EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

FEDERATION OF SAINT CHRISTOPHER AND NEVIS (NEVIS CIRCUIT)

SKBHCVAP2016/0004

BETWEEN:

ANNE HENDRICKS BASS

Appellant

and

[1] DIRECTOR OF PHYSICAL PLANNING
[2] DEVELOPMENT ADVISORY COMMITTEE

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer	Justice of Appeal [Ag.]

Appearances:

Mr. Damian Kelsick for the Appellant
Ms. Jean Dyer for the Respondents

2016: October 10;
December 16.

Civil appeal – Judicial review proceedings – Whether Public Authorities Protection Act applies to judicial review proceedings

The appellant, Anne Hendricks Bass, applied to the court for leave to apply for judicial review of decisions made by the first respondent and/or second respondent ("the respondents"). The application for leave was made more than six months after the decision which the appellant sought to impugn had been made. At the hearing of the leave application, the respondents raised a preliminary objection to the application arguing that the appellant was time barred pursuant to section 2(1)(a) of the Public Authorities Protection Act ("PAPA"). The judge below decided to address this as a preliminary issue. In ruling on the said issue, the judge dismissed the application for leave holding that PAPA did apply with the result that the appellant's ability to commence judicial review proceedings was time barred.

The appellant, being aggrieved with the learned judge's decision, appealed.

Held: allowing the appeal and remitting the matter to the court below, that:

> Judicial review proceedings have long been recognised by several judicial authorities as being public law proceedings and invariably fall in the category of prerogative writs as distinct from private law actions between individuals and public authorities for some tort committed by the public authority or government body in question. In considering whether PAPA applies to judicial review proceedings, certain factors should be taken into account; these factors include context, history, previous authority and the salutary caution that the right of access to the courts for the purposes of judicial review can only be abrogated by clarity of intent and of language. Accordingly, when examined contextually and practically, it is apparent that judicial review proceedings are not caught within the ambit of PAPA and were not intended to be so caught absent clear language to this effect.
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> Froylan Gil**harry SR dba Gilharry's Bus Line v Transport Board et al** Civil Appeal No. 32 of 2011, Belize Court of Appeal, (delivered 20th July 2012, unreported) applied; Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council BVIHCVAP2008/0004 (delivered 27th October 2008, unreported) distinguished.

REASONS FOR DECISION

[1] PEREIRA CJ: The appellant, Anne Hendricks Bass, applied to the High Court for leave to apply for judicial review of decisions made by the first respondent and/or second respondent ("the respondents"). She sought to obtain an order of certiorari to quash: (i) the decision granting permission to Caribbean Development Consultant Ltd. ("CDC") to construct a 17 building, 51 unit development on 4.4 acres of coastal land at Liburd Hill in St. James' Parish in Nevis; and (ii) the decision, if any, to waive the requirement for CDC to provide a complete and proper Environmental Impact Assessment as required by section 20(2) of the Nevis Physical Planning and Development Control Ordinance.[1]

[2] At the hearing of the leave application, the respondents orally objected to the application by way of a preliminary point taken in limine, arguing that the appellant was time barred pursuant to section 2(1)(a) of the Public Authorities Protection

[1] Cap. 6.09(N), Revised Laws of Saint Christopher and Nevis 2009.

Act[2] ("PAPA"). The respondents relied heavily on the decision of this Court in Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council[3] which they contended decided that judicial review proceedings are caught by the provisions of PAPA. The appellant took the view that PAPA was not applicable to judicial review type proceedings and accordingly was not applicable to its leave application. Accordingly, the issue which fell to be determined by the learned judge following counsel's submissions on the point, was whether the application for leave to apply for judicial review was caught by PAPA, or more succinctly put, whether PAPA applied to judicial review proceedings. The judge ruled that PAPA did apply with the result that the appellant's application for leave to bring judicial review proceedings being made more than six months after the decision sought to be impugned had been made, was time barred. The appellant's application for leave was accordingly dismissed. The appellant appealed with the leave of the court to the Court of Appeal.

