In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 348

BETWEEN:-

HARRY MATTHIE

(As Chairman of the Bermuda Parent Teacher Association)

Applicant

-and-

(1) THE MINISTER OF EDUCATION

(2) THE COMMISSIONER OF EDUCATION

Respondents

***EX TEMPORE* RULING**

SUPPLEMENTAL *EX TEMPORE* RULING

(In Chambers)

Date of hearing: 27th August 2015
Date of ruling: 28th August 2015
Date of supplemental ruling: 9th September 2015

Mr Eugene Johnston, J2 Chambers, for the Applicant

Mr Delroy Duncan, Trott & Duncan Limited, and Mr Brian Myrie, Attorney General's Chambers, for the Respondents

EX TEMPORE RULING

Introduction

1. On 25th August 2015 I granted Mr Matthie leave to seek judicial review of, *inter alia*:

   (1) The Second Respondent ("the Commissioner")'s decision, possibly made on various dates between 31st May and 30th June 2015, to transfer, move, and/or alternate various teachers and/or principals throughout the public school system for the 2015/2016 school year ("the Transfers"); and

   (2) The First Respondent ("the Minister")'s decision to make the Education (Parent Council) Rules 2015, on 24th July 2015 ("the Rules"). The Rules provide for the establishment of Provisional Parent Councils and Parent Councils.

2. The school year begins on 1st September 2015 and the Rules come into force on 8th September 2015.

3. Mr Matthie seeks interim orders pursuant to Order 53, rule 3(10) of the Rules of the Supreme Court 1995 ("RSC") that (i) the Transfers and (ii) the implementation of the Rules be stayed so as to preserve the status quo pending the determination of the judicial review application.

4. Mr Matthie applies for judicial review on behalf of himself, the executive members of the Bermuda Parent teacher Student Association ("BPTSA"), of which he is Chairman, and at least some of the non-executive members of the BPTSA, although this application is opposed by others of its members.

5. I am satisfied that he has both capacity and standing to bring these proceedings.

Test for stay

6. As stated in Judicial Review Handbook, Sixth Edition, by Michael Fordham QC, at para 20.2:

> "*The basic approach to interim remedies, adapted from private law, is (1) to require a prima facie (arguable) case for granting judicial review and then (2) to identify and avoid the greater risk of an injustice (from an interim loser becoming an ultimate winner). The Court looks at the case in the round, taking into account matters such as: the strength of the challenge; … the status quo; and the wider public interest.*"

7. As Lord Walker, giving the judgment of the Privy Council, stated in BACONGO v Department of Environment of Belize [2003] 1 WLR 2839 at para 50:

> "*… the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result).*"

Arguable case and merits

8. I found when granting leave for judicial review that Mr Matthie has an arguable case. That application was ex parte on notice, although the Minister and the Commissioner did not attend. The eloquent submissions of Delroy Duncan, who appears for the Respondents at the instant hearing, have not persuaded me that Mr Matthie does not have an arguable case.

9. As to the merits, Eugene Johnston, who appears for Mr Matthie, submits that the Transfers and the Rules are unlawful as he and those whom he represents had a right or alternatively a legitimate expectation to be adequately consulted about them which was not complied with.

10. This right or alternatively legitimate expectation is said to derive from two sources:

(1) *First source*: The decision of Kawaley CJ in Ming v Commissioner of Education [2012] Bda LR 48, who held at para 34 that the applicants had:

> "*(a) a substantive legitimate expectation that the PTAs would be involved in the running of schools based on an express and unambiguous Ministerial promise made on September 16, 2011 that the statutory role envisaged for school governing boards in the running of maintained schools would be played by PTAs instead. ...*
>
> . . . . .
>
> *(b) a procedural expectation that the Respondents would adopt and follow a procedure that was fair to enable the PTAs to play the role in the management of their children's schools which it was promised they would be allowed to play in place of boards of governors.*"

I shall call this "the Ming Point".

(2) *Second source*: The principle stated by Auld LJ giving the judgment of the Court of Appeal of England and Wales in R (Edwards) v Environment Agency [2007] Env LR 9 at para 90:

> "*It is an accepted general principle of administrative law that a public body undertaking consultation must do so fairly as required by the circumstances of the case.*"

(3) As stated by Maurice Kay J (as he then was) in R (Medway Council v Secretary of State for Transport [2003] JPL 583 at para 28:

> "*In my judgment, it is axiomatic that consultation, whether it is a matter of obligation or undertaken voluntarily, requires fairness.*"

(4) Even if it was not required by Ming, the consultation exercise purportedly undertaken by the minister with respect to both the Transfer and the Rules failed, it was submitted, to satisfy the criterion of fairness. I shall call this "the Voluntary Consultation Point".

