IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2019

CLAIM NO. AXAHCV 2019/0004

BETWEEN:

SOF 82 ANGUILLA HOLDINGS LLC

Applicant

and

THE ATTORNEY GENERAL OF ANGUILLA

Respondent

Appearances:

Ms. Tara Carter instructed by Carter & Associates for the Applicant
The Honourable Attorney General, Mr. Dwight Horsford for the Respondent

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2019: February 25;
March 25.
Issued 27th March 2019.

Application for leave to apply for judicial review – Alternative remedy – CPR 56.3 (3) (e) – Duty to give reasons – Unreasonableness – Irrationality – Test to be applied when considering the grant of leave to apply for judicial review – Whether Attorney General properly joined – Sections 3 and 13 of the Crown Proceedings Act – Refusal of planning permission – Appeal to the Executive Council – Judicial review of decision of Executive Council refusing appeal

DECISION

Chronology

[1] Innocent, J. (Ag.): This is an application for leave to apply for judicial review. The applicant had previously made a without notice application and the court directed that the application for leave be heard in open court. In the course of the proceedings the court heard the oral submissions of both parties. The court was also privy to the written submissions filed by both parties.

[2] The applicant in these proceedings is a limited liability company registered in Anguilla and the owner of the property known as Four Seasons Resorts & Residences located at Barnes Bay, Anguilla.

[3] The applicant has brought the present proceedings with the Honourable Attorney General of Anguilla named as the respondent which they say has been joined as a party pursuant to the provisions of section 13(2) of the Crown Proceedings Act.

[4] The applicant had applied to the Land Development Control Committee (the 'LDCC') for permission to construct a hotel storage facility, temporary staff housing and a three-bedroom general manager's unit. This application was submitted on June 18th 2018.

[5] The application was considered by the LDCC at its meeting held on June 19th, 2018. A deferral notice dated June 27th, 2018 was sent to the Applicant's agent by electronic mail indicating that the application was deferred pending the LDCC obtaining feedback from other government agencies and for the applicant to rectify certain deficiencies in the application submitted.

[6] The applicant complied with the deferral notice and the forms and plans were rectified and resubmitted to the LDCC.

[7] On August 17th, 2018 the applicant through its agent received notification of the refusal of the grant of planning permission for the proposed development. This refusal was dated July 31st, 2018.

[8] According to the applicant the LDCC's grounds for the refusal as set out in the letter dated July 31st, 2018 were that "the development as proposed is contrary to the executed MOU between the Government of Anguilla and SOF-VII Anguilla Holdings LLC and the Aliens Land Holding License which stipulates that the project is a luxury real estate product. Based on this agreement the development therefore should be of a tourism nature only."

[9] Consequent on this refusal the applicant filed an appeal to the Executive Council ('ExCo') on September 5th, 2018. The grounds set out in the appeal to ExCo were as follows: -

(a) The fact that the LDCC is a creature of statute and it could only act in accordance with its remit under the law.
(b) For that reason, they were only to consider the applications before them.
(c) The application form makes no provision for submissions in relation to the MOU or aliens land holding license ('ALHL').
(d) The applicant had no opportunity to give a response to their findings with respect to the MOU and ALHL.
(e) The MOU relied upon was with another entity that was not the applicant to construct.
(f) In any event the MOU required mutual cooperation and there was evidently a housing shortage for management at the project and a storage requirement for efficient operations.

[10] Not having received any communication from ExCo regarding their decision on the appeal the Applicant's Solicitors wrote to the Minister by letter dated September 25th, 2018 seeking a decision of ExCo. There was no reply to this correspondence.

[11] However, on September 24th, 2018 ExCo made a decision on the appeal lodged by the applicant. The applicant alleges that the decision of ExCo was never communicated directly to the applicant. ExCo's minute the applicant say was discovered online by their solicitor. It was only then that the applicant discovered that the appeal was denied by ExCo.

[12] The applicants complain that ExCo denied the appeal without giving reasons. The Court was referred to the contents of ExCo's minute EX MIN 18/554. The contents of the Minute will be examined later on in detail.

