IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 338 of 2022

BETWEEN

EDGAR EK	**APPLICANT**

AND

MINISTRY OF THE PUBLIC SERVICE, CONSTITUTIONAL AND POLITICAL REFORM, AND RELIGIOUS AFFAIRS	**1st RESPONDENT**
MINISTRY OF SUSTAINABLE DEVELOPMENT, CLIMATE CHANGE, AND DISASTER RISK MANAGEMENT	**2nd RESPONDENT**
PUBLIC SERVICES COMMISSION	**3rd RESPONDENT**
THE ATTORNEY GENERAL	**4th RESPONDENT**

Before the Honourable Madam Justice Geneviève Chabot

Date of Hearing: January 30th, 2023

Appearances

Nazira Uc Myles, for the Applicant

Samantha Matute and Israel Alpuche, for the Respondents

DECISION ON APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW

1. The Applicant is the Deputy Chief Environmental Officer at the Department of the Environment. He challenges the appointment of Mr. Anthony Mai as Chief Environmental Officer. Mr. Mai was appointed to that post on February 24th, 2022.

2. The Applicant alleges that the decision to appoint Mr. Mai was *ultra vires* and null and void, as it was made in breach of the duty to act fairly and the rule of natural justice against

bias. The Applicant also alleges that the decision to appoint Mr. Mai was made in breach of the Applicant's legitimate expectation of an employment process that is objective, impartial, and fair.

3. The Applicant applies for the following orders:

    1) An Order granting permission to the Applicant to apply for judicial review of the decision of the Ministry of Sustainable Development, Climate Change, and Disaster Risk Management, the Ministry of the Public Service, Constitutional and Political Reform, and Religious Affairs, and the Public Services Commission, to select, appoint and endorse Mr. Anthony Mai to the post of Chief Environmental Officer of the Department of the Environment, with effect from 24th February 2022, with a view to having the Decision removed into the Supreme Court and quashed;

    2) An Order pursuant to Rule 56.4(8) that permission operates as a stay restraining the 1st, 2nd, and 3rd Respondents from further effecting or enforcing the decision to authorize Mr. Anthony Mai to assume and act in the post of Chief Environmental Officer of the Department of the Environment, with effect from 24th February 2022, including applying or causing to be applied section 3(2) of the *Environmental Protection Act* or section 107(1) of the *Belize Constitution* to appoint Mr. Mai to the post of Chief Environmental Officer until further order of the Court;

    3) An Order that the full hearing of the substantive claim for judicial review will be expedited and held on the date and time to be specified in the Order;

    4) Costs;

    5) Any such further or other order as this Honourable Court deems just.

4. For the reasons that follow, permission to apply for judicial review is denied.

Legal Framework

5. Rule 56.3 of the *Supreme Court (Civil Procedure) Rules*, 2005 (the "*Rules*") requires a person wishing to apply for judicial review to first obtain permission from this Court. Under Rule 56.2, an application for judicial review may be made by any person, group, or body which has sufficient interest in the subject matter of the application.

6. The "usual test"[1] for leave to apply for judicial review was described by the Privy Council in *Sharma v Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)*[2] as follows:

> (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 p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (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(N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable *mutatis mutandis* to arguability:
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> > "… 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."
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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, 733.

7. For permission to apply for judicial review to be granted, therefore, an applicant must satisfy the Court that they have an arguable case having a realistic prospect of success. The Court must also be satisfied that no discretionary bar, such as delay or an alternative remedy, applies to the case. The threshold to be met under the *Sharma* test is considered to be low,[3] "at a height which is necessary only to avoid abuse".[4]

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[1] Claim No. 43 of 2021 *Ian Haylock v Prime Minister of Belize et al.* at para. 16, citing *Attorney General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44 and *National Commercial Bank Jamaica Ltd v Industrial Disputes Tribunal and Peter Jennings* [2016] JMCA App 27. See also Claim No. 761 of 2019 *Julian Johnathan Myvett v Comptroller of Customs et al.* at para. 8.
[2] [2006] UKPC 57 ("*Sharma*").
[3] *Maharaj v Petroleum Company of Trinidad and Tobago Ltd (Trinidad and Tobago)* [2019] UKPC 21; *Attorney General of Trinidad and Tobago v Ayers-Caesar* [2019] UKPC 44.
[4] Claim No. 563 of 2021 *Senator Michael Peyrefitte v Minister of Finance et al.* at para. 40.

