REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV 2018 - 01783

In The Matter Of Judicial Review Act No. 60 Of 2000

And In The Matter Of An Application By Animals For Education Limited For Leave To Apply For Judicial Review Of:

The Refusal of the Chief Game Warden to Grant

An "Intention to Import" Permit For the Importation of Two Female Red Kangaroos into Trinidad and Tobago from Ontario, Canada

Between

Animals for Education Ltd

Applicant/Claimant

And

The Chief Game Warden

Respondent/Defendant

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on November 22, 2019

Appearances:

Mr. Rajiv Persad, Mr. John Heath, Ms. Elena Da Silva, Ms Laurissa Mollenthiel and Mr. Lionel M. Luckhoo, Attorneys at Law for the Claimant

Ms. Karlene Seenath, Ms. Ronelle Hinds and Ms. Amrita Ramsook, Attorneys at Law for the Defendant

JUDGEMENT

A. Introduction

1. The refusal by the Chief Game Warden ["the Defendant"] of the Claimant's application for an Intention to Import Permit for two female red Kangaroos ["the Kangaroos"] gave rise to this Judicial Review Claim.

2. The Claimant, Animals for Education Ltd, is a company with the primary objective of educating the public about conservation of native and exotic animals. The Company had been permitted by the Defendant to import a number of wild animals, including kangaroos, to be kept and displayed for the public at its Safari Park in Chaguaramas. However, when it applied on May 10, 2017 for an Intention to Import Permit for two more kangaroos, its application was ignored for several months and then refused on February 20, 2018.

3. This refusal decision is challenged by the Claimant on grounds that the Defendant took into account irrelevant considerations, failed to ascertain the relevant information that should have been taken into account and made his decision in a manner that was procedurally unfair.

B. Decision

4. My finding in this matter is that the Claimant has, by cogent evidence and submissions, successfully established a valid challenge to the Defendant's decision. However, this success is based solely on the narrow ground of lack of procedural fairness.

5. The Defendant has, by the evidence presented and the highly persuasive submissions of Counsel, established that there was no failing on the part of the Chief Game Warden with regard to taking into account the information that came to his attention in making his decision.

6. However, there was no meaningful response from Counsel for the Defendant to the contention that the procedure used to come to the decision was procedurally unfair. As such, it remained un-contradicted that while information was considered from diverse persons, there was no attempt to seek the input of the Claimant's Directors or Management in clarifying the matters of concern that led to the refusal of its Application.

7. Accordingly, for the reasons further explained in this Judgement, the Claimant will be granted some of the declarations and orders sought. The refusal decision will be quashed so that the application for the Intent to Import Permit can be fairly re-considered by the Defendant.

C. Procedural History

8. The Claimant's application for leave to apply for Judicial Review was in relation to declarations and orders sought as follows:

    i. A declaration that the Intended Respondent took into account irrelevant considerations in his decision to refuse to grant the Applicant an Intention to Import Permit for the importation of two female red kangaroos from Ontario, Canada to Trinidad and Tobago;

    ii. A declaration that the Intended Respondent failed to take into account relevant information in his decision to refuse to grant the Applicant an Intention to Import Permit to import two female red kangaroos from Ontario, Canada to Trinidad and Tobago;

    iii. A declaration that the Intended Respondent's decision on 20 February 2018 to refuse to grant the Applicant an Intention to Import Permit to import two female red kangaroos from Ontario, Canada to Trinidad and Tobago on the basis that the Applicant had refused entry to Forestry Division Personnel and had prevented them from inspecting the

conditions under which the animals were held was plainly irrational in the circumstances of this case;

iv. A declaration that the Intended Respondent's decision on 20 February 2018 to refuse to grant the Applicant an Intention to Import Permit to import two female red kangaroos from Ontario, Canada to Trinidad and Tobago was unlawful, null and void;

v. A declaration that the Intended Respondent's decision on 20 February 2018 to refuse to grant the Applicant an Intention to Import Permit to import two female red kangaroos from Ontario, Canada to Trinidad and Tobago was unreasonable, procedurally unfair and/or procedurally improper;

vi. A declaration in the alternative that the Intended Respondent lacked the jurisdiction to refuse to grant the Applicant an Intention to Import Permit to import two female red kangaroos from Ontario, Canada to Trinidad and Tobago;

vii. An order of certiorari to quash the decision of the Intended Respondent made on 20 February 2018 to refuse to grant the Applicant an Intention to Import Permit for the importation of two female red kangaroos from Ontario, Canada to Trinidad and Tobago;

viii. An order of mandamus directing the Chief Game Warden to reconsider its decision whether to grant the Applicant an Intention to Import Permit for the importation of two female red kangaroos from Ontario, Canada to Trinidad and Tobago.

