

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P366 of 2019

Claim No. CV 2019-01839

Between

**THE PERMANENT SECRETARY, MINISTRY OF SOCIAL DEVELOPMENT AND
FAMILY SERVICES**

CENTRAL PUBLIC ASSISTANCE BOARD

Appellants

And

RUTH PETERS

Respondent

Panel: A. Mendonça, J.A.

G. Smith, J.A.

M. Dean-Armorer, J.A.

Date of delivery: June 5, 2020

Appearances:

Mrs. T. Gibbons-Glenn and Ms. R. Theophilus instructed by Ms. S. Dass and Ms. D. Katwaroo appeared on behalf of the Appellants

Mr. J. Singh, Mr. D. Rambally and Mr. Taklalsingh instructed by Ms. R. Khan appeared on behalf of the Respondent

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The issue before this court is whether the Public Assistance (Disability Assistance) (Prescribed Forms) Regulations (hereinafter referred to as “the Prescribed Forms Regulations”) are ultra vires the Public Assistance Act (PAA) under which they were made.
2. The factual background giving rise to this appeal need not be stated in any great detail. Briefly, the Respondent was diagnosed with Guillain-Barré syndrome and assessed by a medical officer with a ninety per-cent (90%) disability around July 2018. According to the affidavit of Mr. Emrol Peter, the Respondent’s father, the Guillain-Barré syndrome is a rare neurological disease. He stated that he has personally observed the Respondent being unable to walk or generally move around and in need of assistance in performing basic personal day to day tasks. He further indicated that she is no longer capable of earning an income and can no longer financially support herself and her family.
3. On or around October 2, 2008 Mr. Peter attempted to apply, on behalf of the Respondent, for disability assistance under the provision of the PAA. Section 11B of the PAA provides that an application for disability assistance shall be submitted in writing in the form and manner prescribed in regulations made under the Act to the Local Board. Regulation 3 of the prescribed forms regulations provides in a schedule to the regulations the form that is required to be prescribed under section 11B. That form contains a section with the heading “QUALIFICATIONS”. Clause (d) of that section provides that “to be eligible for a Disability Assistance Grant, a person –
 - (d) must be certified by a Government Medical Officer as being permanently disabled from earning a livelihood as a result of visual, mental, hearing, or physical impairment.”

4. As mentioned earlier, the medical officer certified that the Respondent was ninety per-cent (90%) disabled. However, in relation to the duration of the ailment he stated “one year pending clinical report”. It is accepted that the medical officer in those circumstances did not certify that the Respondent was permanently disabled as required under paragraph (d) referred to above.
5. According to Mr. Peter, he was told by the social welfare officer at the Sangre Grande welfare office where he attempted to make the application for the disability assistance grant on behalf of the Respondent, that nothing could be done to help his daughter as she was not one hundred per-cent (100%) disabled and because of that she could not receive a disability assistance grant.
6. The Respondent consulted attorneys-at-law who advised that the requirement that an applicant for a disability assistance grant must be certified as permanently disabled is ultra vires the PAA as it is the clear intent of the PAA to assist persons who through disability are unable to earn a living through permanent and/or temporary disablement.
7. These proceedings were then filed as judicial review proceedings in which the Respondent challenged the policy and/or criteria and/or regulations imposed and maintained by the Appellants which stipulated that an applicant for a disability assistance grant must be certified as, *inter alia*, permanently disabled. The Respondent’s challenge was on the basis that the requirement in the form of application as prescribed by the Prescribed Forms Regulations, which provide at paragraph (d) referred to above that a person to be eligible for a disability assistance grant must be certified as being permanently disabled, is ultra vires section 11A(1)(d) of the PAA. The Respondent’s case is that that section only requires that to be eligible for a disability assistance grant a person must be so disabled that they are unable to earn a livelihood and has been certified by a medical officer as being so disabled. It does not provide that the disability must be permanent.