[13] By letter dated November 8th 2018 to the Minister of Lands and copied to the Honourable Attorney General the applicant sought confirmation of the decision of ExCo and the reasons for its decision. There was no response to this correspondence.

[14] On or about November 12th, 2018 the applicant's solicitor was instructed by the Office of the Attorney General to resubmit the application for planning approval to the LDCC. The applicant resubmitted the application for approval of the storage facility and housing.

[15] The LDCC considered the resubmitted application on or about the end of November 2018. The applicant alleges that the resubmitted application was deferred by the LDCC so that they could once again obtain feedback from other government agencies. The applicant says that they are not in receipt of any deferral notice from the LDCC.

[16] On December 10th, 2018 the applicant's solicitor wrote to the Honourable Attorney General seeking reasons for the LDCC's decision and informing that if no reasons were forthcoming that it was their intention to seek Judicial Review. Again, the applicant says that this letter remains unanswered.

[17] The application for planning approval was again considered by the LDCC on January 9th, 2019 but however there has been no decision forthcoming from the LDCC regarding the outcome of its deliberations.

[18] The facts recited above appear not to be disputed by the respondent. The respondent essentially challenges the application for leave to apply for judicial review on procedural and technical legal grounds. I will consider these later on in this decision.

[20] On January 22nd, 2019 the applicant filed this application for leave to apply for Judicial Review. The applicant seeks to challenge the decision of the LDCC on the grounds hereinafter appearing.

Ultra vires, Irrationality & Illegality

[21] First they say that the LDCC being a creature of statute their actions ought to be confined to the enabling legislation which is the Land Development Control Act (the 'Act') and the Land Development Control Regulations (the 'Regulations'). They rely on section 2 (1) of the Act which they say makes it clear that the LDCC is established for the purpose of considering applications made under the Act for permission to carry on development. According to the applicant section 4 of the Act stipulates that applications for development are to be made in accordance with the Form set out in the Schedule to the Act. In addition, they argue that section 5 (2) of the Act empowers the LDCC to refuse an application after considering the application and the plans. Therefore, they argue that the jurisdiction of the LDCC is confined to the consideration of the application form and the plans annexed thereto. It is the applicant's contention that the decision of the LDCC must be made based on the documentation before them and ought not to be based on extraneous matters. The applicant contends that the Act contains no requirement for the LDCC to consider either the ALHL or the MOU.

[22] The applicant submits that based on the foregoing the LDCC's decision to refuse the application was ultra vires the Act and therefore illegal.

Legitimate expectation, unfairness and bad faith

[23] Second, the applicant contends that the LDCC acted unfairly in delaying their consideration of the application for planning permission to consult with other government agencies.

[24] Third, they say that the LDCC acted unfairly and in bad faith having deferred the resubmitted application for planning permission for consideration by other government agencies.

[25] In addition, the applicant contends that the LDCC's reliance on the ALHL and the MOU was unfair since the applicant was not required, invited or permitted to provide any information, make submissions and representations to the LDCC in relation to these matters.

[26] In relation to the decision of ExCo the applicants say that ExCo acted irrationally and illegally in refusing the appeal against the LDCC's decision.

Failure to give reasons

[27] The applicant contends that ExCo failed to give reasons for its refusal of the appeal and as an administrative body was bound to give reasons for its decision. This failure to give reasons on the part of ExCo was despite numerous request made by the applicant for ExCo to provide them with reasons for refusing the appeal. According to the applicant ExCo's refusal to give reasons in the circumstances amounted to unfairness and the exercise of bad faith on their part.

Legitimate expectation

[28] The applicant also relies on the doctrine of legitimate expectation as a ground for judicial review. According to the applicant the direction from the office of the Attorney General to resubmit the application for planning approval created a legitimate expectation in favour of the applicant that the application would be considered fairly and granted.

Procedural matters

[29] Before considering the merit of the application for leave to apply for judicial review it is necessary to first consider certain procedural and legal points, in particular

those raised by the respondent. If the procedural points raised by the respondent are decided in its favour then that would effectively dispose of the matter.

