[2016] JMSC. Civ. 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 03411

BETWEEN	**NATALIA PSARAS**	**APPLICANT**
AND	**MARIE LUE**	**1ST RESPONDENT**
AND	**THE MINISTER OF NATIONAL SECURITY**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL**	**3RD RESPONDENT**

IN CHAMBERS

Mr. Donald Foote for Applicant.

Ms. Janna Marie Patel watching proceedings on behalf of the PICA.

Ms. Carla Thomas for all Respondents.

Heard: 23rd, 29th September & October 7, 2016

Application for leave to apply for judicial review- threshold test-whether leave to operate as stay of proceedings – civil procedure rules part 56 – aliens act whether actions of immigration officer justiciable – natural justice -

CORAM: WINT-BLAIR, J. (AG.)

[1] The Applicant, Nataliia Psaras has applied to this court by way of an ex-parte notice of application for leave to apply for judicial review filed pursuant to part 56 of the Civil Procedure Rules on August 15, 2016. In that application, the applicant sought the following relief:

(a) *That leave be granted for judicial review for an order of certiorari to quash the decision of the first respondent, the Visa Manager of the Passport, Citizenship and Immigration Agency (PICA) requiring that the applicant depart the island upon denial of her application for an extension of her visitor's visa without facilitating her right to appeal that decision pursuant to Rule 56.1(3)(a) of the Civil Procedure Rules, 2002.*

[2] The application was based upon the following grounds:

(1) That the decision to ask the applicant to depart the island on August 12, 2016 after denial of her application for extension of her visitor's visa without facilitating her right to appeal its denial is an unlawful act.

(2) That notifying the applicant of her right to appeal the denial of her application for the extension of her visitor's visa after the time within which to appeal its denial had expired is an unlawful act.

(3) That notifying the applicant of her right to appeal the refusal of her application for the extension of her visitor's visa after the time within which to appeal its refusal had expired is an unlawful act.

(4) That no alternative form of redress exists.

(5) The applicant is not privy to the detail of any consideration given by the first respondent to the matter in question before the decision to deny the application for extension which forms the decision of the first respondent.

(6) The time limit for making this application is not exceeded.

(7) The applicant is personally and directly affected by the decision of the PICA.

[3] This ex parte application for leave to apply for judicial review was first set down before me on the 23rd day of September, 2016. Counsel Mr. Don Foote for the applicant, Ms. Carla Thomas on behalf of the Director of State Proceedings for the second respondent and Ms. Janna Marie Patel for the first respondent from

Passport Immigration and Citizenship Agency (PICA) appeared. On that date Mr. Foote applied for an adjournment indicating then that there were ongoing discussions with counsel. This position was given assent by both opposing counsel. The matter was adjourned to September 29, 2016 for hearing.

[4] On the 29th September, 2016, the aforementioned counsel attended upon the hearing of the application for leave for judicial review. No issue was taken by opposing counsel as regards the substance, content or form of any of the documents filed by the applicant's counsel.

[5] In summary, counsel for the applicant relied upon the affidavit of urgency of the applicant filed on August 15, 2016, He indicated that the application for leave should be granted as the position of the PICA was justiciable, reviewable and a denial of the principles of natural justice. Further that Immigration officers act upon delegated authority falling under the jurisdiction of the Minister of National Security which Minister's powers are reviewable. Actions under section 7 of the Aliens Act are justiciable, particularly when they are made in a manner which is arbitrary and capricious. Further that the PICA is estopped from denying the applicant a right to a hearing as it was they had given her a document which indicated that she had such a right.

[6] In summary, counsel for the respondent opposed the application relying on the provisions of the Aliens Act and the Aliens (Nationals of the Ukraine)directions, 2013 made pursuant to section 17 of the Aliens Act proclaimed in force on March 7, 2013. The applicant was not in the island on a visa but on a 30 day stay as she is visa exempt. The Aliens Act is the governing statute and Section 6 sets out the conditions for eligibility of admissions. The applicant falls under section 6(h) as a visa waiver applies based on her nationality.

[7] Neither section 6 nor section 17 of the Aliens Act confers a right of appeal on an alien who is refused an extension of stay. The applicant is therefore not entitled to judicial review as she cannot assert a right she does not have, relying on the threshold test for leave set out in the ***Honourable Satnarine Sharma v Carla***

Browne Antoine, Wellington Virgil and Trevor Paul PC Appeal No. 75 of 2006; (2006) WIR 379.

[8] She also argued that the applicant never sought to attend the PICA for a review of the denial of her application after receiving the letter on August 5, 2016. Therefore it is not the PICA which did not afford a review of the denial of her application but the applicant who did not avail herself thereof. (This letter demands that the applicant leave the island on or before August 1, 2016.)Further, the applicant has no right to the reasons for decisions made by the PICA.

