THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2015-03190**

IN THE MATTER OF AN APPLICATION BY RAJAEE ALI (A PERSON INCARCERATED AT THE PORT OF SPAIN PRISON) FOR AN ADMINISTARTIVE ORDER UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998 AS AMENDED
AND
IN THE MATTER OF SECTION 4 AND 5 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ACT NO. 4 OF 1976
AND
IN THE MATTER OF THE DECISIONS OF THE COMMISSIONER OF PRISONS TO DENY AND/OR PROVIDE THE APPLICANT INTER ALIA AND THE FAILURE OF THE COMMISSIONER OF PRISONS TO PROVIDE THE APPLICANT INTER ALIA

1. **WITH OPPORTUNITES FOR DAILY OUTDOOR EXERCISE IN THE OPEN AIR IN ACCORDANCE WITH THE PRISON RULES MADE UNDER THE WEST INDIAN PRISONS ACT OF 1938 AND TO MAKE NECESSARY ARRANGEMENTS FOR THE APPLICANT TO TAKE DAILY EXERCISE IN THE OPEN AIR**
2. **WITH OPPORTUNITIES FOR RELIGIOUS INSTRUCTIONS IN THE FORM OF JUMAH AT LEAST ONCE PER WEEK**
3. **WITH THE RECIEPT OF FOOD ITEMS FOR HIMSELF AT HIS OWN EXPENSE AND TO HAVE SUCH FOOD SENT IN TO HIM AT HOURS FIXED BY THE SUPERINTENDENT AND SUBJECT TO STRICT EXAMINATION**

AND

IN THE MATTER OF AN APPLICATION FOR REDRESS IN ACCORDANCE WITH SECTION 14 OF THE CONSTITUTION BY RAJAEE ALI A CITIZEN OF THE REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT CERTAIN PROVISIONS OF THE SAID CONSTITUTION HAVE BEEN CONTRAVENED AND ARE BEING CONTRAVENED IN RELATION TO HIM

BETWEEN

RAJAEE ALI

Applicant

AND

STERLING STEWART
(THE COMMISSIONER OF PRISONS)

1st Intended Respondent

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2nd Intended Respondent

BEFORE THE HONOURABLE MADAM JUSTICE ELEANOR J. DONALDSON-HONEYWELL

APPEARANCES:

Mr. Gerald Ramdeen and Mr. Varun Debideen for the Claimant

Mr. Rishi Dass and Ms Theresa Hadad for the first and second intended Respondents

DATE: 9th October, 2015

REASONS FOR ORAL DECISION

Introduction:

1. On October 8, 2015 an Oral Decision was delivered giving rulings on an application dated September 25, 2015, filed by the Applicant on September 28, 2015. The Applicant sought leave to file a Claim for judicial review and also interim orders against the first Intended Defendant. This written ruling provides reasons for the said decision.

The Application:

2. On December 2, 2014, the Applicant was remanded without bail on a charge of conspiracy to murder Kevaughn "Lurbz" Savory. He has been, incarcerated since that date, in a cell where he is the sole occupant at the F1 Division of the State Prison at #103A Frederick Street. In the instant proceedings he sought leave to apply for judicial review of the decisions of the Commissioner of Prisons to deny and/or the failure of the Commissioner of Prisons to provide him with, inter alia:

    a. Opportunities for daily outdoor exercise and airing in accordance with the Prison Rules made under the **West Indies Prison Act 1838** ["the Prison Rules"] ;

    b. Opportunities for religious instruction in the form of attending prayer services once a week in accordance with the Prison Rules;

    c. The receipt of food items for himself at his own expense subject to strict examination in accordance with the Prison Rules; and

    d. Accommodation in a cell in another part of the State Prison in conditions that are more humane and civilized and are not inimical to his health

3. The interim injunctive relief sought was for orders to be granted that the first named Intended Respondent forthwith make arrangements for the Applicant to have daily airing opportunities, be permitted to attend weekly religious services, be permitted to order his own food and have it sent in by relatives and be moved to more humane accommodation within the prison. In addition, the Applicant sought injunctive orders for the first Intended Respondent to produce to the Court two sets of documentation: firstly, the daily occurrence and activity book recording all activities of the Applicant and secondly, his prison inmate file with his medical records contained therein.

Issues:

4. The issues to be resolved in considering the Application were:
    a. Whether the Applicant should succeed on the application for leave to apply for judicial review and, if so, on what conditions; and
    b. Whether the interim injunctive relief claimed by the Applicant should be granted.