8. The Appellants maintained that the Prescribed Forms Regulations were not ultra vires the PAA.
9. When the matter came before the Trial Judge the Appellants also raised as an issue whether they had made any decision that can be subject to judicial review. The Appellants argued that no such decision had been made. The Trial Judge found no merit in this argument. That finding has not been challenged in this appeal and the only issue for the court's determination is whether the Prescribed Forms Regulations are ultra vires the PAA.
10. Before going further, it is convenient to set out in detail, in our view, some of the provisions of the PAA that are relevant to this appeal:

11A. (1) Notwithstanding any provision of this Act, a person is entitled to receive disability assistance if —

- (a) his total income does not exceed twelve thousand dollars per annum;
- (b) he—
 - (i) is a citizen or resident of Trinidad and Tobago as defined in the Immigration Act; and
 - (ii) has been continuously resident in Trinidad and Tobago for a period of three years preceding the claim for disability assistance, except that he has not been absent from Trinidad and Tobago for a period exceeding six months in the aggregate;
- (c) he has attained the age of eighteen years; and
- (d) he is in the opinion of the Local Board so disabled that he is unable to earn a livelihood and has been certified by a Medical Officer as being so disabled.

(1A) Notwithstanding subsection (1)(b)(ii), the Board may consider and approve an application for disability

assistance where the applicant had been absent from Trinidad and Tobago for a period exceeding six months in the aggregate for medical purposes.

(1B) An applicant for disability assistance under subsection (1A) shall provide the Board with satisfactory evidence in support of the application.

(2) Notwithstanding certification pursuant to subsection (1)(d), the Director (Social Welfare) may, if he sees fit, refer the applicant to the Chief Medical Officer for assessment and certification of disability and if such certification is not obtained, the Local Board may refuse the applicant's claim in accordance with this Act.

(3) Disability assistance shall be one thousand, eight hundred dollars per month.

(4) A person who is paid disability assistance shall continue to receive such assistance so long as –

- (a) his total income does not exceed the amount referred to in subsection (1);
- (b) he satisfies the conditions referred to in subsection (1)(b)
- (c) ***(Deleted by Act No. 2 of 2012).***

(5) Notwithstanding subsection (1)(b)(ii), the Minister may approve a claim for disability assistance where the applicant has been continuously resident in Trinidad and Tobago for more than twelve months but less than three years.

11B. An application for disability assistance shall be submitted in writing in the form and manner prescribed in Regulations made under this Act, to the Local Board.

16. (1) The Minister may make Regulations for carrying the purposes and provisions of this Act into effect, and, without limiting the generality of the foregoing, may make Regulations—

- (a) causing the circumstances of every applicant for or recipient of public assistance to be enquired into;
- (b) prescribing the procedure to be followed on and the forms to be used for applications for public assistance;

- (c) providing for the maintenance of adequate records of applications for public assistance, reports and decisions thereof, and amounts of public assistance paid;
- (d) prescribing the method and places of payment of public assistance granted under this Act;
- (e) providing for the suspension or discontinuance of disability and public assistance grants;
- (f) providing for the payment of grants in the event of mutilation, destruction or loss of the instrument of payment;
- (g) prescribing the procedure for verifying that the recipient of a grant is alive.

11. The Respondent's challenge to the prescribed forms regulations is a challenge to subordinate legislation. They are regulations made by the Minister under section 16 of the PAA. There was no dispute between the parties as to the applicable legal principles. In **R (on the application of The Public Law Project) v. Lord Chancellor** [2016] UKSC 39 (paras 23-24), Lord Neuberger stated the circumstances in which subsidiary legislation will be held to be invalid:

"23. Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is ultra vires, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.

24. Normally, statutory provisions which provide for subordinate legislation are concerned with subsidiary issues such as procedural rules, practice directions, and forms of notice; hence statutory instruments are frequently referred to as regulations. However, such statutory provisions sometimes permit more substantive issues to be covered by subordinate legislation, and, as is the case

with section 9(2)(b) of LASPO, they sometimes permit subordinate legislation which actually amends the statute concerned (or even another statute), by addition, deletion or variation.”

