to the Respondent for information regarding the operations of the office of the Respondent; and (b) the submission on the said 5th December 2016 of applications by two of his colleagues for information concerning the status of their complaint to the Respondent submitted since 31st March 2015.

28. Counsel for the Applicant submitted that the issue regarding whether the Respondent was a public authority and subject to the provision of the FOIA is matter that is important in the public's interest. Further, he submitted that judicial clarification was required for good public administration and legal certainty.[5] In support of these submissions Counsel relied on the authorities of: **Salem** (supra); **Bob and Moses v Manning, Civil App. No. 97 of 2002**; **Reid v Her Worship Magistrate Joan Gill, CV 2009-02631**; **Jaggessar v Teaching Service**

[5] See Applicant's Submission filed herein on 20th January, 2017 at para. 2.

Commission, CV 2009-01445; **Charleau v The Commissioner of Police, HCA S-866 of 2004**; and **Charleau v The Commissioner of Police, Civil App. No. 106 of 2007.**

29. Although Counsel for the Respondent accepted that in the instant proceedings a discrete point of statutory construction was raised (whether the Respondent was a public authority), he submitted that it served no practical purpose since the Applicant would have already achieved the substantial benefit of the information sought. Accordingly, it would now be a waste of the Court's resources and costs for the Applicant to pursue this application. Counsel also submitted that the Applicant failed to show that a large number of similar cases exist or are anticipated and that speculative or threatened or intended FOIA requests are not sufficient. [6]

30. Having considered the aforementioned authorities relied on by the Applicant, I have made the following observations in respect of the decisions where it was determined that the issues were not academic:

    a. In **Reid** (supra), the Defendant allowed charges to be re-laid against the Claimant which were previously discharged. Jones J. (as she then was) determined that on the facts there was a live issue for determination which was of public interest as it involved *"the integrity of the proceedings before the Magistrate."*

    b. In **Jaggessar** (supra), there were still live issues regarding the constitutionality of the relevant regulation that was of general public importance to be determined although the Claimant had retired.

    c. In **Charleau** (supra) the Court of Appeal was clear that whether a matter raises an issue of real public importance is dependent on the facts of the case. Therein, Jamadar JA. was of the view that the underpinning facts needed to be established in order for the court to conclude that the issue was an academic one. To do so without the relevant facts would be premature.

31. In my opinion, the facts of the instant matter are distinguishable from those in **Reid** (supra) and **Jaggessar** (supra). In this case, the ultimate purpose of the application is to compel the Respondent to consider the application for disclosure and to disclose the documents to the Applicant. In my opinion, since the documents have already been disclosed to the Applicant,

[6] See Respondent's Submission filed herein on the January 20th, 2017 at paras. 11- 12

there is no live issue between the Applicant and the Respondent. To my mind, although a question of statutory construction does arise, namely, whether the Respondent is a public authority for the purposes of the FOIA, this Court is unwilling to grant leave given that it would be divorced from any factual controversy between the parties in these proceedings.

32. In respect of the evidence adduced by the Applicant in his affidavit filed on 5th December, 2016, it is important to bear in mind that the Applicant applied for leave to apply for judicial review on 4th May 2016 and his application was supported by his affidavit also filed on that date. After the Respondent furnished the Applicant with the requested information and filed the application to refuse leave on the grounds that the proceedings brought by the Applicant are now academic, the Applicant now seeks to bolster his application for leave by reference to the three requests for information submitted to the Respondent on the same date as his affidavit. In my opinion, the three FOIA requests by the Applicant and his colleagues on 5th December, 2016 do not establish that there is a good reason in the public's interest for this matter to proceed. There is no evidence before me as to the response of the Respondent to these requests and it would be premature and speculative for this Court to determine that because three requests have been submitted to the Respondent, there is some good reason why it is in the public interest for this action to proceed. The fact is that the Applicant has received the documents that he sought from the Respondent. If arising out of the responses of the Respondent to the December requests, the Applicant and/or his colleagues consider that an application for leave to apply for judicial review should be filed, they would be entitled to do so based on the specific facts of those matters and the Court will then be called upon to determine whether leave should be granted. Therefore, I am not satisfied that there exists a good reason in the public's interest for the Applicant to pursue the application.

33. In the premises, the application for leave to apply for judicial review is hereby dismissed, with no order as to costs.

Dated this 31st day of March, 2017

……
Andre des Vignes
Judge