EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2013/0016

(INTERLOCUTORY APPEAL PURSUANT TO CPR 62.10)

BETWEEN:

[1] VERBIN BOWEN
[2] JAVANTIA BOWEN
(by her next friend VERBIN BOWEN)
[3] JOSHUA BOWEN
(by his next friend VERBIN BOWEN)

Appellants

and

[1] THE ATTORNEY-GENERAL
[2] THE CHIEF IMMIGRATION OFFICER

Respondents

Before:
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

On written submissions:
Dr. David Dorsett for the Appellants
Mr. Justin L. Simon, QC, Attorney-General, for the Respondents

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2013: November 4.

Civil appeal – Interlocutory appeal – Public law – Immigration proceedings –Application to a judge for an interlocutory order of mandamus against the Chief Immigration Officer – Application refused - Appeal against exercise of judicial discretion – Principle upon which a Court of Appeal will interfere – No judge's reasons, or notes, or transcript, or evidence of what transpired in the court below provided – Consequence of failure to do so – CPR 62.10(1)

Held: dismissing the appeal and making no order as to costs, that:

1. An appeal of a judge's exercise of a discretion must include in the appeal bundle either (i) the judge's written reasons or, (ii) in the absence of such written reasons, a transcript of the hearing, or, (iii) in the absence of a transcript, a copy of the judge's notes; or, (iv) in the last resort, an affidavit of what transpired in the court below. The appellant having failed to file any of the documents listed, the Court is unable to determine the judge's reasons for her decision. In the circumstances, there is no basis for this Court to interfere with the judge's exercise of her discretion to refuse the application for an interim order of mandamus.

   Rule 62.10 of the **Civil Procedure Rules** 2000 applied.

JUDGMENT

[1] **MITCHELL JA [AG.]**: Verbin Bowen ("Mr. Bowen") is a national of Saint Vincent and the Grenadines residing in Antigua and Barbuda, and the father of the other two appellants. Mr. Bowen was charged in the Magistrate's Court with the offence of malicious damage, pleaded guilty, and was convicted and fined $500.00 which he paid forthwith. Upon his conviction, the Chief Immigration Officer applied for an order that he be removed from the State on the ground that Mr. Bowen, although claiming that he had been residing in Antigua and Barbuda since 1996, was not recorded as a legal resident. The magistrate ordered his removal from the State.

[2] Mr. Bowen has appealed to the Court of Appeal seeking to have the removal order set aside. He has also filed a constitutional motion and an application for judicial review. As part of his proceedings, Mr. Bowen applied to the High Court seeking interim relief in the form of an order of mandamus requiring the Chief Immigration Officer to issue him a permit to remain in Antigua and Barbuda until the determination of his constitutional action or until further order. At a without notice hearing, a judge of the High Court suspended the removal order pending an inter partes hearing.

[3] At the subsequent inter partes hearing, the respondents conceded that, in light of the earlier suspension order, they would not now seek or attempt Mr. Bowen's removal from Antigua and Barbuda. The learned trial judge denied Mr. Bowen's application for interim relief by way of an order of mandamus. Mr Bowen has appealed this order.

[4] Mr. Bowen duly filed his notice of interlocutory appeal against the judge's refusal to grant the order of mandamus, together with the appeal bundles and his written submissions as required.[1] The respondents filed and served their notice of opposition as required,[2] and subsequently their submissions in reply.[3] Mr. Bowen has responded to those submissions. The appeal has now been placed before me to be determined by a single judge on paper.[4]

[5] The issue before me can be simply stated. Bearing in mind that an order of mandamus is a form of discretionary relief to which an applicant is not entitled as of right,[5] was the judge in the court below demonstrably wrong in refusing to order the Chief Immigration Officer to grant Mr. Bowen a permit to remain in Antigua and Barbuda pending the determination of his constitutional action?

[6] Normally, when an appellant persuades a Court of Appeal that a judge in the court below acted on a wrong principle of law, or took into account irrelevant material, or ignored relevant material, or failed properly to exercise a discretion, or, for that matter, that her decision exceeded the generous ambit within which reasonable disagreement is possible and therefore may be said to be clearly or blatantly wrong, all as set out in greater detail by Rawlins CJ in his judgment in the case of

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[1] CPR 62.10(1).
[2] CPR 62.10(3).
[3] CPR 62.10(4).
[4] CPR 62.10(5).
[5] It is an administrative law remedy the granting of which is subject to CPR 56.

Enzo Addari v Edy Gay Addari,[6] only then would an appeal court feel able to interfere with the judge's exercise of her discretion. The Court of Appeal applies the test in Enzo Addari to the judge's reasons for arriving at her decision. An appellant ensures that the judge's reasons are before the Court of Appeal by complying with rule 62.10 of the Civil Procedure Rules 2000 ("CPR").

[7] CPR 62.10(1) provides that on filing an interlocutory appeal the appellant should file and serve with the notice of appeal written submissions in support of the appeal together with six bundles of the following documents bound, indexed and paginated:

> "(a) the judgment (if any) or order appealed;
> (b) such affidavits, witness statements or exhibits relevant to the question at issue on the appeal which were put in evidence before the court below;
> (c) any written submissions or requests for information and replies;
> (d) the judge's notes of any submissions made (if any); and
> (e) any other relevant documents applicable to the appeal."

[8] In the instant appeal, all that we have by way of the judgment or order or the judge's notes, as required by CPR 62.10(1)(a) and (d) above, is a draft of the judge's order, presumably prepared by Mr. Bowen's attorney, but not settled by the judge. The draft order records her order, where relevant to this appeal, as:

> "(3) The application for a mandamus order is denied on the ground that the removal order is suspended."

This draft order, not having been settled by the judge, is not the order referred to at CPR 62.10(1)(a) above. It is, presumably, Mr. Bowen's attorney's version of what the judge's order might look like. Nor, for the same reason, is the ground given in paragraph (3) of the order capable of being described as the judge's reasons.

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[6] Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2005/0021 (delivered 23rd September 2005, unreported).

[9] I will accept that it is not normal in the courts of our region where resources are thin to have a stenographer or transcription service in Chambers, so that it is unlikely there would have been any recording or transcript made of the argument before the judge and of any oral reasons she may have given for her decision. However, a judge normally takes a note of the proceedings before her, of her decision and her reasons for her decision. Those notes can be requested by any appellant or respondent in the absence of written reasons. Where the judge's notes are necessary for the prosecution of an appeal, for example, due to the lack of a transcript or the absence of the judge from whom written reasons can be requested, the notes should be sought by an appellant in writing from the Registrar of the High Court. As a last resort, if the court fails to respond by supplying any of the judge's reasons, a transcript, or her notes, the appellant may file an affidavit deposing as to what happened in the court below. All of these methods have been used at one time or another in order to get the judge's reasons before the Court of Appeal.

[10] This Court takes note of the usual practice of the judges of our region on giving an oral decision on an application heard in Chambers to express their reasons orally, and to direct the order to be prepared by counsel for the claimant so it can be settled by the judge and signed by the Registrar. A judge in such a case would only put her reasons in writing when so requested. A High Court judge has no practical way of knowing that an interlocutory appeal has been filed against her order, and that written reasons for her order will be needed by the Court of Appeal, unless someone brings notice of the need for her reasons to her attention.

[11] If a judge neglects or for any reason fails to provide her reasons for her order, and the reasons cannot otherwise be determined, the judge's order is thereby vitiated and the appeal may be automatically allowed, as explained by Rawlins CJ in his

judgment in Jada Construction Caribbean Limited v The Landing Limited.[7] Alternatively, where a judge fails to give reasons for her decision, the Court of Appeal may, in a suitable case, exercise its own discretion, as explained by George-Creque JA[8] in the case of Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste.[9] Such considerations do not arise here as there is no reason to believe that the trial judge has failed to give reasons for her decision.

[12] In this case, there is no evidence of any request having been made of the judge for her reasons. There is not, for example, exhibited to an affidavit any letter from the appellants to the Registrar of the High Court indicating an intention to file an appeal and requesting of the judge a written note of her reasons for her order. There is no suggestion that the judge in this case failed to respond to a request for her written reasons. Nor is there any suggestion that the appellant sought any transcript of the proceedings, or a copy of the judge's notes. This Court is left to assume that Mr. Bowen never requested any of the judge's reasons, a transcript, or the judge's notes.

[13] While there is no express mention in CPR 62.10(1) of such a requirement, this Court has repeatedly pointed out that it is not acceptable for an appellant to challenge a judge's exercise of a discretion without placing before the Court of Appeal in the appeal bundle any of (i) the judge's written reasons or, (ii) in the absence of such written reasons, a transcript of the hearing, or, (iii) in the absence of a transcript, a copy of the judge's notes; or, (iv) in the last resort, an affidavit of what transpired in the court below. Only then is there such compliance with CPR

[7] Saint Lucia, High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported).
[8] George-Creque JA is now known as Pereira CJ.
[9] Saint Lucia, High Court Civil Appeal SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

62.10(1) that an appeal court can properly engage in the exercise of assessing whether the court below acted properly in exercising its discretion.[10]

[14] In conclusion, it is inherent in CPR 62.10(1) that an appeal bundle in an interlocutory appeal must include one of the documents listed above for the Court of Appeal to be able to determine the judge's reasons for her decision. The grounds for interference, or the lack thereof, should become evident on a perusal of the record of appeal. The reason for interference is not otherwise capable of being discerned by the Court of Appeal. No submissions of counsel can make up for any defect in this respect in the record.

[15] In the circumstances, there is no basis for this Court to interfere with the judge's exercise of her discretion to refuse the application for an interim order of mandamus. The appeal is dismissed. In the circumstances I will not make any order as to costs.

Don Mitchell
Justice of Appeal [Ag.]

[10] See, for example, Donald Frederick v Choo Loi Poi et al, Grenada High Court Civil Appeal GDAHCVAP2012/0005 (delivered 27th June 2012, unreported) per Mitchell JA [Ag.]