Neutral Citation Number: [2024] CA (Bda) 24 Civ

Civil Appeal No. 5 of 2024

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ACTING JUSTICE ALEXANDRA WHEATLEY
CASE NUMBER 2023: No. 112

Date: 20/11/2024

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL IAN KAWALEY

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Between:

DEVON HEWEY

Appellant

- and -

LEGAL AID COMMITTEE

Respondent

Appearances:
Appellant in person assisted by his McKenzie Friend, Mr Eron Hill
Mrs Shakira Dill-Francois of Attorney-General's Chambers for the Respondent

Hearing date(s): On the papers
Date of Judgment: 20 November 2024

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Leave to appeal to Judicial Committee against refusal of appeal against Supreme Court dismissal of judicial review application-connection between arguability of appeal and whether appeal raises a question of "great general or public importance" -Appeals Act 1911, section 2 (b), (c)

RULING ON MOTION FOR PROVISIONAL LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

KAWALEY JA

Background

1. The Appellant originally appealed by Notice of Appeal dated 22 March 2024 against the decision of the Supreme Court (Alexander Wheatley, J (acting) dated 19 March 2024). That decision dismissed the Appellant's application for judicial review of two decisions of the Legal Aid Committee ("LAC"), principally the December 2023 refusal of the LAC to appoint London-based Mr Richard Thomas KC as counsel for the Appellant.

2. On 19 June 2024, we dismissed the appeal. Reasons for that decision were delivered on 27 July 2024. By Notice of Motion filed on 15 July 2024, provisional leave to appeal was sought against that decision, "*pursuant to section 2 (b) and/or 2 (c) of The Appeals Act 1911*".

3. Section 2 (b) of the 1911 Act governs appeals in relation to "*any final determination of any application or question by the Supreme Court under section 15 of the Constitution*". The present appeal does not arise out of an application under section 15 of the Constitution. Accordingly, the relevant jurisdiction to grant leave to appeal which is most clearly engaged is defined in section 2 as follows:

> "*(c) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision.*"

This Court's 19 June 2024 decision

4. This Court upheld the Supreme Court's dismissal of the Appellant's complaint about the Respondent's refusal to grant a legal aid certificate to English leading counsel on grounds which were ultimately unambiguous and elementary. In our Reasons, we pivotally held as follows:

> "*17. It was clear beyond sensible argument that section 5 of the Act, read in a straightforward way, limits the counsel who may be appointed by the LAC instead of Legal Aid Counsel to 'barristers and attorneys who are in active private practice in Bermuda.' The purpose of the roster is to create a pool of lawyers which can be drawn on from time to time in connection with various cases. A foreign counsel who has been specially admitted to the Bermuda Bar for a particular case cannot possibly be considered to be 'in active private practice in Bermuda' in the requisite sense, as the Acting Judge rightly found. The Regulations such as regulation 10 (3) could only validly implement these legislative provisions, not nullify them.*"

5. A decision as clear cut as this does not, on its face, augur well for a discretionary application for leave to appeal. In effect we have already found that the Appellant's central complaint is not a seriously arguable one.

The Application for Leave as of Right: Section 2 (b) of the Appeals Act

6. The Appellant argues in his Skeleton that section 2 (b) is engaged because a constitutional point may be argued without an application under section 15 of the Constitution being filed. Reliance is placed on my own decision in *Centre for Justice-v- Attorney General* [2016] SC (Bda) (at paragraph 29).

7. No need to decide whether or not this interesting submission is right arises because in the present case no constitutional point was argued on any basis before the Supreme Court or the Court of Appeal. Permission to raise a fresh constitutional point on appeal was refused. As I explained in our Reasons for dismissing the appeal from the Supreme Court:

> "*22. Mr Hill requested a short adjournment to the following morning to address an alternative constitutional argument. The Court declined this request on the grounds that no constitutional motion was properly before the Court in relation to this appeal and the appropriate course would be to file an application under section 15 of the Bermuda Constitution. In addition, the President drew attention to the way that section 6 of the Constitution was drafted and the difficulty that it presented in mounting any constitutional claim…*"

8. The hopelessness of the contention that a right of appeal arises in relation to a constitutional point which was not even argued is, or ought to be, self-evident. This limb of the application is summarily refused.

The Application for Leave to Appeal under Section 2 (c) of the Appeals Act

9. The Appellant's Notice of Motion is supported by the following proposed grounds of appeal:

> "***GROUND ONE***
> *The Court of Appeal was wrong to hold that the Respondent has no power to assign or authorize the instruction of overseas counsel to represent the Appellant at his forthcoming criminal trial.*
>
> ***GROUND TWO***
> *The Respondent failed to lawfully exercise its power to assign or authorize the instruction of overseas counsel to represent the Appellant at his forthcoming criminal trial.*"

10. Ground 2 only arises for consideration if Ground 1 succeeds.

11. The Appellant's Skeleton addresses the "*great general or public importance*" requirement of section 2(c) first, betraying an appreciation that demonstrating an arguable ground of appeal was a problematic undertaking in the circumstances of the present case. This was putting the cart before the horse, because a point which is not a seriously arguable one can hardly be an important one in the requisite statutory sense. Mr Hill, despite his undoubted ingenuity, was unable to conjure out of thin air some stunning new argument to suggest that this Court's robust findings were arguably wrong.

12. The Solicitor-General in her written responsive submissions aptly relied upon this Court's decisions in *The Hong Kong and Shanghai Banking Corporation Limited-v-NewOcean Holdings Limited* [2021] CA (Bda) 21 Civ (at paragraphs 10-11), approving the earlier decision in *Imran Siddiqui-v-Athene* [2019] BN 2020 CA 2. In the latter case, Smellie JA cited the following passage from the Eastern Caribbean Court of Appeal (BVI) decision in *Renaissance Ventures Ltd-v- Comodo Holdings* [2018] ECSC J 1008-3 (Mendes, JA (Acting):

> "*10… Where there is no genuine dispute on the applicable principles of law underlying the question which the applicant wishes to pursue on his or her proposed appeal, a question of great general or public importance does not ordinarily arise, especially where the principle of law is settled either by the highest appellate court or by longevity of application.*

> *Where the principle is one established by this Court but is either unsettled, in the sense that there are differing views or conflicting dicta, or there is some genuine uncertainty surrounding the principle itself, or it is considered to be far reaching in its effect, or given to harsh consequences, or for some other good reason would benefit from consideration at the final appellate level, this Court would be minded to seek the guidance of their Lordships' Board. Where, however, the real question on the proposed appeal is the way this Court has applied settled and clear law to the particular facts of the case, or whether a judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, but it would not for that reason alone be a question of great general or public importance.*"

13. The Appellant in reply purportedly "accepted" these legal principles, but doggedly insisted the proposed grounds of appeal raised questions of public importance. These arguments appear to assume this Court's decision is arguably wrong, without grasping an undoubtedly unappealing nettle and seeking to demonstrate why it is arguably wrong.

14. Finally, the Appellant's indefatigable McKenzie Friend filed Supplementary Submissions seeking to place reliance on policy guidelines apparently introduced by the Respondent after the delivery of our 27 July 2024 Judgment. I can see no conceivable way in which any such policy guidelines can undermine or impact upon, in any legal way, the soundness of our findings as to the interpretation of the 1980 Act.

15. In my judgment, there is no genuine dispute as to the proper construction of the relevant provisions of the Legal Aid Act 1980. It is clear that foreign leading counsel may not be assigned as the law currently stands. The requirements for granting leave under section 2 (c) are quite obviously not met as regards Ground 1 and no need to consider Ground 2 arises.

Conclusions

16. For these reasons, I would refuse leave to appeal to His Majesty in Council.

SIR ANTHONY SMELLIE JA

17. I agree.

SIR CHRISTOPHER CLARKE, P

18. I also agree.