

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV No. 2011-00818

Between

SURESH PATEL

Claimant

And

THE COMMISSIONER OF POLICE

Defendant

Dated 25th June, 2013

Before the Honourable Mr. Justice Frank Seepersad

Appearances

Mr. Jagdeo Singh and Mr. Larry Lalla for the Claimant.

Ms. Karen Fournillier instructed by Ms. Mohammed Carter for Defendant.

DECISION

1. By Fixed Date Claim Form filed on March 16th 2011, the Claimant, Suresh Patel, sought Judicial Review of the Defendant's decision to withhold the release of fifty (50) .177 smooth bore air pistols ("the said air pistols") and a quantity of .177 caliber pellets ("the said pellets") which were imported into Trinidad and Tobago by the Claimant in September 2010.
2. The Claimant also sought a review of the Defendant's decision that the said air pistols were to be destroyed failing his ability to return same to the manufacturer.
3. The Claimant contended that the said decisions are illegal, null and void and are in breach of his rights under Section 4(a) of the Constitution to the enjoyment of his property and the right not to be deprived thereof except by due process of law and he sought the following reliefs against the Defendant:
 - a. A Declaration that the Defendant's decision to withhold the air pistols and the pellets is illegal, null, void and of no effect.
 - b. A Declaration that the Defendant's decision that the air pistols be destroyed failing the Claimant's ability to return the air pellets to the manufacturer is illegal, null, void and of no effect;
 - c. A Declaration that the Defendant's decision to withhold the air pistols and the pellets is in breach of the Claimant's right under section 4(a) of the Constitution to the enjoyment of his property and the right not to be deprived thereof except by the due process of law;
 - d. An order of Certiorari quashing the decisions referred to in paragraphs (a) and (b) above;
 - e. An order of Mandamus compelling the Defendant to return/release the air pistols and pellets to the Claimant;
 - f. Damages;

- g. Interest;
 - h. Costs, and
 - i. Such further and other reliefs as the Court deems appropriate.
4. With respect to relief (c) the Claimant, in his submissions filed on the 25th April, 2013 abandoned this relief having conceded that the Attorney General was not made a party to this action and therefore the Court ought not to make any declarations in relation to any alleged Constitutional breaches by the State.
5. In support of his claim, the Claimant filed two (2) affidavits namely-
- Claimant's Principal Affidavit dated and filed March 16, 2011; and
 - Claimant's second Affidavit dated and filed July 13, 2011.
6. In response the Defendant filed four (4) affidavits-
- Affidavit of Brian Pierre dated and filed June 22nd 2011;
 - Affidavit of Kenneth Richards dated and filed June 24th 2011;
 - Affidavit of Dwayne Gibbs dated and filed May 21st 2012; and
 - Affidavit of Derrick Sankar dated and filed May 22nd 2012.
7. The following are the undisputed facts from the affidavit evidence-
- By letter dated March 18th 1998 the Defendant granted permission to the Claimant to import one hundred (100) .177 smooth bore air rifles and 600,000 rounds of .177 caliber pellets. Further, on March 29th 2010 by Firearm Import Permit number 13/2010 the Defendant granted further permission to the Claimant to import fifty (50) .177 Crossman brand smooth bore air pistols.

- In September 2010, the Claimant imported the said air pistols into Trinidad and Tobago together with a quantity of .177 caliber pellets. These items on arrival into Trinidad were detained by Customs and subsequently lodged with the police at the Police Armoury, St. James for inspection prior to their release in keeping with standard practice. The said air pistols had never previously been imported into Trinidad and Tobago by the Claimant.
 - Following the deposit of the said items at the Police Armoury, by letter dated February 1st 2011, the Claimant was advised that the Defendant had decided that the said air pistols be withheld as they *'are not only physically dangerous, but also replicas of real weapons that could be used for illegal acts'*. The Defendant further directed that the said air pistols were to be destroyed, failing the Claimant's ability to promptly return same to the manufacturer.
8. During the case management of this matter the parties agreed to have the said air pistols examined by a forensic scientist and for a report to be generated. The examination was undertaken by Mr. Derrick Sankar and a report was generated by him and same was annexed to his affidavit filed on the 22nd May 2012 as **"DS1"**.
 9. In the said report Mr. Sankar stated that the barrels from five (5) randomly chosen air pistols *"...had smooth barrels on its inside with no rifle marks and hence they are not firearms. I also disassembled one of the air pistols lab exhibit #12488/11 and further examined the inside of its barrel but I observed no micro groove marks (rifling marks). I concluded that this air pistol of caliber 177 had a smooth barrel and is not a firearm."*
 10. The findings in the report generated by Mr. Sankar contradicted the findings of Mr. Kenneth Richards at paragraphs 6 and 7 of his affidavit filed June 24th 2011 and as well as the findings of Mr. Brian Pierre at paragraphs 9, 10 and 11 of his affidavit filed June 22nd 2011.
 11. No decision to withhold the release of the quantity of .177 caliber pellets was ever communicated to the Claimant.

