[2021] JMSC Civ. 67

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021 CV00181

BETWEEN	**CHARLEY'S WINDSOR HOUSE LIMITED**	**APPLICANT**
AND	**PRIME MINISTER AND MINISTER OF ECONOMIC GROWTH & JOB CREATION**	**RESPONDENT**

IN CHAMBERS – Application heard on paper

Trudy-Ann Dixon-Frith instructed by DunnCox, for the applicant

Kamau Ruddock, instructed by the Director of State Proceedings for the respondent

Heard: February 10 and April 23, 2021

Judicial review – Application for leave to apply for judicial review – Threshold test: Whether the applicant has an arguable case for judicial review with a realistic prospect of success - Doctrine of ultra vires – Whether statutory authority acted ultra vires – Principles of illegality and irrationality – Whether statutory authority acted illegally and irrationally - Duty to give reasons – Whether the decision of the statutory authority should be set aside for failure to give reasons

ANDERSON, K. J

BACKGROUND

[1] In or about December 2018, the applicant applied to the Town and Country Planning Authority (hereinafter referred to as, '*the TCPA*') and the Kingston and Saint Andrew Municipal Corporation (hereinafter referred to as, '*the KSAMC'*) for planning and building permission to construct a petroleum storage and dispensing facility and a convenience store on the property comprised in Certificate of Title now registered at Volume 1365 Folio 368 of the Register Book of Titles. The application for planning permission, was also supported by the relevant architectural drawings, which illustrated how the building would be laid out on the grounds of the property.

[2] By letter dated June 11, 2019, the TCPA communicated its decision to refuse the grant of the planning permission to construct the gas station and convenience store on the proposed land. The TCPA gave the reasons for its refusal as follows:

> 1. *'The proposed filling station and filling store would be an undesirable intrusion into the predominantly residential area and would be detrimental to the amenities thereof.*
>
> 2. *The Town and Country Planning the Provisional Development Order (2017) Policy, PFS and Policy PFS prohibit such industries taking place where the amenities may be adversely affected.*
>
> 3. *The proposed distances from the residential and institutional developments do not satisfy the requirements of the Revised Policy Guidelines for Proper Sitting and Design of Petrol and Oil Filling Stations.'*

[3] In a letter dated July 9, 2019, the KSAMC also refused building permission.

[4] In a letter dated July 17, 2019, the applicant appealed the TCPA refusal to the Minister responsible for town and country planning. The appeal was heard on November 26, 2019 and the evidence received and examined by the Honourable Daryl Vaz (hereinafter referred to as, '*Minister Vaz.*')

[5] The respondent refused the appeal in a letter dated October 25, 2020 (hereinafter referred to as, '*the decision*') and upheld the decisions of both the TCPA and KSAMC. The respondent, in its decision, has communicated that:

> *'After careful consideration of technical reports and submissions made, I am satisfied that this type of land use cannot be supported at the proposed location. My decision therefore is to dismiss the appeal, thereby upholding the refusal of the planning permission by the Town and Country Planning Authority.'*

[6] By way of a notice of application for court orders, filed on January 20, 2021, the applicant seeks the following orders:

1. *'Leave be granted to the applicant to apply for judicial review by way of:*

   (1) *An order of certiorari against the respondent quashing his decision and finding made on October 25, 2020, refusing the appeal of the applicant which challenged the decision of the Town and Country Planning Authority made on May 21, 2019 relative to planning permission for property known as land comprised in Certificate of Title now registered at Volume 1365 Folio 368 of the Register Book of Titles and bearing civic address 9 Herb McKenley Drive, Kingston 6, Saint Andrew.*

   (2) *An order of mandamus against the respondent compelling him to allow the appeal of the applicant which challenged the decision of the Town and Country Planning Authority made on May 21, 2019 and grant the planning permission sought by the applicant for the construction and development of the petroleum storage and dispensing facility on property known as land comprised in Certificate of Title now registered at Volume 1365 Folio 368 of the Register Book of Titles and bearing civic address 9 Herb McKenley Drive, Kingston 6, Saint Andrew.*

2. *A declaration that the decision and the finding of the respondent made on October 25, 2020, refusing the appeal of the applicant which challenged the decision of the Town and Country Planning Authority made on May 21, 2019, is unlawful and accordingly is null and void and of no effect.*