[3] Following the hearing before the Court of Appeal on 10th October 2016, the Court ruled that judicial review proceedings are not caught by the provisions of PAPA and allowed the appeal against the preliminary objection. The application for leave was accordingly remitted to a different judge in the court below for a full consideration on the merits with leave granted to CDC to also be heard on the said application. The Court indicated that written reasons for its decision would be given at a later date. These reasons are now set out below.

[4] An appropriate starting point is a consideration of the text and context of the relevant provision of PAPA. Section 2(1)(a) of PAPA states as follows:

> "2. Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

[2] Cap. 5.13, Revised Laws of Saint Christopher and Nevis 2009.
[3] BVIHCVAP2008/0004 (delivered 27th October 2008, unreported). The decision in Quorum emanated from the Virgin Islands and section 2(a) of the Virgin Islands Public Authorities Protection Act (Cap. 62, Revised Laws of the Virgin Islands 1991) mirrors section 2(1)(a) of the SKB PAPA.

> (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof;" (My emphasis).

[5] Applications for judicial review are governed by Part 56 of the Civil Procedure Rules 2000. This Part 56, headed "Administrative Law", also sets out the procedure for obtaining other administrative orders such as declarations, or relief under the Constitution.[4] A person applying for judicial review would typically be seeking one of the remedies of certiorari (for quashing unlawful acts), mandamus (for requiring performance of a public duty) or prohibition (for prohibiting unlawful acts). As mentioned above, the appellant sought an order of certiorari, to quash decisions made by the respondents.

[6] While PAPA does relate to proceedings which involve acts carried out by public authorities, the question in this appeal was whether it would also apply in instances where the aggrieved party seeks judicial review of a particular decision taken or act carried out by the relevant public authority or government body. The appellants appealed on four grounds which are set out below:

(1) The learned judge erred in law in ruling that section 2(1)(a) of the PAPA creates a time limitation to the filing of judicial review proceedings. The appellants termed this ground the "The Limitation Decision".

(2) The learned judge erred in law and in fact in ruling that the respondents acted within their jurisdiction and authority in granting planning permission for the HTRIP Candy Resort Villa Development. This ground, they termed "The Ultra Vires Decision".

[4] See CPR 56.1(a) and 56.7(1)(c), respectively.

(3) The learned judge erred in law and in fact in ruling that the appellant's "reasons for the delay in applying for judicial review are frivolous and unacceptable". This ground was termed "The Delay Decision"

(4) The learned judge erred in law and in fact in ruling that the appellant's application for leave to apply for judicial review is without merit. This ground was termed "The Judicial Review Decision".

The Court dealt solely with ground 1 at the hearing of the appeal, being satisfied that the decisions rendered traversed beyond the scope of the preliminary issue raised.

Submissions

[7] The appellant submitted that the learned judge erred in ruling that section 2(1)(a) of PAPA was applicable to judicial review proceedings on a proper statutory interpretation of the section. The appellant relied on dicta of Thomas JA in Loris James v The Attorney General of Saint Christopher and Nevis[5] in arguing that a purposive interpretation ought to be adopted and that the courts have moved on from adopting 'a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The Courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was adopted.'[6] The appellant also relied on the authority of Froylan Gilharry SR **dba Gilharry's Bus Line v Tra**nsport Board et al[7] in support of the submission that other factors ought to be taken into account in interpreting PAPA when dealing with judicial review proceedings. According to Morrison JA in Froylan, these other factors include 'context, history, previous authority and the salutary caution that the right of access to the courts for the

[5] SKBHCVAP2007/0015 (delivered 6th October 2008, unreported).
[6] Para. 20, Loris James v The Attorney General of Saint Christopher and Nevis, SKBHCVAP2007/0015 (delivered 6th October 2008, unreported).
[7] Civil Appeal No. 32 of 2011, Belize Court of Appeal, (delivered 20th July 2012, unreported).

purposes of judicial review can only be abrogated by clarity of intent and of language'.[8] It was submitted that when the factors outlined by Morrison JA are examined in the context of Saint Christopher and Nevis' Public Authorities Protection Act, this yields the same result as had been obtained in Froylan, that is, that PAPA is inapplicable to judicial review proceedings.

