



[2013] JMSC Civ. 113

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2013 HCV 00594

**In the matter of an application by
Detective Constable Glen Riley for
Leave to Apply out of time for an
Administrative Order for Judicial
Review**

AND

**In the matter of R vs. Commissioner
of Police Ex parte Detective
Constable Glen Riley**

AND

**In the matter of Rules 26, 30, 33, 35,
37, 38, 44, 47 and 48 of the Police
Service Regulations, 1961**

Mr. Garth Lyttle instructed by Garth E. Lyttle and Company for
Applicant

Mr. Harrington McDermott instructed by the Director of State
Proceedings for Respondent

IN CHAMBERS

Heard on 22nd April 2013; 10th May, 2013

***Application for leave to apply out of time – Administrative Order – Judicial Review
– Police Service Regulations 1961 – Rules there-under***

Coram: Morrison, J.

[1] Over a decade ago Glen Riley, the Applicant herein, enlisted in the Jamaica Constabulary Force. He worked in the parish of St. Elizabeth and was an Intelligence Officer up to the time of his suspension from the establishment. However, things began to fall apart for the Applicant.

[2] According to the Applicant's affidavit in support of his Notice of Application for Leave to Apply Out Of Time For Judicial Review, dated 19th January 2013, he and other police officers had interviewed one Derrick Gilfillian who had been in custody at Nain Police Station, St. Elizabeth. Subsequently, on the 10th July, 2008, he and one Constable Dwight Peters travelled together in the latter's private motor car to the Alpart Plant, St. Elizabeth and while he was seated in the parked car, "five policemen suddenly walked up ordered me out of the car and arrested me." "At the time I was arrested, " he continues, Constable Peters was not there. They then went inside the Alpart building and I saw them returning with Constable Peters and then charged both of us with breach of the Corruption Act." Continuing, he depones, on the 27th August 2009, both he and Constable Peters went on trial in the Black River Resident Magistrate Court, "where after the Crown presented its case the Judge told me I was free to go as no *prima facie* case was made out against me. Thereupon the matter was determined in my favour. I immediately went to the officer in charge of my division and advised him that the charges were dismissed against me and that I should be re-instated. He then advised me to await the decision of the CP."

[3] The centre of his career was failing to hold, for while he was awaiting "the decision of the CP", he was served with a document dated 7th January 2011. This document came from the Police Service Commission's (The PSC) through which it was conveyed that his retirement in the public's interest was being contemplated, that is, steps should be taken to retire him from the Jamaica Constabulary Force in accordance with Provision 26 of the Police Service Regulations, 1961 (PSR). Then follows the hope of his redemption: "That a statement setting out the grounds on which my retirement was contemplated was attached. The content of this Notice were matters that were

dealt with in our trial before the Black River Resident Magistrate Court and so were already enquired into and a determination made in our favour.”

[4] Even so, he bemoans, and while awaiting to be re-instated, officialdom activated its standard interdiction procedure that culminated via Force Order No. 340 dated 9th August 2012 stating that, “I was permitted to retire from the Force in the public’s interest ...” This ought not to have been, he resisted, as “I am still awaiting to be charged and tried at a Court of Enquiry pursuant to the Interdiction Notice.” The unmeritorious reduction of his professional circumstances as pointed to, was against the background of his legitimate expectation that he would have been served with the requisite charges and be offered an opportunity to know the nature of the charges against him, who his accusers are and that he be given an opportunity to defend himself against those charges. Thus aggrieved, he prosecuted his application in the terms as outlined.

[5] The ceremony of innocence having been initiated, he thereby asks this Court to say that he is entitled to the following reliefs:-

- a) that leave be granted to him to apply, out of time, for an Administrative Order of Certiorari to quash the decision of the Commissioner of Police (CP) contained in Police Force Order No. 3401 dated (9th August, 2002) published effective 10th November, 2012 and Letter from King’s House reference No. GGS 11/07 dated 12th October, 2011 permitting the applicant to retire in the public’s interest.
- b) An order that a copy of the adverse reports sent by the CP to the Police Service Commission (PSC) pursuant to Rule 26 of the Police Service Regulations, 1961 recommending the compulsory retirement of the Applicant from the Jamaica Constabulary Force (JCF), be served on the Applicant.
- (c) An Order of Mandamus to compel the CP to reinstate the Applicant in accordance with the provisions of Rules 37 and 44 of the Police Service Regulations (PSR), 1961.