[9] I have considered the dicta of both Mangatal J, (as she then was) in the matter of ***Shirley Tyndall v Patrick Hylton et al*** 2010 HCV 00474 and Sykes, J in ***R.* v. *Industrial Disputes Tribunal, ex p. J. Wray & Nephew*** Limited 2009 HCV 04798 which are both very instructive and have aided greatly in arriving at this decision.

[10] The court is constrained to arrive at the decision whether to grant leave on the material before it. The central issues in this application are:

(i) Whether the applicant has locus standi.

(ii) Whether the applicant has attained the threshold bar of raising an arguable case as set out in the material before the court which has a realistic prospect of success.

(iii) Whether there exists any discretionary bar such as delay or any alternative remedy.

[11] On the first issue, the court's considerations include those set out in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited** [1981] 2 All E.R. 93 in the dicta of Lord Wilberforce:

> "The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative

> orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

Thus, the applicant' locus standi was established as it could not be said that she was the author of a trivial complaint and there is need for certainty on the part of the PICA in applications of this nature.

[12] On the second issue, the applicant ultimately seeks an order of certiorari. This hearing was not determinative of any of the substantive issues raised by the applicant, as the court at this stage is concerned with the threshold test set out in the Privy Council decision of **Sharma v Brown-Antoine**, previously referred to. The test is as set out below:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin. L.R. 623 at 628, and Fordham, Judicial Review Handbook 4th edition, (204), p. 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.
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> ....
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> "It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of

the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733."

[13] It was necessary to conduct an examination of the applicant's affidavit (which in no wise is deciding any of the issues raised therein or conducting a hearing of the substantive matter) in order to determine what was being argued by the applicant.

[14] The applicant deponed as follows:

- That she came to Jamaica on February 27, 2016 to set up a charity to distribute medical supplies to the Negril Health Centre and Fire Department.

- She was given a one month stay by way of a visitor's visa upon her arrival in Montego Bay.

- She applied for and obtained an extension of stay until May 22, 2016.

- She left the island on May 16, 2016 from Kingston.

- She returned to the island arriving in Kingston on May 18, 2016 and was granted a stay until June 17, 2016.

- On June 16, 2016 she applied at PICA's head office in Kingston for an extension of stay and was given exhibit "NP1" date stamped June 16, 2016 and marked "pending approval."

- This application was denied by letter exhibit "NP2", dated July 18m 2016 date stamped August 5, 2016.

- This letter, dated July 18, 2016, gave the applicant seven days to appeal the denial in writing was received by the applicant's attorney-at-law on August 5, 2016.

- This letter required the applicant to leave the island on or before Monday, August 1, 2016. The letter also says as follows: **"You may appeal this decision in writing within seven (7) business days. All correspondence should be addressed to the Director of Immigration Services at the above addess. (**emphasis is mine).

- That prior to the receipt of the letter on August 5, 2016, Mr. Foote had received a telephone call from Miss Shevonie Powell of PICA informing him that the applicant had four days to leave the island as her application had been denied.

[15] The applicant complained in ground one that the decision made by the first respondent in the letter dated July 18, 2016 demanded that she leave the island on or before August 1, 2016. But she did not receive the letter until August 5, 2016. By the time the letter was in hand the applicant had already become subject to removal from the island and the time for filing an appeal had passed. She no longer enjoyed any kind of status in Jamaica. It was all the more important that she apply to the court for an urgent remedy to this dire situation in which she had been placed through no fault of her own.

[16] There was no submission from the respondents' counsel to suggest that the applicant's counsel did not receive the letter dated July 18, 2016 at "NP2" on August 5, 2016. Ms. Thomas' submissions were centred on there being no right of appeal set out in the Aliens Act and that the applicant did not avail herself of the review provisions of the PICA having received said letter of denial. This simply meant that the applicant could not assert a non-existent right and by extension she would have had no arguable case with a realistic prospect of success.

[17] It is clear on the undisputed affidavit evidence that the applicant was informed in writing by PICA that she had the right to appeal their denial of her application for an extension of stay. The respondents are now estopped from asserting that she does not have the right that they had informed her by notice in writing she had.

Perhaps the words “**All correspondence should be addressed to the Director of Immigration Services at the above address.”**(emphasis mine) relate to the internal review policy to which Ms. Thomas referred in her submissions and not to a right pursuant to the Aliens Act. This is an available conclusion based on the submissions as formulated by counsel.

[18] Grounds two and three are identical except the words denial and refusal are used interchangeably. There was a clear denial of natural justice in the applicant’s being informed that she could appeal the refusal of her application after the time for such an appeal had passed.

[19] Section 7 Aliens Act provides by implication that a period of leave may be extended if the application for an extension is made before the current period of leave has expired. The period of extension would then continue until the application is decided (or withdrawn) and while any appeal against the decision is still pending.