Law:

Whether leave should be granted:

5. According to **s.**6 of the **Judicial Review Act, Chap. 7:08** ["the Act"]:

> *"(1) No application for judicial review shall be made unless leave of the Court has been obtained in accordance with Rules of Court.*
>
> *(2) The Court shall not grant such leave unless it considers that the Applicant has a sufficient interest in the matter to which the application relates."*

6. In ***Sharma v Brown-Antoine***[1] the legal formulation for the threshold for leave to pursue judicial review of a decision and the proper approach to be taken, was articulated by the Privy Council as follows:

> *"14(3) Under section 5(1) of the **Judicial Review Act 2000** judicial review lies against a person acting in the exercise of a public duty or function. Section 5(3) lists a number of familiar grounds, which include an improper exercise of discretion, taking account of irrelevant considerations and acting on instructions from an unauthorised person. Leave to apply for judicial review must be obtained: section 6. The court may not, save in exceptional circumstances, grant leave for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal the decision: section 9.*
>
> *(4) The ordinary rule now is that the court will refuse leave 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 an alternative remedy: **R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628**; **Fordham, Judicial Review Handbook, 4th ed.(2004), p 426**. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said, with reference to the civil standard of proof, in **R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468**, para 62**,** in a passage applicable mutatis mutandis to arguability:*

[1] [2006] UKPC 57, paras. 14 (3) & (4).

"... 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 not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities." It is not enough that a 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 the interlocutory processes of the court may strengthen": ***Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 733.*** *"*

7. Extrapolating from the Act as interpreted in this decision of Sharma, J. in deciding on an application for leave, there are several matters to be considered. There is no specific order in which these matters must be examined and considerations on each one may be relevant to findings on the others. In the hearing of this leave application I considered these matters in two main stages. In the first stage consideration was given to whether the Applicant has shown:

    i. That he has sufficient interest to bring the action – s. 6 of the Act;

    ii. That there has been no undue delay – s. 11 of the Act;

    iii. That the decision complained of was made by a body or person which can be challenged – s. 5(1) of the Act; and

    iv. That there is no alternative remedy – s. 9 of the Act.

8. In the second stage consideration was given to whether the Applicant has shown that there is an arguable ground for judicial review having a realistic prospect of success.

9. With regard to the first stage, it is clear that the Applicant has sufficient interest to bring the action and is bringing the application against the Commissioner of Prisons which is in fact a public body judicially reviewable under the Act. The issues requiring more in depth examination at the hearing of the application for leave were whether there had been undue delay and whether there is an alternative remedy.

10. On the issue of delay s. 11(1) of the Act provides:

    "An application for judicial review 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."

Further, **Part 56.5 of the Civil Proceeding Rules, 1998 (CPR)** states:

> *"(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."*

11. In ***Sanatan Dharma Maha Saba v Patrick Manning***[2], Kangaloo, JA stated that a "*good reason*" sufficient to satisfy **section 11(1)** of the Act *"is not limited to, although it may include, an explanation for the delay. The 'good reason' for example, could be the public importance of the matter notwithstanding the unexplained delay. It may also include the overwhelming case of the Applicant..."*.

12. In the present case it was clear from the Applicant's Affidavit sworn in support of the application for leave that his concerns with regard to three of the matters proposed as matters for Judicial Review first arose, in December, 2014, when he was incarcerated. More specifically his complaint is that it was from that time that he was not afforded humane accommodation, airing and the privilege to have food sent in. As it relates to airing, the Applicant in his Affidavit claimed that in around January, 2015 he inquired as to why he was not being aired. It was then that he found out that there had been a letter dated January 8, 2015 from the Superintendent of Prisons to all Prison Supervisors directing inter alia that the Applicant "*must be aired and be allowed to tub by himself at all times*". The failure to adhere to this direction was another starting point for the Applicants complaint about not being aired.

13. The other area of complaint was of more recent vintage. The Applicant alleged that it was from July, 2015, after a prison break-out involving three fellow inmates that he was no longer allowed to attend weekly religious services. The Applicant's application to file his proposed Judicial Review Claim falls within the three month period as it relates to this complaint.

14. On the evidence presented it was apparent that the application in so far as it challenged decisions regarding airing, diet and accommodation may have been made five to six months past the recommended period under the Act. The Applicant submitted in the Leave application however that "There has been no delay on the part of the Applicant in bringing these matters to the attention of the intended Respondents."