[6] The Defendant in being adversant says that the Application was not made within the three (3) months from the date when grounds for the Application first arose as is set out in CPR 56.6(1) and that the Applicant has not put forward any “evidence giving a ‘good reason’ as to why an extension of time should be granted pursuant to Rule 56.6(2).

[7] Second, that the Applicant has failed to pursue an alternative form of redress in the form of an Appeal to the Privy Council as provided by Regulation 42 of the PSR and in any event he has failed to comply with CPR 56.3(3)(d).

[8] Third, the Applicant has failed to satisfy the threshold for leave, that is, an arguable case having a realistic prospect of success. Pursuant to Regulation 26 of the PSR the decision to retire the Applicant in the public interest is that of the PSC and not the Commissioner of Police and, on an examination of the Applicant’s evidence the procedure adopted in retiring the Applicant in the public interest was carried out in accordance with Regulation 26 of the PSR.

The Evidence

[9] In the instant case the decision to retire the Applicant was, by way of written correspondence dated October 12, 2011 communicated to him in these words: “... the Police Service Commission has advised His Excellency, The Governor General that you should be retired from the Jamaica Constabulary Force in the public interest, with effect from the 16th July, 2008, in accordance with the provisions of Regulation 26 of the Police Service Regulations, 1961 ...”

It is to be noted that through letter dated 7th January 2011, under the signature of the Chief Personnel Officer of the Office of the Services Commission, the Applicant had been informed of the pending action that was being pursued against him by the PSC. In the penultimate paragraph and onwards it states: “A statement setting out the grounds on which your retirement is contemplated is accordingly enclosed to afford you the opportunity of submitting a reply to these grounds.

Your reply should be forwarded through the Commissioner of Police, should be submitted within two (2) weeks of receipt of this letter.”

[10] Under reference the Statement setting out the grounds was included. It reflected a false entry on June 20, 2008 in the Nain Police Station diary; the release from custody of Mr. Gilfillian from custody without charge by the Applicant as well as false reporting in that “no police officer attached to the Constant Spring Police Station named Detective Sergeant Wilkinson,” and on July 10, 2008 being in the company of another police officer to collect money from the said Mr. Gilfillian.

Further, continues the Notice, the Commissioner of Police having lost confidence in the Applicant’s ability to discharge his function as a police officer, the PSC, having regard to the Commissioner’s report “is contemplating whether you ought to be retired from the Jamaica Constabulary Force ...” in light of the PSR. Nevertheless, concludes this Notice, “Before the Police Service Commission deliberates on this matter, you are being invited to respond (if you wish) within fourteen (14) days from the receipt ... to the matters set out ...”

[11] Through letter from the Office of the Services Commission dated 20th October 2011 under the signature of the Chief Personnel Officer, directed to the Applicant, he was reminded of the 12th October 2011 letter giving him the opportunity to apply for a reference “of your case to the Privy Council.” He was then advised by the letter of 20th October, 2011 in this wise: “Your reference (if any), should be forwarded through the Office of the Commissioner of Police, within fourteen (14) days of receipt of the letter from the Governor-General’s Secretary.”

The crowning act in this administrative action was the “King’s House, Jamaica” letter dated October 12, 2011 informing the Applicant of the PSC’s advice to His Excellency that he should be retired from the JCF in the public interest effective 16th July, 2008.

The Law - Delay

[12] According to the Applicant, the Court ought to reject this ground as the Application was never late. The effective date of retirement was 10th November, 2012 pursuant to Force Order No. 3401 dated August, 2012.

[13] The Defendant presents that the decision to retire the Applicant was communicated to him by letter dated October 12, 2011. Notwithstanding the absence of evidence as to when exactly the Applicant received this letter, at the very least, he would have been aware of the decision upon the publication of the Force Orders in August, 2012.

