IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Civil) Appeal 36 of 2019
(Formerly Cause No. G 32 of 2014)

BETWEEN:

BILIKA HARRY SIMAMBA

APPLICANT

AND

ATTORNEY GENERAL

1ST RESPONDENT

GOVERNOR OF THE CAYMAN ISLANDS

2ND RESPONDENT

CERTIFICATE OF THE ORDER OF THE COURT

UPON THE APPLICATION of the Applicant;

AND HAVING CONSIDERED the documents filed in this case including the Application filed on 9 November 2019 for leave to file a Constitutional Motion pursuant to section 26 of the Constitution and the affidavit in support; the Response to that Application dated 22 April 2020, the Reply to that Response dated 27 April 2020; the Further Submissions as to Jurisdiction dated 8 July 2020, and the Applicant's Reply dated 11 July 2020 to those Further Submissions; and the Application dated 19 June 2020 for leave to Appeal out of time from the Judgment and Order of the Hon. Justice Kawaley dated 17 June 2019 in *Simamba v Cayman Islands Health Services Authority* and the affidavit in support, the Respondent's Response dated 22 June 2020, and the Reply to that dated 23 June 2020.

IT IS HEREBY ORDERED BY JUSTICE OF APPEAL BEATSON THAT FOR THE REASONS STATED BELOW:

The Application for Leave to file a Constitutional Motion pursuant to section 26 of the Constitution is refused.

Given under my hand and Seal of the Court this 5 day of August 2020

JBSimp

Registrar, Court of Appeal

REASONS

1. The claim that the Applicant's Right to a fair trial under section 7 of the Bill of Rights has been breached is one that should have been made by way of an application to the Grand Court under section 26 of the Bill of Rights and not to the Court of Appeal. The Applicant is not assisted by section 99(2) of the Constitution for the reasons given in paragraphs 4 -10 of the Respondents' Further Submissions on Jurisdiction.

2. The Applicant is also not assisted by the decisions in *Holder v R* (CCJ granted special leave on 15 July 2019 and appeal withdrawn on 10 September 2019), and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 1)* [2000] EWHC 413 (Admin).

   (a) In *Holder v R* the Caribbean Court of Justice granted special leave to appeal after the Barbados Court of Appeal had failed to give a decision for almost 6 years after reserving its judgment in an appeal against conviction in a capital case during which time the appellant had remained in prison. In the Applicant's case the Grand Court has not failed to give a decision. It is utterly unarguable that Kawalay J's Judgment and Order dated 17 June 2019 was, as the Applicant submitted in grounds 10 and 14, "*not a decision at all*" and "*a refusal to decide the matter according to law*".

   (b) As to *Bancoult (No. 1),* the Applicant maintains in the most general terms that the case decided that "*where the court system has failed at one stage of the hierarchy a litigant may go to the next court above it*": ground 13. But *Bancoult (No. 1)* is not a case about "*leapfrogging*" the hierarchy of courts within a single legal system: it concerns the extra-territorial jurisdiction of the English Courts "*to issue certiorari to overseas territories subject to the Queen's dominion":* [2000] EWHC 413 (Admin) at [27].

3. At para 15 of his Reply to the Respondents' Response dated 27 April 2020 the Applicant states that there is no point in him "*going to the Grand Court again because there was no likelihood that [he] would get a fair trial".* This in substance is a submission that all the judges of the Grand Court are persons of whom the fair minded and informed observer having considered the facts would conclude that there is a real possibility of bias and who are therefore disqualified: see *Porter v Magill* [2001] UKHL 67 at [103]. I have carefully considered all that the Applicant has said in his various documents, but have concluded that it is not arguably the position in this case that all six judges of the Grand Court and all Acting Judges are persons who would not satisfy the test in *Porter v Magill*.

4. In view of my conclusion that there is no jurisdiction in the Court of Appeal to assume the role of the Grand Court in an application under section 26 of the Constitution, it is not necessary to address the other grounds raised by the Applicant and the relief he seeks, but I do so briefly in the following paragraphs.

