COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2019/CLE/gen/00273

BETWEEN:

IAN BRADLEY NIXON

Applicant

AND
THE DIRECTOR OF THE BAHAMAS CIVIL AVIATION AUTHORITY

First Respondent

AND
THE AIRPORT AUTHORITY

Second Respondent

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Mr. Damian Gomez QC, Mr. Robert Adams for the Applicant
	Mr. David Higgins, Fern Bowleg, Ryan Sands for the Respondents
Hearing Dates:	5 October 2020; 20 October 2020

RULING

Klein, J.

Judicial Review – Application for leave – Challenge to suspension of pilot's licence and airman's certificate by Civil Aviation Authority – Challenge to revocation of airport security pass/ID badge by Airport Authority – Amendment to Application – Applicant seeking leave out of time—Delay – Extension of Time – Good reasons – Impecuniosity—Prejudice to the rights of persons and/or detriment to good administration.

INTRODUCTION AND BACKGROUND

[1] The applicant is a commercial pilot who, by this claim, applies for leave to move for judicial review of two decisions by aviation authorities which, in effect, have removed his ability to fly. The first is a decision by the First Respondent, the Director of the Bahamas Civil Aviation Authority ("BCAA"), made on 1 February 2018, which rescinded an earlier decision (said to have been made in May 2013) to revoke his commercial pilot's licence ("CPL") and airman's medical certificate and substituted therefor a suspension of the licence pending the outcome of aircraft accident investigations involving the applicant ("the licence decision"). The second is a decision by the Second Respondent, the Airport Authority ("AA"), said to have been made on 13 March 2013 revoking and withdrawing his airport security permit/identification badge, which allowed him to access the 'airside' areas of the Lynden Pindling International Airport ("LPIA") ("the permit decision").

[2] In fact, the application for leave is just one of three applications by the applicant which are before me, in a matter which has a long and convoluted procedural history, and which are

tethered to events going back to 2013. The application for leave to commence judicial review ("the Application") was originally filed 7 March 2019, along with an incomplete affidavit. A purported "amended affidavit" was filed on 30 July 2019, an *ex parte* summons for leave was filed 20 August 2019, and a summons for leave to amend the Application and for an extension of time to apply for leave was filed 11 February 2020.

[3] The parties appeared before another judge on several occasions between late 2019 and early 2020, but for various reasons, including the incomplete state of the papers before the court, the matter was not heard. They initially came before me in February 2020, and I gave directions for the filing of additional documents, which included a draft of the proposed amendments to the Application which had been foreshadowed to the court, and further affidavits. The applicant on 12 March 2020 filed an identical summons to that filed on 11 February 2020, this time attaching the proposed amendments, and also filed an affidavit in support of that summons.

[4] The respondents vigorously resisted the applications. On 14 February 2020, they filed a summons seeking dismissal of the application for leave to amend, citing inordinate delay and lack of full and frank disclosure. Alternatively, they argued that if the amendments were allowed, leave should be refused in any event based on delay, availability of alternative remedies and lack of disclosure. Their application was supported by the affidavit of Tamika Davis filed 18 December 2019. Additional affidavits were filed on behalf of the respondents in the matter as follows: affidavit of Milo Butler III, general manager of the AA, filed 12 May 2020; affidavit of Captain Charles Beneby, Director General of the BCAA filed 17 March 2020; and affidavit of Andrew Bonaby, Security Manager of the BCAA, filed 17 March 2020. The material in these affidavits were also directed to the substantive issues, and therefore not all of their content is materially relevant for present purposes.

The application to amend

[5] The starting point is that the court clearly has a discretion pursuant to Ord. 53, r. 3(6) of the Rules of the Supreme Court 1978 ("R.S.C. 1978"), on hearing an application for leave, to allow an amendment to the application "*whether by specifying different or additional grounds of relief or otherwise*" on such terms as it thinks fit. This discretion is said to be without prejudice to the court's general powers to allow amendments under R.S.C. Ord. 20, r. 8.

