In The Supreme Court of Bermuda

CIVIL JURISDICTION
2022: No. 179

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW AND IN THE MATTER OF THE COMMISIONS OF INQUIRY ACT 1935

BETWEEN:

LEYONI JUNOS

Applicant

-and-

(1) THE PREMIER OF BERMUDA E. DAVID. G. BURT

(2) COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondents

Before: **Assistant Justice David Hugh Southey QC**

Appearances: **Ms. Leyoni Junos Applicant in Person**
Ms. Lauren Sadler-Best for the First Respondent
Mr. Delroy Duncan QC and Mr. Ryan Hawthorne of Trott and Duncan Limited for the Second Respondent

Date of Hearing: **15 July 2022**

Date of Judgment: **5 August 2022**

SOUTHEY, AJ

Introduction

1. This application for leave to apply for judicial review arises from the work of the Commission of Inquiry into Historic Land Losses in Bermuda ('the Commission of Inquiry'). The Commission of Inquiry was appointed under the Commissions of Inquiry Act 1935 ('the 1935 Act'). On the date I deliver this judgment, I will also deliver judgment in a judicial review of the Commission of Inquiry brought by Raymond Davis and Myron Piper ('the Davis and Piper judgment'). That judgment considers different issues regarding the work of the Commission. That judgment should be read with this judgment as it sets some of the factual background. I will not repeat that judgment, save where necessary.

2. There are references in the papers to the Civil Justice Advocacy Group ('the Group'). I understand that this is not a body that has a legal identity. As a consequence, Ms Junos accepted that this application is brought by her. However, she argues that her role within the Group means that she has the standing to act as a public interest litigant.

Factual background

3. The Davis and Piper judgment describes the establishment and work of the Commission of Inquiry at paragraphs 6-18. I will not repeat that summary in this judgment. However, I highlight 3 matters:

    a. The Honorable (Retired) Justice Norma Wade-Miller was named as Chairman of the Commission of Inquiry in the Premier's Commission.

b. The report of the Commission of the Inquiry was presented to the Honorable House of Assembly on 10 December 2021.
c. The report of the Commission of Inquiry was delivered to the Premier with a covering letter signed by the Commissioners including Wade-Miller J as Chairman.

4. The proceedings were issued on 13 June 2021.

Grounds

5. The grounds in this application are not adequately particularised. Unlike the grounds filed in the judicial review brought by Robert Moulder, which is another matter that I will deliver a judgment in when I deliver this judgment, I have struggled to clarify the grounds by reference to evidence filed. The basis problem is that the Form 86A is in very general terms. For example, it states that:

> *The Report of the Commission into Historic Losses of Land in Bermuda (COI) is ultra vires Section 6 of the Commissions of lnquiry Act I 935 ("the Act"), in that it does not represent the result of a full, faithful and impartial inquiry into the matter specified in their commission (the Terms of Reference in the Official Gazette) and is therefore not in the public interest.*

6. This does not identify why it is said that the report of the Commission of Inquiry was not 'full, faithful and impartial'. The affidavit then sets out what are said to be 'examples' of flaws in the approach of the Commission. What is unclear is why these are not simply challenges to findings in individual cases considered by the Commission. However, the grounds are not structured as a challenge to findings in individual cases.

7. In oral submissions Ms Junos made it clear that she was bringing this application as a public interest litigant. As such she was seeking to demonstrate systemic flaws. That was why she was seeking to identify

examples of flaws that she would supplement if granted leave. This demonstrated a flawed approach. I accept that the threshold for the grant of leave is low and applied that approach in the Davis and Piper application.

8. 3 matters that were highlighted orally were:

    a. The status of the Honorable Wayne Perinchief, who is given various titles such as Acting Chair and Deputy Chair of the Commission of Inquiry.

    b. A complaint that statements made by the Commission of Inquiry about Ms Junos were misleading.

    c. A complaint that the Commission of Inquiry had determined its own terms of reference.

Arguments of the parties

9. Ms Junos made oral submissions that argued, among other matters, that:
    a. It was in the public interest for this application to be allowed as flaws in the report of the Commission of Inquiry needed to be corrected.
    b. The application was not out of time (see below).
    c. She had standing as a public interest litigant.

10. The Commission of Inquiry filed a skeleton argument objecting to the grant of leave. This skeleton argued, among other matters, that:

    a. There had been delay in commencing the claim. There was no basis for extending time.

    b. Ms Junos lacked standing to bring this application.

    c. The claim lacked merit.

11. During the leave hearing, the Commission of Inquiry was clear that it would not supplement the skeleton argument and participate further. It was noted that the hearing was formally ex parte and that the 2nd affidavit of Ms Junos had been filed the day before the hearing, which limited the ability of the Commission to engage with it.