15. It was the submission of counsel for the Intended Respondents that there had been a six month delay and the Applicant should have applied for an extension of time to apply for leave. Such an application would have to be based on some good reason for extending

[2] CA, Civ. App No 174 of 2004

the period. There would be need to explain the reason for the delay, show that the applicant's case is strong and that there would be no prejudice to the Respondent if an extension of time is granted.

16. Counsel for the Applicant submitted in response that there had been no delay since the matters complained of were continuing. Furthermore, he argued that on every day that the Applicant was not afforded the treatment sought with respect to meals, airing and accommodation the first Intended Defendant would have made a decision not to provide and/or failed to provide same. I was persuaded that this argument provided sufficient basis to rule out delay as a reason not to grant leave for judicial review. However, further determination was reserved on the issue of delay for consideration in the substantive hearing of the Claim.

17. There were also reservations in the consideration as to whether there was an alternative remedy that could have been accessed by the Applicant instead of applying for Judicial Review. This was so because under the Prison Rules there appears to be provision for processes of complaint to the Inspector of Prisons appointed under the **Prisons Act Chapter 13:01**. In September, 2014, a few months before the incarceration of the Applicant, the legal framework governing inspection of prisons was modified by **Act No. 13 of 2014** with the establishment of an Inspectorate of Prisons. The extent, to which the role of the Inspector as set out in the Prison Rules provided an avenue to redress in practice, remained unclear up to the time of the leave hearing as there was no information on this in the Applicant's Affidavit. Again, this was not considered a sufficient reason to deny the application for leave and this issue was reserved for further consideration in the substantive hearing.

Realistic Prospect of Success:

18. Having determined that the issues of delay and alternate remedy were sufficiently addressed, not to bar the grant of leave, I moved to the second stage of the consideration as to whether to grant leave, i.e. whether there was a realistic prospect of success in judicial review proceedings. Counsel for the Applicant cited a number of Judgments concerning allegations of degrading prison conditions. These included cases where the prisoner has been sentenced to death and is awaiting execution and therefore seeks to show that the conditions prior to execution were sufficiently inhumane and degrading so as to require commutation of the sentence to life imprisonment. In those cases, the authority of the Privy Council in ***Thomas v Baptiste***[3] still stands. Their Lordships held:

> *"That although the prison conditions in which the Applicants were kept contravened the Prison Rules and were therefore unlawful, they did not cause so much pain and suffering or such deprivation of the elementary necessities of life as to constitute not just harsh but cruel and unusual treatment within section*

[3] H.C.A. No. 1373 of 1998; [2000] 2 AC 1

5(2)(b); and that in any event, even if the prison conditions by themselves had amounted to cruel and unusual treatment thereby infringing the Applicants' constitutional rights, that would not make the lawful death sentences passed upon them unconstitutional, and so commutation of those sentences would not be the appropriate remedy."

19. The Applicants in that case experienced conditions very similar to those complained of by the present Applicant as there were similar breaches of the Prison Rules. The major difference in the present case is the deprivation of "airing" time which if borne out in evidence may be graver in the present case, as well as the allegation of prevention from partaking in religious instruction. It is to be noted in that case their Lordships considered that the prison conditions in third world countries fall appallingly short of the standards of the more affluent countries and that it would not serve human rights to set exceedingly demanding standards which would cause breaches to be commonplace. It accepted the Court of Appeal's analysis and decided against the commutation of the sentence for these reasons.

20. Counsel for the Applicant underscored, however, that even in this Privy Council decision of **Thomas v Baptiste**, there was a strong dissent by Lord Steyn with regard to the prison conditions experienced by the death row prisoners amounting to cruel and unusual punishment sufficient to commute the death penalty. Further, although the High Court decision of Jamadar, J. (as he then was) was reversed, it was commended to the Court by counsel for the Applicant as support for the arguability of the instant case having at least a realistic prospect of success. This submission was persuasive in advocating that there is at least some debate which makes the Applicant's case suitable to be heard at a full hearing for judicial review.

21. Further, counsel for the Applicant cited High Court decisions concerning judicial review in cases of degrading prison conditions. The case of ***Alladin Mohammed v Commissioner of Prisons***[4] involved a similar application for judicial review of the Commissioner of Prisons' decisions and/or failures for very similar prison conditions, including the issues of airing and family prescription of meals. In that case, the judge found that there was no sufficient reason for the lack of airings and granted a mandamus directing that the Respondent make arrangements for the exercise of the Applicant. He, however, denied the family prescription stating that the state had discretion to allow or disallow this privilege.

