



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. 317

In the matter of an application for judicial review

BETWEEN:-

OKEISHA CLARKE

Applicant

-v-

THE MINISTER OF LEGAL AFFAIRS

Respondent

JUDGMENT

(In Court)

Judicial review – grant of Legal Aid for criminal proceedings in Magistrates’ Court – Legal Aid Act 1980 section 10 – meaning of “disposable income”

Date of hearing: 8th and 17th November 2016

Date of judgment: 22nd November 2016

Mr Kamal Worrell, Lions Chambers, for the Applicant

Ms Shakira Dill-Francois, Attorney General’s Chambers, for the Respondent

1. This is an application for judicial review which has happily been resolved by consent. I have nonetheless prepared a short judgment because the application raises a point of general public importance about eligibility for Legal Aid.
2. The Applicant is one of three co-defendants who have been charged in the Magistrates' Court with robbery contrary to section 338 of the Criminal Code. This is a serious offence. On summary conviction she would be liable to a fine of up to \$10,000, or to imprisonment for up to five years, or to both.
3. When facing these charges the Applicant naturally wishes to have legal representation. She cannot afford a lawyer so she has applied to the Legal Aid Office to cover the cost of one. She is eligible for Legal Aid, subject to means, because under section 3 of the Legal Aid Act 1980 ("the Act"), Legal Aid may be granted for the summary trial of an offence, like robbery, which is triable either way (ie in either the Magistrates' Court or the Supreme Court). Indeed, robbery is an offence for which, under section 10(2) of the Act, Legal Aid is available as of right. But section 10(1) of the Act provides that it is only available – and here is the catch – to someone whose disposable income is less than \$18,000 a year. The Third Schedule to the Act provides at para 2(1) that a person's disposable income is the aggregate annual gross income of the household of which she is a member, less certain permissible deductions.
4. The Applicant is an unemployed student and a single mother of three young children. For the past three years or so she has been dependent on Financial Assistance. In her Legal Aid application she stated that her household income was \$38,346.40. She claimed the deductions allowed by the Act of \$6,000 for other dependents in her household and \$9,600 for rent, leaving her with a net income of \$22,746.40. From this, of course, she has to meet the cost of groceries, utility bills, and other living expenses. Nonetheless, on the face of it her disposable income was above the \$18,000 threshold. The Legal Aid Committee, which is the body that makes decisions about the grant of Legal Aid, therefore wrote to inform the Applicant that her

application had been declined. She has sought judicial review of that decision.

5. The point upon which the application turns is a short one which only emerged during the course of the hearing. Both counsel agreed, in my judgment correctly, that in the Act “*disposable income*” means the pool of income at someone’s disposal from which she could, in theory at any rate, pay her legal fees. It therefore excludes those Financial Assistance payments which the Department of Financial Assistance insists on making directly to third parties such as utility providers. Upon investigation, it transpired that once such payments are excluded, the Applicant’s disposable income falls below \$18,000 so that she is, after all, entitled to Legal Aid in the Magistrates’ Court proceedings.
6. The application for judicial review is therefore allowed by consent. As the parties are to draw up a consent order I need not address the question of costs.

Dated this 22nd day of November 2016

Hellman J