12. The Defendant continues to withhold the release of the said air pistols on the grounds that if they are released they pose a real threat to national security.

The Defendant's case

13. The Defendant stated that his decision to continue to withhold the release of the said air pistols to the Claimant was based on several factors related to considerations of national security. He contended that the physical configuration of the said air pistols allows for them to be used in aid of criminal activity as it is difficult to distinguish them from an actual firearm.

14. He also contended that the increase in gun related offences at this time and the potential use of air pistols for the furtherance of criminal activity were matters considered by him in arriving at his decision.

15. The issues that arise for determination in this matter are as follows:

1. Whether an alternative remedy is available to the Claimant at common law and if so, whether the court should refuse to grant any relief in this action.
2. Whether the Defendant's decision to withhold the release of the air pistols is justiciable.
3. Whether the Claimant is entitled to damages.

Issue 1 – Alternative Remedy

16. The Defendant submitted that Judicial Review is a remedy of last resort and where an alternative remedy exists and has not been used the court may exercise its discretion to refuse relief. The Defendant referred the court to the cases of Canserve Caribbean Limited v Comptroller of Customs and Excise CV 2009-03446, Fidelity Finance & Leasing Company Limited & Others v. His Worship Sherman Mc Nicolls and the Director of Public Prosecutions CV 2008-1228/1268/1269 and Rule 56.3 (3) (e) of the Civil Proceedings Rules 1998 (as amended) in support of its position that the Claimant

failed to disclose on his Fixed Date Claim Form that an alternative remedy was available and the reasons why same was not pursued and that in any event the existence of the alternative remedy, namely an action in detinue ought to have been pursued and the court should therefore exercise its discretion and refuse relief.

17. The Claimant in his submissions submitted that that Defendant has raised the issue of an available alternative remedy too late in the proceedings and that the instant proceedings are more convenient than any available alternate remedy having regard to the time and costs expended on the instant matter and further submitted that this matter involves a simple issue of law namely whether the Commissioner of Police has the power in law to make policy on national security issues so as to prevent the importation of air weapons and/or outlaw the use of same.

Resolution of this issue

18. In **R v. Epping and Harlow General Commissioners ex p. Goldstraw** [1983] 3 All ER 257 at 262 Donaldson MR noted as follows: –

“But it is a cardinal principle that, save in the most exceptional circumstances, that the jurisdiction will not be exercised where other remedies were available and have not been use’

19. In Leech v. Deputy Governor of Parkhurst Prison [1988] AC 533 at 581 D-E, Lord Oliver stated:

“it has never been previously, so far as I am aware, been suggested that the mere existence of an alternative remedy, of itself and by itself, ousts the jurisdiction of the Court, though it may be a powerful factor when it comes to the question of whether the discretion to review should be exercised.”

20. In The Judicial Review Handbook 4th Edition by Michael Fordham, Fordham at page 2702 paragraph 36.3 says:

“Usually, an alternative remedy will not be exclusive one (i.e. one which might be seen as excluding judicial review). Instead, the question will be whether judicial

review should be entertained as a matter of discretion and sound case-management...The existence of an alternative remedy...can be a strong reason to refuse permission at the beginning of the case or a remedy at the end of it. The court will look at all the circumstances, including the nature of the issue and the suitability of the alternative remedy for resolving it.”

21. In De Smith’s Judicial Review 6th Edition at para. 16-016 it is stated that:

“Claimants are refused permission to proceed with judicial review where the court forms the view that some other form of legal proceedings or avenue of challenge is available and should be used. Questions as to whether a claimant should have used another type of redress process should arise on the application for permission and not at or after the substantive hearing of the judicial review claim. Once the court has heard arguments on the grounds of review, there is little purpose in requiring the parties to resort to some other remedy; indeed, to do so may be contrary to the overriding objective of the CPR. But a failure to pursue other remedies may influence how the court exercises its discretion to award costs.”