11. As to the Ming Point, Mr Duncan submitted that there was no question of any right to consultation, merely whether there was a legitimate expectation,

and that where a legitimate expectation is founded on a representation by a decision maker, the decision maker can vary or withdraw the representation. Thus, in Ming, Kawaley CJ stated at para 44:

"*... the parental right to such participation cannot lawfully be denied unless it is proposed to recast the legislative scheme altogether*";

and at para 47:

"*The promise relied upon is so fundamental a part of the proper exercise of the Respondents' statutory powers in relation to managing maintained schools that it constituted an abuse of power to depart from it without notice.*" [Emphasis added.]

12. As to the representation that PTAs would be treated by the Minister as standing in the shoes of the Boards of Governors, Mr Duncan submitted that this was withdrawn by reason of section 7(3) of the Education Amendment Act 2015:

"*Any functions which, before the coming into operation of sections 3 and 6 [on 29th March 2015], are being or have been carried out by a Board of Governors of a maintained school which does not provide senior school education, or by any other body on behalf of, or in the absence of, a board of governors of such a school, shall be carried out by the Commissioner of Education.*"

13. Although I have not heard detailed argument on the point and am not in a position to form any final view as to its merits, my provisional view is that there is force in Mr Duncan's submissions.

14. As to the Voluntary Consultation Point, before forming even a provisional view as to its merits I would have to conduct a detailed factual inquiry as to the adequacy of the consultation or purported consultation which took place. That is something which lies beyond the scope of this interlocutory application. I therefore express no view as to the merits of the Voluntary Consultation Point.

Transfers: risk of injustice

15. Turning to the Transfers, I shall consider the risk of injustice.

16. The Transfers involve the transfer of thirty teachers and six principals. The teacher transfers were concluded on 1 June 2015 and the principal transfers on 27 July 2015. To halt them now would cause disruption to the affected schools. In his submissions yesterday, Mr Duncan summarised the nature of the disruption, which was evidenced and expanded upon in an affidavit filed by the Commissioner this morning:

    (1) Lesson plans have been prepared by the teachers to be transferred for children at particular schools. These are not generic and cannot simply be transposed to the children at the teachers' previous schools.

    (2) Classrooms have been set up.

    (3) Teachers and principals have physically relocated and moved their supplies for the next school year.

    (4) Teachers and principals have met with personnel at their new schools to discuss and prepare for the academic needs of the year.

    (5) Principals have in all cases met with PTA presidents.

    (6) This work would have to be undone then redone before the start of the next school year.

    (7) Some of the transfers were to fill vacant posts. If they are reversed there will be nobody filling those posts.

    (8) The time which it took to organise these transfers is no longer available before the start of the new school year.

17. If I do not grant a stay, such disruption may follow in due course, depending upon whether Mr Matthie's application for judicial review of the Transfers is successful, and, if so, whether the Court grants an order of certiorari to quash them. But if I do grant a stay, such disruption will be inevitable.

18. By refusing to grant a stay, I would not be excluding the possibility of an order for certiorari. If the Court does make such an order, it is possible or even likely that the Transfers will go ahead anyway after further consultation, as the power to determine whether they should do so rests with the Commissioner.

19. If, following a successful application for judicial review, the Court does not make an order for certiorari, the application will not have been in vain as the Court has power to grant a declaration as to the rights of the BPTSA or its constituent PTAs to be consulted in future, and, if the Court is so minded, as to the scope of such consultations. Such a declaration would vindicate the right to consultation for which Mr Matthie contends.

20. In the circumstances, I am satisfied that the risk of injustice is greater if I order a stay of the Transfers than if I do not. I therefore decline to do so. The disruption that a stay would inevitably cause is in no-one's best interests, least of all that of the children in the affected schools, to whose interests I attach particular importance.

21. There are several additional factors supporting this decision, although I would have made it even in their absence.

22. First, there is the issue of delay. Mr Matthie was aware of the Transfers at the latest by 2nd July 2015, when the Transfers and his response to them on behalf of the BPTSA were reported in The Royal Gazette.

23. Mr Matthie did not file an application for leave to apply for judicial review until 17th August 2015. This is clearly a case where expedition is important. Had he acted more promptly, it may well have been possible for the judicial review application to have been determined in good time before the start of the school year and in any event prior to 1st September 2015, thereby obviating any case for an injunction.

24. Second, there is the issue of representation. Mr Matthie brings these proceedings with the support of at least some of the members of the BPTSA, but how many members is unclear. On the other hand, the presidents of four

of its constituent PTAs have filed affidavits in opposition to these proceedings.

25. The fact that these proceedings are contentious within the BPTSA is a factor which I take into account, albeit is not one of central importance.

Rules: jurisdiction

26. Turning to the Rules, it is well established that in the exercise of its common law power the Court can review the legality of subordinate legislation. See, eg, the judgment of the Privy Council given by Lord Mance in Toussaint v AG of St Vincent and the Grenadines [2007] 1 WLR 2825 at para 18.

