

IN THE SUPREME COURT OF BELIZE, A.D. 2001

ACTION NO. 144

IN THE MATTER of an application for leave to apply for
Judicial Review

AND

IN THE MATTER of a Decision of the Cabinet of Belize
and/or Minister of Budget Management,
Economic Development, Investment and
Trade, jointly and severally, dated 22nd
February 2000

AND

IN THE MATTER of the Customs Regulations Act, Chapter
39 of the Laws of Belize, Revised Edition
1980 and the Commercial Free Zone Act,
No. 27 of 1994

**The Queen
and**

The Attorney General

Respondents

Ex Parte

Belize Foods and Transportations Ltd.

Applicant

—
BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Elson Kaseke, Solicitor General, with Ms. Minnet Hafiz and with Ms. Elisa Montalvo for Applicant.

Mr. Dean Barrow S.C. with Ms. Lois Young Barrow S.C. for the Respondent.

—
DECISION

This matter has come before me as a result of the disposition, by the Court of Appeal, of an appeal by the applicant in the present proceedings, concerning the refusal of a judge of the Supreme Court to restore an application to strike out leave for judicial review that he had granted the present respondents. The Court of Appeal on 17 October 2003, ordered that the hearing of the application to restore the applicant's motion to discharge the leave granted be heard by another judge. This was how these proceedings came before me.

2. When the matter came on for hearing on Wednesday 28th April 2004, there were some exchanges between the Solicitor General who represented the applicants and Mr. Dean Barrow S.C., of counsel for the respondent, as to the exact nature of the application before me: whether it was an application to restore the struck out motion to set aside leave granting the judicial review, or whether it was an application to set aside the leave for judicial review that had been granted.
3. Mr. Barrow S.C. commendably, in my view, no doubt, with a view not to waste much time, conceded that the learned Solicitor General could in fact move to set aside the leave that had been granted to the respondent to apply for judicial review.
4. Some chronology of events, would however, I think, put the issues into perspective in this application before me, which now only concerns the application to set aside the leave granted to the respondent, to apply for judicial review. I give a summary of this chronology as follows:
 - i. The respondent before me made on 8 March 2001, an application for leave to seek judicial review by way of a declaration and damages relating to a decision by the Government of Belize in February 2000, which it claimed resulted in damages to it.
 - ii. Leave was granted by the judge ex parte on 3rd December 2002 for the respondent to proceed to judicial review. The Order granting leave was drawn and filed on 20 December 2002. This Order stated as follows:

“IT IS THIS DAY ORDERED:

- (1) That the Applicant have leave to add the name “Minister of Budget Management, Economic Development, Investment & Trade, as a Respondent.*

(2) *That, notwithstanding that more than 3 months have expired since the cause of action arose, the Applicant have leave to file for judicial review.*

(3) *That the Notice of Motion together with the statement and affidavit in support be served on the Respondents within 14 days of this Order.*

Dated the 20th day of December 2002

By Order,

*E O Pennil
Deputy Registrar*

- iii. The order granting leave for judicial review was served on the present applicant, it is not exactly clear when this was done.
 - iv. The substantive hearing of the motion for judicial review was set for 26th and 27th February 2003.
 - v. On 21st February 2003, the applicant applied to the Court to have the leave granted to the respondent to be set aside.
5. Through some unfortunate concatenation of events, which it is not now, in my view, necessary to go into, the applicant's application to have the leave granted to the respondent set aside did not fare well. It resulted in the judge recusing himself from hearing the substantive judicial review motion after dismissing the applicant's summons to set aside his order striking out the applicant's summons to restore his application to set aside leave granted to the respondent. It was in this unhappy state of affairs that the matter reached the Court of Appeal with the result that it made its order of 17th October 2003, which I had referred to at the start of this ruling.
6. In short, in the proceedings presently before me, I am being asked by the applicant to set aside the leave to move for judicial review

that had been granted the respondent since December 2001 (see paragraph 4 above).