9. On being granted leave to apply for Judicial Review, the Claimant filed a Fixed Date Claim on June 27, 2018. The filed Claim was supported by Affidavit evidence of two witnesses namely; Mr. Raymond Habib, Company Director and Mr. Jason Jackman, Manager.

10. In response to the Claim, the Defendant filed an Affidavit of Mr. Courtney Park, who was the incumbent Chief Game Warden when the refusal decision was made. Mr. Habib replied on behalf of the Claimant by Affidavit dated November 26, 2018.

11. The Claimant applied by Notice filed on January 16, 2019 for permission to cross-examine Mr. Park. The application was contested by the Defendant. It was determined, partially in the Claimant's favour, by Ruling delivered on April 10, 2019 in that permission was granted to cross-examine Mr. Park on certain paragraphs of his Affidavit. The Defendant was given the opportunity to have Mr. Park file a supplemental Affidavit to address issues in relation to which the Claimant sought disclosure of information. This was ordered with a view to narrowing the issues for cross-examination.

12. That Affidavit was filed on May 10, 2019. It disclosed much of the required information, including the legal framework within which Mr. Park made decisions regarding the Claimant's Application. He explained that his function as Chief Game Warden in issuing Intent to Import Permits stems from the Convention on International Trade in Endangered Species ("CITES") to which Trinidad and Tobago is a signatory. The Hearing of oral evidence from Mr. Park took place on June 26, 2019. Thereafter written closing submissions were completed by the parties on October 25, 2019.

D. <u>The Factual Matrix</u>

13. A consideration of the evidence presented in the Affidavits, supplemented by information derived from the cross-examination of Mr. Park provides a much fuller picture of the decision making process that led to the refusal of the Claimant's application.

14. The Claimant's Director, Mr. Habib, set out his understanding of what transpired in his Affidavit dated May 18, 2018. He said that after submitting his application form on May 10, 2017, he was in communication with the Defendant, following up

on its progress. There was no response to his application until after the Claimant filed a Judicial Review Claim that preceded the instant matter. In that Claim, filed five months after the Application, the Claimant challenged the failure of the Defendant to make any decision at all on the application, within a reasonable time.

15. Sometime after that prior Claim was filed, the Defendant sent a letter dated February 20, 2018 to the Claimant belatedly making a decision on his application. The decision was one of refusal of the application for an "Intent to Import" Permit for the two new Kangaroos. The reasons for the denial were in summary as follows:

    a. The head of the Wildlife Section, Mr. Romano MacFarlane had by letter dated October 7, 2016 informed the Claimant that the Ministry of Planning and Development was reviewing the Claimant's operations and requested access on October 13, 2016 to conduct an inspection but were refused entry. Until the inspection is done an assessment cannot be made as to whether to grant the Intent to Import Permit.

    b. The Defendant is awaiting information from the Ministry of Planning and Development on their review of the use of the site where the Claimant operates and cannot make a decision whether to grant the Intent to Import Permit until that information is received.

    c. The Defendant has been informed by the Chaguaramas Development Authority ("CDA") that there is an unresolved legal issue between them and the Claimant concerning the lease of the site. The Defendant cannot grant the Intent to Import Permit until the dispute is resolved.

16. In addition to these reasons stated in the refusal letter, the Claimant discovered another undisclosed reason. It came to the attention of Mr. Habib that there had been correspondence from the Hon. Minister of Agriculture, Land and Fisheries since September 28, 2016. It directed the Conservator of Forests not to approve any Intent to Import applications for wildlife to be housed at the Claimant's Chaguaramas site. Further, the letter indicated that approvals given previously should be revoked. Finally, there was a direction that a joint investigation into

conditions under which the animals were kept had to be conducted at the site by the Ministry of Health and the Zoological Society.

17. The Claimant complained, in the instant matter, that he was never made aware by the Defendant that this directive from the Minister was a deciding factor in the refusal of his application. He also argued that this and other considerations mentioned in the Defendant's refusal letter, such as the alleged unresolved CDA legal issue, were irrelevant.

18. The further contention of the Claimant's witness, Mr. Habib, is that the decision was made in an unfair manner because no attempt was made to inform the Claimant about any of these concerns until after the delayed decision was made in February, 2018. Even then the consideration as to the Minister's directive was not disclosed. The Defendant admitted at paragraph 6 of his supplemental affidavit that the reasons for refusal were not given to the Claimant as the Defendant was awaiting completion of the joint investigation.

19. The witness for the Claimant gave un-contradicted evidence that the Defendant failed to afford the Claimant an opportunity to make representations in response to matters adverse to its application, such as the CDA lease issue and the Claimant's alleged refusal of entry for an inspection, which the Defendant was considering as relevant to his application.

20. The Defendant quite candidly admitted that he received unsolicited information about the alleged unresolved dispute about the lease from the CDA's Chairman and Legal Officer. He only knew one side of the matter. When asked whether he didn't think it appropriate to ask the Claimant's Director Mr. Habib about the matter, he admitted that he never thought of that.

21. The Claimant's Director set out in copious detail, at paragraphs 25 to 31 of his Affidavit, the information he could have given in response to the unfavorable factors being considered by the Defendant in refusing his application, had he been consulted. This included a counter argument to the CDA's view that there is an existing lease dispute. He also provided information on several site inspections

spearheaded by the Defendant's employee Mr. Romano MacFarlane, referred to in the refusal letter. The Claimant mentioned that these inspections were madeso as to counter the Defendant's claim that the Claimant had refused Mr. MacFarlane entry for inspection.

22. The Defendant's approach to the challenges to his decision was admirable in that he gave candid full information in his written and oral evidence, admitting where appropriate certain aspects of the Claimant's case put to him. For example, in his Affidavit evidence the Defendant disclosed that he was going to grant the Claimant's application and had already signed it when the Minister's September 28, 2016 letter came to his attention. Under cross-examination, Mr. Park clarified that the Minister brought the prior correspondence to his attention by WhatsApp communication.

23. The Intent to Import Permit was by then ready for collection and the Claimant was asked to collect it but it was withheld as the Defendant wanted to ensure that the inspection had taken place. Admittedly, the Claimant was not told about any of this until months later when, after initiating litigation, a letter of refusal was given.

24. Although the Defendant had not given the Claimant an opportunity to refute any of the adverse issues at the time they were being considered, Mr. Park sought to address same in his Affidavit. He said that the inspections referred to by the Claimant's witness, conducted by Mr. MacFarlane, did take place but those were not the type of joint investigations envisaged in the Minister's letter.

25. While admitting that consideration of the Claimant's input played no part in his deliberations regarding the issues raised by the Minister and the CDA, Mr. Park was consistent in his evidence as to his view that the information was relevant to his decision. He was of the view that the alleged CDA lease issue had to be resolved and the Minister's directives regarding a joint inspection had to be completed before the application could be approved.

E. Issues

26. The issues to be considered were narrowed in submissions filed by the Claimant as follows:

    a. Whether the decision was made taking into account irrelevant matters

    b. Whether the decision was procedurally unfair

    c. Whether the decision maker failed to take into account or give sufficient weight to relevant matters and

    d. Whether, therefore, the decision was unreasonable.

27. Another issue concerning whether the Defendant had any jurisdiction to approve or refuse the Intention to Import permit was not as forcefully pursued by the Claimant. There is no merit to this aspect of the Claimant's case. It was addressed by the Defendant in evidence and submissions underscoring that this part of the challenge was based on the wrong premise. Specifically, the Claimant conflated the authority to approve grant of a license to import animals with the authority to approve the grant of an Intention to Import Permit.

28. The Defendant made clear that only the former is governed by the provisions of the Act which vests the Chief Technical officer with authority. The latter is governed by international treaty obligations and it is under those obligations that the Defendant was operating when he undertook the approval process.

F. Submissions, law and analysis

29. The approach to be taken by the Judiciary when called upon to review executive action was examined in detail by Kokaram J in **TOSL Engineering Ltd v Minister of Labour and Small and Micro Enterprise Development CV2013-02501** cited by Counsel for the Defendant. At Para 18, page 9, Kokaram J explained

"The reality is that judicial review is a jurisdiction which has been developed and is still being developed by the judges. It has many strands and more will be added, but they are and will always be closely interwoven. But however the cloth emerges from the loom, it must never be forgotten that it is a supervisory and not an appellate jurisdiction."

30. Kokaram J had underscored at Para 16, page 6, that

"*It is not part of the exercise of judicial review to substitute the opinion of the judiciary for that of the executive or public authority vested with the power to decide the matter in question. The main reason for this approach is that in judicial review the Court is concerned with the process by which a decision has been made and not the substance or merits of the decision. R Crown Court at Manchester ex p McDonald [1999] 1 WLR 841*"

31. The grounds upon which the decision of the Defendant is challenged in this case fall within those expressly included as matters that can be considered by the Court under Section 5(3) (d),(e),(h) and (o) of the **Judicial Review Act, Chap 7:08.** In summary, the grounds relate to alleged consideration by the decision maker of irrelevant factors while failing to apply natural justice to the Claimant and ignoring matters relevant to the decision.

