In The Supreme Court of Bermuda

CIVIL JURISDICTION
2012 No. 107

IN THE MATTER OF THE SUPREME COURT ACT 1905

AND IN THE MATTER OF THE BERMUDA BAR ACT 1974

AND IN THE MATTER OF AN APPLICATION FOR SPECIAL CALL TO THE BAR FOR JONATHAN EDWIN SMALL QC

Date of Hearing: 22 March 2012

Anthony Cottle & Martin Johnson for the Applicant; and
Delroy Duncan for the Bar Association.

REASONS

1. These reasons are given on an application for leading counsel from London to be specially admitted and enrolled under section 51(3) of the Supreme Court Act 1905 ('the section') for the purpose of appearing on behalf of the Director of Land Valuation in relation to an appeal against a decision of the Land Valuation Appeal Tribunal. The appeal is in respect of a property known as "Gatewood", 17 Inglewood Lane, Paget.

2. The section provides:

> "(3) The Court shall have power to admit and enrol any qualified person to practise as a barrister and attorney in the courts of Bermuda in any particular case or series of cases which, in the opinion of the court, involve questions of law or practice of considerable difficulty or public importance."

3. In this case there was a challenge to whether the matter involved a question of law or practice of sufficient difficulty or public important as to be within the section. It is not the first time that

such a question has arisen. The application of the section was considered by the Court of Appeal in the matter of Philip Heslop QC (Civ. Appeal No. 12 of 1990, 15 October 1990). More recently Kawaley J considered its application in the matter of Thomas Lowe QC, (Civil Case No. 100 of 2010, 5th April 2010), where he dealt with the relationship between the Court's jurisdiction under the section and the related but distinct considerations that arise when the necessary application for a work-permit for the overseas counsel is made under section 60 of the Bermuda Immigration and Protection Act 1956 ('the Immigration Act'). Section 61(4) of the Immigration Act sets out the relevant criteria, which are of general application and not particular to lawyers, as follows:

> (4) The Minister, in considering any application for the grant, extension or variation of permission to engage in gainful occupation, shall, subject to any general directions which the Cabinet may from time to time give in respect of the consideration of such applications, take particularly into account—
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> (a) the character of the applicant and, where relevant, of his or her spouse;
> (b) the existing and likely economic situation of Bermuda;
> (c) the availability of the services of persons already resident in Bermuda and local companies;
> (d) the desirability of giving preference to the spouses of persons possessing Bermudian status;
> (e) the protection of local interests; and
> (f) generally, the requirements of the community as a whole,
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> and the Minister shall, in respect of any such application, consult with such public authorities as may, in the circumstances, be appropriate, and shall in particular, in the case of an application for permission to practise any profession in respect of which there is established any statutory body for regulating the matters dealt with by that profession, consult with that body.

4. Pursuant to the requirement of consultation with professional bodies contained in the section, the Department of Immigration routinely consults with the Bar Council on such applications, and the Bar Council will express a view by letter. That is what it did in this case. Its view was:

> "Bar Council has considered the application and is of the opinion that the Attorney General's Chambers have not satisfied us that there are no Bermuda counsel with the appropriate expertise available nor that the criteria for a special admission set out in Section 51(3) of the Supreme Court Act 1905 has been met. Furthermore, Bar Council do not generally approve the special admission of leading counsel for interlocutory hearings."

5. Notwithstanding that, the applicant was granted a work permit. The question then was whether the Bar Council had *locus* to appear before the Supreme Court on the hearing of the application for special admission and renew its objection. I took a provisional view that it did, and directed the registry to give it notice. I then permitted it to appear by the President, Mr. Duncan, at the hearing and make submissions. After taking them into account I granted the application for special admission. I did so on the basis that, on the evidence before me, the matter was within the second limb of the section, namely that it was of considerable public importance. I do not intend to address that further in these reasons, which are instead intended to address the role of the Bar Council and the propriety of it appearing on the application.

6. In my considered judgment the role of the Bar Council is to represent the interests of the legal profession in Bermuda. In doing so it may properly express a view both at the stage of the application for the work-permit (when, as a noted above, the Minister is under a statutory duty to consult it) and at the separate and distinct stage of the Court's consideration of the application for admission under the section.

7. This was recognized in a Practice Direction of 25 May 2006 (Circular #9 of 2006).

Applications for Admission to the Bar

1. This practice direction applies both to applications for full admission pursuant to section 51(2) of the Supreme Court Act 1905, and to applications for special admission under section 51(3) of the Act. It supersedes all previous practice directions on the point.

2. All applications for Admission to the Bar, together with the supporting documentation, must be served upon the Bar Council not less than five clear days before the day fixed for hearing.

3. If the Bar Council objects to the application, it must file and serve no later than two clear days before the day fixed for hearing, an acknowledgment of service setting out the grounds of its objection.

4. At the hearing the applicant will be required to produce proof of service on the Bar Council, and admission will be refused until that is done.