7. The principal, nay, the only ground, which the learned Solicitor General for the applicant has urged on me to set aside the leave is delay.
8. The Solicitor General argued that the decision which the respondent is complaining against in its bid for judicial review, was taken by the Government of Belize on 22nd February 2000, and that it was, at the latest, communicated to the respondent by or on 27th February 2000. But the respondent did not move promptly for judicial review and that it was only on 8 March 2001, a little over twelve months, that it applied for leave for judicial review. Leave was granted on 3rd December 2001. This passage of time, since the decision against which the respondent complained, constituted such a delay that, the Solicitor General submitted, by the applicable rules, the respondent became disentitled to permission to move the Courts for judicial review and, that it should not have been granted leave. He accordingly, urged me in the present proceedings, to set that leave aside.
9. It is common ground, at least that much is, between the parties, that this court does possess in appropriate cases, the power to set aside the grant of leave to apply for judicial review. Clive Lewis in his Judicial Remedies in Public Law (1992) Sweet & Maxwell, at p. 243 citing as authority the case of R v Secretary of State of Home Affairs, ex parte Herbage (No. 2) (1987) QB 1077, states the position thus:

“There is an inherent jurisdiction in the court to set aside ex parte orders, including the grant of leave to apply for judicial review. The respondent should apply to the High Court to set aside the order granting leave. This is the appropriate and usual method of setting aside a grant of leave.”

See also, Supperstone & Goldie, Judicial Review (1997) Butterworths, where at paragraph 16.7, the authors state:

“It is now well established that if leave has been granted on a true ex parte basis, the respondent can make an application to set aside the leave ... The availability of this step was clearly established by the Court of Appeal in R v Secretary of State for the Home Department, ex Herbage (No. 2).”

Delay and Leave/Permission to move for Judicial Review

10. Judicial review, of course, is preeminently in the public law arena by which actions or decisions of public authorities are scrutinized by the Courts on the complaint of someone with interest in the subject matter or affected by the action or decision, who alleges some impropriety in relation to that action or decision. It is the general rule therefore that claims to the legal propriety of the decisions of public authorities are required to be commenced promptly.

In this jurisdiction for want of autochthonous Rules of the Supreme Court in this area of the law, recourse is invariably had to the old Order 53 of the English Rules of Court. This practice of piggy-backing or supplementing lacuna in areas of procedure and practice from an external source, it is hoped, will soon be ameliorated with the promulgation of the New Supreme Court Rules (Civil Procedure). However, I believe that this notwithstanding, applications for judicial review will continue to be influenced and informed by the jurisprudence and learning that attended the application of the former Order 53 of the Rules on judicial review.

11. Order 53 rule 4 of the former English Rules (There is now in operation in England the Civil Procedure Rules since 1998, which provides for judicial review in Parts 8 and 54) provides:

“4(1). An application for leave to apply 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.”

12. The learned Solicitor General has therefore argued that as more than three months, in fact, a little over a year, had elapsed since

the decision was taken which the respondent claims caused it loss, the judge should not have granted leave to move for judicial review; and that having granted leave, that leave should be rescinded on the applicant's application. Moreover, the Solicitor General submitted that once the respondent was out of time to apply for leave (as it was clearly in the instant case), the Court should not have proceeded to entertain its application for leave *ex parte* without ensuring that the other side (that is the present applicant) was informed of the reasons for the delay. He cited the decision in **R v Ashford (Kent) Justices, ex parte Richley (1955) 3 All E.R. 327**, where Lord Goddard C.J. said at p. 327:

“... a person who intends or is required to apply for an extension of time must give notice to the person whom he would serve in the ordinary way and who would be affected if the order challenged were not quashed.”

13. I have however some difficulties in acceding to these submissions of the learned Solicitor General. Of course, the authority or dictum of the late Chief Justice Lord Goddard is not to be easily or lightly put aside. But in that case, the court was concerned with a motion for **certiorari** which would result in the order that had been made being quashed. In the present proceedings before me, the respondent is not seeking certiorari but a declaration and damages.
14. But more fundamentally, the order made in the instant proceedings expressly states in its dispositive paragraph 2:

“(2) That, notwithstanding that more than 3 months have expired since the cause of action arose, the Applicant have leave to file for judicial review.” (see paragraph 4 above)

15. Evidently, the judge did not say at least in the order he made on 3rd December 2001, granting leave, that he “considered that there was good reason for extending the period within which the application (could) be made” (0.53 r.4(1)). But he granted leave nonetheless; it was for him to determine if time should be extended. It cannot therefore reasonably be said that the issue of the respondent being out of time was not present in the judge's mind when he granted leave.

