IN THE COURT OF APPEAL OF BELIZE A.D. 2021
CIVIL APPEAL NO. 15 OF 2019

DARRELL USHER **APPELLANT**

v

COMMISSIONER OF POLICE **RESPONDENT**

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BEFORE

The Hon. Madam Justice Hafiz Bertram	-	President (Ag)
The Hon. Mr. Justice Samuel Awich	-	Justice of Appeal
The Hon. Mr. Justice Murrio Ducille	-	Justice of Appeal

A Sylvestre for the appellant.
S M Tucker for the respondent.

28 May 2021 (By Submissions in Writing)

HAFIZ BERTRAM P (Ag)

[1] I have read, in draft, the judgment of my learned brother Ducille JA, and I agree that this appeal should be dismissed, for reasons stated therein, and that the decision of Arana J, be affirmed. Also, I agree with the costs order made in favour of the Respondent in the appeal.

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HAFIZ BERTRAM P (Ag)

DUCILLE JA

[2] This is an appeal from the 2nd May, 2019, ruling of Madam Justice Michelle Arana (as she was then) denying the Appellant's application for leave for judicial review of the decision of the Commissioner of Police to revoke the gun licence issued to the Appellant.

[3] The facts of the case are simple and ably summed up by the learned judge at paragraph 2 of her judgment. The appellant at the time of the decision was a Corporal of the Police. As determined by Arana J, the appellant joined the Police Force on September 9th, 2001, and served as an officer in the Belize Police Force for eleven of the seventeen years since he became a member. He was issued with a firearm licence in respect of a 9 mm pistol. He has served in various intensive arms of the police department, including the Patrol Branch and the Special Patrol Branch (formerly Dragon Unit). The Special Patrol Unit is a specialized unit tasked to address gang, drug and gun crimes.

[4] On 19th January, 2018, the Appellant received a letter from the Commissioner of Police ("***COP***") requesting the Appellant to provide reasons why his firearms licence should not be revoked. The said letter detailed two allegations made against the appellant and as set out at page 18 of the judgment reads as follows:

> ***"…***
>
> ***…***
>
> ***…***
>
> ***I write in respect to the above-mentioned matter.***
>
> ***On Friday, 10th March, 2017 about 9:15 pm police in Belize City stopped a Chevrolet SUV with L/P BC C41809 on Faber's Road. At the time the vehicle was being driven by you accompanied***

by another male person. You were informed that a search would be conducted on the vehicle where you indicated that you will park to the side of the road. However, instead of parking on the side of the road you sped off. The police officers pursued you. Upon reaching the dike area the said vehicle was found parked on the left side of the road with its engine running. You were seen running toward the dike with a camouflage kitbag on your back and made good your escape. A green camouflage kitbag matching the one you were carrying was found floating on the dike. It contained 3 brown parcels of suspected drugs with a combined weight of 9353.83 grams.

On 13th March, 2017 you handed in yourself to the police where you were formally arrested and charged with the offence of Drug Trafficking.

On 28th November, 2017, at about 6:15pm police responded to a report of two persons struggling in a gold Kia Sorento SUV with L/P BC-C56338. Upon arrival they found you and another man struggling inside the vehicle. You were separated by the police and at the time you were in possession of your licenced 9mm pistol S/N VAM8732.

Initial police investigations revealed that you tried to repossess the said vehicle from the other person, Mr. Moses Middleton who had pawn the vehicle with a business place reportedly own by a family member of yours. Middleton in an effort to prevent you from taking the vehicle sped off with the vehicle. In response, and without lawful excuse, you discharged your firearm in an effort to get Middleton to stop.

This was done in total disregard for other persons in the area. The round from your firearm damaged the left front wheel of the vehicle causing it to stop. It was then that you and Middleton struggled for the keys to the vehicle.

… … …

In view of the above you are hereby asked to give reasons why your firearms licence should not be revoked pursuant to section 26 of the Firearm Act, Chapter 143 … … …
… …
…"

[5] The Appellant, through his then counsel, responded to the January 2018 letter indicating that the drug trafficking charge was currently before the court and as such no final determination could be made on the issue at that time and in any event the allegations did not suggest the appellant had improperly and intemperately used his licenced firearm. In relation to the second matter raised in the letter from the COP, the Appellant's attorney pointed out that the Appellant was not provided with a copy of the purported "police investigation" relating to the Moses Middleton allegation nor was the Appellant provided an opportunity to present his version of events.