12. In this case there was no argument that the statutory provisions which provide for the Minister to make regulations permitted him to make regulations that modified or amended the PAA. Among the powers given to the Minister to make regulations as provided for in sections 16(1)(b) and 11B is the power to make regulations prescribing, *inter alia*, the forms to be used for applications for disability assistance. The question therefore in this case is whether a requirement that an applicant must be certified as being permanently disabled from earning a livelihood in order to be eligible for a disability assistance grant as provided for in the Prescribed Forms Regulations is outside the scope of the PAA.

13. The Trial Judge reviewed the provisions of the PAA and noted that they provided for two types of grants namely, the public assistance grant and the disability assistance grant. The disability assistance grant provides for a higher monthly payment than the public assistance grant. She stated that the PAA sets out the criteria for only the disability assistance grant and this is provided for in section 11A(1). The criteria for the public assistance grant are provided for at regulation 3 of the Public Assistance Regulations which provides as follows:

- “3. (1) Public assistance may be provided to a person who is in need by reason of his being prevented by some physical or mental disability from earning a living.
- (2) Public assistance shall be in the form of a grant for a period not exceeding twelve months and is subject to review.”

It is clear from that regulation that the public assistance grant is payable to persons who may be temporarily disabled. The question though is whether the disability assistance grant is also payable to persons who are also temporarily disabled.

14. The Trial Judge considered that the definition of public assistance under the PAA was wide enough to include both public assistance grants and disability assistance grants. The Trial Judge, therefore, having regard to regulation 3(2) of the Public Assistance Regulations concluded that both types of grants are subject to review on updated medical reports. Accordingly, she held that there is no express or implied provision in the PAA that a permanent disability must be proved for any of the grants.

15. The Trial Judge then focused her attention on section 16 of the PAA which confers on the Minister the power to make regulations and concluded that there was no mention of the Minister having the power to adjust or add to the qualifications under the PAA for an application for a disability assistance grant. In the circumstances, the Trial Judge concluded:

“26. The provision by the challenged Regulation for a prescribed form with the added qualification of permanent of disability indeed appears to have an effect which is outside the scope of the statutory power pursuant to which the Regulation was purportedly made. There is merit to the submission of the [Respondent] that the said Regulation limits the rights conferred by the Act in a way that prejudices her and other potential applicants that meet the statutory requirements. It is therefore ultra vires.”

And the Trial Judge granted the follow declaration:

“i. A declaration that the [Appellants’] policy and/or criterion and/or regulation of being certified by a Government Medical Officer as being permanently disabled from earning a livelihood as a result of visual, mental, hearing or physical impairment is

unlawful and/or ultra vires the Public Assistance Act Chapter 32:03, Section 11(A)(1)(d).”

She also ordered that the Appellants strike out the word “permanently” from paragraph appearing in paragraph (d) under the heading “qualifications” in the Prescribed Forms Regulations.

16. It was common ground between the parties that the PAA recognises two types of grants: the public assistance grant and the disability assistance grant. It was also common ground that a person who is not permanently disabled may receive the public assistance grant if he satisfies the other relevant criteria. Of course, the dispute in this case is whether a person must be permanently disabled to be eligible to receive the disability assistance grant as is provided for in the Prescribed Forms Regulations.
17. We accept that section 11A(1)(d) does not expressly provide that the disability must be permanent. Nor does it say that it may be temporary. While the section provides that the extent of the disability must be such as the person “is unable to earn a livelihood” it says nothing of the duration of the disability. To that extent, it seems to us that the provision is ambiguous. The Trial Judge, however, thought otherwise. She did not think that there was any ambiguity. In coming to that conclusion the Trial Judge concluded that the public assistance grant and the disability assistance grant were both subject to review on updated medical reports. The Trial Judge came to that conclusion after a consideration of regulation 3 of the Public Assistance Regulations which applies to “public assistance” which she thought was wide enough to include disability assistance. We do not accept that regulation 3 of the Public Assistance Regulations refers to the disability assistance grant.
18. Regulation 3 refers to public assistance and the question is whether that includes disability assistance as well. In considering this issue it is important to

pay close attention to the definition of public assistance. That term is defined in the PAA and will have the same meaning in the regulations. Public assistance is defined to mean “relief granted to a person in accordance with this Act, and unless the context otherwise requires, includes disability assistance provided for under this Act.” So the term public assistance may include disability assistance unless the context otherwise requires. Context is therefore important in determining whether “public assistance” as used in regulation 3 includes disability assistance. In our view it does not appear to be so.