[6] Mr. Gomez, relying on *Benjamin Copeland Simmons et. al. v. Town Planning Committee et. al.* [2019/PUB/jrv/00018], indicated that the principles applicable to an amendment under Ord. 53, r. 3(6) are basically the same as the established principles under Ord. 20, r. 8. Thus, the court will normally allow such amendments as are necessary to ensure that the real issues in dispute are adjudicated and which can be made without significant prejudice to the other side and/or compensated by costs. I agree that this is the general approach, but I would also advert to the observations of McCloskey J (P) of the Upper Tribunal (Immigration and Asylum Chamber), in *R (on the application of Spahiu and another) v. Secretary of State for the Home Department* [2016] UKUT 230 [para. 4],where he said that:

> "The exercise of the discretion to amend should also take into account the public law character of the proceedings. Thus, where relevant, one of the factors to be weighed may be the broader importance of any significant issue of law—for example, an important or recurring question of statutory construction—raised by the proposed amendment."

[7] In the circumstances, I granted leave for the amendments and awarded costs to the respondents. It is not necessary to say very much about the amendment application, as despite the formal objection in their papers, Mr. Higgins for the respondents did not seriously contest them. Notwithstanding the passage of time since the filing of the application for leave and the application for amendment, I did not find that there was any significant issue of delay, as the application was made at the leave stage. Neither could the respondents identify any specific prejudice said to be caused to them by the amendments. It is also important to record that the issues raised by this application appear to be recurring ones. This may be deduced from the applicant's claim that the respondents were "biased" against him, as other pilots with similar issues were treated differently. Indeed, I am personally aware that similar issues have been raised before the courts as a result of another matter which came before me, although that application was eventually withdrawn.

[8] In any event, the amendments, although extensive in nature, were mainly cosmetic and did not alter the substance of the applicant's claims. They mainly fleshed out the impugned decisions and grounds already pleaded and added factual background. Additionally, the Minister Responsible for Aviation was deleted as the First Respondent, and the Director of the Civil Aviation Authority and the Airport Authority were consequently renamed as the first and second respondents, respectively. This was mainly to reflect legislative changes beginning in 2012 which transferred to the Director of the Department of Civil Aviation ("DCA")—which became the Bahamas Civil Aviation Authority ("BCAA") in 2016, under a new Civil Aviation Act—many of the licensing functions which had hitherto been exercised by the Minister under the Civil Aviation Act of 1976 (Ch. 284).

[9] I also extended the time in which the applicant could make a claim for judicial review and granted leave in respect of the licence decision (in September of 2021), but I refused the extension of time and leave for judicial review in respect of the permit decision. As indicated, the amendment decision gives rise to no issues, but at the request of the parties I provide brief reasons for refusing the extension of time and leave in respect of the permit decision. The applicant, in particular, seems to be of the view that the decisions are linked and apparently ought to rise or fall together.

The facts

[10] The facts of this matter, so far as relevant to the leave issue, may be set out shortly. While there is no fundamental disagreement over the basic facts, the parties do differ on several of the details. The applicant is a commercial pilot, who was issued a United States Federal Aviation Administration ("FAA") pilot's licence in 2002. This was apparently converted to a Bahamian commercial pilot's licence ("CPL") in January of 2003 (CPL 02535), and he also received a Class-1 Medical rating. In May of 2007, he says he was convicted and sentenced in Florida of "conspiracy to supply an illegal substance" into the United States of America

and imprisoned in the US. His FAA licence was revoked for life in August of 2009 based on his conviction. He was eventually released in June of 2011, and thereafter returned to the Bahamas.

[11] He indicates that in June of 2011, he renewed his CPL with the DCA and in November 2012 was issued a permit to enter the restricted areas of the Lynden Pindling Airport ("security pass"). Immediately thereafter, he obtained employment with Pineapple Air as a commercial pilot.

[12] On 13 March 2013, he says that his employer received an email from Mr. Andrew Bonaby, then security director of the DCA, indicating that the applicant's permit had been revoked and demanded the return of the document. On 2 May 2013, he said he met with Mr. Bonaby and returned the permit and "lodged a letter of appeal", which it was indicated would be reviewed and he would be contacted. Apparently, he got no response to his letter. He later met with an official in the Ministry of Transport and Aviation on 29 May 2013 in respect of the matter, where he says he was told that the permit had been revoked for his conviction for the drugs offence in the United States and given a copy of the "regulation" on which it was based. According to his account, that regulation provided as follows: "*No person may be issued an aerodrome pass providing unescorted access to security restricted areas if they have been convicted of any felony offence or misdemeanor offence within the previous five years, or the equivalent offence in another state*." He states that he pointed out to the official that his conviction pre-dated the five-year period and that the statutory prohibition therefore did not apply. He also claims he was fired from his employment with Pineapple Air in 2014 after his permit was revoked.