[6] On 13th March, 2018, the COP sent the Appellant a letter revoking his gun licence. On the 23rd May, 2018, the Appellant subsequently applied for leave for judicial review of that decision.

[7] After setting out the factual background of the matter, the submissions laid before her and accurately stating the principles governing the grant of leave the learned trial judge concluded as follows:

"Having reviewed the submissions for and against this application, I must state that I am in full agreement with the submissions made by Ms. Duncan on behalf of the Respondent. I find that the arguments presented on behalf of the Applicant by Mr. Sylvester (sic), as skillful, mentally stimulating and certainly arguable as they appear to be, do not (to quote my brother judge Abel, J in James Duncan case Claim No. 391 of 2014) 'rise to the level' that would constitute grounds for which leave for judicial review should be granted. Without determining the merits or otherwise of the allegations made against the Applicant (as that is not the matter before me), I must state that I am truly appalled that such an experienced and esteemed officer of the Police Force such as Cpl. Usher would be charged for Drug Trafficking in the first place, and then several months after that incident allegedly involve himself in a physical altercation with a civilian, discharging his firearm in a manner which potentially endangered the very public which as an officer he is sworn to protect and serve. I fully agree with Ms. Duncan that the COP has a wide discretion whether or not to grant the privilege of a gun licence to an individual. I find that the Respondent informed the officer of the allegations made against him in a timely manner, he gave the officer an opportunity to respond, after which he decided to revoke his licence. I find that the decision making process exercised by the Respondent was fair, and in my respectful view, there is therefore nothing to review. The application for leave for judicial review is dismissed with costs awarded to the Respondent to be agreed or assessed."

[8] By Notice of Appeal filed on the 31st July, 2018, the Appellant challenged the decision of Arana J on the following grounds:-

1. ***The learned trial judge erred in failing to properly consider the statutory scheme of section 26(g) of the Firearms Act;***

2. ***The learned trial judge erred in concluding at paragraph [10] of her judgment that the "… arguments presented on behalf of the Applicant … [are] certainly arguable… [however they]… do… not… 'rise to the level' that would constitute grounds for which leave for judicial review should be granted" as the test at the leave stage is whether the Applicant has an arguable case with a realistic prospect of success, which was satisfied on the material before the learned trial judge;***

3. ***The learned trial judge erred in failing to consider the Appellant's specific grounds for leave for judicial review, namely, the revocation of the Applicant's gun licence was unreasonable, irrational and contrary to law. The learned trial judge at paragraph 10 of her judgment considered only whether the decision making process exercised by the Respondent was fair.***

4. ***The learned trial judge erred in concluding that the decision making process exercised by the Respondent was fair, when this was a determination to be made at the substantive hearing stage.***

5. ***The learned Madam Justice Arana in dismissing the Appellant's application failed to take account of the fact that no alternative remedy existed in law for the Appellant to challenge the revocation of his licence.***

[9] At page 4 of its Appeal Submissions, the Appellate posits that of the five grounds of appeal lodged, ground 2 is central and arguably dipositive of the appeal. The remaining grounds, in the Appellant's words, are "offshoots or subsets of ground 2".

[10] Under ground 2, the Appellant challenges Arana J's conclusion that the leave to appeal application does not rise to the level that would constitute grounds for which leave for judicial review should be granted. The Appellant contends that ***section 26(g) of the Firearms Act ("the Act")*** was wrongly applied by the COP. In the Appellant's view the matters raised in the January 2018 letter were not capable of constituting valid reasons for the revocation of the Appellant's licence. In his view, section 26 of the Act operated in such a way that section 26(g) of the Act had to be read *ejusdem generis* to the other grounds listed in that section. As such the wide discretion purportedly granted to the COP by section 26(g) was actually a limited one. The Appellant contends that on a proper reading of section 26(g) any revocation of a licence based on this provision required an inquiry with a high standard of proof.

[11] The Appellant further argued that as the allegations in the January 2018 letter do not rise to standard of proof, on his construction, required by section 26 the decision to revoke his licence was unreasonable, irrational and contrary to natural justice and as such all of the elements required for a successful leave application were met. In that regard the learned judge erred in refusing to grant leave.