22. In R v. Essex County Council ex p. EB (1997) ELR 327, at 329 Mc Cullough J said

“questions about the existence of an alternative procedure will normally arise on the application for (permission) and not at the hearing on the merits.”

23. In R (M) v London Borough of Bromley [2002] 3 FCR193 at para. 23 Buxton LJ stated

“it is... important to bear in mind that the jurisprudence relating to alternate remedies and their relevance to relief in judicial review do not form a separate chapter in the law of judicial review, but are only one aspect of a more general discretionary power of the court to refuse relief in an appropriate case.”

24. Fordham at paragraph 36.3.10 at pg. 706 of the 4th Ed. of the Judicial Review Handbook referred to the case of R v. Chief Constable of West Yorkshire ex p Wilkinson [2002] EWHC 2353 where Davis J at para. 4.3 stated:

“even where permission has been granted in an alternative remedy case, the alternative remedy argument may possibly, albeit perhaps exceptionally, and provided the circumstances are appropriate, still be available to be deployed at a substantive hearing on any discussion as to the appropriateness of relief, if any, to be granted.”

25. In R v Leeds City Council, ex p Hendry (1994) 6 Admin LR 439, at 443 D-F Latham J said:

“the question is not simply whether or not there is an alternative statutory appeal procedure but whether in the context of that procedure the real issue to be determined can sensibly be determined by that means.”

26. In R v Huntington District Council, ex p Cowan [1984] 1WLR 507 at 507 Glidewell LJ said:

“the court should always ask itself whether the remedy which is available to the (Claimant) by way of appeal is the most efficient and convenient, in other words, which of them will prove to be the most effective and convenient in all circumstances, not merely for the (Claimant), but in the public interest.”

27. In Ex p Waldron (1986) QB 824 at 852F – 853A, Glidewell LJ went on to ask the following questions:

“whether the alternative statutory remedy will resolve the question at issue fully and directly, whether the statutory procedure would be quicker or slower, than procedure by way of judicial review, whether the matter depends on some particular or technical knowledge which is merely readily available to the alternative appellate body” and whether the alternative remedy is “apt to decide the question.”

28. In R v Devon County Council, ex p Baker [1995] 1 ALL ER 73 at 92F, Simon Brown LJ said *“which of the two available...avenues of redress, is to be preferred will depend ultimately upon which is the more convenient, expeditious and effective.”*

29. Based on the aforementioned authorities it is clear that the existence of an alternative remedy does not necessarily oust the Court's jurisdiction to proceed with the instant proceedings. Ultimately the court has a discretion.
30. The argument that there is a valid alternative remedy ought properly to be made at the stage when the court is asked to grant leave to proceed with an action that seeks an administrative order and if leave had been granted ex parte then an application to set aside the leave ought to be filed on the ground that there is an alternative remedy.
31. The failure to adopt either course does not however prevent the point from being raised even at the substantive hearing, however, if raised at the substantive stage, the Court must consider whether the circumstances are appropriate and regard must be had to which course would be, having regard to the stage of the matter, the most efficient, convenient, expeditious and effective.
32. The instant matter was actively case managed for over two years and a significant amount of judicial time has been expended. The Court must always have regard to the overriding objective of the CPR and is mandated to properly apportion its very limited resources. There is no real factual dispute in this matter and the real issue to be determined is an issue of law as to whether the Defendant has a discretion exercisable in the interest of national security, having regard to the current state of criminal activity in the country, that permits him to withhold the imported air pistols from the Claimant.
33. In the circumstances and having considered the submissions of the parties, the authorities, the facts of the case and the stage of the proceedings, the court is of the view that the instant matter ought to be proceeded with, notwithstanding the existence of an available alternative remedy.
34. The Court also wishes to point out that it considered the Defendant's submission with respect to Rule 56.3 (3) (e) of the CPR as amended and is of the view that the failure in this case by the Claimant to state in the Fixed Date Claim Form that an alternative remedy was available and to outline why the alternative remedy has not been pursued, is not fatal.

35. The facts of this case are fundamentally different from the facts that were before Mr. Justice Breaux (as he then was) in the Fidelity Finance Case (supra), where the Claimants had failed to disclose a material fact namely that the parties had filed an application for Judicial Review and leave had been refused.