Analysis

8. The Application is denied because two discretionary bars apply. An alternative remedy was available to the Applicant, and the Applicant has failed to provide a satisfactory justification for not using it. In addition, there was unreasonable delay in bringing this Application which is detrimental to good administration.

Alternative Remedy

9. The Applicant challenges the decision of the Respondents to appoint Mr. Anthony Mai to the post of Chief Environmental Officer. The decision could have been appealed to the Belize Advisory Council. The Belize Advisory Council is constituted under section 54 of the *Belize Constitution*. Under section 54(8)(b), the Belize Advisory Council shall "perform such other tasks and duties as are conferred or imposed on it by the Constitution or any other law". While the *Belize Constitution* does not specifically provide that the Belize Advisory Council can hear appeals of appointment decisions, that it has this power is implicit from section 54(12) of the *Belize Constitution*, which states as follows:

> (12) Notwithstanding subsections (10) and (11), in any case where the Council is convened to discharge its duties under section 88, 98,102, 105, 108 or 109 of this Constitution, or **where the Council is convened to hear an appeal from an officer to whom section 106**, 107, 110D or 110F of this Constitution applies, the Chairman shall preside at that meeting [emphasis added].

10. Section 106 of the *Belize Constitution* confers on the Public Services Commission "the power to appoint persons to hold or act in offices in the public service". The Applicant is a public officer who sought to be appointed to an office in the public service. He challenges the appointment process under which another candidate, Mr. Mai, was appointed. A reading of section 54(12), together with section 106(1) of the *Belize Constitution*, suggests that the Applicant had a right to appeal to the Belize Advisory Council.[5]

11. Despite stating in his Application that "there is no alternative form of redress which exists", the Applicant appears to concede in his written submissions that the Belize Advisory Council could have heard his appeal. The Applicant, however, argues that this Court should exercise its discretion under Rule 56.3(3)(e) of the *Rules* and find that an appeal to the Belize Advisory Council is not more appropriate than judicial review in this case. The

[5] This matter is distinguishable from Claims No. 730 and 731 of 2021 *Dave Vaccaro v The Public Services Commission; Rackel Waight v The Public Services Commission* which deal with promotion decisions. Although the parties to this matter at times characterize the decision at issue as a "promotion" decision, this matter deals with an appointment to the office of Chief Environmental Officer, and therefore falls under section 106 of the *Belize Constitution.*

entirety of the Applicant's submissions in support of this point is reproduced verbatim below:

> *26. The Applicant submits that the Rules makes provision for the Court to exercise its discretion in circumstances like the present in which we submit that the only alternative remedy that could be applicable; appeal to the Belize Advisory Council is not more appropriate. The rules does not dictate that the alternative must be pursued before an application for Judicial Review can be made.*
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> *27. An appeal to the Belize Advisory Council is an ineffective and delayed process which would defeats any semblance of justice for those who choose such alternative. The very case from this Department of Ms Maxin Monsanto filed March 24th 2020 has not been addressed more than two and half years later. It is undisputed that cases before the Belize Advisory Council remain undetermined for years to the detriment of public officers and the proper administration of the departments in the public sectors.*

12. While the Court has the discretion to find that judicial review is more appropriate than an alternative remedy available to an applicant, the onus is on the applicant to provide sufficient information in support of their contention that the alternative remedy should not be pursued in the particular circumstances of their case. Judicial review is a remedy of last resort. As noted by this Court in *Bryant Williams dba Griga Line et al. v Minister of Youth, Sports & Transport et al.*,[6] citing *Benjamine Company Serviced Ltd. v Anguilla Financial Service Commission*,[7] where an alternative remedy exists, there must be exceptional reasons for judicial review to be pursued instead:

> 26. As rightly noted by the Respondents, judicial review is a remedy of last resort; where an alternative remedy exists, absent exceptional circumstances courts will refuse leave to apply for judicial review. As held by the Eastern Caribbean Supreme Court in *Benjamine Company Serviced Ltd. v Anguilla Financial Service Commission*, where there exists an avenue of appeal or review created by statute, an applicant must show some exceptional reason why they should be pursuing judicial review instead:
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> > [31] There is a presumption against judicial review where an alternative remedy exists and the Court may not grant leave where the Court forms the view that some other form of legal proceedings or avenue of challenge is available. The most obvious type of substitute remedy is an avenue of appeal or review created by statute. It is therefore for the Applicant to

[6] Claim No. 134 of 2022 ("*Williams*").
[7] AXAHCV2017/0066.

> show some exceptional reason why the avenue of judicial review was pursued instead of the statutory appeal avenue […]
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> 27. The court in *Benjamine* expanded on the issue of "exceptional reason", noting that the inconvenience, cost, and delay of the statutory procedure would not meet the threshold, nor is the fact that the time for filing the appeal has passed.[8]

13. The Applicant did not provide sufficient information to persuade the Court that he should not have to pursue the alternative remedy available to him, namely an appeal to the Belize Advisory Council. The Applicant argues that the process before the Belize Advisory Council is "ineffective and delayed". The Applicant offers only one example in support of his contention that "cases before the Belize Advisory Council remain undetermined for years to the detriment of public officers and the proper administration of the departments in the public sectors". That example is not supported by any evidence showing why the case he refers to has been delayed. An appeal may be delayed owing to factors which may or may not be within the control of the Belize Advisory Council. Without more, this one example is insufficient to conclude that the Belize Advisory Council was not available to hear the Applicant's appeal. Even if this Court were to accept that there are delays before the Belize Advisory Council, the court in *Benjamine* was clear that inconvenience, cost, and delay are not sufficient to justify resorting to judicial review.

14. As a result, this Application is barred because there existed an alternative remedy to hear the Applicant's matter, namely the appeal process before the Belize Advisory Council.

Delay

15. This Application was filed on May 24th, 2022, exactly 3 months after the appointment of Mr. Mai to the post of Chief Environment Officer. The issue is whether there was unreasonable delay in the circumstances.

16. Pursuant to Rule 56.5(1), in considering whether an application for permission to apply for judicial review should be granted, a judge must consider whether there has been unreasonable delay before making the application. Subsection 56.5(2) provides that the judge hearing the application must consider whether the delay would (a) cause substantial hardship to, or substantially prejudice, the rights of any person, or (b) be detrimental to good administration. Under Rule 56.5(3), an application for permission to apply for judicial review must be made promptly, and in any event within 3 months from the date when the grounds for the application first arose.

[8] *Williams, supra* at paras. 26-27.

17. Rule 56.5 was interpreted by Griffith J. in *WCPL25 Debbie Reynolds v Attorney General of Belize and anor*[9] as follows:

> 11. The progression of this rule is important in terms of its interpretation and application. Firstly, by Rule 56.5(1), the Court must find the delay to be unreasonable. Additionally, the relevant factors (set out under Rule 56.5(2)) are that the Court is required to consider whether there will be substantial hardship or prejudice to any other person or detriment to good administration. As written, the Court finds that the rule is speaking to substantial hardship or prejudice in relation to a third person, not the Applicant. Therefore the Applicant's submissions in relation to the Respondents having failed to demonstrate that there would be any prejudice caused to them (the Respondents) by a review of the transfer takes the Court's consideration on the issue of delay no further. With respect to the issue of delay relative to any detrimental effect on good administration, this factor plainly requires the Court to consider the public interest served by good administration of the business of public authorities. The importance of the progression of the Rule as mentioned above is that even after these factors may have been considered and established, it is nonetheless the case that there must be good reason for extending time if three months from the date of decision has expired. Put another way, the Court interprets total effect of Rule 56.5 in terms that even if a prospective application would cause no substantial prejudice or hardship to any third party, or would have no detrimental effect on good (public) administration, the absence of good reason for delay can defeat the application if made after three months.[10]