19. Regulation 3 is inconsistent with the provisions in relation to the disability grant in the PAA. In this regard it is to be noted that under section 11A(1)(d) disability assistance is payable to a person who is so disabled that he is unable to earn a livelihood. Under regulation 3(1), public assistance may be provided to a person who is in need by reason of his being prevented by some physical or mental disability from earning a living. It is difficult to accept that the difference in the language in regulation 3 of the Public Assistance Regulations and section 11A(1)(d) was meant to convey the same meaning.
20. Regulation 3(2) is also inconsistent with the provisions in relation to the disability assistance grant in the PAA as provided for in section 11A(4). Section 11A(4) provides that the person who is paid disability assistance shall continue to receive assistance so long as his total assistance does not exceed the amount referred to in section 11A(1)(a) and he satisfies the conditions at section 11A(1)(b). This leaves no room for a review on other grounds including medical grounds as the Trial Judge thought. The fact that the disability assistance grant is not reviewable on medical grounds would also support an interpretation that the disability assistance grant is available only to those who are permanently disabled since in the case of a person who is permanently disabled there would be no need to have a review to his entitlement on medical grounds.

21. Section 16(1)(e) provides that the Minister may make regulations providing for the suspension or discontinuance of the disability or public assistance grants. This provision does not appear to us to give the Minister the power to provide for an annual or other periodic review on medical grounds as in the case of the public assistance grant especially where section 11A(4) provides that the person is entitled to be paid disability assistance as long as he satisfies the income requirement of section 11A(1)(a) and the residence condition in section 11A(1)(b).
22. The Trial Judge did not consider the difference in the terminology used at section 11A(1)(d) when compared to regulation 3 of the Public Assistance Regulations nor did she expressly consider 11A(4) in coming to her conclusion that there is no express or implied provision in the PAA that a permanent disability must be proven for any of the grants. In our view, section 11A(1)(d) in so far as it uses different terminology for the entitlement to a disability assistance grant from that used in relation to the public assistance grant, and section 11A(4) do point to the conclusion that a disability assistance grant is payable to only those who are permanently disabled.
23. The other matter that was not considered by the Trial Judge is the unlikely result that Parliament would have intended that by introducing the disability assistance grant it would target some of the same people who are eligible for the public assistance grant. As noted above, it is accepted by both parties that the public assistance grant is payable to persons who are temporarily disabled. The disability assistance grant, which was introduced as an amendment to the PAA in 1996, provides for the payment of a larger sum of money than the public assistance grant. It is unlikely that the intention of Parliament would be to offer a grant with a higher payout to some of the same persons who are eligible for the public assistance grant. The practical result would in effect be to render obsolete the public assistance grant in relation to persons who are

temporarily disabled. That amounts to an absurd result and cannot be the intention of Parliament.

24. In our judgment, in view of the above, there is real doubt as to whether the disability assistance grant is payable to persons who may be only temporarily disabled and reinforces the considerations mentioned above as to the ambiguity of section 11A(1)(d). This, in our view, brings us to a consideration of the rule in **Pepper v. Hart** [1990] 1 WLR 204.

25. In **R v. Adams** [2020] UKSC 19 Lord Kerr had this to say as to the rule in Pepper v. Hart:

“33. The rule in Pepper v Hart [1993] AC 593 can be succinctly stated. As Lord Browne-Wilkinson said (at p 640), reference to Parliamentary materials is permitted “where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear”.