[14] Part 56.1(1) of the CPR deals with applications for judicial review. As to delay, Rule 56.6(1) states that an Application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose. However according to Rule 56.6(2), the court may extend the time for the making of such an application for leave, if good reason for doing so is shown. Importantly, says Rule 56.6 (2), where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings. (Emphasis mine)

[15] Now having regard to the October 12, 2011 letter from the PSC and taking into consideration the language of Rule 56.6(1) of the Civil Procedure (CPR) that the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings," it is unsustainable for the Applicant to say that the effective date of the Applicant's retirement from the J.C.F. as per Force Order No. 3401 of 10th November, 2012, should be regarded as the date for the purposes of compliance with Rule 56.6(1), *supra*. It would not be ungenerous to say that the date of 10th November, 2012, at best, represents the official public notification of permission "to retire from the Force." Even if it is accepted that one cannot say when the Applicant

received the October 12, 2011 PSC letter, the fact of its receipt by him would, at its lowest ebb, fix him with knowledge of the publication date of August, 2012. Such a generous rendering would suffice. However, the “Notice of Application for Leave to Apply Out of Time For Judicial Review,” filed on February 1, 2013, rather betrays the Applicant’s contention that there was no delay in applying for leave to apply for Judicial Review. I find, even were I to say that the above application was done *ex abundante cautela*, I would be constrained to say that it is patently misreckoned. Thus regarded, the application was clearly not made with the required promptness. However, it is to be noted that where the application was not made within the stipulated time, such an Applicant is given a window of opportunity to make amends through Rule 56.1(2). It would then fall to the Court to consider the grant of an extension of time to the Applicant provided good reason for doing so is shown. With respect to the nature of the Application it does not challenge expectation that at the very least, an attempt at a good reason for the acknowledged delay would have been offered. Should I say that the patent omission to offer a good reason was unintentional then, taken in concert with Rule 56.6(4), which states that, “paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment”, I would still be obliged to consider Rule 56.6(5). It reads, “When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to :

- a) cause substantial hardship to or subsequently prejudice the rights of any person; or
- b) be detrimental to good administration. But I digress and offer no view as to the import of Rule 56.6(5) since I was not addressed thereon by the parties.

[16] In fine, I agree with the Respondent that, where a Court is called upon to exercise its discretion in favour of a party it does not do so as of right to that party. There has to be presented to the Court evidence which allows for the exercise of that discretion. As the Applicant has not produced even a modicum of evidence on which this Court can act, the argument in respect of delay as presented by the Applicant apart

from being misconceived suffers from a shortage, if not, then from a shortcoming. Accordingly, I accept the argument of the Respondent.

Alternative Form Of Redress

[17] The Applicant's deflection of the Respondent's submission that, "the application must state whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued", is answered by way of the retort that the Rule is not absolute.

Let us then examine the particular Rule which informs this engagement. According to Rule 56.3(3): The Application for leave must state:

- a) ...
- b) ...
- c) ...
- d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;
- e) ...
- f) whether any time limit for making the application has been exceeded and, if so, why;
- g) ...
- h) ...
- i) ...
- j) ...

[18] In the PSC letter of October 12, 2011 the Applicant was advised that he would be retired in the public interest. Further, as already adverted to, the Applicant was put on notice: "However, before His Excellency acts on this advice, you may apply to him for your case to be referred to the Privy Council for its consideration and recommendation to His Excellency. If you choose to do so, then this must be done within (14) days of your receiving this letter and you must state the grounds on which you make the application. Your application should be directed to the Office of the Police Service Commission.

In no unmistakable terms, and with absolute forthcomingness, the Applicant was warned that, “Failure to comply with these requirements will lead to His Excellency acting on the advice of the Police Service Commission without further reference to you.”

[19] Since the procedure falls under the *aegis* of Rule 42 of the PSR attention is now directed to this Rule. It says at paragraph (1) that, “Where –

- a) the Commission has recommended or the authorized officer has directed that a member should be subjected to any disciplinary penalty; and
- b) the member concerned desires to apply by virtue of the relevant provision of the Order for a reference to the Privy Council of that recommendation or direction,

the application shall be made within fourteen days of the date on which the member is informed of the recommendation or direction; and the recommendation or direction shall be referred accordingly.”

[20] I have, with anxious scrutiny, looked to see if there is any evidence admitting of the Applicant’s pursuit of an alternative means of redress as demanded by Rule 56.3(3)(d). I can find none. Nor can I find any evidence to support the requirement why the alternative remedy of Rule 42(1)(b) of the PSR was not pursued or, for that matter, why judicial review is more appropriate in the circumstances.