3. *That such consequential directions may be given as may be deemed appropriate on the grant of leave for judicial review.*

4. *There shall be no order as to costs.'*

[7] The grounds on which the applicant seeks those orders above, are as follows:

> *(1) 'The decision and/or finding made by the respondent to refuse to allow the appeal of the applicant which challenged the decision on the Town and Country Planning Authority made on May 21, 2019 relative to planning permission for property known as land comprised in Certificate of Title now registered at Volume 1365 Folio 368 of the Register Book of Titles and bearing civic address 9 Herb McKenley Drive, Kingston 6, Saint Andrew (the decision) is unlawful, irrational and illogical.*
>
> *(2) The applicant relies on the full contents of the Affidavit of Christopher S. Charley filed contemporaneously herewith.*
>
> *(3) Part 56 of the Civil Procedure Rules permits the instant application to be made.*
>
> *(4) There is no appeal procedure set out in the Town and Country Planning Act to challenge the decision of the Minister responsible for town and country planning, who is the respondent.*
>
> *(5) There are no alternative remedies available to the applicant. Alternatively, all alternative remedies have been exhausted by the applicant.*
>
> *(6) The time limit to apply for leave for judicial review to challenge the decision has not been exceeded, as the decision was made on October 25, 2020.*
>
> *(7) The applicant is personally and directly affected by the decision of the respondent.'*

[8] This matter came on for hearing before me on February 10, 2021, at that hearing, the applicant's attorney was present, while the respondent's attorney was not in attendance. The court made the decision to consider the application on paper. On February 15, 2021, the court received written submissions on behalf of the respondent. Though same was filed belatedly, the court has deemed it prudent to give consideration to said written submissions, for the purposes of these reasons and has therefore, so done.

ISSUES

[9] The substantive issue which is to be considered in light of this application is, whether the applicant has an arguable ground for judicial review with a realistic prospect of success. See: **Fritz Pinnock and Ruel Reid v Financial Investigations Division [2020] JMCA App 13.**

[10] The sub-issues which the court ought to consider are:

i. Whether it is arguable and has a realistic prospect of success, that the respondent may have acted illegally and irrationally in refusing the appeal of the applicant.

ii. Whether it is arguable and has a realistic prospect of success, that the respondent may have acted ultra vires its powers in the Town and Country Planning Act.

iii. Whether it is arguable and has a realistic prospect of success, that the respondent may have had a duty to provide reasons for its refusal to the applicant.

THE LAW

Burden and standard of proof

[11] The burden of proof in matters such as these rests with the person who has filed the application. Hence, the well-known phrase, '*he who asserts must prove.*' The applicant has brought this application against the respondent, and it therefore, has the burden of proving its case in that regard. The requisite standard of proof is, as applied, proof on a balance of probabilities.

The role of the court in matters of judicial review

[12] The role of the court in judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that

affect the public. The approach of the court is by way of review and not of an appeal. As such, this court is concerned with the procedures which the respondent employed in arriving at the decision and not the outcome of said decision.

[13] The Privy Council has noted that the threshold for leave to apply for judicial review is low and the court needs only to look at whether an applicant has an arguable ground for judicial review, which has a realistic prospect of success. See: **Attorney General of Trinidad and Tobago v Ayers-Caesar [2019] UKPC 44** at paragraph 2, per Lord Sales.

[14] The learned authors of **Civil Court Practice 2020**, Volume 1, have noted at part 54.4 as follows, as regards granting leave to apply for judicial review:

> *'Permission should be granted if it is clear that where there was a point fit for further investigation at a substantial hearing with such evidence as was necessary on the facts and all such argument as was necessary on the law.'*

The relevant provisions of the Act

[15] Under **Section 11 of the Town and Country Planning Act** (hereinafter referred to as, *'the Act'*) an application may be made to the local planning authority, for planning permission to develop any piece of land. The authority on receipt of said application, may either grant permission unconditionally, or subject to such conditions as they think fit, or may refuse permission. In dealing with any such application, the local planning authority shall have regard to the provisions of the development order, so far as material thereto, and to any other material considerations.