Whether the Attorney General is a necessary and proper party to the proceedings

[30] The respondent raised the point that the Attorney General is not the necessary and proper party to the proceedings. According to the respondent the application for leave having been brought pursuant to Part 56 of the Civil Procedure Rules (the 'CPR') makes the proceedings prerogative or 'Crown-side' proceedings. Such proceedings they say are not civil proceedings under the Crown Proceedings Act. Therefore, the proper respondent is the relevant authority who made the decision sought to be challenged. They say that the Attorney General made no decision concerned in the matter and therefore was improperly joined.

[31] In support of this contention the Attorney General relied on the decision in Quorum Island (BVI) Limited v Virgin Islands Environmental Council & Minister for Planning (BVI) HCAP2009/0021 (Decided 2011: August 12) ECCA where the court held, inter alia, that:

"Prerogative of "Crown side" proceedings are not civil proceedings under the laws of the Virgin Islands. There is no provision in the laws of the Virgin Islands that requires the Attorney General to be a necessary or proper defendant in prerogative type proceedings. However, the Attorney General may be a necessary and proper party in civil proceedings against the Crown, by virtue of section 13 of the Crown Proceedings Act. The proper defendant in prerogative proceedings is the person or authority whose decision is challenged; in the present case, the Minister…"

[32] Counsel for the Applicant, Miss Carter sought to rebut this argument by contending that Quorum Island was distinguishable on the basis that it involved the provisions of a Crown Proceedings Act dissimilar to that of Anguilla. Counsel

for the applicant relied on the decision in Homer Richardson v The Attorney General of Anguilla[1] for the proposition that the Attorney General is properly joined because the Attorney General was the authority that gave advice to ExCo on the appeal considered by ExCo. I find no merit in this argument. The decision cannot be read in the manner contemplated by the applicant. As I understand it, the case of Homer Richardson reinforces the point that the decisions of the Governor (Governor in Council) and the Executive Council, offices created by virtue of sections 22 and 23 of the Anguilla Constitution, are susceptible to judicial review and or can be subject to claims for administrative remedies. To that extent ExCo can be named a party to proceedings. Sections 3 (2) and 3 (3) of the Crown Proceedings Act R.S.A. c. C160 (the Crown Proceedings Act) provide:

3 (2) The reference to a claim against the Crown in subsection (1) shall be construed as meaning a claim against the Government of Anguilla which, if this Act had not been passed, might have been enforced, subject to the consent of the Governor, in a suit instituted by the claimant as plaintiff against the Attorney General as defendant in accordance with the provisions of the Crown Suits Act, F.A. 10/1907, or might have been enforced by a proceeding provided by any other statutory provision.

3 (3) Any claim against the Crown made pursuant to any statutory provision enacted after 30th June, 1956, unless otherwise directed by any law, be likewise enforced as of right, and without the *fiat* of the Governor, by proceedings taken against the Crown in accordance with the provisions of this Act.

These provisions of the Crown Proceedings Act do not change the landscape as I see it. Neither do the provisions of section 13 of the Crown Proceedings Act. In the present case the applicant's case refer specifically to administrative action for which the CPR Part 56 makes specific provision. The applicant appears to argue

[1] AXAHCV2005/0031 ECSC (Anguilla) April 27, 2006

syllogistically that since the relief sought in against a decision of ExCo the claim can properly be brought as against the "Government of Anguilla" in which case the proper party is the Attorney General. I do not subscribe to this reasoning. There appears to me no difficulty in joining ExCo as a party they being a body duly created by section 23 of the Anguilla Constitution.

[33] I agree with the Attorney General's submission that the Attorney General is improperly joined as a party to these proceedings. However, I do not find that this will inevitably dispose of the present proceedings. I would adopt the same approach and reasoning as Rawlins CJ at paragraphs [27] to [29] in Quorum.