5. Service upon the Bar Council may be effected by leaving the documents at the office of the Bar Association, currently located at Reid House, Ground Floor, Church Street, Hamilton or by fax to 295 4540.

6. Applications for special admission under section 51(3) of the Supreme Court Act 1905 must be supported by an affidavit or affidavits:

(a) setting out the questions of law or practice of considerable difficulty or public importance which are relied upon as justifying the admission; and

(b) exhibiting a copy of the work permit issued by or on behalf of the Minister responsible for immigration.

7. Special admission under section 51(3) of the Supreme Court Act 1905, will normally be limited to one overseas counsel per party, and will not normally be appropriate for second overseas counsel or solicitors.

8. That Practice Direction was subsequently varied by a Practice Direction of 12 January 2007 (Circular #2 of 2007), which streamlined the procedure for special admissions. That is the current Practice Direction, and it reads:

1. This Practice Direction is made after consultation with the Bar Council, and amends Circular No. 9 of 2006 ("Applications for Admission to the Bar"), by limiting the application of that Practice Direction to applications for full Admission under section 51(2) of the Supreme Court Act 1905.

2. Applications for Special Admission under section 51(3) of the Supreme Court Act 1905 ('Special Admission') no longer require to be served upon the Bar Council. Paragraph 3(c) below has been added in place of this requirement.

3. Applications for Special Admission must be supported by an affidavit or affidavits:

(a) setting out the questions of law or practice of considerable difficulty or public importance which are relied upon as justifying the admission;

(b) exhibiting a copy of the work permit issued by or on behalf of the Minister responsible for immigration; and

(c) exhibiting a copy of the letter from the Bermuda Bar Association to the Minister containing the Bar Council's representations on the issue of that work permit.

9. The procedure under the revised Practice Direction ensured that, while the Bar Council were no longer required to be served with the application, the court was made aware of its views, and in particular of any objection that it may have, by means of the letter to Immigration, which the applicant was now required to put before the Court. My understanding at the time was that this was to streamline the process, and relieve the Bar Council from the need to enter an appearance. The change was made in response to concerns expressed by the then President of the Bar Council to me in an email of 14 November 2006:

> "Chief Justice,
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> I write further to your circular No. 9 issued earlier this year which relates to the procedure for calls the Bar.
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> We would be grateful if you could consider a slight amendment, namely that the inclusion of special calls in respect of foreign counsel be removed from the circular.
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> Our reasons for requesting this are based on the additional work it results in for Bar Council - and in particular for the Executive Secretary - and the length of time that is generally available to follow the procedure. Bar Council would like to suggest an alternative proposal for foreign counsel calls.
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> We would suggest that Bar Council send the Registrar of the Supreme Court a copy of the letter which Council sends to Immigration in respect of its response to a request for approval of senior foreign counsel for a particular case. That letter would state that Council either had no objection to the work permit being issued (i.e. the application meets the Bar Association's guidelines) or that we could not support the application.
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> This copy letter would give you the information regarding Bar Council's views on the application but would avoid any delay and additional paperwork generated by having to serve Bar Council with a particular application."

10. The revised procedure was not intended to exclude the Bar Council from the process, or debar them from being heard on the application itself in the Supreme Court, although their ability to appear would of necessity be dependent upon the Court itself inviting them in, because otherwise they would not have notice of the application to the Court. In my view the Court is not obliged to invite the Bar Council into the proceedings and afford them an opportunity to be heard, and obviously would not do so in routine cases where the Bar Council had expressed no objection. However, it may do so as a matter of its own discretion in cases where the Bar Council

had objected, and is likely to do so if it thinks that there may be substance to that objection. Pursuant to that, I invited the Bar Council to appear before me in this matter, and I heard argument on their objection, although at the end of the day I did not accede to it.

11. For completeness I should say that it also my considered view that the opposing party in the litigation to which the application relates does not have *locus standi* to appear before the Supreme Court on the hearing of the application and oppose it. I base that upon the reasoning of daCosta JA in Heslop (*supra*), where he said:

> "I have had an opportunity of reading in draft the Reasons for Judgment of Huggins JA. I entirely agree with his reasoning and conclusions. I only add a few words of my own to underline one aspect of the matter. The procedure adopted in this application was entirely wrong and produces a singularly inappropriate state of affairs. Like my brother "it seems to me unseemly and undesirable that the parties to the litigations should play any part in an application under s. 51(3) of the Supreme Court Act 1905." It is not an edifying spectacle that a special call to the Bar should become the occasion of conflict between two contenting protagonists. That procedure diminishes the dignity that should accompany the administration of justice."

12. The procedure so robustly criticized by daCosta JA derived from a Practice Direction of 16 December 1987 (Circular #11 of 1987), which required service of the application "on all parties affected thereby". That requirement was removed by the subsequent Practice Direction of May 2006, and not reinstated by that of January 2007.

Dated this 29th day of March 2012

Richard Ground
Chief Justice