Delay

12. Section 68(1) of the Supreme Court Act 1905 provides that:

> *The Court may refuse to grant leave for the making of an application for judicial review, or to grant any relief sought on the application, if it considers that—*
> *(a) there has been undue delay in making the application; and*
> *(b) the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*

13. Order 53, rule 4(1) of the Rules of the Supreme Court Act 1985 (GN 470/1985) ('the Supreme Court Rules') provides that:

> *An application for leave to apply for judicial review shall be made promptly and*
> *in any event within six 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.*

14. It is clear from the language of order 53, rule 4(1) that an application must be made promptly even if it is made within 6 months (*Perinchief v Public Service Commission et al* (Civ All No 6 of 2009). The primary requirement is promptness.

15. Although it appears that this application for judicial review was commenced more than 6 months after the decision was made public, I accept that the application was within the 6 month time limit for the purposes of the rule. That is because the 6 months expired on a weekend. This application was lodged on the Monday following that weekend.

16. The fact that the application was made within 6 months does not mean that it was prompt. There is no evidence that explains why this application was lodged on the very last day of the 6 month time limit. In oral argument, Ms Junos argued that it was practice in Bermuda that a claim merely needed to be lodged in 6 months and she was not aware of the requirement from promptness. She also argued that the report was long and it was published while COVID was still a factor.

17. I have concluded that this application is out of time as it was not brought promptly:

    a. The reality is that I have no evidence explaining delay. References to the length of the report and COVID (which are not evidence) do not explain why it took 6 months to draft relatively short papers. 6 months is a relatively long period to draft pleadings.

    b. The judgment in *Perinchief* makes it clear what the law is. The law requires promptness. It is difficult to see how I can find that the practice can be as described by Ms Junos. I have no evidence of that practice and it would be contrary to the law.

    c. Ms Junos says she was not aware of the law. Again this is not evidenced. In any event I do not see how that can be relevant to the assessment of promptness. At most it is relevant to whether time should be extended.

18. Given that I have found that the claim is out of time, I have to consider whether to extend time. I have concluded that time should not be extended for the following reasons:

    a. The complete absence of any attempt to explain why the application was not brought earlier. Even assuming that Ms Junos was unaware of the requirement of promptness (and there appears to be no evidence of that), that does not mean she was not obliged to comply with the Supreme Court Rules. She plainly had some awareness of those rules as she was aware of the 6 month time limit.

    b. The lack of particulars in the grounds is a matter that weighs against an extension of time. Fairness to the Respondents requires a properly particularised application. That implies it is potentially unfair to extend time. Further, the delay in bringing these proceedings cannot be explained by time spent on a careful piece of drafting.

    c. The findings below regarding standing. I have found that the Applicant has standing to bring limited claims. However, the fact that she has no standing to bring the wider aspects of her claim weighs against an extension of time. It means that, at most, this will be a narrow claim.

    d. The findings below regarding merits. It appears to me that the merits are far from being sufficient to justify an extension of time.

Standing

19. Rule 3(7) of the Supreme Court Rules provides:

> *The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*

20. In general sufficient interest arise when someone is affected by a decision that is challenged (*R (Badmus) v Secretary of State* [2020] EWCA Civ 657 at [78].

21. Consistent with the need for someone being affected, in recent years there has been consideration of whether there are better placed challengers when determining whether a person has standing (e.g. *R (Jones) v Metropolitan Police Commissioner* [2021] 1 WLR 519 at [61] – [62] and *R (D) v Parole Board* [2019] QB 285 at [110]). That is hardly surprising, if persons are allowed to challenge decisions when others more directly affected bring no challenge, there is no way of knowing whether those more directly affected object to the decision in question. The existence of a better placed challenger is a relevant factor but not necessarily determinative (*R (Hammerton) v London Underground Ltd* [2002] EWHC 2307 (Admin) at [201]).

22. The Courts have recognized the possibility of public interest applications, particularly where insisting on a particular interest would potentially prevent the review of the legality of a decision (*AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at [170]).

23. Applying the case law above, it appears to me that Ms Junos lacks standing to bring many of the challenges that she seeks to bring. As I have already indicated, it appears to me that many of her complaints relate to the treatment of individual cases, although it is said that those cases are said to be examples of a flawed approach. Those are cases where the individual who complained to the Commission of Inquiry has a more direct interest in the proceedings. It appears to me that they cannot be made into a systemic challenge by seeking to link a number of cases together. It appears to me that the nature of a challenge does not change by adding additional challenges. Ms Junos argued that those individuals could not bring an application but I have no evidence of that.

24. The Form 86A states that:

> *The Civil Justice Advocacy Group - cited by name by the Premier in his June 7th 2019 Ministerial Statement announcing his rationale for setting up this particular Commission of Inquiry in the public interest - has standing in the public interest to bring this application and had a legitimate expectation that such a long-awaited Commission would exercise its authority lawfully, fully, faithfully and impartially.*

25. Ignoring the fact that Ms Junos accepts that she has to bring this claim, it appears to me that reliance upon a ministerial statement does not assist in the context of challenges that are essentially challenges to the outcome of individual's complaints.