18. The Court may find that the delay in applying for judicial review is unreasonable even where the application has been made within the 3 month time limit provided for in Rule 56.5(3). As explained by the Privy Council in *Maharaj v National Energy Corporation of Trinidad and Tobago (Trinidad and Tobago)*,[11] an application for judicial review may not be prompt even where it has been brought within the statutory time limit:

> [37] The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether an application has been made promptly or with undue or unreasonable delay. Thus, for example, in 1991 in *R v Independent Television Commission, Ex p TV Northern Ireland Ltd* reported [1996] JR 60 Lord Donaldson MR warned against the misapprehension that a judicial review is brought promptly if it is commenced within three months.

[9] Claim No. 14 of 2018 ("*Reynolds*").
[10] *Reynolds, supra* at para. 11.
[11] [2019] UKPC 5 ("*Maharaj*").

> "In these matters people must act with the utmost promptitude because so many third parties are affected by the decision and are entitled to act on it unless they have clear and prompt notice that the decision is challenged." (p 61)

Similarly, in *R v Chief Constable of Devon and Cornwall, Ex p Hay* [1996] 2 All ER 711, Sedley J observed (at p 732A):

> "While I do not lose sight of the requirement of RSC Ord 53 r 4 for promptness, irrespective of the formal time limit, the practice of this court is to work on the basis of the three-month limit and to scale it down wherever the features of the particular case make that limit unfair to the respondent or to third parties."

Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.[12]

19. The requirement for an applicant in judicial review to act promptly was expanded upon by Lord Hope of Craighead in *R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council and others*:[13]

> On the other hand, it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at pp 280-281, to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision; see also *R v Dairy Produce Quota Tribunal for England and Wales, ex parte Caswell* [1990] 2 AC 738. But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in *Swan v Secretary of State for Scotland* 1998 SC 479 at p 487:

[12] *Maharaj, supra* at para. 37. See also *R (on the application of Sustainable Development Capital LLP) v Macquarie Corporate Holdings Pty Ltd and Others*, [2017] EWHC 771 at para. 31 ("*Macquarie*").
[13] [2002] 2 PLR 90 (*"Hammersmith"*).

> It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass.
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> In *ex parte Caswell* at pp 749-750, Lord Goff of Chieveley said that he did not think that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. As he pointed out, the interest in good administration lies essentially in a regular flow of consistent decisions and in citizens knowing where they stand and how they can order their affairs. Matters of particular importance, apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact that would be felt if it were to be reopened. These observations, which were made in the context of an application to extend the period under RSC Ord 53, r 4(1), are consistent with the Scottish approach to the question of whether the application should be allowed to proceed. The question of whether the delay amounts to acquiescence or would give rise to prejudice such as to bar the remedy is inevitably one of fact and degree.[14]

20. This Court finds that the Applicant did not act promptly in bringing this Application. The Applicant's Affidavit in support of the Application details his concerns with regard to the process leading up to Mr. Mai's appointment. As early as November 2021, the Applicant raised concerns in relation to Memorandum CON/GEN/1/01/21(5) in which it was announced that the Applicant and Mr. Mai, then Senior Environmental Officer, would share the responsibilities of Chief Environmental Officer pending a permanent appointment to that post. According to the Applicant, the Memorandum was inconsistent with the Department's practice to appoint the second most senior officer at the Department, the Deputy Chief Environmental Officer, to hold over in the absence of the Chief Environmental Officer.

21. On December 23rd, 2021, Circular Memorandum No. 86 of 2021 (the "Circular") was issued. The Circular advertised an internal vacancy for the post of Chief Environmental Officer. The Circular listed under the subheading "Qualifications/Experience" the following requirements: (i) Master Degree in Environmental Science, Natural Resource Management, Ecology, Management or other related field; and (ii) at least 10 years working experience with the Department of the Environment.

[14] *Ibid* at 112.