5. **Grounds 2, 3, 7 & 9**, that Kawaley J failed to give meaningful reasons, that this prejudiced the Applicant's right of appeal, was *Wednesbury* unreasonable, and that he blatantly and persistently refused to follow clear authorities, are unarguable. The substance of the

complaint appears to be that he did not deal with the 52 cases and 7 issues raised by the Applicant. It is, however, not necessary for a judgment to identify and explain each and every factor which weighed with the judge or to provide multiple citations for a single proposition, particularly on a point, such as the immunity point, on which no final decision was reached. *"It is not necessary to address every single argument let alone provide a detailed answer to every point made ..."*: Zuckerman, *Civil Procedure: Principles and Practice*, 3rd ed. § 3-202. What need to be identified are the issues the resolution of which were vital to the judge's conclusion and the manner they were resolved: *English v Emery Richmond* [2002] EWCA Civ. 605 at [19]. The reasons in the judgment *"enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'"* and thus fully meet the requirements of the classic test in *South Bucks DC v Porter (No. 2)* [2004] UKHL 33 at [36].

6. **Grounds 1.3 and 8: Failure to give a meaningful hearing, making the decision principally on the basis of written submissions, and requiring additional expert medical evidence if the case was to proceed:** The submission that the Judge should not have required additional medical evidence in the case against the HSA, but should have allowed the matter to proceed to directions was raised in the Notice of Appeal on 19 June 2020 and, for the reasons given in the Order on that Application is unarguable. In relation to the submission that the Judge did not give the Applicant a meaningful hearing, while not every judge would have decided to proceed by written submissions rather than to adjourn the hearing listed for 6 May, for the following reasons, the Judge's decision to proceed in the way that he did was not outside the margin afforded to a judge in all the circumstances of this case:

   (a) The Applicant stated (his tracked suggested addition to [5] of the draft judgment) that because, after his indication to the court office in March 2019 that if he was not able to travel for the 6 May hearing he would request a hearing by video link, the HSA's representatives stated they would not object, he *"assumed that the hearing would be by video link"*.
   (b) It thus appears, as stated in the Judgment at [5], that the application for him to attend the hearing by video link was first made very shortly before the hearing and only after the court office sent an email to the parties about the hearing: see para 10(19) of Applicant's Reply to Respondents' Response to Constitutional Motion. At that stage, it was not practicable to make the administrative arrangements for a videoconference hearing: Judgment [6].
   (c) The circumstances taken into account by the judge and the reasons for his decision were that the application turned primarily on points of law, detailed written arguments had been submitted on both sides, and the Applicant wished the case to proceed rather than being adjourned: Judgment [6] and [7]. The Applicant stated that his submissions amounted to at least 75 pages and those of the HSA to about 45 pages: para. 67 of Affidavit in support of the Constitutional Motion.
   (d) The oral submissions by those representing the HSA on 6 May took approximately half an hour and the time allowed for such submissions by the Applicant on 3 June was approximately the same.

7. **Grounds 10 and 14**, that Kawaley J and before him Mangatal J failed to decide the case within a reasonable time, are also unarguable. In relation to Mangatal J, it is regrettable that almost three years had passed since the first hearing before her in December 2015, but in view of the centrality of the "immunity issue", Williams J's decision in *Thompson v HSA* in February 2016, and the pending appeal from that decision, it is not surprising that account was taken of the progress of that case. Moreover, in the period between March 2016 and October 2018 when Mangatal J recused herself after the Applicant's complaint about her to the Judicial and Legal Services Commission and the Governor, the Applicant did not appeal against any of her decisions to adjourn the matter pending a decision in the appeal. As to the allegation about Kawaley J, see para. 2(a) above.

8. In relation to **ground 17**, the reason for the Second Respondent's decision is contained in his letter to the Applicant dated 23 October 2019. Although the letter is succinct, it is clear from the reason given why the Second Respondent decided the complaint in the way that he did within the test in *South Bucks DC v Porter (No. 2)* on which see para. 5 above. In any event, a challenge to that decision should be made by way of an application for judicial review to the Grand Court and not by a Constitutional Motion to the Court of Appeal.

9. The matters raised in **grounds 2, 3, and 9-12** are ones which should properly be dealt with by applying for leave to appeal against the Judgment and Order of Kawaley J dated 17 June 2019. The Applicant filed such an Application on 19 June 2020 and a decision has been made on the grounds raised in that Application, for reasons which are given in the order on that Application.

10. The matters raised in **grounds 1, 5 and 16** about Kawaley J's conduct in *Simamba v Health Services Authority* are matters for the Chief Justice under section 106(1A) of the Constitution.

11. The Relief sought in **paragraphs 2.1 and 2.2** of the Application for leave to file a Constitutional Motion is misconceived because, by section 94(1) of the Constitution, the Grand Court is a superior Court of Record. Certiorari and mandamus lie only against the decisions of inferior courts: see *Re a Company* [1981] AC 374, 392 and *Suratt v AG Trinidad & Tobago* [2007] UKPC 55 at [49].