[8] The appellant submitted that PAPA applies to 'any action, prosecution, or other proceeding' that is 'commenced against any person…'[9] and judicial review proceedings are not commenced against any person, but rather, it is the decision itself that is challenged, not the decision maker. Whereas the PAPA would apply within the sphere of private law actions, judicial review proceedings are public law proceedings and so do not apply to this legislation. The appellant pointed out that even the learned judge made the observation that this matter was one of 'Public Law and public interest'[10]. Other authorities which the appellant relied on in support of his argument included R v Port of London Authority, Ex parte Kynoch Ltd[11] and AG v Claude Jardim.[12] The appellant further submitted that the learned judge erred in applying the case of Quorum in arriving at the conclusion that PAPA was applicable, and that in that case, the issue which is the subject of this appeal was not live for determination by either the lower or the appellate court. The appellant submitted that section 2(1) of PAPA contains no clear intent or language to allow for a statutory time bar to judicial review proceedings.

[9] The respondents, on the other hand, urged this Court to find the Froylan decision not highly persuasive on the basis that it turned on the language of the Belize Public Authorities Protection Act ("the Belize PAPA"), which Act has features which distinguish it from PAPA. The respondent submitted that the wording of the Belize PAPA which Morrison JA examined, analysed and upon which he based

[8] At para. 71.
[9] Section 2(1) of PAPA.
[10] See para. 68 of the judgment of the learned judge.
[11] [1919] 1 KB 176.
[12] Guyana Court of Appeal, Civil Appeal No 134 of 1998.

the conclusion which he arrived at – that the Act was inapplicable to judicial review proceedings – does not exist in PAPA. The respondents bolstered their argument by stating that section 2(1)(c) of PAPA contemplates that proceedings can be commenced for relief other than damages and argued that this Court ought to reject the appellant's argument that PAPA relates to actions brought against public officers where there is a claim for damages or similar private law relief.

[10] The respondents further submitted that, having accepted that the scope of the language of section 2(1)(a) of PAPA is wider than that contained in the Belize PAPA, the next consideration ought to be whether an application for leave to apply for judicial review is a "proceeding" within the meaning of section 2(1) PAPA. The respondents relied on the definitions contained in the Interpretation Act[13] as well as the court's decision (first instance and appellate) in Quorum for their contention that the appellant's judicial review claim is caught by section 2(1) of PAPA.

Discussion

[11] On the issue of the applicability of PAPA to judicial review proceedings, at the hearing of the appeal, this Court was of the view that while on its face, the form of language used in Part 56 of the CPR may appear to suggest that PAPA would apply to judicial review claims, since both PAPA and judicial review claims, generally speaking, have to do with litigation commenced by a party who is aggrieved by some act of a public body or authority, it is necessary to look a bit deeper than this in order to make a determination on whether PAPA in fact applies to such claims. The respondents made the point (as did the learned trial judge) that the language of PAPA differed in material respects to that of the Belize PAPA, which was the legislation being examined in what the Court thought was the appellant's more persuasive authorities on the point, Froylan. In that case, the Belize Court of Appeal examined the applicability of section 3(1) of the Belize PAPA, which required service of notice of intended proceedings on a public authority at least one month prior to the commencement of proceedings, to judicial

[13] Cap. 1.02, Revised Laws of Saint Christopher and Nevis 2009.

review proceedings. While (unlike the present case) in Froylan what was being dealt with was whether service of notice was required, this led to a discussion of the general applicability of the Belize PAPA, and by extension, the applicability of the specific section 3(1) being examined, to judicial review proceedings. The Court therefore, did not accept the respondent's submission that what was being determined in that case was sufficiently different to what is being determined in the present appeal for Froylan to be regarded as a very persuasive authority in support of the appellant's submissions.