26. I recognise that there are some arguments where Ms Junos has standing. Firstly, there is complaint about statements regarding Ms Junos. That is a matter which she is best placed to challenge. In addition, there are at least 2 challenges to matters that apply to all cases before the Commission: the complaints about Mr Perinchief and the terms of reference. Because these challenges are wider than the outcome of individual cases, there may be nobody who is in a better position to bring them. I will consider the merits of the challenges below.

Merits

27. As already indicated, there are 3 matters that I can identify in the grounds that appear to me to pose less issues regarding standard than others. Although I have concluded that time should not be extended, I have considered the merits. That is partly because the merits may be relevant to the issue of time.

Mr Perinchief

28. Section 1 of the 1935 Act provides that:

> *(1) The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.*
>
> (2) *Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public*. [Emphasis added]

29. It should be noted that the Governor (and by implication the Premier (see below)) has a power to appoint a Chairman. They have no duty to appoint a Chairman. It would be lawful for the Premier to make no decision as to who should act as Chair.

30. Section 1A of the 1935 Act provides that:

> *(1) The Premier shall, in addition to the Governor, have the authority to issue commissions of inquiry under this Act.*
>
> *(2) When the Premier acts under subsection (1), sections 1 to 6 and 11, and the First and Second Schedules, shall be read with "Premier" in place of "Governor", and the rest of those provisions shall be construed accordingly.*

31. This makes it clear that the Premier can exercise the powers of the Governor identified above. Obviously, in this case it was the Premier who established the Commission of Inquiry. It is also the Premier who appointed the Chairman.

32. Section 2 of the 1935 Act provides that:

> *In case any commissioner is or becomes unable or unwilling to act, or dies, then the Governor may appoint another commissioner in his place; and any commission issued under this Act may be altered as the Governor may consider desirable by any subsequent commission by the Governor, or may be revoked by a notification to that effect published in the Gazette.* [Emphasis added]

33. 2 points are clear about section 2. Firstly, this provision does not expressly refer to the position of the Chairman. Secondly, in any event, this power is again discretionary. It is not a duty.

34. Section 8 of the 1935 Act provides that:

> *The commissioners acting under this Act may make such rules for their own guidance and the conduct and management of proceedings before them, and the hours and times and places for their sittings, not inconsistent with their commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their commission.*

35. Section 8 makes it clear that it is for the Commission to determine its own procedure. It appears to me that there is no reason why this could not include the appointment of a Chairman if none were appointed by the Governor or the Premier.

36. In light of the statutory framework set out above, it appears to me that there is no reason to believe that the role played by Mr Perinchief was unlawful. The Commission of Inquiry was entitled to regulate its own procedure. I can see no reason why this would not include taking action to determine how the Commission should proceed where the Chairman was unavailable. That appears to have been all that the Commission did. There was no suggestion that Wade-Miller J, the Chairman identified in the Commission, was replaced or was unable to exercise her role. As noted above, she signed the letter presenting the report of the Commission. Even had the Chairman become unavailable, section 8 would have allowed the Commission to take action. It appears to me that the grounds challenging the role of Mr Perinchief are unarguable.

Remarks regarding Ms Junos

37. The Commission of Inquiry report states that:

> *Regrettably, because their claims were refused, some Claimants and some persons who were engaged by the COI publicly criticized the Inquiry, questioning the integrity of the process and the partiality of certain Commissioners. As a creature of statute and a quasi-judicial body, the COI practised the required judicial restraint and did not engage in public debate when criticized.*

38. I am willing to assume that this passage of the Commission of Inquiry report referenced Ms Junos (although that is not expressly stated).

39. It appears to me that there is no basis for concluding that the passage of the Commission of Inquiry report quoted in the paragraph above is unlawful. Ms Junos disagrees with the paragraph on the basis that the comments of the Commission suggest she made unfounded allegations. Even assuming that it is correct that the Commission suggested Ms Junos made unfounded allegations, it does not mean that the Commission acted unlawfully. The role of the Court is not to review findings of fact unless those findings can be

demonstrated to be irrational (which is difficult). No basis has been identified. I should add that I have assumed the findings above can be challenged. It appears to me that that is far from clear as it is unclear whether there was any actual decision.

40. The limited role for the Court in relation to findings of fact also demonstrates why it would be difficult for the Court to consider challenges to other findings of the Commission as proposed by Ms Junos.

The terms of reference

41. I have already delivered the Davis and Piper judgment. In that judgment I addressed the approach of the Commission of Inquiry to its terms of reference. In my opinion, the application of Ms Junos adds nothing. I note in particular, my findings regarding standing. Those findings imply that Ms Junos has no standing to challenge a misdirection in a particular case.

Conclusion

42. In light of the matters above, it appears to me that I should refuse leave. I have no doubt that Ms Junos was of the opinion that the approach of the Commission was flawed. However, that does not mean that she is entitled to bring a claim that is delayed and so contrary to the Supreme Court Rules.

Dated this 5th day of August 2022

DAVID HUGH SOUTHEY
ASSISTANT JUSTICE