[20] In keeping with this interpretation, an immigration officer who denies an application for an extension of stay during the appeal period as well as one who has not notified the applicant of an appeal period has effectively deprived the applicant of fairness and failed to observe the principles of natural justice particularly the audi alteram partem rule.

[21] The applicant is solely adversely and personally affected by the decision of the first respondent and she has locus standi pursuant to rule 56.3(3)(g)of the Civil Procedure Rules. There are no issues of delay and no alternative remedy has been sought. The most obvious alternative remedy is either a channel of appeal or review provided for by statute. I agree with counsel Ms. Thomas’ submission that there is no right of appeal set out in the Aliens Act. It is because there is no statutory right of appeal that the only remedy open to the applicant is that of judicial review.

[22] On the issue of justiciability, the decisions of decision makers in matters of immigration are justiciable and therefore reviewable. In **Regina v. Secretary of State for Foreign and Commonwealth Affairs , Ex parte Everett[1989] 2 WLR 224, Taylor, L.J. citing Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374** made it clear that:

> “the powers of the court cannot be ousted merely by invoking the word "prerogative." The majority of their Lordships indicated that whether judicial review of the exercise of prerogative power is open depends upon the subject matter and in particular upon whether it is justiciable**.** At the top of the scale of executive functions under the prerogative are matters of high policy, of which examples were given by their Lordships; making treaties, making war, dissolving Parliament, mobilising the Armed Forces. Clearly those matters, and no doubt a number of others, are not justiciable**.** But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.”

The further issue of the delegation of powers pursuant to section 7 of the Aliens Act need not be explored at the leave stage.

[23] In **Council of Civil Service Unions v. Minister for the Civil Service** [1985] A.C. 374 at page 415 Lord Diplock’s speech set out the development of judicial review and enunciated as follows:

> “Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative

law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). The third is where it has acted contrary to what are often called "principles of natural justice." As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken."

[24] These authorities seem to suggest that justiciable decisions made by the executive are reviewable by the courts in terms of the manner in which those decisions have been taken and these cases apply to the remaining grounds which ask the court to embark upon an examination of the route to decision-making by the first respondent.

[25] On the totality of the material before the Court and Counsel's submissions made in this matter, the decision arrived at is on the application on its merits. In ***R* v. *Secretary of State for the Home Department, ex p Begum* [1990] COD 107, CA** at page 108 Lord Donaldson MR described the approach to be taken as follows:

> *"Permission should be granted if it was clear there was a point fit for further investigation at a substantive hearing with all such evidence as was necessary on the facts and all such argument as was necessary on law. If the judge was satisfied that there was no arguable case he should dismiss the application for permission to apply for judicial review."*

[26] I rely on the approach postulated by Lord Donaldson MR above to find that the instant case warrants further investigation at a hearing with all such evidence and law as is necessary for the court to render a decision on the substantive issue. The applicant has satisfied the court that she has an arguable case with a realistic prospect of success.

[27] The question of a stay must now be considered. The jurisdiction to grant a stay is found in Rule 56.4(9) in that the grant of leave operates as a stay of the proceedings. The rules in relation to the application for leave for judicial review presuppose that the application may be considered on paper with the judge going on to assess the effect of granting leave to the applicant. In this regard, I interpret Rule 56.4(9) to mean that the question of a stay may also be made on paper as part of the same process without separate submissions from both sides. If I am wrong in my interpretation of the Rule, I rely upon on the state of the record as neither side took issue with this rule nor made submissions as to how it should be interpreted.

[28] In this regard, I rely upon the dicta of Dyson, L.J. in **R (on the Application of Ashworth Hospital) v Mental Health Review Tribunal for West Midlands and Northwest Region** (2002)EWCA 923 at para 42 which says:

"The purpose of the stay in a judicial review is clear. It is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that if a party is ultimately successful in his challenge, he will not be denied the benefit of his success…"

[29] In the instant case, the applicant is without status in this country. She would therefore be subject to removal and in that event, would have to continue these proceedings from outside of Jamaica. This would attend upon her issues of cost, inconvenience and inhibit expedition all of which defeat the overriding objective of the Civil Procedure Rules.

[30] In all the circumstances the applicant is granted leave to apply for judicial review as follows:

1) To apply for an order of certiorari quashing the decision of the first respondent.

2) Too apply for an order of certiorari quashing the order for the applicant to depart from the jurisdiction until the matter is properly heard and determined by this court.

3) The grant of leave shall operate as a stay of the proceedings until the application for judicial review is heard and determined.

4) That as the matter is urgent, the hearing of the substantive matter is to be given an expedited dates pursuant to Rule 26.12(c)

5) Leave is conditional upon a fixed date claim from being within 14 days of the date of this order.

6) Costs are to be costs in the claim.