Whether application for leave to file judicial review is premature

[34] This issue arises within the context of the resubmitted application to the LDCC by the applicant. At the first hearing of the application for leave to file judicial review the Court specifically raised this issue with Counsel for the applicant. The issue was put to Counsel in this way, whether the applicant was capable of applying for leave for judicial review against the previous decisions of the LDCC and ExCo while determination of the resubmitted application for planning approval was pending, the same having been deferred by the LDCC. The Court pointed out that there may very well be some wisdom in either awaiting the decision of the LDCC with respect to the resubmitted application for approval or instead challenge the LDCC's decision to defer the application as the case may be. I also posed the question of whether having acted on the directive of the Attorney General to resubmit the application to the LDCC amounted to an acceptance of the decisions of the LDCC and ExCo which thereby prohibited the applicant from challenging them. To put it another way, whether in any event the applicant could mount a challenge by way of judicial review against the decision of the LDCC to defer their decision on the resubmitted application or to put it another way, a decision that has not yet been given.

[35] According to the Respondent, the applicant by resubmitting the application to the LDCC following the refusal to grant permission and the dismissal of the appeal was engaging the process under the Act de novo. They argue that the LDCC has not rendered a decision on the resubmitted application and its deferral of consideration cannot be faulted in light of the present proceedings which obviously would affect their decision on the matter. Furthermore, they say that the resubmission of the application for approval "has overtaken the controversy concerned in the first application of which complaint is made in the present proceedings". Finally, the Attorney General contends that the "decision of contemporary relevance would be that of the LDCC on the resubmitted application for planning permission".

[36] In response to this argument Counsel Miss Carter directed the Court to the provisions of Regulation 8 of the Land Development (Control) Regulations R.R.A. L15-2 (the 'Regulations'). According to her the effect of this provision is that the failure by the LDCC to give a decision within the time stipulated by the provision in the Act amounted to a refusal of the application.

Does the court have jurisdiction

[37] The issues raised by the Attorney General leads me to conclude that a jurisdictional issue arises upon the present application for leave. Section 7 of the Act provides:

"Upon the refusal of the Committee to grant permission for the development of any land, the applicant may, within 30 days after such refusal has been transmitted to him, appeal against such refusal to the Executive Council who may confirm or reverse the decision of the Committee."

It appears to me that the Act has a built in appellate procedure that an applicant for planning approval must follow if aggrieved by a decision of the LDCC. Therefore, prior to mounting any judicial challenge to the decision of the LDCC an

applicant for planning approval must first exhaust the appellate procedure under the Act. It follows therefore, that if an applicant is dissatisfied with the decision of ExCo, then, and only then can the applicant have recourse to the High Court. I am fortified in my view by the decision in Wilkinson v Barky Corporation [1948] 1 KB 721[2] where Asquith LJ said in the course of his judgment in the Court of Appeal:

"It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to the remedy or that tribunal, and not to others. As the House of Lords ruled in *Pasmore v Oswaldtwistle U.D.C.*2 (Per Lord Halsbury): `The principle that where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law'…The real answer to the Plaintiff's contention under this head can be put in several ways: No act of the parties can create in the courts a jurisdiction which parliament has said will vest, not in the courts, but exclusively in some other body. Nor again can a party submit to, so as to make effective, a jurisdiction which does not exist: which is perhaps another way of saying the same thing."

[38] In Attorney General and Anor v Vance Chitolie Gordon JA in delivering the judgment of the Court of Appeal said: -

"[10] It is clear to me that in this case, the importer has been given a statutory right to challenge the determination by the second Appellant of a value of imported goods, but that such challenge can only be mounted within the constraints of the Customs Act. This the Respondent has failed to do and I am clear that neither this Court, not the High Court has the original jurisdiction to hear such challenge by the

[2] Cited with approval in The Attorney General of Saint Lucia & The Comptroller of Customs v Vance Chitolie Civil Appeal No. 14 of 2003 (delivered: January 10, 2005) per Gordon JA at paragraph [9]

Respondent. Clearly, the High Court and the Court of Appeal have appellate jurisdiction as given by section 139 of the Customs Act, but only that."

[39] Therefore, applying this reasoning it seems to me difficult to comprehend how the applicant in the present proceedings can successfully challenge the initial refusal of the LDCC by way of judicial review. In the circumstances, I am of the considered view that the only decision capable of being challenged by the applicant is that of ExCo.

