SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 823/2005

SARAH FLOOD – BEAUBRUN
ORGANIZATION OF NATIONAL EMPOWERMENT

Applicants

AND

MARCUS NICHOLAS

Respondent

Appearances:

Mr. Dexter Theodore for Applicant
Ms. Carol Gideon – Clovis for Defendant
Ms. Cybelle Cenac for interested party United Workers Party
Mrs. Georgis Taylor – Alexander for interested parties
Attorney General and Chief Electoral Officer

……..

2005: November 23, 28
December 19,

……..

DECISION

MASON J:

[1] On 31st October 2005, the Applicants sought and were granted leave to apply for judicial review of the decision of the Respondent to exclude the Applicants' nominees from list of scrutinieers submitted by the Respondent to the Electoral Commission pursuant to Section 4 of the House of Assembly (Elections) Amendment Act 2005.

[2] That Order of the Court operated as a stay in relation to the nomination, appointment, training or deployment of Scrutineers pending the hearing and determination of the application for judicial review.

[3] The matter came on for hearing on 23rd November, 2005 on which date, the Respondent sought to have the matter struck out on the grounds that, while admitting that the Respondent as a public official whose decisions are subject to administrative order, viz judicial review, the Applicants had no locus standi.

[4] It was argued for the Respondent that in order to make an application under part 56 of the Civil Procedure Rules, 2000, a person must have a sufficient interest, one that is over and above other members of the public; that merely by being an elected member of Parliament (first Applicant) and a political party (second applicant) might give rise to rights but not interest over and above other members of the public, that being the criterion /basis for application.

[5] Counsel for the Applicants submitted inter alia that they in fact did have a sufficient interest because it was the intention of the Applicants to contest the upcoming parliamentary elections and were genuinely and personally interested in obtaining the relief

they were seeking and should therefore not be debarred from presenting their challenge to an administrative decision.

[6] The court accepted the submissions of Counsel for the Applicants and ordered the hearing to continue.

[7] The background facts and chronology of events, though lengthy but considered necessary to be recounted are as follows;

[8] The first Applicant is a member of Parliament having contested the last General Election as a member of the St. Lucia Labour Party, the incumbent Government.

[9] The second Applicant is a recently formed political party of which the first Applicant became the leader having parted company with the Government.

[10] The Respondent is the leader of the Opposition who contested the said General Elections as a member of the United Workers Party.

[11] There are four Opposition Parliamentarians in the House of Assembly. Honourable Arsene James, Honourable Marius Wilson, the first Applicant and the Respondent.

[12] At a poll taken to determine which of them should be appointed Leader of the Opposition, Hon. Arsene James voted for himself, Hon. Marius Wilson and the Respondent voted for the Respondent, the Applicant abstained.

[13] Her Excellency the Governor General as a consequence exercised her constitutional judgment pursuant to section 67(2) of the Constitution of St. Lucia and appointed the Respondent as Leader of the Opposition.

[14] Subsequent to this appointment, the first Applicant became a member and later the Political leader of the second Applicant.

[15] The Chief Elections Officer wrote to the Respondent on 10th February, 2005 inviting him to submit to the Electoral Department a list of scrutineers, and secondly on 12th July 2005 informing him of the criteria for the appointment of the scrutineers and of the extension of the deadline for submission of the list.

[16] The House of Assembly on 16th August, 2005 passed the House of Assembly (Elections Amendment) Act 2005.

[17] The Respondent by letters to the Chief Electoral Officer first on 14th September 2005, submitted a list of scrutineers and secondly on 15th September 2005 notified of changes to that list.

[18] On 17th September, 2005, an article appearing in the Voice newspaper attributed .to the Respondent certain statements indicating his intention to nominate the scrutineers from the United Workers Party, the reason being that St. Lucia is a two party state.

[19] On 28th September 2005, the Chief Electoral Officer wrote again to the Respondent requesting him to submit an additional number of scrutineers.

[20] The Applicants wrote two letters to the Respondent:

On 5th October expressing concern that they had not been approached for their list of scrutineers; and on 20th October 2005 submitting their list of scrutineers..

[21] The amendment to the Act became law on24th October 2005 having been assented to by Her Excellency the Governor General.

[22] The Applicants again on 26th October 2005 wrote the Respondent, this time submitting a further list of scrutineers.

[23] The Respondent did not reply to any of these letters.

[24] It is necessary at this point to reproduce section 4 of the House of Assembly (Elections)(Amendment) Act, 2004, thee section which has given rise to this action.

[25] That section provides:

Section 4 of the principal Act is amended by

(a) deleting paragraph (b) of subsection (1) and by replacing it with the following:

(b) the following officers appointed the Electoral Commission from among eligible persons:

(i) a Registration Officer for each electoral district;

(ii) such number of enumerators, enumerator co-ordinators, photographs and other persons as may be deemed necessary;

(iii) such number of scrutineers as derermined by the Electoral Commission to be nominated by the Prime Minister and appointed by the Prime Minister and appointed by the Electoral Commission;

(iv) such number of scrutineers, in equal number as appointed pursuant to sub-paragraph (iii), to be nominated by the Leader of the Opposition and appointed by the Electoral Commission to represent the official Opposition in Parliament".

(b) inserting the following subsection (5) after subsection (4):

"(5) For the purposes of paragraph (b) of subsection (1), an eligible person means a person who:

(i) is not less than 18 years of age

(ii) is not declared to be a bankrupt

(iii) has not been convicted of a criminal offence except where the offence is a minor traffic offence or has been spent in accordance with the Criminal Records (Rehabilitation of Offenders) Act 2004".

[26] In my judgment, there are three issues which fall to be determined;

1) the interpretation of section 4(b)(iv) of the House of Assembly (Elections) (Amendment) Act 2005 and more specifically the meaning of who or what constitutes the "Official Opposition in Parliament".
2) whether the Respondent had a duty to consult with other persons in opposition in Parliament and whether having not so consulted, he failed in his duty to act with procedural fairness; and
3) whether therefore an action from judicial review is maintainable

[27} Interpretation of Section 4 (b) (IV)

Meaning of the term "Official Opposition in Parliament"

[28] The elementary rule of interpretation of statutes is that whenever a statement falls to be construed and there is no ambiguity in the language of the statute, the words must be given their natural and ordinary meaning and that nothing must be implied that would be "inconsistent" with the words expressly used: Maxwell on Interpretation of Statutes 11 edition chapter 1, page 1. The rule of construction is to intend the Legislature to have meant what they have actually expressed: ibid at page 4.

[29] However, should there be ambiguity in the language, in order to interpret the statute, the Court may try to ascertain the intention of Parliament from external aids such as Parliamentary debates, Hansard reports and the like.

[30] Counsel for the Applicants saw the need for the Court to seek the assistance of the Hansard Report of the debate in of the House of Assembly on 16th August 2005, but I see

no reason for the Court to consider the extract presented in order to interpret the legislation.

[31] Section 4(iv)(b) of the Act as amended has three specific requirements;

1) That the scrutineers be equal in number to those nominated by the Prime Minister (and appointed by the Electoral Commission)

2) that the nomination of the scrutineers be made by the Leader of the Opposition (and appointed by the Electoral Commission) and

3) that the scrutineers represent the official Opposition in Parliament.

[32] In my opinion the language of this section is clear, plain and unambiguous and its meaning and intention is not to be collected from any notions which may be entertained by the Court as to what is just or expedient: ibid at page 5. For once the meaning is plain, it is not the province of the Court to scan its wisdom or its policy. The duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words. Ibid at page 5.

[33] This leads us then to the question of who or what constitutes the "Official Opposition in Parliament".

[34] Counsel for the Applicants argued that the term must be taken to mean, given the present peculiar circumstances, all of the persons sitting in opposition in the House of Assembly.

[35] This assertion was rejected by all opposing Counsel.

[36] It is accepted however by all sides that previous to the amendment of the House of Assembly (Elections) Act 1979 the term "Official Opposition" had never been used or defined in any legislation in St. Lucia.

[37] Neither the Constitution nor the Interpretation Act makes any reference to it.

[38] The expression "Official Opposition", I am given to understand, has its genesis in the English Parliamentary system which is a predominantly two party system and in which the largest opposition group was and still is regarded as the official opposition.

[39] St. Lucia has adopted a similar system.

[40] Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament 16th edition at page 259 is instructive.

[41] "The prevalence (on the whole) of the two party system has usually obviated any uncertainty as to which party has the right to be called the official opposition; it is the largest minority group which is prepared, in the event of the resignation of the government to assume office……."

[42] Section 67(2) of the Constitution provides, "Whenever there is occasion for the appointment of a Leader of the Opposition, the Governor General shall appoint the member of the House who appears to him or her most likely to command the support of a

majority of the members of the House who do not support the Government, or if no member of the House appears to him or her to command support of the largest single group of members of the House who do not support the Government". (My emphasis)

[43] In our instant case, when it fell to be determined the question who commanded the support of the largest single group of members of the House of Assembly who do not support the Government, Her Excellency the Governor General requested that prior to the submission of Her Excellency's judgment all your Opposition members, who at the time were all in independent opposition, indicated who he or she supported.

[44] We know from the facts recounted above, that the Respondent received two of the four possible votes, with him then emerging as Leader of the Opposition.

[45] It seems therefore reasonable to conclude that the Respondent, having been duly appointed by Her Excellency, the Governor General in accordance with section 67(2) of the Constitution of St. Lucia and taking into account that he has the support of two of the four persons polled, must be regarded as the person representing the official Opposition in Parliament.

[46] I therefore reject the contention by Counsel for the Applicants that the term "Official Opposition" in Parliament" means and must include all of the persons sitting in opposition in Parliament in favour of the contention by Counsel for interested Party, the United Workers Party, that if the intention of Parliament was that the scrutineers to be nominated

were to represent the opposition in Parliament, there would have been no need to have qualified "Opposition" by use of the word "official'.

Duty to Consult

Issue of procedural fairness

[47] Counsel for the Applicants stated that the Applicants are seeking not to invoke any prescribed procedure laid down in the Act, which the Respondent did not follow but rather to invoke the rules of natural justice.

[48] He contends that in furtherance of the democratic process, the Respondent ought to have consulted with all of the persons in opposition.

[49] Counsel cited the case of R V Secretary of State for Transport exp. Greater London Council (1983) Q.B 556 for the proposition that while although there may be no express or implied requirement in the enabling Act for consultation, natural justice may in the appropriate case require consultation.

[50] He argued that a process which will ultimately effect the lives of all St. Lucians that is the remuneration process demanded that consultation with the parties take place. And this despite the fact that the Constitution makes no reference to parties because the Westminister system which this country has adopted is predicated upon the party system and political parties are the instruments by and through which the will of the people is exercised.

[51] Counsel for the Respondent while accepting that the proposition referred to above regarding natural justice is a sound one, noted that the authority went on to indicate that there are two instances where natural justice would require consultation viz:

a) specifically where there is either a statutory or contractual right, or

b) where there is a legitimate expectation of consultation

[52] Other opposing Counsel sought to adopt the contention of Counsel for the Respondent in this regard and to note that these instances are absent in our case.

[53] They argued that if Parliament had intended for consultation by the Respondent, it would have expressly said so because throughout the legislation passed in his country, wherever consultation was required, the legislation specifically stated so.

[54] To illustrate this point, reference was made to the appointment of certain positions e.g. senators, certain positions for public officers and commissions and in this particular instance, the appointment of the Chief Elections Officer.

[55] Section 4(1) of the House of Assembly (Elections) Act 1979 provides.

"For the purposes of the register of elections there shall be :

a) a Chief Electoral Officer who shall be appointed in accordance with section 88(1) of the Constitution.

[56] Section 88(1) of the Constitution of St. Lucia notes:

1) the Chief Electoral Officer shall be appointed by the Governor General acting after consultation with the Electoral Commission

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[57] Opposing Counsel stated the while the Respondent right in exercising his discretion regarding the nomination of scrutineers have been moved to consider the interests of the Applicants, that this consideration could not be elevated to a duty to consult.

[58] To be fair to Counsel for the Applicants, no mention was made of the issue of legitimate expectation and quite rightly so.

[59] It is not applicable in this case given the definition of the principle as adumbrated by Lord Diplock in O'Reilly V Mackman (1983) 2 AC 237.

"Legitimate or reasonable expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the Claimant can reasonably expect to continue".

Neither existed in the present case.

[60] I cannot find from a scrutinizing of the provisions of section 4 (iv)(b) any right (to be consulted or any duty (to consult) and I therefore hold that the power/authority given to the Respondent as Leader of the Opposition is merely advisory, he has no duty to consult,

but rather a discretion whether he would consult. While that discretion must be exercised through judgment and not whimsically or by inclination, it is not the duty of the Court to go behind that discretion.

[61] As stated in the case of Associated Provincial Picture Houses Limited Vs Wednesbury Corporation 1947 1 K.B. 223, the Court can only intervene when it is shown that the body has contravened the law.

[62] Lord Greene MR et page 228 stated "…but the court wherever it is alleged that the …..authority had contravened the law, must not substitute itself…. It is only concerned with seeing whether or not the proposition is made good. When a …..discretion is entrusted by Parliament…….what happens to be an exercise of that discretion can only be challenged in the court is in a strictly limited class of case, the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. The exercise of such a discretion must be a real exercise of discretion. If in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard, then in exercising the discretion, it must have regard to those matters. Conversely if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane .to the matter in question, the authority must disregard those irrelevant collateral matters".

[63] In this case the Court is not prepared to interfere with the exercise of discretion unless of course there is procedural unfairness.

[64] Counsel for the Applicants states that the Respondent by signing the lists submitted by the Applicants and proceeding to nominate his own scrutineers has not acted with procedural fairness.

[65] It must be noted that the only list with which this court can be concerned in the case of the Applicant is that submitted on 26th October, 2005 since the previous lists of 5th and 20th October were submitted before the legislation was passed on 24th October and can therefore only be termed as anticipatory.

[66] Counsel stated citing the use of British Oxygen V Board of Trade (1971) AC 610 that anyone who has to exercise a discretion must not "shut his ears to an application ……. What the authority must do is refuse to listen at all: (per Lord Reid). Counsel submitted that this is exactly what the Respondent did.

[67] The Respondent on the other hand in his Affidavit of 16th November, 2005, indicated that he duly considered all names and persons referred to him including the list submitted by the Applicants and often having given such due consideration to all interests, proceeded to nominate persons who in his considered judgment were most appropriate for appointment by the Commission.

[68] Counsel for the Applicants sought to discredit this assertion by stating that it was humanly impossible in the time stated.

[69] The Court however is not prepared to look behind it. To do otherwise would be to unsurp the power given by the Act to the Leader of the Opposition.

{70] "All that the Court can do is to see that the power which is claimed to be exercised is one which falls within the four corners of the power given by the legislature and to see that those powers are exercised in good faith. Apart from that, the Courts have no power at all to inquire into the reasonless, the policy, the sense, or any other aspect of the transaction:" per Lord Greene M.R. In Carlton Ltd. Commissioner of Works and Others {1943] 2 AER 560.

[71] The Court then in deciding that the contention of Counsel for the Applicants regarding procedural fairness must fail would be wise to adopt the words of Lord Mistill in R V Secretary for State of the Home Department (1994) 1AC 531 et 560H – 561A.:

[72] "It is not enough for the (Claimants) to persuade the Court that some procedure other than the one adopted by the decision maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made".

Judicial Review

[73] In an extract from Commonwealth Caribbean Public Laws, 2nd edition, Professor Albert Fiadjoe at page 15 opined. "The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, discuss, acts and omissions of public authorities in order to ensure that they act within their given powers.

[74] Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality.

[75] "Judicial review, unlike an appeal allows a person to challenge the acts or omissions of a public authority for legality. Such challenge may be mounted on the basis of the grounds for review which the courts have developed overtime and which Lord Diplock has compressed into "illegality", "irrationality" and "procedural impropriety".

[76] See also the statement of Sir Vincent Floissac in Chief Immigration Officer of the British Virgin Islands V Buennett (1995) 50 WIR 153 at 158 when in identifying the circumstances when judicial review may be available to an Applicant and when a court can exercise its inherent jurisdiction of judicial control.

[77] "There is no doubt that the High Court has an inherent jurisdiction (either by judicial review or otherwise) to supervise and judicially control certain decisions and actions of public authorities constituted by law to make those decisions on to take those actions. Subject to the formalities prescribed by rules of court, the jurisdiction is exercisable whenever a public authority (purporting to exercise a constitutional, statutory or

prerogative power has made or taken or intends to make or take a justifiable judicial quasi-judicial or administrative decision which affects or will effect a complainant who has locus standi by way of a relevant or sufficient interest in the decision or action and who alleges and proves that the decision or action is or will be illegal, irrational or procedural improper".

[78] He continues, "In such a case the High Court may make such appropriate prerogative or other order as may be necessary to protect the complainant from the illegality, irrationality or procedural impropriety of the decision or action.

[79] In our case it has been admitted and accepted that the functions performed by the Respondent as Leader of the Opposition in this particular process - the nomination of scrutineers - is a public function and as such are prima facie amenable to judicial review.

[80] The Court has been asked by the Applicants to exercise it's power to make the following orders:

1) certiorari to remove into the High Court of Justice and quash the list of scrutineers compiled by the Respondent and submitted to the Electoral Commission to observe the enumeration and registration of elections, and/or
2) prohibition restraining the Respondent from compiling a list of scrutineers which excludes nominees submitted to him by the Applicants and or
3) mandamus compelling the Respondent to nominate to the Electoral Commission, to represent the Applicants, a number of scruitneers equal to the

number nominated by the Honourable Prime Minister, or alternatively, one half of the number nominated by the Honourable Prime Minister, and/or

4) mandamus compelling the Respondent to disclose to the Applicants all documents including but not limited to correspondence and notices passing between the defendant (sic) and the Electoral Department on the subject of scrutineers.

[81] It has been proved above that the Respondent as Leader of the Opposition

1) represents the official opposition in Parliament
2) as such has exercised the right and authority as conferred by section 4 (iv)9b) of the House of Assembly (Elections)(Amendment) Act 2005 to nominate scrutineers equal in number to those of the Prime Minister
3) having nominated, has no legislative or other duty to consult with other persons in opposition in the House of Assembly;
4) in carrying out the process of nomination has acted with procedural fairness, and
5) on the basis of these four above, his actions cannot be subject to judicial review.

[82] Consequently the Applicants' application is dismissed with costs to the Respondent.

[83] Adjourned for argument re costs.

SANDRA MASON Q. C.

High Court Judge