[21] If any legal principle or authority is required to show that an Applicant must exhaust alternative remedies before resorting to judicial review I need only point to the authority of **Preston v Inland Revenue Commissioners** [1985] 2 All E.R. 372. The facts are. In 1974 “P” acquired half the share capital of a company which he later sold in two stages in 1975 and 1977. Following on a meeting between an Inspector of the Inland Revenue and “P” concerning “P’s” tax returns for the years 1975-1976 to 1977-1978 and in particular “P’s” claim for relief in respect of certain losses and interest payments as also his transactions in shares of the company, it was agreed that “P” would withdraw his two claims for relief in exchange for the Inspectorate raising any further inquiries into “P’s” tax affairs. “P” having withdrawn his claim for relief he

discharged a liability to capital gains tax in respect of the shares. In 1997 the Island Revenue requested “P” to furnish information to the sale of shares they having received information that “P” had sold his shares pursuant to a tax avoidance scheme whereby the sale price was calculated on the basis of gross profits and not net profits. In 1982 the Island Revenue issued a notice requiring “P” to furnish information relating to the sale of the shares. “P” supplied the information but pointed out that he considered the 1978 agreement to be binding. Subsequently, the Revenue issued a Notice cancelling “P’s” tax advantage in consequence of which “P” applied for Judicial Review. In doing so “P” sought a declaration that the Revenue were not entitled to further assess him or to attempt to assess him in respect of the sales of the shares. The judge at first instance granted “P’s” declaration on the basis of the Revenue failing to take into account the 1998 agreement before initiating the procedure to cancel “P’s” tax advantage which was, in any event, a discretion that was unreasonably exercised.

[22] Interestingly, in setting aside the first instant judgment the Court of Appeal held that besides the initiation of the procedure by the Revenue to cancel “P’s” tax advantage being managerial and thus not open to Judicial Review but also that the decision to initiate the procedure was not unreasonable due to “P’s” failure to make full disclosure. “P” appealed to the House of Lords. In the course of his judgment Lord Scarman, in stark and clear words, said: “... a remedy by way of judicial review is not made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge, it is not an appeal. Where Parliament had provided by Statute appeal procedures ... it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.”

[23] For his part Lord Templeman grafted and crafted his judgment on the relevant legislature that engaged both the Revenue and “P”. To paraphrase it says: where with respect to such a taxpayer such as “P”, the Revenue have reason to believe that a taxpayer has obtained a tax advantage pursuant to a transaction, such as a sale of shares, the Revenue may notify the taxpayer in writing that he has so done. The

taxpayer may then make a statutory declaration that the legislation does not apply to him either because he has not been involved with any such transactions in the circumstances prescribed by that legislation or because the taxpayer can show, in the words of the law, “that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of their main objects, to enable the tax advantages to be obtained ...” Following the legislative thread of the procedural requirements containing a complex of duties and discretionary powers if, after the matter is referred to the Tribunal set up for the purpose of determining whether or not a prima facie case for proceeding has been established, should the Tribunal rule against the Taxpayer he may appeal to a Special Commissioner.

In the instant case, the same general principle applies: where Parliament has provided by statute appeal procedures, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.

The factual basis in the case at bar is the very letter of 20th October 2011: “In this connection, a letter dated the 12th October, 2011 has been addressed to you by the Governor General’s Secretary, giving you the opportunity to apply for a reference of your case to the Privy Council.”

I do not see anywhere in the Applicant’s affidavit where he has alluded to any alternative form of redress as being available and, were that the case, why judicial review is more appropriate and why the alternative has not been pursued.

[24] In the final analysis, on the facts, on authority and on principle, the Applicant has failed to obtund the formidable argument of a failure to pursue an alternative form of redress before seeking leave to apply for judicial review.

No Arguable Case

[25] Mr. Lyttle’s answer to this submission by the Respondent is restated without admixture: “... the Applicant says that he has good and arguable grounds for Judicial Review and he has a realistic prospect of succeeding on the basis that he was already tried on the same set of facts a decision given by the learned trial judge and that

decision was rejected by the Commissioner without his appealing. Therefore, relying on the same set of facts, and circumstances he now turns to the Police Service Commission and the Governor General to retire the Applicant from the JCF ...”