27. What is less clear is whether, in the absence of a statutory duty to consult, the Court can review subordinate legislation on the ground that those affected by it have not been consulted. Whether on the facts of the present case there exists a statutory or analogous duty to consult is one of the issues before me.

28. In R (Detention Action) v Secretary of State [2014] EWCA Civ 1634 at para 67, Beatson LJ stated:

> "*The fact that there was no consultation on the change from the previous DFT detention policy which applied until the Secretary of State's decision and no impact statement does not affect the clarity or the legality of the new policy: on consultation, see for example Bates v Lord Hailsham [1972] 1 WLR 1373.*"

29. In R (British Waterways) v The First Secretary of State [2006] EWHC 1019 Admin at para 23, Collins J stated:

> "*The consultation process did not refer to the proposed change which, as the defendant must have known, would affect the claimants to a very substantial extent. There is no statutory obligation to consult, but having chosen to do so, I think the defendant ought to have let the claimants know what was proposed an enabled them to comment on those proposals … It was not fair, if consultation was decided to be needed, to exclude them in relation to a proposal which would have such a dramatic effect upon them.*"

In the present case, the fairness of the consultation is at issue.

30. In R (British Casino Association Ltd) v Secretary of State, [2007] LLR 437, QBD, Langstaff J was sceptical of any duty to consult. He preferred at para 85 the view of Stanley Burnton J in Bapio Action Ltd v Secretary of State [2007] EWHC 199 at 47 that:

> "*Moreover, even if there has been no consultation, or the representations of consultees have been rejected by the Minister, those affected may present representations to Parliament which at least in theory may reject the Minister's decision. In other words, the remedy is political rather than judicial.*"

31. The fact that in the present case the Rules were passed by the negative resolution procedure and were therefore not debated in either the Legislative Assembly or the Senate would not undermine the applicability of that reasoning to the present case.

32. It is for Mr Matthie to satisfy me that I have jurisdiction to order a stay with respect to the Rules. This is not a mere technicality: courts cannot make orders which exceed their powers. Although I look forward to fuller argument on the point at the substantive hearing of the judicial review application, I am not presently satisfied that I have power to order such a stay. I therefore decline to do so.

33. I shall hear the parties as to costs, which I anticipate will be reserved, and further directions. [The Court made an order for costs reserved and gave directions for the filing and service of evidence on the judicial review application.]

SUPPLEMENTAL *EX TEMPORE* RULING

Introduction

1. When giving my *ex tempore* ruling I stated that at the substantive hearing of the judicial review application I looked forward to fuller argument as to whether the Court has jurisdiction to order a stay with respect to the Rules.

2. Since then, the indefatigable Mr Johnston has filed supplemental written submissions in which he suggests that I need not wait that long, but invites me to reconsider my ruling on the jurisdiction point in light of the decision of the UK Supreme Court in Bank Mellat v HM Treasury (No 2) [2014] AC 700. I have also had the benefit of written submissions in reply from Mr Duncan and further oral argument from both counsel.

3. There are three issues arising:

   (1) Whether the Court has jurisdiction to revisit its decision on the Rules, and, if so, whether it should do so.

   (2) If the answer to issue (1) is "yes", whether the Court has jurisdiction to order that the implementation of the Rules be stayed.

   (3) If the answer to issue (2) is "yes", whether the Court should order such a stay. The Court does not require any further submissions on issue 3 as it has already heard full argument on this issue.

Issue 1

4. It is trite law that as I have not yet signed the order flowing from my decision I have jurisdiction to revisit that decision. As stated by Baroness Hale, giving the judgment of the UK Supreme Court in In re L [2013] 1 WLR 634 at para 16:

   "*It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected.*"

5. Judgment is perfected when, pursuant to RSC Order 42, rule 5(1), it is entered into the book kept for that purpose by the Registrar.

6. When considering whether to exercise its discretion to revisit a decision, the court's overriding objective must be to deal with the case justly, *per* Baroness Hale in Re L at para 27.

7. Whether I should exercise that discretion in the present case depends in my judgment on whether in light of the decision in Bank Mellat the Court

clearly has jurisdiction to stay the implementation of the Rules. If it does, then I should consider whether to order a stay. However, if the jurisdictional question is not free from doubt, then the position before the Court will be as it was when I gave an *ex tempore* ruling, in which case I would not be minded to reconsider the decision.

Issue 2

8. Bank Mellat concerned the Financial Restrictions (Iran) Order 2009 ("the 2009 Order"), a piece of subordinate legislation made by the UK Treasury under the Counter-Terrorism Act 2008 which directed all persons operating in the financial sector in the UK not to enter into or continue to participate in any transactions with in practice just two companies, one of which was the claimant.