[40] Counsel for the applicant contended during the course of the proceedings for leave that the failure of the LDCC to render a decision on the resubmitted application, and not within the time stipulated by Regulation 8 of the Regulations and there being no extension of time amounts to a refusal of the resubmitted application by the LDCC. Regulation 8 provides:

"The Committee shall determine an application for planning permission within a period of 2 months from the date of receipt of a duly completed application except when there is an agreement in writing between the Committee and the applicant to extend such period and, where no determination is made within a period of 2 months or within such extended period, as the case may be, planning permission shall be deemed to have been refused."

[41] Counsel for the Applicant, Miss Carter argued that the implied refusal by the LDCC as per the Regulations, required the LDCC to give reasons for the refusal of planning permission on the resubmitted application. Implicit in this argument is the suggestion that this failure to provide reasons for the implied refusal of the resubmitted application is also amenable to judicial review.

[42] I disagree for the reasons already stated. In short, the Act provides an appellate procedure. Therefore, the applicant's cannot obtain leave to file judicial review simply because the appellate procedure under the Act amounts to an alternative

remedy. To hold otherwise would run contrary to CPR 56.3 (3) (e). The applicant has failed to state in their application whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued. The ordinary rule as I understand it 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. This is the principle encapsulated in CPR 56.3 (3).

[43] In the circumstances, I hold that the applicant's challenge to the implied decision on the resubmitted application by way of judicial review also fails. The applicant has not explored and has not proffered any reason for not exploring the appellate procedure provided for by the Act. Therefore, the applicant has failed to satisfy the requirements of CPR 56.3 (e).

[44] Therefore, it seems to me that the only decision left to be considered is that of ExCo. In considering whether the decision of ExCo is amenable to judicial review I have pondered the submissions made by the Honourable Attorney General that the resubmitted application has "overtaken the controversy" in the previous application which is sought to be challenged in the present proceedings. By this I understand the Attorney General to be saying that the present application for leave is frivolous in light of the applicant's acquiescence in the triggering of the process anew.

[45] I do not agree with this submission. It cannot be right to assume that by merely resubmitting the application for planning approval that the applicant can be taken to have simply abandoned a preexisting right of action at its disposal. In the circumstances, I now turn to consider whether the applicant's application for leave to apply for judicial review against the decision of ExCo can meet the required threshold for the grant of leave.

[46] In view of the previous conclusions made with respect to the initial decision of the LDCC and the resubmitted application to the LDCC it will only be necessary at this stage to deal with the decision of ExCo. Therefore, it will be necessary to examine the decision sought to be impugned under each ground relied on by the applicant.

Whether there are arguable grounds for judicial review with a realistic prospect of success

[47] The second preliminary legal challenge mounted by the Attorney General was that the Applicant failed to satisfy the threshold requirement of there being in existence arguable grounds for judicial review with a realistic prospect of success. I have approached the issue by examining the decision of ExCo in light of each ground relied upon by the applicant in support of the application for leave.

[48] The applicant seeks leave to apply for judicial review of the decision of ExCo denying the applicant's appeal against the decision of the LDCC on the grounds that, first, ExCo failed to give reasons for its decision, second, that the decision was irrational and third, that it was made in bad faith. Having considered all the submissions of the parties I am of the considered and reasoned opinion that apart from the failure to give reasons none of the other grounds alleged by the applicant can pass muster in light of the legal principles related thereto. Therefore, this decision will only deal with the former ground advanced by the applicant.

Failure to Give Reasons

[49] The applicant says that ExCo only set out in the Executive Council Minute 18/554 of October 24, 2018 (the 'Minutes') its reasons for refusing the appeal in the following terms:

"Noting the comprehensive details contained in the paper on this matter agreed that the appeal against planning permission from SOF 82 Anguilla Holdings, LLC to construct storage units and twenty-four (24) apartment units at West End, Anguilla on Block 17910 B, Parcel 198 should not be allowed."

According to the applicant the decision contained in the Minute makes it unclear what 'paper' the Minute referred to and what 'paper' was actually considered by ExCo in arriving at its decision. Therefore, they say that the reasons given by ExCo are inadequate and fall far short of ExCo's duty to give reasons under the law. In short they say that ExCo failed to give reasons for refusing their appeal.