32. In coming to a decision in this matter, the evidence and submissions on both sides in relation to these grounds, were considered while applying the supervisory approach outlined on the **TOSL** case.

Whether the decision was made taking into account irrelevant matters

33. As aforementioned, I have found in favor of the Defendant's argument that the Claimant has failed to prove on a balance of probabilities that the Defendant took into account irrelevant matters. According to Counsel for the Claimant, in closing submissions, it is clear that the decision-maker, under cross-examination, told the Court he had in fact approved the Claimant's application. The Intention to Import Permit was ready to be collected by the Claimant. However, it was as a result of

two particular considerations that the Defendant determined not to grant the application.

34. Firstly, the Defendant is said to have wrongly taken into account the directive in the Minister's letter dated September 2016 that there should be no approvals and that a joint inspection had to be done. Secondly, the Defendant is said to have wrongly taken into account the unsolicited information received from CDA officers about an alleged unresolved legal issue concerning the Claimant's lease with the CDA.

35. The Claimant's case is that neither of these considerations was relevant to the decision as to whether to grant an Intention to Import permit for the kangaroos, made by the Defendant.

36. Counsel for the Defendant ably refuted this submission by underscoring that it is to the specific legal framework governing the decision maker's function that the Court should look in determining what considerations were relevant or irrelevant. This was explained in the text Judicial Review by Michael Supperstone QC et al, 3rd Edn page 192, paragraph 8.22.1 cited by Counsel. The learned authors stated that,

> *"The first stage in identifying the relevant and irrelevant factors must be a consideration of relevant statutory provisions. As has been said by Lord Bridge;*
>
> > *'… if there are matters which on the true construction of the statute conferring discretion, the person exercising the discretion must take into account and others which [that person] may not take into account, disregard of those legally relevant matters or regard of those legally irrelevant matter will lay the decision open to review on ground of illegality.'"*

37. The Claimant's director made reference in his Affidavit to **Section 4 of the Animals (Disease and Importation) Act Chap 67:02, Animals (Importation) Control Regulations**. He expressed his awareness that the said section provides for a Chief Technical Officer to grant permits to import animals. As aforementioned, one of

his initial challenges to the Defendant's decision was based on lack of authority for him to make the said decision.

38. This was however clarified by the Defendant who made clear in his supplemental Affidavit that his authority to grant Intention to Import Permits was based, not on that statute, but on the CITES international obligations. The unanswered submission of Counsel for the Defendant is that "no statutory provision has been identified by the Claimant which outlines the considerations in the grant and refusal of the Intent to Import Permit".

39. Accordingly, there being no statutory provisions setting out the relevant considerations for the decision maker, the grant or refusal of the Intent to Import permit was in the discretion of the Defendant. Counsel for the Defendant did not by this submission suggest that the Defendant could make the decision arbitrarily or unreasonably. Clearly the decision making considerations must withstand scrutiny and meet the Wednesbury Reasonableness standards cited by Counsel for both sides in **Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation [1948] 1 KB 223.**

40. This point was supported in the Defendant's submission by citing the decision of the House of Lords in **Tesco Stores LTD v Secretary of State for the Environment (1995)1WLR 759**. The Court observed:

> *"… it is for the courts, if the matter is brought before them, to decide what a relevant consideration is. If the decision maker wrongly takes the view that some consideration is not relevant and therefore has no regard for it, his decision cannot stand and he must be required to think again. But it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense*."

41. The **Wednesbury** standard of reasonableness was established as follows:

> *"Theoretically it is true to say—and in practice it may operate in some cases—that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is right, but that would require overwhelming proof, and in this case the facts do not come anywhere near such a thing. Counsel in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that* ***it must be proved to be unreasonable in the sense, not that it is what the court considers unreasonable, but that it is what the court considers is a decision that no reasonable body could have come to, which is a different thing altogether****. The court may very well have different views from those of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse. All over the country, I have no doubt, on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority who are put in that position and, provided they act, as they have acted here, within the four corners of their jurisdiction, the court, in my opinion, cannot interfere."* [Emphasis added]

> *"… the power of the court to interfere in each case is not that of an appellate authority to override the decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confide in it."*

42. Applying this approach, Counsel for the Defendant contended that there was nothing unreasonable or irrational about the Defendant having treated the contentions reported to him by the CDA and the directive in the Minister's letter as relevant information to be considered in making his own decision. On the evidence it is clear that the Defendant did not simply accept the Minister's

directive. He went further to assess the situation on his own volition in considering whether to grant the permit.