[16] **Section 13 of the Act**, deals with the process of appealing from decisions of the local authority. Subsection 2 reads as follows:

> *'Where an appeal is brought under this section from a decision of a local planning authority or the Authority, the Minister shall make a determination within ninety days of the hearing thereof and may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, or the Authority, as the case may be, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance.'*

[17] **Section 28A of the Act**, stipulates the process which the appeal is to be heard. It states as follows:

> *'(1) The Minister may, if he thinks fit, appoint person or person or persons-*
>
> *a. to hear, receive and examine the evidence in an appeal; and*
>
> *b. to submit to him, for his determination, a written report of the findings and recommendations, within twenty-one days of the hearing of such evidence*
>
> *(2) A person or persons appointed under subsection (1) shall hear the evidence within twenty-one days of the date on which such appointment is made.*
>
> *(3) Where such person or persons fail to comply with subsection (2), the Minister shall hear and determine the appeal in question.'*

[18] In order for the court to assess whether an applicant has a case with a realistic prospect of success, the court ought to, at this stage, engage in a mature consideration of the grounds, which have been alleged, and make a determination as to whether those grounds, have been made out as an arguable case. This will allow the court to arrive at the decision as to whether the applicant's case should go on to a substantial hearing, at judicial review.

ANALYSIS

[19] It must be highlighted that the submissions, filed by the parties and in particular, by counsel for the applicant, were extensive and helpful to this court. An evaluation as to whether the applicant has an arguable application for judicial review with a realistic prospect of success, will rest firmly on what is delineated in the case law and the requirements for judicial review. The court will now address its mind to the grounds as alleged, by the applicant and opposed by the respondent, but will not do so in detail, as to do so, would be counter-productive in the prevailing context.

Mistake of fact

The applicant's submissions:

[20] This ground is rooted in the belief of the applicant that the respondent perceived that the proposed location, was predominantly residential and as such, it could not be supported by the proposed commercial use. The applicant has contended that the TCPA, in the first instance, erroneously held that the proposed location, was residential and as such, the decision by the respondent is also erroneous. The applicant bases this argument in the fact that the respondent considered the National Environment and Planning Agency's revised report, which indicated that the area in question was predominantly residential.

[21] In support of this this ground, the applicant has asked that the court be guided by the expert report of Breakenridge and Associates, which was prepared by the applicant, for its earlier application to discharge a restrictive covenant. That report is labelled as exhibit **CWH 13**. At paragraph 4.2 of said report it is noted that:

> *'Herb McKenley Drive is characterized by a predominantly mixture of older type single family detached dwelling houses on quarter acre lots, which have been converted to commercial offices, interspersed with institutional light and industrial uses in the form of a church and a petrol filling station.'*

[22] The applicant further contends that in recognition of the change in the development and usage of lands in the area, **Provisional Development Order 2017**, has been issued, which rezoned the area for commercial and office use. The applicant has also attached an affidavit which was sworn to by Francine Derby which was placed before Minister Vaz, at the hearing of the appeal, which outlined the history of the proposed location.

[23] The applicant argues, that the evidence in this regard, all point to the established fact that the relevant area, though previously predominantly residential, is now commercial. As such, the respondent's decision must then be deemed erroneous, on the basis of that mistaken fact, and is thus, illogical.

The respondent's submissions:

[24] The respondent has contended that notwithstanding the changes in the character of the area in question, there is still a residential component to the area which must, and was, considered by the respondent, especially in light of the effect which a petrol filling station, would have on the amenities of the area, as a whole. It is noted that the proposed site is adjacent to the residential community of Latham Avenue. When taken together, it is contended that there was no mistake of fact, so as to make the decision, one to be set aside on one of the established grounds for judicial review.

The court's findings

[25] In **R (Alconbury Developments Ltd. & Others) v Secretary of State for the Environment, Transport [2003] 2 AC 295,** Lord Slynn stated at paragraph 53 that it is accepted that the court has jurisdiction to quash a misunderstanding or ignorance of an established and relevant fact.

[26] The basis for any tribunal of law to decide any matter is based on applying the law to the relevant set of facts before it. If it is asserted that the facts grounding a decision, were incorrect, then it within the court's judicial review power, to exercise its jurisdiction, to quash said decision. That decision, if based on established erroneous facts, would undoubtedly be an erroneous one.