16. The learned Solicitor General has however, because of the respondent's delay, stoutly urged that leave should not have been granted, and that at least by implication, the extension of time granted to the respondent should not have been done without reference to the applicant. And that the leave granted should now be put aside.
17. I am not persuaded by the contention of the Solicitor General that once an applicant is outside the period to apply for leave for judicial review, then no extension of that period can be granted without a summons served on the putative respondent stating the reason for the delay in applying. This argument, with respect, will seriously undermine judicial discretion which is clearly operative in judicial review proceedings. The discretion of course, is to be judiciously exercised. On the Solicitor General's hypothesis, for I will call it no more than that, it is the putative respondent who must entertain the reasons for the delay.

In my view, the reason for extending time for judicial review is for the judge to determine. And I do not understand Richley to be saying otherwise. The judge may however, in view of the delay, order the papers for leave to be served on the putative respondent. O. 53, r. 4(1) clearly vests the judge at the application for leave stage with the discretion if he considers "there is good reason for extending the period within which the application (could) be made." On the face of the order in the instant case (para. 2 thereof), the judge, evidently adverted his mind to this. See Lord Goff of Chievely in R v Dairy Product Quota Tribunal, ex parte Caswell (1990) 2 A.C. 738 at p. 746 H to 747A where he states:

"Next, as I read rule 4(1), the effect of the rule is to limit the time within which an application for leave to apply for judicial review may be made in accordance with its terms, i.e. promptly and in any event within three months. The court has however power to grant leave to apply despite the fact that an application is late, if it considers that there is good reason to exercise that power; this it does by extending the period." (emphasis added).

18. The grant ex parte of leave for judicial review after the lapse of the three months period or where the application is not made with

promptitude, of course, affects a putative respondent. And it would be desirable in such a case to hear the putative respondent. But the grant of leave by itself does not determine or decide the liability, if any, of the respondent. This is to be determined at the substantive hearing. However, whether leave to apply is granted ex parte or inter partes, it is for the judge to decide, where the application is outside the time limit, whether there is good reason for extending the period within which the application could be made. This, I think, is in keeping with the requirement for leave for judicial review. This requirement serves, in my view, both as a filter so that palpably hopeless cases can be weeded out; and to ensure that even with the passage of time, a truly meritorious case with prospects, gets ventilated at a substantive hearing. It is in the case of the latter that the court is given the discretion by O.53 r. 4(1), to extend the period within which the application for leave could be made. The Court is the sole judge for determining if there is good reason for doing so.

19. The issue of the fatality of delay in judicial review proceedings is underscored by sound policy reasons: the interest of speedy certainty. As Lord Diplock for example, stated in O'Reilly v Mackman (1983) 2 A.C. 237 at 280 H-281A:

“The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.”

See generally Fordham Judicial Review Handbook 3rd ed. (2001), at p. 431 et seq.

20. Therefore, in practice, delay as an issue, confronts an applicant for judicial review at two levels. The first of these is at the leave stage. This falls squarely within the provisions of Order 53 rule 4(1). The Court may well refuse leave because of the lapse of time or the applicant's delay since the decision complained against was taken: see the decision of this court in Action No. 40 of 2002 Ex parte Belize Telecommunications Ltd. 11th February 2002 (unreported).

21. The second level is at the substantive hearing in which an applicant, who, despite the delay in applying for judicial review, was granted leave, may nonetheless come to grief, in the sense that at the substantive hearing, the Court may find that because of the delay that had attended the application, it could not afford the applicant any remedy.
22. However, it is the intermediate stage between the grant of leave and the substantive hearing that gives rise to some difficulties: can the respondent, that is, the party against whom the judicial review proceedings are taken, nonetheless apply to have the leave granted be set aside because of the delay? This I believe is the situation of the parties before me in the present proceedings.
23. As I have pointed out above, at paragraph 9, such an application can be made and the court has an inherent jurisdiction to set such leave aside – ex parte Herbage supra. But such an application must be made timeously. In the present case, it has been argued for the respondent that the application to set the leave aside was not made in good time: Leave was granted on 3rd December 2002 and the applicant only applied to set it aside on 21st February 2003. This may or may not be timeous, but it was made before the date for the substantive hearing. So in a sense there is, in terms of delay, a kind of tu quoque, a tit for tat argument, between the parties. That is, both sides have been guilty of delay: the respondent, in applying for leave; and the applicant in applying to set that leave aside. This perhaps, may be dismissed by “A plague on both your houses” reaction. But it would not dispose of the issue in contention between the parties.
24. However, more fundamentally, it is clear than an application to set aside leave for judicial review where one has been granted, should be made with circumspection and then, only sparingly. Such an application may be warranted where the case is so compelling by reason, for example, of some material non-disclosure on an applicant’s part in obtaining leave, an application for leave being one of uberimae fides and, an applicant should, at the leave stage, make full disclosure of all material facts.
25. I think, with respect, Supperstone & Goldie in their book Judicial Review, supra at 16.7 correctly state the position thus:

“... application to set aside leave should be made sparingly, and only where there has been an important and material non-disclosure or where the applicant’s case, for some reason, is truly unarguable – a situation equivalent to ‘Homer having nodded’ or the judge who granted leave simply not being in a position to appreciate the true nature of the case. Schiemann J in R v Secretary of State for the Home Department, ex parte Klalid Al-Nageesi (1990) COD 106, stated that leave should be set aside only where a judge was satisfied that there was absolutely no arguable case; a test applied by McCowan J in R v Secretary of State for the Home Department, ex p Angur Begumn (1989) COD 398.”

26. I do not think that, in the circumstances of these proceedings, the leave granted to the respondent can reasonably be faulted for non-disclosure of material fact or for unarguability, or patent error on the judge’s part. In any event, the learned Solicitor General has not argued any such reason for wanting to impeach that leave. He pitched his tent on the sole ground of delay.
27. In terms of delay, as a reason for seeking to have leave set aside, I am inclined, in the circumstances of this case, to be guided by the Practice Note which Lord Lane a former Chief Justice of England issued on 21st July 1983, reported in (1983) 2 All E.R. p. . This states:

“Delay in applying for leave to apply for judicial review

Where an application for leave to apply for judicial review under RSC Ord 53 is not made promptly and in any event within three months from the date when grounds for the application first arose by Ord 53, r 4, the application should set out the reasons for the delay.

If the consent of a proposed respondent to an extension of time has been obtained, such consent should be submitted with the application. If a proposed respondent has not consented to an extension, he shall, on notice to the applicant, have the right to apply promptly in open

court to set aside any leave or direction which is given. Such an application to set aside will not always be necessary, since in any event on the substantive hearing a respondent will be entitled to rely on delay in making the application as a ground for opposing the grant of relief.” (emphasis added)

I have emphasized the point in the quotation about taking the issue of delay at the substantive hearing as a ground for opposing the grant of relief.

28. From a survey of the authorities, it is clear that **delay** as an issue in judicial review proceedings, presents two hurdles to an applicant:

(1) At the leave stage, he may sail through if, notwithstanding, the delay, the judge were to grant leave to proceed. The grant of leave invariably is taken as enlargement of time within which the application, since the cause for seeking judicial review arose, should have been made. This does not preclude a respondent however, to appeal to the inherent jurisdiction of the Court to rescind that leave on the principle of **Herbage supra**.

(2) The second and perhaps more formidable hurdle in the way of an applicant for judicial review is at the hearing stage. At this stage the Court may well decide that even though the case for the applicant is made out, but in view of the delay that had intervened since the decision sought to be impugned was taken, the applicant would not be afforded relief.

I call this stage more formidable because unlike the leave stage, it disposes of the application; whereas at the leave stage, the unsuccessful applicant may renew the application for leave that has been denied. Admittedly, this is a practice that is not done in this jurisdiction and for good reason, should not be encouraged.

29. Accordingly therefore, I have listened with care to the arguments and submissions of the learned Solicitor General for me to set aside the leave granted in these proceedings. In the circumstances

of these proceedings, I find myself however unable to accede to his request. The main ground of delay on the respondent's part which he so strenuously argued before me, can perhaps, with profit and effect, be taken at the substantive hearing as a reason which may well disentitle the respondent to any relief. But for now, I will not shut down the respondent's case by setting aside the leave it was granted since 3rd December 2001: see Criminal Injuries Compensation Board ex parte A (1999) 2 A.C. (1999) 1 WLR 974.

30. Much, too much time, I think, has been expended on skirmishes between the parties to this application. It is time battle was joined on the merits. I will hear counsel on an appropriate date for the substantive hearing.

The costs of these proceedings will abide the outcome of that hearing.

A. O. CONTEH
Chief Justice

DATED: 12th May, 2004.