The rule in **Pepper v. Hart** permits reference to parliamentary material to shed light on the meaning intended by Parliament by the words used in legislation where the matters at (a), (b) and (c) referred to by Lord Kerr are satisfied.

26. In our view, the criterion at (a) is satisfied. The words used in section 11A(1)(d) are ambiguous for the reasons referred to above. Further, if the disability assistance grant applies to persons with a temporary disability as does the public assistance grant, that in our view would produce an absurd result. During the course of the hearing reference was made to the Hansard reports that in our view satisfied (b) and (c). We therefore propose to refer to the relevant extracts of Hansard as an aid to shed light on the meaning intended by Parliament. Before so doing, we should mention that the Trial Judge did

review to Hansard reports. She referred to them, she said, simply for information since according to her there was no ambiguity or absurdity in the legislation. She indicated that there was nothing in the Hansard reports to indicate that there was a requirement for a person to be permanently disabled for a disability assistance grant. For reasons given above, we are of the view that the legislation is ambiguous and/or absurd. Further, in our view, the Trial Judge did not refer to the appropriate material in the Hansard reports which would have provided her with clear statements as to the meaning intended by Parliament by the words used in the legislation.

27. Our main focus will be on section 11A. This section creates the disability assistance grant and was introduced by amendment to the PAA in 1996 by the Public Assistance (Amendment) Act, 1996. The section sets out the criteria that a person must satisfy to be entitled to receive a disability assistance grant. Section 11A(1)(d) in the 1996 Act was as follows:

“(d) he is certified by a Government Medical Officer as handicapped with a disability that –

- (i) is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;
- (ii) is permanent or likely to be permanent; and
- (iii) results in inability to earn a living which in the opinion of the Local Board would be adequate.”

28. It is clear that the 1996 Act required that the person applying for disability assistance had to be certified by a government medical officer as being handicapped with a disability that is permanent or likely to be permanent. The Prescribed Forms Regulations were made in 1997 and reflected the requirement of permanence in the 1996 Act.

29. Section 11A(1)(d) was amended in 1998 by the Finance Act, 1998. By that Act, Section 11A(1)(d) was deleted in its entirety and replaced with the following:

“(d) he is in the opinion of the Local Board so disabled that he is unable to earn a livelihood.”

The 1998 amendment to section 11A(1)(d) brought it closer to the provision as it stands today. Indeed, the subsequent amendment to which we will refer shortly added after the words “to earn a livelihood” the words “and has been certified by a Medical Officer as being so disabled.” so as to bring section 11A(1)(d) as it stands today.

30. The deletion by the 1998 Act of subparagraph (d) as it was enacted in 1996 which expressly contained a requirement that the disability must be permanent or likely to be so might have suggested a movement away from that requirement. But that was not the position. The then Minister of Finance, Senator Kuei Tung, who piloted the Bill stated before in the House of Representatives that in the opinion of the government the provision dealing with disability assistance was too wide and the intention was to narrow the scope of the provision. He further stated that the entitlement to disability assistance was as a result of the 1996 Act totally dependent on a certificate by a government medical officer. This had resulted in persons with illnesses such as asthma, hypertension and arthritis coming forward with medical reports and applying for disability assistance. He then said that what the 1998 amendment “does, therefore, or seeks to do, is to give the local Public Assistance Board the authority to determine a person is so disabled that he is unable to earn a living, or in fact, not earning a living.”

31. Having identified that the purpose of the 1998 Act was to narrow the scope of the PAA, one would not expect that the intention would be to remove the requirement for permanent disability. That position was made clear by Senator Kuei Tung. He stated:

“It should be pointed out that the need for a medical report has not been dispensed with, since the applicant would still be required

under the Public Assistance Disability Regulations of 1997 to be certified by a government medical officers as being permanently disabled from earning a livelihood as a result of visual, mental, hearing, or any other physical impairment.”