Issue 2

Whether the Defendant's decision to withhold the release of the air pistols is justiciable.

36. The Defendant has contended that the Claimant's air rifles have been withheld having regard to national security concerns. At paragraph three (3) of his affidavit filed 21st May 2012, the then Commissioner of Police, Mr. Dwayne Gibbs, outlined his responsibilities which includes, inter alia, the issuing and granting of firearm user licenses, permits, certificates, firearm import permits and the revocation of same. Having regard to the findings of the firearm expert Mr. Sankar the air pistols in question are not firearms and there is no issue relative to the revocation of any firearm users licence.

37. By permit No13/2010 a firearm import permit was issued to the Claimant to import fifty (50) .177 smooth bore air pistols. The court is not certain and it was not explained why there was a need for a firearm import permit to import items that are not firearms in accordance with the definition of the Act. However an application was made and same was in fact granted.

38. Pursuant to the Firearms (Air Weapons) Order 3/1971, an air weapon means an air rifle, air gun or air pistol and for the purpose of the definition of firearm outlined at section 2 of the Firearms Act Chapter 16:01, a firearm does not include air weapons of a below .177 caliber; unless the barrel thereof is rifled.

39. The air pistols in this case are not prohibited weapons and they were imported by the claimant, who having obtained a firearm import permit had an assurance from the Defendant that he could in fact import the said items. The Claimant was entitled to rely on this assurance and he did so and thereby incurred the cost of importing the air pistols into the country.

40. The fundamental issue that therefore has to be determined is whether there is any overriding interest arising from the Defendant's duties and responsibilities which entitle the Defendant to withhold the said air pistols. The court noted that the permit No13/2010 referred to no condition save that the number of air pistols to be imported was fifty (50) and they were to be of smooth bore and of .177 caliber. There was no injunction preventing the importation of any pistols that bore resemblance to a firearm.
41. The Firearms (Air Weapons) order which was made by His Excellency the President has the effect of making an air weapon of smooth bore and of .177 caliber or less, legal.
42. Nothing in the Firearms Act vests the Defendant with a discretion to override and or to impose conditions in relation to the Firearms (Air Weapons) Order and no Authority and/or Executive Order was cited by the Defendant that so empowers him. All the cases cited by the Defendant were with respect to the exercise of power by a Sovereign, Minister of Security and or Secretary of State. Further the Court has been referred to no authority that suggests that the Defendant is empowered to make and determine national security policy.
43. Consequently this Court is of the view that the Defendant had no authority to object to the Claimant's importation of the air pistols on the ground of national security. It may very well be that given the state of criminal activity, such air pistols ought not to be sold, but to prevent same would require a revision of the provisions of the Firearms Act by Parliament and it may be in the interest of the citizens of Trinidad and Tobago if such an exercise is in fact undertaken as a matter of urgency.
44. The Claimant in this action also sought relief with respect to pellets which he imported. The Defendant's position on this issue is however quite clear. At paragraph 19 of the affidavit of Brian Pierre it was stated that the pellets were not the subject of any decisions by the Defendant to withhold the release of same.
45. Further by letter dated 2nd May, 2011 the Claimant was informed that he could collect the pellets at the Armoury Repairs Section. The Claimant ought to have retrieved the pellets and the court is not prepared in the circumstances to grant any declaration in relation to

the said pellets. There is also no evidence before the Court that the air pistols are damaged in any way and that they cannot now be sold and there is insufficient information before the Court so as to lead the Court to hold that damages ought to be awarded in this case.

46. For the reasons that have been hereinbefore outlined the following reliefs are granted.

- i. The Court declares that the Defendant's decision to withhold the Claimant's fifty (50) air pistols is illegal, null and void and of no effect;
- ii. The Court declares that the Defendant's decision that the said air pistols be destroyed; failing the Claimant's ability to return the said air pistols to the manufacturer is illegal, null, void and of no effect;
- iii. An Order of Certiorari is hereby granted quashing the decisions referred to at items i and ii above;
- iv. An Order of Mandamus is hereby issued thereby compelling the Defendant to return and release the said air pistols to the Claimant; and
- v. There shall be a stay of execution of 42 days;
- vi. The Defendant is to pay to the Claimant the cost of this action and the parties shall be heard on the issue of costs.

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FRANK SEEPERSAD
JUDGE