9. By a majority, a nine-judge bench of the UK Supreme Court quashed the 2009 Order. One of the grounds on which the Court did so was procedural fairness in that the Order breached the common law duty to give advance notice and an opportunity to make representations to an individual against whom it was proposed to exercise a draconian statutory power.

10. Lord Sumption, with whom Baroness Hale, Lord Kerr and Lord Clarke agreed, discussed procedural fairness at paras 28 – 49 of his judgment. Lord Neuberger at para 180 and Lord Dyson at para 196 agreed with his judgment on this issue. Lord Sumption's judgment is somewhat discursive, but is in my judgment consistent with Lord Neuberger's pithy distillation of applicable principle at para 179:

"*In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow*

to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

11. This statement is to be understood within the context of Lord Sumption's statement at paragraph 44:

"…there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. Cooper v Wandsworth Board of Works 14 CBNS 180 was a case of this kind, and when Willes J, at p 190, described the duty to give the subject an opportunity to be heard as a rule of 'universal application', he was clearly thinking of this kind of case. Otherwise the proposition would be far too wide. While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice." [Emphasis added.]

12. The Rules are akin to a general legislative order which impacts on a substantial part of the population, namely the parents of children enrolled at maintained schools which do not provide senior school or pre-school education: see section 21A of the Education Act 1996, as inserted by section 4 of the Education Amendment Act 2015.

13. However it is common ground that the Rules were promulgated following a consultation exercise about potential legislative changes in which the BPTSA was consulted. The Permanent Secretary for the Ministry stated in her affidavit filed for the previous hearing at para 36:

"*The legislative framework was developed following the review and consideration of the consultative submissions from the beginning of the consultation process in September 2013 to its conclusion in early October 2014, as well as research and investigations into local and international approaches and trends in parental involvement. The framework was designed to be an ongoing process intended to continuously improve parental and community involvement, and consists of 3 inter-related pillars:*

i. The introduction of parent councils for maintained primary and middle schools and the removal of boards of governors for maintained pre-, primary and middle schools. Parent councils provide for parent and community representation and participation at maintained school sites; …"

14. At para 38 of her affidavit, the Permanent Secretary referred to the fact that:

"*The following points were raised during consultation, and their ultimate influence on the Education Amendment Act 2015 and Education (Parent Council) Rules 2015 are articulated below…*"

15. In those circumstances I am satisfied that, as Chairman of the BPTSA, Mr Matthie had a legitimate expectation that the consultation with respect to Parent Councils would be fair. The Court therefore has jurisdiction to review whether in fact it was, and hence the lawfulness of the decision making process which resulted *inter alia* in the Rules which govern Parent Councils' powers and duties.

16. Accordingly, I shall go on to consider the application for a stay of the decision to implement the Rules on its merits.

Issue 3

17. In my judgment neither Mr Matthie nor the Respondents will suffer any real injustice however I decide the stay application. In this regard I note that the interval between my decision on the stay application and the hearing of the judicial review application is likely to be short.

18. If I order a stay and the Respondents succeed on the application for judicial review, then following that decision they will be able to implement the Rules without further delay. In the interim, the PTAs will continue to function as representative parental bodies for the purposes of consultation and deliberation concerning the affected schools. Whereas this may cause administrative inconvenience to the Respondents, the nature of any such inconvenience was not spelled out to me.

19. On the other hand, if I do not order a stay and Mr Matthie succeeds on his application for judicial review, the mere fact that I did not order a stay will not inhibit me from quashing the Rules if they are found to be unlawful. In other words, the refusal of a stay will not create "facts on the ground" that will impact upon my decision as to whether to make an order for certiorari.

20. In the interim, parents will not be without a consultative body. They will have the benefit of Parent Councils (assuming that there is time to establish them before the judicial review application is heard and determined) and they will continue to have the benefit of PTAs. Albeit the interrelationship between PTAs and Parent Councils has yet to be worked out.

21. If the parents at a school do not want to establish a Parent Council then under the Rules they do not have to. If they do want to establish a Parent Council there is no reason why the parents involved in the PTA for the school cannot, if they wish, also be involved in the Parent Council.

22. Mr Duncan referred me to the leading speech of Lord Goff in Factortame Ltd (No 2) 1 AC 603, HL, who stated at 673 D – E:

> "*So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law.*"

23. The Rules now form part of "*the law of the land*". This principle would apply to them with equal force irrespective of whether they had yet come into force.

24. It is for Mr Matthie to satisfy me that there is, at the very least, a good reason to order a stay of the implementation of the Rules. He has not done so. I therefore decline to order one. The balance of convenience (which in the present case is a more apt phrase than the balance of justice or injustice) favours judicial restraint. In so holding, I take into account the importance of upholding the law of the land.

Dated this 28th day of August, 2015 (ex tempore ruling)
Dated this 9th day of September, 2015 (supplemental ex tempore ruling)

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Hellman J