[27] It is to be noted that the respondent in its decision, did not explicitly communicate that he treated with the area as being residential. As such, the reference to the '*proposed location,'* may, in the mind of the respondent, be with the understanding that the area has been rezoned as commercial, but it is believed that the applicant's proposed commercial use, will negatively affect the amenities of the area, as a whole, which it is entitled to consider under the Provisional Development Order Policy.

[28] The question as to whether the area in question was deemed commercial or residential is a relevant consideration for this case. Though the court has observed

that there is also no absolute evidence that the respondent did not operate on that mistaken fact, it is a matter which requires proper ventilation and arguments at a trial for judicial review. As such, this court accepts this ground as having met the threshold of being an arguable ground for judicial review.

[29] For entirety, the applicant has also contended at paragraph 45 of the affidavit of Christopher Charley that there were errors of law or errors as to mixed facts and law, which taken together, render the decision unreasonable. The court is also of the opinion that a further investigation of these allegations should be conducted at the trial for judicial review.

Relevant/Irrelevant Considerations

The applicant's submissions:

[30] The applicant argues that the respondent failed to consider a number of factors in arriving at the decision. These factors include: the area being rezoned for commercial use, the surrounding properties being commercial and that there is no residence adjoining the property which will be adversely affected by the proposed gas station, the fact of non-objection from the National Works Agency, Ministry of Health, Fire Brigade and Bureau of Standard Jamaica, as well as other material considerations as required by the Act. The applicant contends in the alternative, that even if these factors were considered by the respondent, they were not given due weight and as such, the decision ought to be found be to unreasonable.

The respondent's submissions:

[31] The respondent has contended that in the decision communicated to the applicant on October 25, 2020, it is explicitly stated that the respondent considered the technical reports and submissions made, and arrived at the decision. As such, this ground, as alleged, does not warrant judicial review.

The court's findings

[32] Learned authors De Smith**,** Woolf and Jowell of **Judicial Review,** 5th ed. at page 557, noted as follows:

> *'When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts, have, however, been willing to strike down as unreasonable decisions where manifestly excessive or rnanifestly inadequate weight has been accorded to a relevant consideration.'*

[33] In **R v Lord Saville of Newdigate and others, Ex parte A and Others [2000] 1 WLR 1855**, a decision of the English Court of Appeal, Lord Woolf stated at paragraph 33 that:

> *'… there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. But this description does not do justice to the decision-maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision…'*

[34] The respondent undoubtedly has a discretion to consider appeals before him. In so doing, however, that discretion ought to be exercised in accordance with the law. **Section 11 of the Act,** stipulates that the respondent ought to consider the relevant development order, in any decision, regarding a proposed planning permission. In a case of this nature where there was a provisional development order, which has explicitly stated that the area in question is rezoned commercial, it is indeed questionable, what weight was given to that factor in arriving at its decision. The court accepts that the respondent is not obligated to slavishly apply said development order. This court however, firmly believes that evidence should be led as to the weight which same was given. It may in fact be, that the respondent gave due consideration to the relevant factors. This court is however, unable to,

for present purposes, undertake a proper assessment as to same, nor is this court, at this preliminary stage, expected to do so.

[35] In considering any matters, it is incumbent on the authority to consider the evidence which has been presented and to apply sufficient weight to same. From that which has been presented by the applicant, the court, at this stage is unable to satisfy itself, that, from the evidence which was led, they were given their due weight. In the opinion of the court, the evidence as to what weight is to be given to these relevant considerations, ought to be ventilated at a trial for judicial review. As such, in the opinion of this court, an arguable case for judicial review has been made out, on this ground, also.

Procedural Non-compliance

The applicant's submissions:

[36] The applicant contends that the decision should be set aside on the basis that the appeal process was not conducted in conformity with **Section 13(2) of the Act**. The applicant contends that the hearing was not conducted de novo, as the respondent did not give regard to the provisional development order, that the proposed use by the applicant, fell squarely within that land usage permitted by that development order.

[37] The applicant also contends the decision should be set aside on the basis that there was a breach of **Section 28A(3) of the Act.** The applicant states that the Act stipulates that it is the respondent, himself, who is to hear the appeal, where there is a failure to comply with **Section 28A(2),** which stipulates that the person so appointed shall hear the appeal within 21 days of their appointment. As such, the appeal was ultra vires, when it was heard by Minister Vaz outside of that 21 days.