[50] The applicant also contends that the failure to give reasons in the manner alleged taken in conjunction with ExCo's failure and or refusal and delay in responding to the applicant's numerous request for reasons for the refusal from the Minister and the Honourable Attorney General and their delay in responding amounted to bad faith. In the premises, the applicant seeks a Writ of Mandamus directed at ExCo ordering them to overturn their decision.

[51] In response the Honourable Attorney General argued that the decision of ExCo to dismiss the Applicant's appeal was predicated on its view of the soundness of the LDCC's decision. The respondent also contends that the allegations made by the applicant seeks "to interrogate the wisdom and correctness of the decisions of the LDCC and ExCo.

[52] The Honourable Attorney General also contends that judicial review is not an appeal against governmental decisions on its merits. By this I understand the Honourable Attorney General to be correctly stating that a claim for judicial review is not a rehearing of the matters before the administrative body and the substitution by the court of its own decision on the merits of the matter for that of the administrative body. Clearly the object of judicial review is precisely that a "review" of the manner in which the administrative body arrived at its decision as opposed to a rehearing of the matter. Incidentally the Act does not provide a right of appeal to the High Court by way of rehearing as does other legislation[3]. This wisdom of government policy he says is not a matter for the courts and, in a

[3] See CPR Part 60

democratic society, must be a matter for the elected government alone. In support of this argument he cites the case of R v Secretary of State for Commonwealth & Foreign Affairs (Ex parte Hoareau & Bancoult [2019] EWHC (Admin) 221

[53] I agree entirely with the submission of the Honourable Attorney General on this point subject to the following qualifications. First, in the present case there is no discernable government policy concerning the subject matter upon which ExCo was called upon to deliberate. Second, if indeed there was such a government policy such policy considerations did not feature in any reasons for decision provided by ExCo to the Applicant. If such a policy was in existence ExCo ought to have adverted the Applicant's mind to it at some stage of the decision making process. In other words government policy must be implemented in a manner that is transparent and not likely to create uncertainty.

Duty to Give Reasons

[54] It is now a generally accepted as sound principle in the realm of public law that a failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful in two ways. First it may be said that such a failure is procedurally unfair. Second, a failure to give reasons may indicate that a decision is irrational. The rationale for this principle is the provision of an explanation of the basis of a decision that adversely affects others.

[55] The giving of reasons is widely regarded as one of the principles of good administration in that it encourages a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision making. If published, reasons can provide guidance to others on the body's future decisions, and so deter applications which would be unsuccessful. A reasoned decision is necessary to enable the person prejudicially affected by the decision to know whether he has a ground of challenge by way of judicial review.[4]

[4] De Smith's Judicial Review, 7th Edition, Sweet & Maxwell 7-090

[56] Reasons will also enable the reviewing court to scrutinize effectively the decision for relevant error, without necessarily usurping the function of the decision-maker by itself re-determining the questions of fact and discretion which Parliament entrusted to the decision maker. Without reasons it can be extremely difficult to detect errors.[5]

[57] In simple terms a person who has a right to be heard has a right to know how an administrative body resolved issues in dispute. It seems to me that unless an administrative body indicates the considerations that it has taken into account and the relative weight assigned to them there can be no assurance that the administrative body has discharged its obligation to correctly decide issues and base its decision on the material presented at the hearing, rather than extraneous considerations.[6]

[58] An administrative body is under a duty to provide reasons for its decision sufficient to show to what it has directed its mind, and, a failure to do so is a breach of procedural fairness. The concept of fairness requires that a person aggrieved by a decision be provided with reasons so that they may know whether they can maintain an action for judicial review on an independent ground such as unreasonableness or irrationality.[7]

[59] The standard to which reasons are required will depend on the circumstances of each case. However, the reasons given must be intelligible and must adequately meet the substance of the arguments advanced on the case presented. It is also preferable that if the reasons demonstrate that a systematic analysis has been undertaken by the decision-maker, the reasons should be sufficiently detailed to make it clear to the aggrieved party why the decision maker decided as it did, and

[5] Infra 7-091
[6] Infra 7-092
[7] Infra 7-099

to avoid the impression that the decision was based upon extraneous considerations, rather than the matters raised on the hearing.[8]

[60] The reasons given for a decision must also be such that it enables the party aggrieved by it to know what, if any, impact the considerations taken into account by ExCo in upholding the refusal of planning permission on appeal may have in the determination of future planning applications.

[61] Failure by an administrative body to adhere to these principles may result in the striking down of their decisions where a claimant can show substantial prejudice resulting from the failure on the part of the decision-maker to show how issues before it were resolved or decided, or by demonstrating some lack of reasoning which raises substantial doubts over the decision-making process or by indicating that the tribunal had never properly considered the matter or that the proper thought processes had not been gone through.

[62] Where a claimant seeks to impugn a decision of an administrative body other than by claiming non-compliance with a duty to give reasons for example by challenging the rationality of the decision, a failure by the authority to offer any answer to the allegations may justify an inference or presumption that the decision was absurd or perverse.[9]

[63] In light, of the evidence presented to the court by way of Affidavit of the numerous unanswered request for reasons for ExCo's decision refusing the appeal made by the applicant to the relevant Minister and the Attorney General I am inclined to accept that ExCo has failed to give any or any adequate reasons for its decision. The outcome that follows from this is entirely a matter to be explored on the hearing of the claim for judicial review.

[8] Infra 7-102
[9] Infra 7-103 – 7-109

[64] The adequacy of the 'reasons' if they can be so regarded contained in ExCo Minute must be examined in light of the material and documentation that was before ExCo when it deliberated on the applicant's appeal. Having examined the material that was before ExCo when they determined the applicant's appeal it seems to me that the reasons (if any) given by ExCo were vague and uncertain. In addition, it appears that in arriving at its decision ExCo seemed to have accorded a considerable amount of weight to the MOU/MOA and the ALHL and accorded no weight to the matters put forward by the applicant in support of their appeal in arriving at its decision. The foregoing inferences are fortified by the fact that the applicant has made numerous request for reasons for ExCo's decision and none have been forthcoming.

Reasonableness and Irrationality

[65] I have considered the applicant's written and oral submissions in this regard. Distilled to its essence the applicant's contention is that in arriving at the decision which it did ExCo appeared to have adopted the findings of the LDCC without affording any or any adequate weight to the other matters before them that were submitted by the Applicant. In addition, the applicant argued that ExCo fell into error by taking into account irrelevant information, particularly the MOU/MOA and the ALHL. Therefore, they say that the decision of ExCo in refusing the appeal was irrational or unreasonable.

[66] In considering whether the decision of ExCo could be seen to be unreasonable or irrational I have considered the provisions of the MOU/MOA and the ALHL. Having looked at the terms of the MOU/MOA and the ALHL it appears that the matters contained therein in relation to the preservation of land use were relevant considerations that ExCo was entitled to consider.

[67] In any event it cannot be said that ExCo in their deliberations only relied on the MOU/MOA and the ALHL in arriving at their decision. In arriving at this conclusion I am fortified by the fact that ExCo also had before them the documentation

submitted by the Applicant in support of their appeal against the decision of the LDCC.

[68] However, it seems to me that the Applicant is alleging that ExCo having had the benefit of the documentation submitted to them by the applicant could not have arrived at the decision which they did, a decision the applicant says was arrived at by ExCo according disproportionate weight to the MOU/MOA and ALHL and the decision of the LDCC in comparison to the other considerations placed before them by the applicant. In fact I understand the applicant to also be saying that no consideration was given to the submissions made to ExCo by the applicant. They say that had ExCo applied its mind to these considerations it would have arrived at an entirely different decision.

[69] In my view ExCo was entitled to find that they were satisfied with the decision of the LDCC based on the LDCC's reliance on the MOU/MOA and the ALHL. This was an exercise of the power that was conferred on them by virtue of the statutory appellate process. Therefore, the court cannot interfere by usurping the power that ExCo had by substituting its findings or conclusions for that of ExCo.

[70] However, what the court is entitled to do is review the manner in which ExCo arrived at its decision. The pith and substance of the applicant's Affidavits suggest that ExCo failed to take into account the matters contained in the applicant's written representations in support of their appeal. Therefore, they say ExCo's failure to give reasons exemplifies a defect in the decision making process. The applicant's contend that the decision of ExCo as contained in the Minute did not provide any insight into how ExCo arrived at its decision; and, in addition, any reasons (which the Applicant's say were not provided) contained in the decision were vague, incomprehensible and uncertain. In addition, they say that it appears from the Minute of ExCo's decision that ExCo accorded too much or inappropriate weight to the MOU/MOA and the ALHL while it appeared therefrom that the applicant's representations did not feature in ExCo's deliberations.

[71] In a nutshell the applicant alleges that in arriving at its decision ExCo failed to balance all relevant considerations. Alternatively, that having regard to the decision of ExCo as contained in the Minute it cannot be said with any degree of certainty or rather one is left in doubt whether ExCo failed to balance all relevant considerations in its deliberations.

[72] In the present case we are not privy to the deliberations of ExCo; that evidence is certainly not before the court. However, as I understand it what weight to be given to a particular relevant consideration is a matter for the decision-maker. The court will only intervene where the decision maker has not examined the competing relevant considerations in a balanced way which results in disproportionality.

[73] The application of this principle is highlighted in **De Smith's Judicial Review at** paragraph 11-034 in relation to town and country planning cases where it states:

"In the context of town and country planning ------, a local authority, or the Secretary of State on appeal, may, in considering whether to grant a permission for the change of use of a building, have regard not only to the proposed new use but also to the existing use of the building and weigh the one against the other. The courts are normally concerned to leave the balancing of these considerations to the planning authority. However, where the refusal of planning permission is based on the preference for the preservation of the building's existing use, the refusal may be struck down in the extreme case when there is in practice "no reasonable prospect" of that use being preserved. In such a case the courts are holding that the existing use is being awarded excessive weight in the balancing exercise involved. Although planning authorities are required, in deciding whether to grant or refuse planning permission, to have regard to government circulars, or to development plans, a slavish adherence to those (relevant and material) considerations may render a decision invalid. The courts have also interfered with

the balancing of material planning considerations by holding that excessive weight had been accorded to a planning permission that had long since expired …"

[74] It is on the above premise that I find that the applicant has met the desired threshold of their being an arguable case for judicial review of the decision of ExCo refusing the applicant's appeal.

Conclusions

[75] Having applied the above principles to the present case I am of the considered view that the applicant has met the threshold of an arguable case with a reasonable prospect of success required for the grant of leave to apply for judicial review.

[76] It is clear that in the present case that ExCo has either failed or refused outright to give any or any adequate reasons for its decision. This failure in my view has the effect of depriving the applicant of knowledge of the matters that ExCo took into account in arriving at its decision and prevents the applicant from formulating or mounting any challenge to the decision by way of judicial review. In addition, in light of this failure to give reasons the fact that the applicant was directed to resubmit the application for planning approval to the LDCC becomes even more curious considering that the applicant is now in no better position to address any deficiencies in its renewed application.

Order

[77] The Court's order is as follows: -

1. Leave is granted to the applicant to file a claim for judicial review to obtain a Writ of Certiorari for the purpose of it being quashed the decision of the Executive Council (the Government of Anguilla) contained in Executive Council Minute dated October 24th, 2018 (EX MIN 18/554) refusing the applicant's appeal against the decision of the Land Development Control Committee refusing the applicant's

application for planning approval to construct storage units and twenty-four (24) apartment units at West End, Anguilla on Block 17910 B, Parcel 198.

2. The grant of leave is conditional on the applicant filing a Fixed Date Claim for Judicial Review within fourteen (14) days of the date of this order.

3. The Claim Form and Affidavits in Support shall be served on the defendant not less than fourteen (14) days before the date fixed for the first hearing.

4. The applicant shall comply with the provisions of CPR 56.9 (3).

5. The Executive Council (Government of Anguilla) shall be substituted as the Defendant in these proceedings in place of the Honourable Attorney General.

6. The costs of and occasioned by this application shall be agreed or otherwise assessed by the registrar.

Shawn Innocent
High Court Judge (Ag.)

By the Court

Registrar