[13] In April 2014, the applicant says he renewed his appeal with another letter to the civil aviation authorities, and later engaged an attorney who wrote another letter in June 2014. The Chairman of the AA replied by letter dated 5 August 2014, informing him that his CPL had been withdrawn and so had his security badge, as he had been convicted in the US and served time for a drugs offence. The applicant says that at that time he had not been made aware by the first respondent that his CPL had been withdrawn or revoked. To the contrary, he says he was advised by the Flight Standards Inspectorate of the DCA by letter dated 20 August 2014, in response to his request for "airman validation", that his licence had not been withdrawn or revoked. It appears from that letter that the CPL was to expire on the 31 May 2015 in any event. Thereafter, the applicant says he made further requests of the second respondent for a permit to enter the restricted area of the LPIA, so that he could resume employment.

[14] On the 17 January 2018, he says he was advised by the first respondent that his CPL and airman certificate had been revoked. This time, he engaged another firm of attorneys who wrote to the BCAA on 23 January 2018 seeking to have the licence reinstated and threatening to institute legal action within three days if they did not receive a favourable response. However, on 1 February 2018, the BCAA Director wrote the applicant's attorneys informing them that, based on the letter submitted by the applicant's counsel, they had rescinded the revocation of the licence "*without prejudice to the BCAA*" (a qualification which the applicant

says was never explained). However, in the same letter, the BCAA Director informed the applicant's attorneys that a decision was made to suspend his licence pending an investigation into an aircraft accident involving an aircraft flown under the applicant's command whilst employed by Pineapple Air, and that a further investigation was being undertaken into possible other security violations by the applicant.

[15] By letter dated 5 February 2018, which the applicant says he received on 13 February 2018, the first respondent requested that the applicant furnish information relating to the aircraft which was the subject of the investigation. The applicant says he responded by letter dated 22 February 2018, providing the requested information, but thereafter he heard nothing from the respondents regarding the suspension of his CPL and the investigations, or the issue of his security pass. As a result, the applicant lodged the application for judicial review in March 2019.

[16] The respondents accused the applicant of omitting pertinent details from his account, and in fact cite the lack of disclosure as one of the grounds for resisting the application for leave and extension of time. In the affidavit of Milo Butler III, general manager of the AA, it is stated that applicant applied for an ID badge on 25 March 2013 to allow access airside but, significantly, that he denied on his application form (which was exhibited to the affidavit) that he had ever been convicted in a court in The Bahamas or elsewhere. The AA says that while they were processing the application for the ID badge, they were informed by Mr. Andrew Bonaby that the applicant had been arrested for importing dangerous drugs into the US and had served time in federal prison. This they later confirmed with the US Customs and Border Protection and as a result his application was not approved.

[17] Mr. Bonaby further stated that the AA wrote to the applicant on 16 May 2013 indicating that they were denying his application for an LPIA restricted area permit, which would have allowed him access to the "restricted airside" of the airport. According to the affidavit of Milo Butler III, on 16 May 2013 they also sent a letter to the general manager of then Executive Flight Support (a fixed based operator which apparently carried out many of the airside support services for commercial fights), to advise that the applicant was not authorized to access the restricted airside, as his pilot's licence and ID badge had been withdrawn.

[18] The respondents say that notwithstanding the revocation of the applicant's aviation documents, he continued to carry out certain operations in violation of the applicable regulations and policies. For example, they indicate that he continued to fly in violation of the restrictions and apparently was helped by his wife (who worked with Executive Flight Support) to access restricted airside at LPIA. Further, they contend that, notwithstanding the revocation of his ID badge for LPIA, the applicant through a "pattern of deceptive behaviour" was able to procure ID badges for two other aerodromes. On 15 May 2015, the applicant made an urgent request for an ID badge for the Rock Sound airport, which was granted "*due to a lack of inter-agency communication*". When this was discovered, it was revoked and retrieved. He further obtained an ID badge from the Grand Bahama Airport Company in March of 2016, which was subsequently revoked and returned with the assistance of the CAA and police authorities in May of 2016. Although the applicant claims that he was terminated

by Pineapple Air in 2014, both requests for the additional permits were made in his capacity as a pilot for Pineapple Air. In fact, the respondents allege that the applicant continued to fly without proper documentation until he crashed a plane in 2018.