22. Kangaloo, JA observed in **Ish Galbaransingh and Steve Fergueson v AG CA Civ. 207/2010** that "*It must only be in wholly unmeritorious cases which are patently unarguable (barring issues of delay and alternative remedies) that the courts should exercise its discretion in refusing to grant leave*." In light of the authorities cited,

[4] HCA 2044 of 2005

including clear precedent for issues of the nature concerned in the Applicant's complaints having been recognised as arguable in a judicial Review Claim, it was my determination that leave should be granted for the Applicant to file his Claim herein.

Whether Interim Orders should be granted:

23. Counsel for the Applicant cited **Chief fire Officer and Public Service Commission v Elizabeth Felix-Phillip and 37 others Civil Appeal No. S 49 of 2013** where at para 36 Bereaux, JA provides guidance on the **American Cyanamid**[5] based approach to determining whether to grant interim relief in Public Law proceedings. He explained that "*It is sufficient if an Applicant for interim injunctive relief can show that there is a serious issue to be tried. If he can establish that, he has "crossed the threshold" and the Court can then address itself to the question whether it is just or convenient to grant an injunction.*"

24. It was my determination that there is a serious issue to be tried in the Applicant's proposed Claim. Accordingly, the focus of my determination as to whether to grant the interim relief claimed focussed on the balance of convenience and justice. In this regard I paid particular attention to the fact as highlighted by Bereaux, JA that "*In cases in which a party is a public authority performing duties to the public, the balance of convenience must be looked at more widely and must take into account the interests of the public in general to whom these duties are owed*."

25. In considering the interests of the public and how the grant of injunctive relief could impact on the performance of duties of the first Intended Defendant, I was persuaded by the submission of counsel for the first Defendant that due deference should be accorded to the fact that the duties concerned are in the sphere of national security. Counsel cited the case of **Secretary of State for the Home Department v Rehman [2003] 1 AC 153** at page 185 para G-H on the type of analysis required when the Court determine Public Law issues that may impact on national security.

26. It was argued on behalf of the Applicant that the balance of convenience and justice could only be determined in favour of the grant of the interim injunctions claimed since all the Applicant was seeking was the enjoyment of rights he was entitled to under the Prison Rules. It was argued, therefore, that the public interest, would be in upholding the law. Counsel for the Applicant said that there could be no inconvenience to the first Intended Respondent or prejudice to the public interest if the injunctions were granted and it were later found that there had been no failure on the part of the Respondents. Counsel for the Applicant further submitted that although the Respondents were afforded the opportunity to have an *inter partes* hearing at the leave stage they failed to provide any evidence by way of Affidavits on the balance of convenience. Accordingly, it was

[5] American Cyanamid Company v. Ethicon Ltd. 1975 AC 396

argued there was no evidence of any possible public interest or national security concern weighing against granting the interim relief.

27. In response counsel for the Respondents cited paragraphs of the Applicants own affidavit which revealed security concerns that should be weighed in determining the balance of convenience. It was further pointed out that the Court could take judicial notice that a matter in which the relief sought involves issues such as movement of prisoners and where specific prisoners are accommodated would be a matter involving national security considerations in relation to which the public interest could be affected.

28. In particular, the Court was asked to take into account the polycentric impact of any of the orders claimed being made. Such a decision should not be made prematurely as it could impact not only on the Applicant but on the treatment of other Prisoners and on the Public Interest. Counsel further reminded the Court of the recognised relevance of the consideration of polycentricity in Administrative Law decision making. He contended that a decision concerning movements of one prisoner is a polycentric issue since it involves a large number of interlocking and interacting public interests, logistical and security considerations in the administration of the prisons. This characteristic of polycentricity in the decisions being challenged and in the administrative authority subject to the challenge was such he argued that it provides recognised rationale for judicial deference and restraint. Accordingly, it could only be on very sound evidence that any decision should be made by a court that would impact on administration of the prison, the public interest and national security in these circumstances of polycentricity. It was for this reason that even on the decisions cited by counsel for the Applicant such as those by Rajkumar, J in ***Alladin Mohammed v Commissioner of Prison*** and by Kokaram, J. in ***Karen Mohammed v Her Worship Marcia Ayers-Caesar CV 2015-02799*** delivered on August 20, 2015 no coercive orders were made concerning movement of prisoners prior to full hearing of all the evidence.

29. It was my finding that the balance of convenience and justice, when the public interest and the interests of national security were taken into account, weighed against all but one of the injunctive orders being granted as interim measures before consideration of comprehensive evidence and submissions at the substantive hearing of the Judicial Review Claim. The sole interim order granted was for the provision of medical records from the Applicant's prison file to the Court. This relief was granted at the interim stage in circumstances where there was no evidence before the Court that the grant of this relief would be inimical to the public interest. Additionally, counsel for the Respondent did not, in submissions, contend that the disclosure of the medical information would have raised national security concerns.