[12] Furthermore, the respondents did not address the other factors discussed in Froylan which support the view that PAPA does not apply to judicial review proceedings. These included the line of English Authorities in relation to the UK Public Authorities Protection Act, 1893 (in which section 1(a) is in pari materia to section 2(1)(a) of PAPA) which effectively state that, as was succinctly put by Morrison JA in Froylan, 'the right of access to the courts for the purposes of judicial review can only be abrogated by clarity of intent and of language'. Indeed, **Halsbury's Laws**[14] sets out the class of actions to which the UK Public Authorities Protection Act, 1893 applies. It states:

> "It [the Act of 1893] applies only to actions in respect of a tort or wrong, whether actions for damages only, or actions for injunctions or declarations or *quia timet* actions. It does not apply to actions for breaches of contract or for the price of goods or of work and labour, although bargained for in order to carry out a statutory duty, nor to actions *in rem*, to proceedings by way of *certiorari*, *mandamus*, *quo warranto*, or prohibition, to an action for the recovery of land, to an action to set aside a compromise, to an action in prize against the Procurator-General, to an action for the recovery of compensation for riot damage, nor to a claim for workmen's compensation." (My emphasis).

Thus, the respondents' submission that because section 2(1)(c) of PAPA contemplates that proceedings can be commenced for relief other than damages it cannot be said that PAPA relates to actions brought against public officers only where there is a claim for damages or similar private law relief, is wholly

[14] Viscount Hailsham, Halsbury's Laws of England (2nd edn., Butterworth & Co. 1931) para. 40.

misconceived. While it is true that proceedings for relief other than damages may be commenced pursuant to PAPA, it does not follow that such 'other relief' extends to public law actions like judicial review proceedings. The passage from Halsbury's Laws cited above makes it clear that while the Act can apply to an action in which damages are not being sought, such as actions for injunctions or declarations or *quia timet* actions, it does not apply to proceedings by way of certiorari, mandamus or prohibition, as well as certain other actions.

[13] As mentioned previously, the respondents relied heavily on the case of Quorum as authority for the proposition that PAPA would apply to judicial review proceedings. However, in this Court's view, Quorum simply "recorded" that it had been conceded between the parties, without analysis, that the BVI Public Authorities Protection Act (the relevant section of which mirrors the provision in PAPA and which in turn mirrors the UK Public Authorities Protection Act, 1893 provision) applied to judicial review proceedings.[15] The matter proceeded on the basis that PAPA applied, and then what was ultimately determined was that an application for leave to apply for judicial review was a 'proceeding' for the purpose of PAPA. Barrow JA examined whether the fact that the application for leave was a condition precedent to the filing of a claim and not the claim itself, affected whether it could be termed a "proceeding" for the purposes of PAPA. Therefore, this Court holds the view that Quorum did not decide and nor is it authority for the proposition that PAPA applies to judicial review proceedings as this broader question was not in issue for determination. It simply decided, on the assumption that PAPA applied, that an application for leave was a "proceeding" for the purpose of PAPA.

[14] Even though the language in the Belize Act is cast somewhat differently and what was being considered was the requirement to serve notice of intended proceedings on a public authority, that court came to the view that the provision

[15] Noted by Barrow JA (when he was dealing with the issue of costs) at para. 13 of the judgment of the Court of Appeal.

was not applicable to judicial review proceedings but rather was a provision governing private law claims against a public authority. Closer to home, in the case of Fire Service Association v Public Service Commission et al,[16] Baptiste JA (with whom the other members of the Court agreed) came to a similar view. In that case the question was whether a notice under article 28 of the Code of Civil Procedure of Saint Lucia[17] had to be given for bringing proceedings for judicial review. The Court answered this question in the negative, distinguishing the case of Quorum, as not being an authority for the proposition that article 28 does apply to judicial review proceedings. Article 28 is akin to section 3 of the Belize PAPA in Froylan.

[15] What these decisions demonstrate, however different the language of PAPA may be from that of the Belize PAPA or Article 28 of the Civil Code, is that when examined contextually and sought to be engaged practically, it becomes apparent that judicial review proceedings are not caught within their ambit and were not intended to be so caught absent clear language to this effect. Indeed the words of Denning LJ in the case of R v Medical Appeals Tribunal, Ex parte Gilmore[18] cited by Morrison JA in Froylan are directly on point in this regard, 'the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words'.[19] Judicial review proceedings have long been recognised by the authorities as being public law proceedings and come in the category of prerogative writs as distinct from private law actions between individuals and public authorities for some tort committed by the public authority or government body in question. In our opinion, it would be unusual for the Crown to limit its ability to regulate its own bodies and public authorities. It also explains the rationale behind the treatment of delay as a discretionary and not an absolute bar to the bringing of judicial review proceedings so as not to unduly fetter this ability. After all, judicial review claims are really in the nature of Crown proceedings