43. This led him to discussions with the Zoological Society Chairman to follow up on whether the joint inspection referred to by the Minister had been completed. Then the said Chairman, who happened to be also the Chairman of the CDA, volunteered to the Defendant unsolicited information about the alleged legal issue concerning the Claimant's lease.

44. Again, the Defendant did not simply take it as given that this was a reason for not approving the Claimant's application. He explained that it was his own view that the information received was relevant to the security of tenure of the Claimant's possession of the site to keep the Kangaroos and hence the welfare of the animals.

45. There being no statutory underpinnings governing what the Defendant was to take into account, it is my finding that the Claimant has not shown on a balance of probabilities that these matters of the Minister's letter and the CDA lease concerns were irrelevant or unreasonably considered by the Defendant.

Whether the decision was procedurally unfair and as a result the decision maker failed to take into account or give sufficient weight to relevant matters and therefore, the decision was unreasonable.

46. The Claimant failed to establish that the Defendant took into account irrelevant matters but succeeded in all other aspects of the narrowed issues relevant to this Judgement. In challenging the decision of the Defendant as procedurally unfair, the Claimant cited **R (on the application of Ramda) v Secretary of State for the Home Department [2002] EWHC 1278 (Admin)** where Sedley LJ said,

"As to the fairness of the process, two principles come into potential conflict.

One is that there has to be finality in decision-making as much as in litigation: the Home Secretary is not required to be drawn into a never-ending dialogue whenever his decision proves unacceptable to a wanted person.

The other is that ***he must not rely on potentially influential material which is withheld from the individual affected. This is a simple corollary of Lord Loreburn's axiom that the duty to listen fairly to both sides lies upon everyone who decides anything*** *(Board of Education v Rice [1911] AC 179) and of Lord Denning's dictum that if the right to be heard is to be worth anything it must carry a right in the accused man to know the case against him (Kanda v Government of Malaya [1962] AC 322)."* [Emphasis added]

47. In closing submissions Counsel for the Claimant summarized the evidence before the Court on the undisputed position as follows:

    a. The Defendant, as decision-maker in this matter, was initially prepared to grant the permit applied for but thereafter did not do so as a result of the unsolicited information/direction given him by the Minister and officers of the CDA.

    b. Among the matters reported to the decision-maker was that there was a legal dispute affecting the Claimant's lease from the CDA. That caused him to be concerned about the housing of the animals. The information from the Minister led the Defendant to the view that there was an essential joint inspection that remained outstanding, to be done at the Claimant's premises. The Defendant admitted that he did not speak with a Mr. MacFarlane who was to have been involved in such an inspection before concluding that it was not completed.

    c. The Defendant relied on these representations adversely against the Claimant in refusing the permit, without informing the Claimant of the representations he had received and without giving the Claimant an opportunity to give his perspective and disclose relevant information on the matters raised.

    d. As a result, the Defendant was deprived, in his decision making process, of taking into account information that could have come from the Claimant

as set out at paragraphs 25 to 31 in the Affidavit of the Claimant's Director. The said information would have been relevant to his decision.

48. In light of the foregoing, there is merit to the submission of Counsel for the Claimant that the Defendant's decision must be quashed. This is so because it was arrived at without procedural fairness, it failed to take into account relevant information that could have been received from the Claimant and it was in all the circumstances an unreasonable decision in the **Wednesbury** sense.

G. Decision

49. Judgement is awarded to the Claimant as follows.

i. It is hereby declared that the Defendant's decision on 20 February 2018 to refuse to grant the Claimant an Intention to Import Permit to import two female red kangaroos from Ontario, Canada to Trinidad and Tobago was unreasonable, procedurally unfair and/or procedurally improper;

ii. An order of certiorari is granted to quash the decision of the Defendant made on 20 February 2018 to refuse to grant the Claimant an Intention to Import Permit for the importation of two female red kangaroos from Ontario, Canada to Trinidad and Tobago;

iii. An order of mandamus is granted directing the Defendant to reconsider his decision whether to grant the Claimant an Intention to Import Permit for the importation of two female red kangaroos from Ontario, Canada to Trinidad and Tobago;

iv. The Defendant is to pay the costs of the Claimant of this Claim in an amount to be assessed by the Registrar if not agreed.

……..

Eleanor Joye Donaldson-Honeywell

Judge

Assisted by Christie Borely JRC1