[12] The Respondent argues on appeal that the decision of the learned judge to deny the leave application was a sound one. The Respondent asserts that the learned trial judge determined that in the circumstances that the Respondent acted in

observance of the substantive principles of public law. The Respondent argues that Appellant's challenge to the COP's decision appears to be an appeal of the merits of the decisions itself and not a review of the legality of the process, as is the purpose of judicial review.

Halsbury Laws of England Volume 61A at paragraph 2 states that:

> "*Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.*
>
> ***Judicial review is concerned with*** *reviewing not the merits of the decision in respect of which the application for judicial review is made, but with* ***ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful****.*
>
> ***The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected****: it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question*."

[13] The threshold an applicant must meet in order to successfully obtain leave to pursue a claim for judicial review is that the applicant has an arguable case with a realistic prospect of success. This was established in the case of ***Sharma v Brown-Antoine [2006] UKPC 57 at paragraph 14 (4)***:

> *"**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 LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), 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.*** *As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:*

> *'… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.* ***Thus the flexibility of the standard lies*** *not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but* ***in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities****.'*

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."*

[14] The well-established principles in ***Sharma*** were cited with approval in the local case of ***James Duncan v National Council for Education et al Claim 391 of 2014*** where Abel, J opined as follows:

> "***In determining whether to grant to the Claimant permission to apply for judicial review, the sole question for determination is whether the Claimant has an arguable case for judicial review with any or any realistic prospect of success. This is a mixed question of law and fact and involves a consideration of the merits of the application and the prospect of the Claimant succeeding on his claim if he is allowed to proceed to make an application for judicial review.*** *Also involved is arriving at a conclusion after weighing all of the factual and legal considerations which arise for determination based on the Claimant's case for judicial review*." (Emphasis added)

[15] At paragraphs 80 to 83 of ***James Duncan*****,** Abel. J further stated:

> "*[80] As such, this court ought to grant permission, only if satisfied that the papers discloses 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, which merits full investigation at a full oral hearing with all the parties and all the relevant evidence.*
>
> *[81] In exercising its gate-keeping function it is clear that this court has a discretion, and therefore may refuse permission to argue certain grounds because a particular ground or challenge does not raise to the level of being arguable with a realistic prospect of success, and may therefore grant limited*

permission: to hear one or more of the grounds while refusing permission in respect of others.

[82] ***As judicial review is concerned not with the merit of a decision by a public body but the lawfulness of the decision making process itself, at the point of considering an application for permission to apply for judicial review,*** *this court will be concerned with identifying whether or not one or more grounds of judicial review may be established*."

[16] It must be remembered that an appellate court will only overturn the decision of a lower court where an Appellant has demonstrated that the decision under challenge was plainly wrong. The Appellant has not met that threshold in the present case. A review of Arana J's decision clearly shows that the learned justice correctly stated the test to be applied when determining an application for leave to commence judicial review. The learned judge considered the detailed arguments presented by the Appellant and concluded that while the arguments presented were arguable, the arguments did not satisfy the remaining portion of the test; namely, the Appellant's arguments ultimately had no realistic prospect of success.

[17] As established by the authorities, judicial review is concerned with the fairness and legality of the decision making process. The basis of Arana J's conclusion that the application had no realistic prospect of success is the learned judge's assessment of the fairness of the decision making process. The learned judge's focus on this aspect of the application is reasonable as the Applicant did not challenge the ability of the Respondent, no allegations that the decision was *ultra vires* the Act or that the Respondent acted improperly.

[18] On the facts presented the holding of Arana J that the process was fair is unassailable. The Applicant was provided a detailed description of the allegations before the COP on which the decision to revoke the licence was based, the Applicant was given an opportunity to defend/respond to the allegations. The Applicant through

his counsel responded to the allegations raised. The COP considered the response and rendered his decision. Arana J's determination on these facts that there is therefore nothing to review is a reasonable one.

[19] In the premises, I would dismiss the appeal and affirm the decision of Arana J to refuse the application for leave to apply for judicial review. I would award costs of the appeal to the Respondent to be assessed if not agreed.

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DUCILLE JA