[16] SLUHCVAP2010/0013 (delivered 16th December 2013, unreported).
[17] Cap. 243, Revised Laws of Saint Lucia 1957.
[18] [1957] 1 QB 574.
[19] At p. 583.

notwithstanding that they are allowed to be brought by a citizen with sufficient interest in the matter.

[16] The Court of Appeal of England in the case of The King v Port of London Authority,[20] was inclined to the view that the six months' limitation to actions, prosecutions, and proceedings prescribed by section 1 of the UK Public Authorities Protection Act, 1893, does not apply to the prerogative writ of mandamus. As was mentioned above, section 1 of the UK Public Authorities Protection Act, 1893 is analogous to section 2 of PAPA of Saint Christopher and Nevis. Similarly, it is on all fours with section 2(a) of the PAPA of the Territory of the Virgin Island's which was under consideration in Quorum.

[17] In The King v Port of London Authority, the applicants, owners of land adjoining the Thames, had applied for permission to construct a deep water wharf and other extensive works. The Port of London Authority were by section 2, subsection 1 of the Port of London Act, 1908, charged with the duty of considering the state of the river and the accommodation afforded in the Port of London, and of taking such steps as they may consider necessary for the improvement thereof; and for these purposes they were enabled to construct, equip, maintain, or manage any docks, quays, wharves, and jetties. The Port Authority refused the owners' application on the ground that the accommodation applied for was of the character of that which Parliament had charged the authority with the duty of providing. The applicants applied for, and later obtained, a rule nisi for a mandamus commanding the Authority to consider and exercise their discretion according to law. Bankes LJ had this to say at page 186:

> "As to the effect of the Public Authorities Protection Act, 1893, I express no confident opinion without further considering the dicta cited, but my present impression is that the language of that Act does not extend to proceedings of this class. The essence of the prerogative writ of mandamus is a command to a tribunal to do something which it has omitted or refused to do, and an application for the writ is not an action, prosecution, or other proceeding for any act done in pursuance or

[20] [1919] 1 KB 176.

> execution or intended execution, nor, as I think, for any neglect or default in the execution, of any Act of Parliament or public duty or authority. But apart from that, the Act seems to contemplate something which results, if successful, in the payment of damages or in the enforcing of some penalty, and the words "action, prosecution, or other proceeding" were not intended to include a prerogative writ calling upon a public authority to perform a public duty."

[18] Scrutton LJ in voicing his agreement stated at page 188, that:

> "As to the Public Authorities Protection Act, 1893, the writ of mandamus, like that of certiorari and prohibition, is a high prerogative writ, and a very valuable right in the Crown for keeping subordinate tribunals within their jurisdiction. Clear words are necessary to impair such a right, and the words of this Act, "action, prosecution, or other proceeding against any person," are no such clear words as to have that effect. There is less inconvenience in coming to this decision because the Court has always a discretion to refuse the writ of mandamus after an undue lapse of time."

[19] This theme was echoed in the case of Whitfield v Attorney-General,[21] where it was held that the Public Authorities Protection Act of Bahamas had no relevance to proceedings in which an applicant is seeking to enforce rights enshrined in the Constitution. Similar language is to be found in Durity v Attorney General of Trinidad and Tobago[22] in which the Privy Council held that the Public Authorities Protection Act of Trinidad and Tobago did not apply to constitutional proceedings.

[21] (1989) 44 WIR 1.
[22] [2002] UKPC 20.

Conclusion

[20] For the reasons set out above, the Court concluded that judicial review proceedings are not caught by the provisions of PAPA and the appeal was accordingly allowed. The application for leave to apply for judicial review was remitted to the court below for consideration on its merits.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Humphrey Stollmeyer
Justice of Appeal [Ag]

CONCURRENCE CORRECTED

By the Court

Chief Registrar