The relevant provision for retirement from the Jamaica Constabulary Force in the public interest is Section 26 of the PSR. From it is gleaned that where retirement is being contemplated the PSC must request a report from the Commissioner of Police.

[26] Second, the PSC is obliged to consider the report of the Commissioner of Police “and giving the member an opportunity of submitting a reply to the grounds on which his retirement is contemplated.”

[27] Third, if the PSC, after giving due consideration to the usefulness of the embattled member having regard to the conditions of the Jamaica Constabulary Force, the Commission is satisfied that it is desirable in the public interest to retire such a person, it shall recommend to the Governor General that the member be required to retire as the Commission may recommend.

[28] In **Sharma v Brown-Antoine et al** (2006) 69 W.I.R. 369 the Privy Council through Lord Bingham said, inter alia: 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. ...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 ... 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 is hoped the interlocutory processes of the court may strengthen ...”

[30] In the course of his judgment in **Regina ex parte Dwayne A. Mullings et al And The Police Service Commission And The Attorney General for Jamaica reported at SCCA No. 18/2007** delivered on 23/2/2009 Cooke JA, with whom Panton, P and

Dukharan, JA(Ag.), as he then was, agreed, said that, "Retirement in the public interest is essentially that such a person is unsuitable to continue to be member of the Jamaica Constabulary Force. This unsuitability is not solely to be determined in a situation where strict proof is forthcoming but also in circumstances where there is material which rises above mere suspicion that the behavior of a member of the force is unacceptable." Relying on Regulation 47(2)(i) of the PSR, 1961, Cooke, JA trenchantly asserted that "retirement in the public interest is quite different from dismissal based on specific charges. Whereas the latter is confined within defined parameters, the former is subject to great latitude, subject only to the pending caveat that any such retirement must be reasonable cause."

[31] In the instant case, the NOTICE OF THE GROUNDS ON WHICH THE RETIREMENT OF DETECTIVE CONSTABLE GLEN RILEY IN THE PUBLIC INTEREST PURSUANT TO REGULATIONS 26 OF THE POLICE SERVICE REGULATIONS, 1961 is being contemplated, brought to the attention of the Applicant the bases of the contemplated action viz:

- "a) On June 20, 2008 at 11 a.m. you made a false entry in the Nain Police Station diary to the effect that you attended the Nain Police Station to interview Mr. Gilfillan in relation to a shooting incident which took place in Stony Hill, St. Andrew, and that the incident was being dealt with by Detective Sergeant Wilkinson of the Constant Spring Police Station;
- b) At the material time there was no police officer attached to the Constant Spring Police Station named Detective Sergeant Wilkinson. Mr. Gilfillian was also later released from custody on your instruction without being charged;
- c) Thereafter, on July 10, 2008 you were in the company of another police officer to collect money from the said Mr. Gilfillian."

It was in those circumstances that the Commissioner said that he had "lost confidence

in your ability to discharge your function as a Police Officer to serve and protect and further, is of the view that your usefulness to the Jamaica Constabulary Force has been considerably impaired.”

[32] It seems to me to be palpably plain, from the undated photocopy document supplied by the Applicant, that the Commissioner acted with utter fairness in treating with the embattled Applicant having regard to the PSR. It is ineluctable also that two of the grounds upon which the Applicant’s retirement was being contemplated were unconnected with the action for breach of the Corruption Act, the offence for which the Applicant and another were charged and put before the Resident Magistrate Court Black River, Saint Elizabeth. It is not disputed that the latter matter was determined by the Court in favour of the Applicant.

Applying the reasoning of Cooke, JA in the **Dwayne Mullings et al** judgment, adverted to earlier, I am to say that, the retirement of the Applicant in the public interest is quite different from the specific charges that were before the Resident Magistrate Court. After all, it is for the Commissioner of Police to see to the good administration of the Jamaica Constabulary Force over which he is in charge. In any event, apart from the argument of the Applicant being misaligned where it speaks of, “the Application for leave to apply for Judicial Review of the decision of the Commissioner of Police,” the Applicant’s arguments advanced against the procedure adopted in retiring the Applicant in the public interest cannot be sustained as being unfair as for every procedural step along the way the Commissioner of Police and the PSC were scrupulous in their respective observance of the guiding PSR.

[33] Accordingly, the Application for leave to apply out of time for Judicial Review is refused assent.