22. On December 30th, 2021, four Environmental Officers wrote a letter to the CEO of the Ministry of the Public Service, Constitutional and Political Reform to express concerns that a person with a management degree would not be qualified to occupy the post of Chief Environmental Officer, and that the work experience with the Department of the Environment required for the post should be in a senior capacity, such as a Head of Unit or a higher post. The Applicant did not sign the letter, but in his Affidavit in support of this Application he implies that he was aware of the letter and endorsed its content. The Applicant writes that "we" (meaning the four signatories and himself) requested that the 1st Respondent "revise and recirculate" the Internal Vacancy Notice considering "all that we said in our letter". It is therefore clear that by December 30th, 2021 at the latest, the Applicant was aware of the new requirements for the post of Chief Environmental Officer.

23. Since no reply to the December 30th, 2021 letter was forthcoming, on February 18th, 2022 the Applicant wrote a letter to the same recipients requesting a reply to the December 30th, 2021 letter, a reason for the changes in the qualifications and experience requirements for the post of Chief Environmental Officer, an explanation of the process and procedures to advertise a vacancy, and an update to a previous appeal lodged before the Belize Advisory Council concerning Mr. Mai's promotion to the post of Senior Environmental Officer. A letter was also sent on February 23rd, 2022 to the Public Service Union regarding those issues.

24. The interviews for the post of Chief Environmental Officer were held on February 4th, 2022. In his Application, the Applicant raises irregularities with regard to the composition of the interview panel and the interview process. The Applicant alleges that members of the panel were biased or conflicted. He also alleges that he was not allowed the time that had been allocated to present his vision for the Department. Those irregularities in the interview process were known to the Applicant since February 4th, 2022.

25. On February 24th, 2022, the Public Services Commission informed Mr. Mai of his appointment to the post of Chief Environmental Officer, with immediate effect. February 24th, 2022 is the date of the decision being challenged.

26. The Applicant sat on his rights for a full 3 months and provided no explanation as to why he did not file this Application earlier. It was known to the Applicant since at least December 30th, 2021, if not earlier, that the Respondents had changed the qualifications and experience requirements for the post of Chief Environmental Officer. It was also known to the Applicant since February 4th, 2022 that there were alleged irregularities in the interview process. The decision to appoint Mr. Mai was made on February 24th, 2022. It is not until May 24th, 2022, on the very last day of the statutory time limit that the Applicant filed this Application as an "Urgent" Application. In the circumstances, the Application was not made promptly.

27. The Court further finds that the delay of three months in making this Application is detrimental to good administration. Mr. Mai was appointed Head of the Department of the Environment, a post which carries significant responsibilities. Circular Memorandum No. 86 of 2021 advertising the vacancy provides that the Chief Environmental Officer "administers the Environmental Protection Act 1992/1998/2009 and Ministry policies and manages the human and financial resources of the Department of the Environment". The Respondents note that Mr. Mai has been in his post since February 24th, 2022 "and has by virtue of that office made decisions with legal ramifications on the premise of his valid appointment as the Chief Environmental Officer".

28. The Court is mindful of the caution in *Macquarie* that "prompt action is necessary so that the parties, and the public generally, know whether they are able to proceed on the basis that a decision is valid and can be relied on and so that they can plan and make business decisions accordingly".[15] It is detrimental to good administration for the holder of an important post such as Chief Environmental Officer to settle into the role and start making decisions having significant legal, financial, and human resources implications, only to be subject three months later to an "Urgent" Application seeking to quash the appointment and, pending the determination of the judicial review, restraining the Respondents "from further effecting or enforcing the decision to authorize Mr. Anthony Mai to assume and act in the post of Chief Environmental Officer of the Department of the Environment". The delay in bringing this Application is detrimental to good administration as it jeopardizes the effective governance of the Department of the Environment, and its ability to act on the strength of decisions made by Mr. Mai since his appointment.

IT IS HEREBY ORDERED

(1) The Application for Permission to Apply for Judicial Review is denied.

(2) Costs are awarded to the Respondents in an amount to be agreed or assessed.

Dated July 3rd, 2023

Geneviève Chabot
Justice of the High Court

[15] *Macquarie, supra* at para. 31. See also *Hammersmith, supra* at 112: "the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision".