

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP 2010/0013

In the matter of an application for
Judicial Review under Part 56 of the
Civil Procedure Rules 2000

and

In the matter of Article 28 of the Code
of Civil Procedure

BETWEEN:

FIRE SERVICE ASSOCIATION

Appellant

and

[1] PUBLIC SERVICE COMMISSION
[2] CHIEF FIRE OFFICER
[3] ATTORNEY GENERAL

Respondents

Before:

The Hon. Mde. Janice M. Pereira

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

Appearances:

Ms. Cynthia Hinkson-Ouhla for the Appellant

Ms. Grace Ward-Glasgow for the 1st Respondent

Ms. Brender Portland-Reynolds and Mr. Dwight Lay for the 2nd and 3rd
Respondents

2010: October 26;
2013: December 16.

Whether article 28 of the Code of Civil Procedure, Cap. 243, applies to judicial review proceedings – Limitations to protection afforded to public officers by article 28 – Whether

Chief Fire Officer acted ultra vires in making recommendation to Public Service Commission to fill vacant post in Fire Service – Judicial review proceedings brought challenging appointment – Failure to give notice of suit as required by article 28

The Public Service Commission filled a vacant post in the Fire Service based on a recommendation made by the Chief Fire Officer. The Fire Service Association challenged this appointment by way of judicial review. The learned judge dismissed the appellant's claim on the ground that the Chief Fire Officer and Attorney General ought to have been served with notice of the suit pursuant to article 28 of the **Code of Civil Procedure**.¹

The appellant appealed the learned judge's decision on the grounds that she erred in law in failing to appreciate that article 28 is not applicable to judicial review proceedings and does not provide blanket immunity to public officers. The appellant further contended that the learned judge misdirected herself in failing to appreciate that the issue of whether the second respondent had acted ultra vires in making the recommendation had to be considered before striking the second and third respondents as parties to the suit, since the protection of article 28 can only be relied on by a public officer acting within the scope of his or her authority.

Held: allowing the appeal and awarding costs to the appellant which are to be assessed pursuant to the **Court Procedure Rules 2000** and paid by the Attorney General, that:

1. It is only where a public officer acting in the legal exercise of his functions is sued for damages that he can rely on article 28 for protection. In the present claim, declaratory relief was sought as well as certiorari, mandamus and prohibition. Absent a suit for damages, no question of prohibition of rendering judgment unless notice of such suit is given can arise. The learned judge erred in dismissing the appellant's claim for judicial review.

Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council
British Virgin Islands High Court Civil Appeal No. BVIHCVAP2008/004 (delivered 27th October 2008, unreported) distinguished.

2. There is nothing in the context of article 28 to suggest that it applies to judicial review proceedings.

Castillo v Corozal Town Board v Another (1983) 37 WR 86 distinguished.

3. A public officer acting outside of his statutory functions cannot rely on the absence of notice (which notice article 28 stipulates is a requirement) for protection from an action brought against him or her.

Roncarelli v Duplessis [1959] SCR 121 (Supreme Court of Canada) applied.

¹ Cap. 243, Revised Laws of Saint Lucia 1957.

JUDGMENT

- [1] **BAPTISTE, J.A.:** This appeal raises the issues of whether article 28 of the **Code of Civil Procedure**² (“The Code”) applies to judicial review proceedings and whether there are limitations to the protection afforded to public officers by that article. These issues find expression consequent upon the decision of a High Court judge dismissing a claim for judicial review on the ground of failure to give notice of suit pursuant to article 28 of The Code.
- [2] The background facts are that the Chief Fire Officer recommended to the Permanent Secretary of the Ministry of the Public Service that Fernando James be appointed to fill a vacant post in the Fire Service. The Public Service Commission appointed Mr. James to the post. The Fire Service Association sought and obtained leave to apply for judicial review to challenge the appointment. At the first hearing of the claim the learned judge opined that before proceeding further, it was necessary to dispose of three procedural issues raised in the affidavit of the Chief Fire Officer. For the purpose of this appeal only one of the issues is of moment, namely, whether the appellant ought to have served notice of the suit on the Chief Fire Officer and Attorney General pursuant to article 28 of The Code. The learned judge invited submissions from counsel on the matter and dismissed the claim on the ground that there was no service of notice of suit upon the Chief Fire Officer and Attorney General, pursuant to article 28 of The Code.
- [3] The grounds of appeal advanced were:
- (1) the learned trial judge erred in law when she failed to appreciate that article 28 of the **Code of Civil Procedure** is not applicable to judicial review proceedings;
 - (2) the learned judge erred in law when she failed to appreciate that article 28 did not provide blanket immunity to public officers. Article 28 applies

² Cap 243 of the Revised Laws of Saint Lucia 1957.

when a public officer is sued in private law for acts or omissions creating liability which may arise whilst the public officer is performing his public functions;

(3) the learned trial judge misdirected herself by failing to appreciate that the issue of whether the second respondent acted ultra vires had to be determined before striking the second and third respondents as parties to the suit since the protection of article 28 can only be relied on by a public officer acting within the scope of his or her authority.

[4] The appellant submits that the whole tenor of article 28 indicates that it is not applicable to public law actions and the word “judgment” appearing in the article should be interpreted in that context and not as defined in any other statute. Article 28 presupposes that the intended action will be commenced by writ of summons and a cause of action exists for which damages are recoverable. Damages, being a private law remedy, are not normally available in actions for judicial review. The article 28 notice cannot be fitted within the time frame of the rules governing judicial review. Contextually, article 28 is not applicable to judicial review proceedings. Article 28 does not provide blanket immunity to public officers. The protection does not derive from the status of the public officer. It attaches if the acts complained of are done in the exercise of statutory power or authority. A public officer cannot rely on the protection offered by article 28 if the actions complained of are outside the scope of his authority.

[5] The respondent submits that the issuance of an article 28 notice is mandatory with respect to judicial review proceedings. It is a condition precedent to the filing of proceedings against public officers performing a public function. The words ‘nor can any judgment be rendered’ imposes a limitation on the discretion of the court to render judgment against a public officer, or other person fulfilling any public duty or function in circumstances where article 28 notice is not given. This was recognised by the court in **Castillo v Corozal Town Board and Another**.³ Based

³ (1983) 37 WIR 86.

on the definition of an “order” in the **Civil Procedure Rules 2000** (“CPR 2000”), the pronouncement of any decision by the learned judge with respect to any application for judicial review shall be the issuance of a judgment in the matter. This would be irrespective of the pronouncement being made at the leave stage or otherwise. An application for leave for judicial review equates to a commencement of a proceeding: **Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council**.⁴ In view of **Quorum**, article 28 operates with respect to leave applications.

[6] **Quorum** was concerned with the question of whether an application for judicial review was statute barred under the **Public Authorities Protection Act**,⁵ the application for leave to apply for judicial review having been filed on the last day of the six month period prescribed by the Act for bringing proceedings. The appellant in **Quorum** had argued that the judicial review claim was commenced only upon the filing of the claim and not upon the making of the application for leave, which was not an “action”, “claim” or “proceeding” within the meaning of the Act. The court held that an application for leave to apply for judicial review is a proceeding within the meaning of section 2(a) of the Act. Different considerations to **Quorum** apply to the present case. **Quorum** was not interpreting article 28 or any similar provision. Section 2 of the **Public Authorities Protection Act** is of far wider scope than article 28 of The Code. I do not regard **Quorum** as authority for the assertion that article 28 of The Code applies to applications for leave to apply for judicial review. Rather, **Quorum** simply decided that the application for leave to apply for judicial review was a “proceeding” for the purposes of section 2 of the **Public Authorities Protection Act**. That does not extend to meaning that all proceedings are “suits” or “claims” as the word “suit” in article 28 of The Code is understood. It clearly relates to the institution of a “suit”, “an action” or “a claim” seeking damages. Whereas an application for judicial review is a proceeding, it

⁴ British Virgin Islands High Court Civil Appeal No. BVIHCVAP2008/004 (delivered 27th October 2008, unreported).

⁵ Cap. 62 of the Revised Laws of the Virgin Islands 1991.

cannot be disputed that such an application is not the suit or the claim as contemplated by article 28 of The Code. This case is accordingly distinguishable from **Quorum**.

[7] Before considering article 28 of The Code it is instructive to make some pertinent observations in relation to judicial review. Judicial review proceedings are proceedings in public law essentially to ensure that a public body complies with the law. Judicial review provides the means whereby judicial control of administrative actions is exercised. Judicial review is regulated by CPR 2000 and operates in two stages. Unlike the case of an ordinary action, the court's prior permission is required to proceed with a judicial review claim. A person wishing to make a claim for judicial review must first obtain leave. The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.⁶ The primary purpose of the leave stage is to provide a judicial filter to weed out unmeritorious claims. Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.

[8] The forms of relief invariably claimed in judicial review proceedings are certiorari, mandamus or prohibition. The court has a discretion to award damages, however the rather stringent requirements of rule 56.8(2)(a)(i), (ii) and (iii) of CPR 2000 must be satisfied. The court may award damages if: (i) the claimant has included in the claim form a claim for damages arising out of any matter to which the claim for judicial review relates; (ii) the facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and (iii) the court is satisfied that at the time when the application was made the claimant could have issued a claim for damages.

[9] Article 28 of The Code states that:

⁶ See *The Honourable Satnarine Sharma v Carla Brown-Antoine & Ors* [2006] UKPC 57, para. 14.

“No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

“Such notice must be in writing, it must specify the grounds of the action, must be served upon him personally or at his domicile, and must state the name and residence of the plaintiff.”

Article 28 is fairly limited in scope. It simply seeks to protect persons falling within its purview from being sued for damages by reason of any act done by them in the exercise of their functions and prohibits the rendering of judgment against them unless written notice of the suit for damages is served upon them in the time prescribed and in the terms stipulated. In the present case a judicial review claim was brought in which declaratory relief was sought as well as certiorari, mandamus and prohibition. No claim for damages was made.. Absent a claim for damages, no question of prohibition of rendering judgment unless notice of such suit is given arises. Consequently article 28 of The Code could not have been engaged. That to my mind is sufficient to dispose of the appeal. The learned judge clearly erred in law in dismissing the claim for judicial review. The very nature of the claim brought precluded the invocation of article 28 of The Code.

[10] Quite apart from the fact that there was no claim for damages there is nothing in the context of article 28 of The Code to suggest that it applies to judicial review proceedings. Absent such a contextual indicator, one would be hard pressed to conclude that it applies to judicial review proceedings. The notice requirement of article 28 supports the conclusion that contextually the article does not apply to judicial review proceedings which, as previously indicated, operate in two stages. Indeed no notice of an application for leave may be given⁷. Furthermore, leave may be granted or refused. If leave is refused then there is no question of bringing a claim, be it one seeking damages or otherwise, and therefore no claim to be contemplated for which an article 28 notice ought to be given. It further begs the

⁷ See CPR 56.3(2).

question of the relevance of an article 28 notice at the leave stage when what is essentially sought at the leave stage is in reality permission to bring a claim. If permission is refused, the matter ends there, unless the refusal is overturned. In that context it cannot be said that a claim has been made. Quite apart from that, article 28 provides for at least one month written notice of suit to be given before issuance of the writ [claim] whereas CPR 56.4(11) provides that where leave is granted the claim must be issued within fourteen (14) days. This would then be inconsistent with the 30 day period prescribed by article 28. The application for leave to apply for judicial review was filed on 3rd September 2009 and the order granting leave was made on 21st December 2009. Within 14 days of receipt of the order granting leave, an applicant is obliged to make his claim for judicial review. On 6th January 2010 the fixed date claim form was filed seeking judicial review. In terms of article 28 of The Code at least one month before 6th January 2010, notice of the suit would have to be given. The order granting leave having been made on 21st December 2009, no notice of suit could have been given before that time. The fixed date claim form seeking judicial review having been filed on 6th January 2010, there was no way that the "at least one month" notice requirement before suit could ever be met. The appellant's counsel correctly adverted to the inability of fitting the service of the article 28 notice within the time frame of the rules governing judicial review. This inability to fit the minimum 30 day service period of the notice under article 28 of The Code into the 14 day period for making a judicial review claim supports the view that article 28 is inapplicable to judicial review proceedings.

[11] In this case, the judgment of the trial judge was informed by two first instance judgments from Saint Lucia: **B-Line Car Rentals v Comptroller of Customs et al**⁸ and **Peter Clarke v The Attorney General et al**.⁹ **B-Line** concerned an application by petition for an injunction. The court referred to article 28 of The Code as well as the definition of "order" in CPR 2.4 and stated that for the

⁸ Saint Lucia High Court Civil Claim No. SLUHCV2006/0725 (delivered 18th September 2006, unreported).

⁹ Saint Lucia High Court Civil Claim No. SLUHCV1999/0475 (delivered 19th April 2004, unreported).

purposes of the application for the injunction, an order included a judgment. The learned judge concluded that given the decision of the court in **B-Line** on the interpretation and application of article 28 in light of the definition of "order" in CPR 2000, it is clear that article 28 applied to the defendants in the present case. I note however that **B-Line** did not concern a suit for damages. The issue there was the application by petition for an injunction.

[12] It is necessary to consider the relationship between CPR 2.4 and article 28 of The Code in light of the argument advanced by Mrs. Portland-Reynolds that "order" includes "judgment". CPR 2.4 provides that: 'In these rules, unless otherwise provided for or the context otherwise requires – ... "order" includes an award, declaration, decree, direction or judgement'. Where article 28 of The Code states 'nor can any judgment be rendered against him' the word judgment does not exist in a vacuum, but is related to the suit for damages referred to earlier in the article. In the absence of a suit for damages it would not be proper to have recourse to the definition of "order" in CPR 2000 to include judgment. The context does not provide for such an inclusion. In any event if one were to accept the argument that "order" includes "judgment" it would mean that an order granting leave to apply for judicial review would be a judgment falling within the prohibition of article 28 unless written notice of suit was given in the time prescribed and containing the stipulated particulars. The fallacy here is that there is no requirement to serve an article 28 notice on an application for leave to apply for judicial review. Further, were the application for leave to fail, it cannot be truly said that a claim or suit has been brought for which an article 28 notice was required.

[13] In **Peter Clarke**, Mr. Clarke claimed damages for false and wrongful imprisonment and assault. The defendants included three police officers. The notice of intention to institute legal proceedings was defective in that it was not personally served on the police officers or left at their domicile. The court held that the consequence of giving a defective notice or no notice was fatal to Mr. Clarke's action against the defendants. Unlike the present case, **Peter Clarke** involved a claim for damages and importantly, was a private law proceeding in tort.

[14] In **Peter Clarke** the court relied on the cases of **Castillo v Corozal Town Board and Another**¹⁰ and **Cumberbatch v Weber**.¹¹ In **Castillo** the appellant brought an action in negligence claiming damages against the respondent public authority to which the provisions of the **Public Authorities Protection Ordinance** applied. Section 3(1) stated:

“No writ shall be sued out against, nor a copy of any process be served upon any public authority for anything done in the exercise of his office, until one month after notice in writing has been delivered to him, or left at his usual place of abode”

No notice was given by the appellant to the first respondent pursuant to section 3(1) of the Act. It was held that section 3(1) made provision for a mandatory condition precedent to the institution of suit against a public authority namely the delivery of the notice in writing in the terms stipulated. In my judgment, **Castillo**, involving as it does, private law proceedings in tort, does not provide authority for the proposition that under article 28 a failure to serve a notice is an absolute bar to an action, neither is it authority for the proposition that article 28 applies to judicial review proceedings.

[15] The issue of whether a public officer or person fulfilling a public duty or function was acting in the exercise of his functions has to be considered if he seeks to avail himself of the protection offered by article 28 of The Code. The matter was brought into focus in **Roncarelli v Duplessis**.¹² Mr. Duplessis was the Premier and Attorney General of Quebec. He was found liable in damages for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. On the issue as to whether that was done by him in the exercise of his public functions, Martland J said:

“... I do not think that it was a function of either the Prime Minister or the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely

¹⁰ (1983) 37 WIR 86.

¹¹ (1965) 9 WIR 143.

¹² [1959] SCR 121 (Supreme Court of Canada).

outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.”¹³

Abbott J observed that the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission. It followed therefore that ‘in purporting to authorize and instruct the manager of the ... Commission to cancel appellant’s licence, the respondent was acting without any legal authority whatsoever.’¹⁴

[16] In **Roncarelli** the respondent had also contended that the appellant’s action must fail because no notice of such action was given under article 88 of the **Code of Civil Procedure of Quebec** (article 88 is identical to article 28 of Saint Lucia). Abbott J agreed with the learned trial judge that the respondent was not entitled to avail himself of ‘this exceptional provision since the act complained of was not “done by him in the exercise of his functions” but was an act done by him when he had gone outside his functions to perform it.’¹⁵

[17] A public officer or person fulfilling a public duty or function who is sued for damages would not be entitled to an article 28 notice if he was not in the legal exercise of his functions at the time of committing the act complained of. Thus in **Lachance v Casault** (mentioned in **Roncarelli v Duplessis** at page 186) a bailiff attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the seized articles, as required by the order of the court requiring the guardian to give up possession to the seizing creditor. The guardian resisted the bailiff’s action as being unauthorised. The bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of article 88 he was not entitled to notice under article 88 since

¹³ At p. 158.

¹⁴ p. 123.

¹⁵ p. 186.

at the time the act complained of was committed, he was not 'in the legal exercise of his functions'.

[18] **Roncarelli** makes it clear that a public officer acting outside of his statutory functions cannot rely on the absence of notice. When dealing with article 28 of The Code it is necessary to establish whether the act was done by the officer in the legal exercise of his functions. It may be that on the statement of case there is no dispute that he so acted. It is only where a public officer acting in the legal exercise of his functions is sued for damages that he can be protected by article 28, keeping in mind that article 28 does not apply to judicial review proceedings.

[19] The appeal is allowed with costs to the appellant and the decision of the learned trial judge is set aside. Costs are to be assessed pursuant to CPR 2000 and are to be paid by the Attorney General.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]