32. He further stated:

“With respect to public assistance, disability payments, we are merely trying to tidy something that has become a little cumbersome for us. Everyone who has a cold or is under stress is now claiming disability assistance because they think they are entitled to it. That is the way the system has been. We felt that the system has become so clogged with applications that we are unable to deal with it and we are really not reaching the people whom we want to help. As I said, people with hypertension are getting medical certificates and saying that they are unable to work. That, however, is not a permanent condition and we are trying to address persons who have permanent disabilities, rather than those with temporary disabilities or otherwise.”

33. Similar statements were made by Senator Kuei Tung in the Senate as are apparent from the following:

“Mr. President, if the legislation is not tightened we could end up with what I describe as runaway expenditure under this programme. The problem seems to be that the disability provision is totally dependent on the certification of a Government Medical Officer. What the amendment seeks to do, therefore, is to give the local Public Assistance Board the authority to determine whether an applicant is so disabled that he is unable to earn a living. It should be pointed out that the need for a medical report has not been dispensed with, since the applicant would still be required under the Public Assistance Disability Assistance Regulations 1997, to be certified by a Government Medical Officer as being permanently disabled and unable to earn a livelihood as a result of visual, mental, hearing or physical impairment.”

34. The statements of the Minister therefore made it clear that the purpose of the 1998 amendment was to narrow the scope of the provisions relating to the

disability assistance grant by giving the Local Board the authority to determine whether the applicant is so disabled he is unable to earn a living. Consistent with the intention to narrow the scope of the provision, the intention was not to remove the requirement that the disability must be permanent. It would therefore appear patently clear that the meaning intended by Parliament by the words “he is in the opinion of the Local Board so disabled that he is unable to earn a livelihood” left in place the requirement that the disability must be permanent. This was reinforced by the Prescribed Forms Regulations which were left intact and which required the medical officer to certify the applicant as being permanently disabled.

35. Section 11A(1)(d) of the PAA was further amended by the Public Assistance (Amendment and Validation) Act, 2004. By the 2004 Act the words “and has been certified by a Medical Officer as being so disabled” in Section 11A(1)(d) were added after the words “he is unable to earn a livelihood” introduced by the 1998 amendment. That brought Section 11A(1)(d) to what it is today.

36. Senator C. Kangaloo (as she then was), then Minister in the Office of the Prime Minister (Social Services Delivery) speaking in the Senate explained that the amendment provided for a certificate by a medical officer as medical input was required in assessing the person’s entitlement to a disability grant.

37. In answer to a question raised by another Senator as to the difference between a disability assistance grant and a public assistance grant, Senator Kangaloo responded:

“Madam President, under the Disability Grant the disability is permanent, under the public assistance the disability can be of a temporary nature. That is the difference between both grants. With respect to the ability to earn a livelihood, because it is anticipated that your disability is to such an extent rendering you unable to earn a livelihood, is why you have that phrasing...

...with respect to the medical report, may I point out that initially when the grant was first introduced, there was a need for the

medical report. The Act was then amended. The requirement for the medical report was taken out but the regulations still had the need for the medical report. It is felt that because of the disability one would need some sort of medical input in assessing a person's entitlement to the Disability Grant. Madam President, that is why the requirement for the medical report is now being put in."

38. It is clear from the Hansard reports that the meaning attributed to section 11A(1)(d) was that it required that an applicant seeking a disability assistance grant should be permanently disabled to be eligible to receive such a grant. This meaning, as we have said above, is suggested by careful reading of the PAA. The Hansard extracts to which we have referred clarify any ambiguity in the meaning of the provision and avoids the absurdity that would result in the disability assistance grant also being payable to those persons who are only temporarily disabled.

39. In view of the above, in our judgment, the Prescribed Forms Regulations are, in so far as they require an applicant for a disability assistance grant to be certified as being permanently disabled are not ultra vires but are within the scope of the PAA. We therefore allow the appeal and set aside the order of the Trial Judge. We will hear the parties on the costs both here and below.

A. Mendonça, J.A.

G. Smith, J.A.

M. Dean-Armorer, J.A.