Disposition:

Having taken into account the evidence and submissions the following orders were made:

1. Permission is hereby granted to the Applicant/Intended Claimant to file his application for Judicial Review to claim the following reliefs sought in the application, subject to the conditions set out below:

Against the First Named Intended Respondent:

a. A declaration that the decision of the first named Intended Respondent his servants and/or agents not to allow the Applicant to take daily exercise for one hour or for such longer periods as the medical officer may deem necessary having regard to the state of his health and the nature of his work is illegal, unreasonable and ultra vires and in breach of the Prison Rules made under the **West Indies Prison Act 1838.**

b. A declaration that the decision of the first named Intended Respondent his servants and/or agents not to allow the Applicant the opportunity for religious instructions at least one per week to attend prayer in the form of Jummah is unconstitutional, illegal, unreasonable and ultra vires and in breach of the prison rules made under **West Indies Prison Act 1838 .**

c. A declaration that the decision of the first named Intended Respondent his servants and/or agents not to allow the Applicant to order food for himself at his own expense and/or to have such food sent for him by his relatives at hours fixed by the Superintendent and subject to strict examination is illegal, unreasonable and ultra vires and in breach of the prison rules made under **West Indies Prison Act 1838**.

d. An order of certiorari to remove to this court and quash the decisions of the first named Intended Respondent identified at paragraphs 1, 2 and 3 herein.

e. An order of mandamus directing the first named Intended Respondent forthwith to make all necessary arrangements to have the Applicant take exercise in open air, as often as practicable, and in any event, barring inclement weather, not less than once per day for not less than one hour per day.

Against the Second Named Intended Respondents:

f. A declaration that the detention of the Applicant from the 2nd December, 2014 until present and which detention is continuing at the F1 Division of the State Prison, 103A Frederick Street, Port of Spain is illegal, ultra vires and in breach of the Applicant's constitutional rights and freedom guaranteed under section 4(a), (b), (d) and section 5 (2) (b) of the Constitution of the Republic of Trinidad and Tobago.

g. An order that monetary compensation including vindicatory damages be paid to the Applicant by the Intended Respondents for the breach of his constitutional rights.

Against the First and Second Named Intended Respondents:

h. Costs to be assessed.

i. Such further or other relief as this Honourable Court may deem fit in the circumstances of this case.

2. As it relates to the interim relief claimed against the first named Intended Respondent the following orders were made**:**

a. An interim order that the first named Intended Respondent to produce to this Honourable Court the daily occurrence and activity book or by whatever other name it may be called recording all the activities of the Applicant, which is in the custody, control and possession of the first named Intended Respondent is not granted.

b. An interim order that the first named Intended Respondent to produce to this Honourable Court the Applicant's prison inmate file which is in the custody, control and possession of the first named Intended Respondent more particularly the inmate's medical records contained therein is granted.

c. An order of mandamus directing the first named Intended Respondent forthwith to make all necessary arrangements to have the Applicant attend and receive religious instructions at least once per week more particularly to attend Jummah prayers each Friday is not granted.

d. An order of mandamus directing the first named Intended Respondent forthwith to make all necessary arrangements to have the Applicant removed from the cell in which he is presently detained in the F1 Division to another part of the state prison in conditions that are more humane and civilized and which is not inimical to his health is not granted.

e. An interim injunction restraining the first named Intended Respondent whether by his servants and/or agents or howsoever otherwise from taking any steps to prevent the Applicant from ordering food for himself at his own expense and/or to have such food sent for him by his relatives at hours fixed by the Superintendent and subject to strict examination by the first named Intended Respondent his servants and or agents is not granted.

3. It was further ordered that the leave to file a Claim for Judicial Review granted above is conditional upo**n:**

a. The Applicant is to file and serve a supplemental affidavit on or before 22nd October 2015 on issues raised whether alternate remedies were exhausted.

b. A Claim Form is to be filed on or before 22nd October, 2015 and served on the Intended Respondents or before 5th November, 2015.

c. The Intended Respondents are to file and serve affidavits in response on or before 19th November, 2015.

d. A Case Management Conference shall be held on 9th December, 2015 at 9:00a.m. in courtroom POS18.

……
Eleanor Joye Donaldson-Honeywell
Judge

With Research Assistance by:
Christie Borely
Judicial Research Counsel