[38] Further, it is contended that the decision was made far in excess of the 90-days statutory period prescribed by **Section 13(2).** It is contended that the decision, being made almost a year after the hearing of the appeal, ought to be set aside on the basis of ultra vires, as the respondent acted outside of his statutory powers.

The respondent's submissions:

[39] The respondent contends that notwithstanding that it appears that **Sections 28A(3)** and **13(2) of the Act** have not been complied with, there are no invalidating consequences stipulated in the Act, for the failure to comply. It is thus submitted that it is unlikely that Parliament intended that those failure to comply, should result in the total invalidation of the decision.

The court's findings

[40] In matters of alleged breach of statutory provisions, the court, upon review of the process which led to the decision, ought to closely examine the relevant section(s) in question, in order to determine what would be the consequence of the non-observance of same. It is because this court must do this, that renders those grounds arguable and as having, a real prospect of success.

Duty to provide reasons

The applicant's submissions:

[41] The applicant seeks judicial review on the basis that the respondent provided no or provided inadequate reasons for the decision. The applicant contends that the absence of reasons has rendered it unable to fully criticize the decision of the respondent and to be able to fully comprehend the ground for refusal.

The respondent's response:

[42] The respondent contends that there is no statutory duty imposed on the respondent by the Act to provide reasons for his decisions. In any case, the applicant was aware at all material times, of the issues which the TCPA had with the application and the respondent consequently upheld that decision. Consequently, the balance of factors weighs in favour of no reasons being given for the refusal of the appeal.

The court's findings

[43] In **R (CPRE Kent) v Dover District Council [2018] 1 WLR 108** it is stated, per curiam, at paragraph 109F and G, as follows, as regards the giving of reasons where planning permissions are concerned, that:

> *'Although public authorities are not under a general common law duty to give reasons for their decisions fairness may in some circumstances require it even in a statutory context in which no express duty is imposed. Although planning law is a creature of statute the proper interpretation of the statute is underpinned by general principles derived from the common law.* ***The giving of reasons is essential to allow effective supervision by the courts, and fairness provides the link between the common law duty to give reasons for an administrative decision and the right of the individuals affected to challenge the legality of the decision****. The existence of a common law duty to disclose reasons for a planning decision is not inconsistent with the abrogation in 2013 of the specific duty to give reasons for all grants of planning permission which was imposed by secondary legislation in 2003. The general principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts and there is no reason to distinguish between a ministerial inquiry and the decision-making process of a local planning authority. [Emphasis added]*

[44] The following is quoted at paragraph 120 C-F:

> *'The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications.'*

[45] The court having reviewed the Act, it is observed that there is no explicit duty imposed on the respondent to give reasons. The respondent is a public servant and the relevant statute, has imposed on him, the duty and the responsibility to consider appeals made from the TCPA. In carrying out this function, it is expected that for good governance and integrity, reasons will typically, be stated, for his decisions. The court agrees with the applicant that, the decision did not contain any pronouncements on the grounds of appeal as alleged by the applicant, nor did

it contain an indication as to what weight was given to the relevant considerations in arriving at said decision.

[46] The court is unable to review the process of the respondent to conclude, as is required to be done in planning permission cases, that the decision has left the applicant and the court with '*no real substantial doubt as to what the reasons for the decision were and what were the material considerations which were taken into account*.' See: **City of Edinburgh v Secretary of State for Scotland and Anor [1998] 1 All ER 174.**

[47] The absence of reasons in this matter, is, in the opinion of the court, an arguable ground for judicial review, which, the parties should be allowed to advance arguments in favour of/opposition to, upon a trial for judicial review.

CONCLUSION

[48] In the final analysis, the applicant has established that it has arguable grounds for judicial review, which has a realistic prospect of success. For that reason, the court is of the opinion that the applicant ought to be granted the leave to apply for judicial review, on all of the grounds, as sought.

DISPOSITION

[49] In the circumstances, this court's orders, are as follows:-

(1) Leave to apply for judicial review is granted and the applicant shall file its fixed date claim form to apply for judicial review, by or before May 8, 2021.

(2) First hearing of F.D.C.F. shall be scheduled by the Registrar in consultation with the parties, provided that order No.1 has been complied with, by the applicant.

(3) The costs of the application for leave to apply for judicial review shall be costs in the claim.

(4) The applicant shall file and serve this order.

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Hon. K. Anderson, J.