Legislative and regulatory context

[19] To make these facts a little bit more intelligible, it is necessary to provide a bird's-eye-view of the legislative and regulatory context. It is no exaggeration to say that the legal and regulatory context of civil aviation in The Bahamas is extraordinarily complex. The law is contained in multiple pieces of domestic legislation and regulations, which have also imported many of the international standards and recommended practices. These standards are set by the international governing body for aviation, the International Civil Aviation Organization ("ICAO"), pursuant to the Convention on International Civil Aviation ("Chicago Convention of 1944") to which the Bahamas is a party. The Convention is designed to secure the safety, regularity and efficiency of international civil aviation. It is also important to record that the civil aviation laws and regulations have been under constant reform in the past two decades, with the result that the entities and persons regulating licensing and security have undergone several mutations during the course of the applicant's long-running challenges.

[20] As mentioned, under the Civil Aviation Act 1976 ("the Act"), the Minister (or his delegate) was generally responsible for regulating civil aviation and had the authority and discretion to issue and revoke or suspend licences and permits. In 2002, the Airport Authority Act and its Regulations created a separate Airport Authority ("AA") with the responsibility for the security of aerodromes operated by the Government, and they assumed the responsibility for issuing badges allowing access to restricted areas of these aerodromes. In 2012, the Act was amended to allow the Director of the Department of Civil Aviation to exercise many of the regulatory functions of the Minister. The Act was repealed by the Civil Aviation Act 2016, which created a Civil Aviation Authority of The Bahamas ("the BCAA") and implemented far-reaching changes to effect the separation of the regulatory and safety functions of civil aviation from airport operations and air navigation services, in response to ICAO mandates.

[21] Under the 2016 Act, the BCAA became the "*designated authority for civil aviation in accordance with the requirements of the Convention*" (s. 20), with the public interest duty of regulating the safety and security of civil aviation. This included, *inter alia*, the power of "*issuing, renewing, suspending or revoking of certificates, licenses, permits, approvals registrations and authorization as provided for under this Act and regulations*" (s. 9(c)). The Convention, along with its multiple Annexes, also requires states to implement a number of safety programmes and policy documents, such as the National Civil Aviation Security Program ("NCASP"), which contains various security components based on Annex 17 (Security) of the Convention. For example, there is an Aerodrome Security Programme ("ASP") created under the NCASP, and the regulation which was quoted to the applicant for the revocation of his permit was contained in the 2013 version of the ASP. Many of these international standards were introduced via the 2012 amendments, and continued under the 2016 Act. Section 23 of the 2016 Act mandates that persons, organizations, companies and other entities with access to or conducting business on aerodromes are to comply with all

requirements of the NCASP and any supplementary rules. Section 11.1 of the NCASP contains a list of "disqualifying offences" and states that "*no person may be issued an airport pass providing unescorted access to security restricted areas if they have been convicted of any of the offenses enumerated in the following or of an equivalent law of another state*". A number of offences under various pieces of legislation are referred to, which include the offenses with which the applicant was charged.

[22] As a matter of completeness, the 2016 Act has now been repealed by the 2021 Civil Aviation Act, and 2021 Civil Aviation Authority Act. The 2021 Civil Aviation Act retains the ability of the Director General to exercise the functions of the CAA, and the power to suspend, vary or revoke an "aviation document" (i.e., licence, permit, certificate). However, it sets out a more comprehensive procedural process for how those functions are to be exercised, including a process for the notification of such decisions to a person affected and an opportunity for the holder of any aviation document to object and make representations.

ANALYSIS AND DISCUSSION

[23] As indicated, the Application challenges two discrete decisions, in respect of different decision-makers. A number of grounds for the claim were formulated. With regard to the licence decision, these were as follows: that the first respondent (i) breached the *audi alteram partem* rule in that he was not given any notice nor an opportunity to be heard with respect to the decision; (ii) the decision was tainted with actual or apparent bias; (iii) the decision was irrational and unprincipled; and (iv) no reasons or any adequate reasons were given for the decision to revoke and or suspend indefinitely the CPL. These grounds are basically repeated, *mutatis mutandis*, in respect of the decision by the second respondent. The applicant seeks *certiorari* quashing the decisions, and orders seeking the reinstatement of the CPL and Class 1 Medical, as well as the issuance of an ID badge allowing access airside to the LPIA and other aerodromes under the supervision of the second respondent. He also seeks damages, as he contends he has been "*deprived of his livelihood*" by the decisions of the respondents.

[24] As can be seen from the recitation of the facts, the decisions which are said to be susceptible to judicial review took place many years ago, and therefore the question of delay is a central consideration.

The relevant legal provisions and principles

[25] Applications for judicial review are governed by Ord. 53 of the R.S.C. 1978 and s. 19 of the Supreme Court Act. Section 19(3) and Ord. 53, r. 3(1) similarly provide that no application for judicial review shall be made unless the leave of the court is obtained. Rule 13(7) requires the applicant to have a "*sufficient interest in the matter to which the application relates*" as a condition precedent to the grant of leave. The governing principles for the grant of leave have been set out most definitively by the Privy Council in *Sharma v Brown Antoine* [2007] 1 WLR 780 (at 787), where the Board said:

> "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 alternative remedy…".

[26] It is accepted that the threshold for the grant of leave is not very high (see *AG of Trinidad & Tobago v Ayers-Ceasar* [2019] UKPC 44, Per Lord Sales at para. 2). The purpose for leave is to filter out challenges where the applicant either does not have the necessary interest to maintain the challenge, where the claim has no real prospect of success, or where it is subject to discretionary bars such as delay or alternative remedy.

Time limits in judicial review proceedings

[27] Ord. 53, r. 4(1) provides in relevant part as follows:

> "4. (1). An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application should be made."

[28] Thus, the overriding principle is that the application should first of all be made promptly. In this regard, an application might be made within the statutory period and yet not be made "promptly" for the purposes of this provision (see, for example, *R v Independent Television Commission, ex p. TV NI Ltd.* (1991) Times, 30 December CA). On the other hand, an application outside of the six-month period will be out of time, although subject to the court's power to extend time.

Delay and extension of time

[29] I was referred to a number of the usual authorities in support of the applicant's argument for extension of time (e.g., *R v Dairy Produce Tribunal for England and Wales, ex parte Caswell* [1990] 2 AC 738; and *R v Comr for Local Administration, ex parte Croydon London Borough Council* [1989] 1 All ER 1033). In *ex parte Caswell*, Lord Goff said (at. 747b-g):

> "…when an application for [permission] to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but even if it considers that there is such good reason, it may still refuse leave (or, where the leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6)) or would be detrimental to good administration."

[30] However, as the Privy Council has recently undertaken an exhaustive analysis of the authorities on delay and extension of time in *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5, I prefer to refer to the summary of the principles set out there.

[31] In *Maharaj*, the Privy Council were called upon to reconcile two different approaches taken by the courts to the grant of leave in Trinidad and Tobago for applications out of time and considerations of prejudice and detriment in the context of delay. The different approaches came about as a result of textual variations in the drafting of s. 11(1) of the Judicial Review Act, and Civil Procedure Rules r. 56.5. Section 11(1) provides in part that an application for judicial review shall be made promptly and in any event within three months from the date the grounds arose, unless "*the court considers that there are good reasons for extending the period within which the application shall be made*." Both s. 11 and r. 56.5 list the following as relevant considerations for extension of time—whether it would cause substantial prejudice or hardships to the rights of any person or be detrimental to good administration. Under the first approach, if the court found that there were no good reasons for extending time, it would refuse permission without considering whether the grant of permission was likely to result in prejudice or detriment. On the alternative approach, the question of prejudice or detriment was a factor which was considered in determining whether there was good reason to extend time, as provided under s. 11. The Privy Council held that prejudice and detriment were key to the consideration of whether there had been a lack of promptitude and whether there were good reasons to extend time, and did not arise just as residual considerations once good reasons were proffered. The Lordships also made it clear that this was a general statement of principle which did not depend on the legislative position in Trinidad and Tobago.

[32] There, in setting out the governing principles, Lord Lloyd-Jones JSC, speaking on behalf of the Board said:

> "36. More generally, and quite independently of the particular provisions and scheme of the legislation in Trinidad and Tobago, as a matter of general principle, considerations of prejudice to others and detriment to good administration may, depending on the circumstances, be relevant to the determination of both whether there had been a lack of promptitude and, if so, whether there is good reason to extend time.
>
> 37. The obligation on an applicant is to bring proceedings promptly and in any event within three months of the grounds arising. The presence or absence of prejudice or detriment is likely to be a key consideration in determining whether an application has been made promptly or with undue or unreasonable delay. […]
>
> Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by the delay.
>
> 38. In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasize that the statutory test is not one of good reason for delay, but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issue, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest."

Analysis and discussion

[33] The respondents opposed the grant of leave mainly on two main grounds: delay and alternative remedies. They point out in their affidavits that the grounds for review on which the applicant is relying, if any at all, arose respectively in January 2018 and March 2013. Therefore, the application for leave in March 2019 was made some 8 months out of time with respect to the licence decision and in the case of the permit decision some 6 years after the time for doing so had expired. They contended also, in respect of the licence decision, that the applicant had an alternative remedy, in that pursuant to s. 73(1) of the Civil Aviation Act 2016, the applicant had a right to apply to have any decision reviewed by its Board of Directors. Section 1(d) reads as follows:

> "1(1) Where the Director or any authorized person— […]
>
> (d) decides to revoke, suspend or vary a licence, certificate, permit, approval, authorization, validation or rating otherwise than on application of the holder,
>
> The Authority shall serve on the person concerned a notice stating the reasons for the decision and the person concerned may, within fourteen days of the date of the service of the notice, serve on the Authority a request that the decision be reviewed by the Board of the Authority.
>
> (2) Where a request has been served on the Authority in accordance with subsection (1), the Board shall, before making a decision, consider any oral representations which may be made to it or any representations in writing which may have been served upon it by the person concerned within 21 days after the date of service of the request."

[34] It clearly emerged during the course of the hearing for leave that the respondent's opposition was not equally trained on the decisions. There was in fact a much stronger objection to the grant of leave on the grounds of delay to the revocation of the security clearance than to the suspension decision. In fact, Mr. Higgins conceded during his submissions that he was not really opposing the extension of time with respect to the 2018 decision, although he was taking the alternative remedy point. But he emphasized that the challenge to the 2013 decision was "*way out of time*".

<u>The suspension of the licence</u>

[35] I found on the facts of this case that there was good reason for extending the time with respect to the licence decision, taking into consideration the factors set out in the cases referred to by the applicant and the approach set out by the Privy Council in *Maharaj*. Firstly, even accepting the contention of the respondents that the grounds for making the challenge first arose in January 2018, and that the challenge was some eight months out of time, I do not consider that to be significant in the context of this case. In this regard, I note that the applicant was communicating and attempting to achieve a resolution of the matter with the respondents right up to the filing of the application for leave. In fact, one of the reasons relied on by the

respondents for not formally coming back with a decision based on the investigations is that the applicant had at that point already filed a claim in court.

[36] The respondents also contended that they would be prejudiced if the challenge were allowed to proceed. But, as pointed out by Mr. Gomez, they could point to no specific allegation of prejudice in their affidavit. The respondents are public authorities with the statutory authority for the regulation and supervision of the aviation industry, as well as responsibility for the security of aerodromes that come under their purview. They owe a duty to the public and persons specifically affected to properly exercise those functions according to their statutory remit. It is difficult to see what prejudice they would suffer if the court were to exercise its discretion to allow a legitimate dispute which affects the livelihood of a person to be properly ventilated, notwithstanding any minor procedural defaults on the part of the applicant.

[37] Even apart from any question of delay, I am also of the opinion that the suspension of the licence falls into the category of a continuing state of affairs, and therefore remains open to challenge (see, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Ross-Clunis* [1991] 2 A.C. 439 (continuing failure to recognize citizenship)). It is axiomatic that a suspension is only intended to be a temporary state of affairs, and the applicant argues that in effect the suspension has allowed the respondents to achieve by "subterfuge" the revocation which they rescinded.

[38] As to alternative remedy, the respondents are certainly right to point out that if there is an appeal on the merits—i.e., the appellate process provided under the Civil Aviation Act 2016—that avenue should have been followed and resort should only be made to judicial review in exceptional circumstances (see, *R v Chief Constable of Merseyside Police, ex parte Calveley* [1986] QB 424). But I am not inclined to the view that the applicant failed to exhaust alternative remedies. This is because I do not see any clear evidence that the mechanism for the appellate process was ever properly triggered by the respondents. This requires the Authority to furnish the person with a notice stating the reasons for the decision made, and for the person affected to serve a request for review within 14 days, and to be allowed to make representation within 21 days thereafter. As the licence was suspended pending the outcome of the investigations, the applicant necessarily was not provided with the reasons, and could not be until the investigation was concluded. In fact, the letter from the BCAA actually stated that they would be prepared to meet with the applicant to discuss the findings once the investigation was complete, and before any further action was taken. However, it is clear that the suspension itself is a distinct decision capable of being reviewed pursuant to the s. 73 process.

<u>The revocation of the ID/security permit</u>

[39] I agree with the respondents, however, that the issue of the ID badge and security pass is on a different footing from the licence decision. The applicant was informed either in March or May of 2013 (depending on which account is believed) that his permit had been revoked, and he was told the reasons. He said he lodged letters "appealing" the decision in May 2013, April 2014, and indeed hired a lawyer in June 2014 who also wrote on his behalf. One of

the reasons the applicant submits for the delay in making the application is that he was impecunious, as a result of not being able to work.

[40] Mr. Higgins in his oral submissions contended that the applicant had not adduced any good reasons for extending time, and opined that the claim that he was impecunious "*didn't hold water*". In this regard, Mr. Higgins emphasized that the applicant did in fact engage counsel in 2014 and that in fact he never stopped working, basically using tactics to work outside of the regulatory system. He contended further that the applicant's claim to being impecunious can only properly relate to the period post-January of 2018, after the crash, as he managed to work up to that point. And even then, they say, the applicant had the capacity to employ senior counsel, who wrote what was in fact a letter-before action as early as January 2018. Despite this, the judicial review proceedings were not launched until March 2019.

[41] The applicant relied, among other cases, on *R v Commissioner for Local Administration, ex p. Croydon London Borough Council* [1989] 1 All ER 1033, and *R v Stratford-on-Avon District Council, ex parte Jackson* [1985] 1 WLR 1319, to support his claims of good reason for delay. In *ex parte Croydon*, Woolf L.J. said (at 1046-g):

> "While in the public law field, it is essential that the courts should scrutinize with care any delay in making an application and a litigant who does delay in making an application is always at risk, the 'rules' are not intended to be applied in a technical manner. As long as no prejudice is caused…the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of [a remedy] to which he is otherwise entitled."

In *ex parte* Jackson (at 1324-a), Ackner LJ said:

> "…it is a perfectly legitimate excuse for delay to say that the delay is entirely due to the fact that it takes a certain time for a certificate to be obtained from the legal aid authorities."

[42] However, the cases on impecuniosity and its role in explaining delay are not all one way. For example, in *R v Metropolitan Borough of Sandwell, ex p Cashmore* (1993) 25 HLR 544, Owen J. the court held that delay in obtaining legal aid was not "normally" a good reason for extending time. In the Jamaican Supreme Court case of *Dewayne Thomas v. Commissioner of Police [2015] JMSC Civ. 26*, Williams J. (Ag) rejected an application made in August 2014 to judicially review a police officer's discharge from the force by a decision which was made on March 2010. The applicant had contended that he was impecunious as he had a sick child and had to resort to receiving assistance from the Legal Aid Clinic, after attempts to utilize the services of different law firms and the Public Defender. In rejecting the application to extend time, the judge quoted with approval the words of Lawrence-Beswick JA (Ag) (dissenting) in the Jamaican Court of Appeal case of *Alcron Development Ltd. v Port Authority of Jamaica* [2014] JMCA App. 4, where it was said:

> "Impecuniosity is, to my mind, a compelling reason for one's inability to access legal services which do sometimes come at a relatively high price. However, the court is mindful of the fact that the absence of funds may be unjustifiably proffered as a reason for delay in underserving instances."

[43] I agree that impecuniosity is a factor that can be considered in assessing whether there is unreasonable delay. But I am far from satisfied that the applicant has demonstrated that impecuniosity in any way prevented him from advancing a challenge to the decision. As noted by the respondents, it is dubious whether there was any impecuniosity at all, as the applicant in fact found creative ways to continue flying. Instead of taking persistent action to challenge the decision on principled grounds, he took the risk of defying the authorities and potentially incurring further infractions—behaviour which in fact is alleged to have led to the suspension of his licence. It is trite that decisions of public authorities are to be respected unless they are established as unlawful. Further, there is little to no information as to what steps were taken between 2014 and 2018 to advance any legal claim. I therefore do not find that the applicant has provided any good reasons for his failure to challenge the revocation decision promptly. There was ample evidence and good reason (if the applicant were right about the 5-year reach of the disqualifying regulation in 2013) to mount a challenge for judicial review from as early as March or May of 2013.

[44] The applicant's counsel seems to take the view that the decisions challenged are joined at the hip, and that the value of granting leave to challenge the first is somehow diminished if leave were refused to challenge the second decision. I accept that the impugned decisions are connected, and it seems tolerably clear that they were made in a consultative context intended to achieve a coherent national aviation security outcome. But they constitute distinct substantive decisions, capable of being independently challenged, and indeed the judicial review challenge has been formulated on the basis that these are discrete decisions. In fact, the issuance of the licence and permit by separate entities seems to have been exploited by the applicant to obtain the two further permits between 2015 and 2016 to access aerodromes in other islands, even though the LPIA permit had been revoked. The respondents also point out that, despite the challenge to the LPIA permit, the plaintiff has not challenged the revocation of the other two permits.

[45] I am therefore not inclined to the view that the decisions are inextricably linked for the purposes of granting extension of time and leave. Another important consideration is that the refusal to grant the extension of time and leave to challenge the security pass is not necessarily detrimental to the applicant's claim. This is because, in the case of a pilot, the grant of the security pass or identification badge is subsidiary to the possession of a valid licence, as is borne out by the 2019 Civil Aviation (Special Regulation No. 9) Regulations, 2019. This provides in material part as follows:

> "(e) No person in possession of a valid pilot's licence, who is a citizen or permanent resident of the Bahamas, and who is not presently engaged as a pilot in commercial air transportation operations with an Air Operator Certificate (AOC) holder in The Bahamas, may gain or shall be permitted to gain access to a restricted or unauthorized area of any aerodrome in the Bahamas, unless that person is also in possession of a valid aerodrome pass or badge properly issued by the Airport Authority or the Grand Bahama Airport Company."

[46] Thus, a successful challenge to the licence decision (for which the court has granted leave) would render the applicant eligible to apply for a security pass/identification badge. In fact, Mr. Gomez accepted this logic in oral submissions when the issue was raised:

> "It may well be that should the Applicant be successful in the judicial review proceedings, the position of the 2013 revocation may become academic….[T]here is nothing stopping him from applying for a permit to enter the restricted area, having regard to the fact that he has a licence. As a new applicant his …application would have to be considered afresh."

[47] I have obviously accepted that the applicant has an arguable case with a reasonable prospect of success regarding the licence decision, bearing in mind the overarching principle that judicial review is concerned with the procedural fairness and legality of a decision, not its merits. It has, therefore, not been necessary for the purposes of this application (nor is it appropriate at this stage of the case) to say very much about the merits of either parties' case. In any event, the respondents' main challenge has been directed to the discretionary bars, not the arguability of the claim. But whether the applicant can make good on his claim is a matter for the substantive hearing, and I say no more on it.

CONCLUSION

[48] For the foregoing reasons, bearing in mind the factors and circumstances which have been discussed, I granted the extension of time and leave to challenge the suspension of the CPL, but dismissed the application for extension of time and leave in respect of the revocation of the security permit for restricted access.

27 January 2022

Loren Klein,
Justice