

COMMONWEALTH OF THE BAHAMAS

2021

IN THE SUPREME COURT

PUB/JRV/034

Public Law Division

IN THE MATTER OF an application for leave to apply for Judicial Review by Glenard Evans
pursuant to the Rules of the Supreme Court, Order 53, Rule 7

BETWEEN

GLENARD EVANS

AND

Applicant

AIRPORT AUTHORITY

Respondent

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: Romona Farquharson-Seymour for the Applicant

Devard Francis, Regina Bonaby for the Respondent

Date of Hearings: 19th April 2022, 22nd April 2022, 6th December 2022,

20th January 2023, 21st March 2023

DECISION

1. By application filed 6th October 2021, the applicant seeks leave to commence judicial review proceedings with respect to a decision of the Airport Authority revoking his badges and clearance. The application initially came by way of ex-parte summons, but an inter partes hearing was directed at the instance of the court.
2. The application for leave is supported by an affidavit of the applicant filed 6th October 2021, in which he avers that he was an employee at Jet Blue Airlines when, around 15th

February 2021, he was arrested by officers of the Drug Enforcement Unit of the Royal Bahamas Police Force following the discovery of a quantity of dangerous drugs in Florida on a flight that had departed from the Lynden Pindling International Airport. The applicant was detained for twenty-four hours, questioned, and released without charge.

3. The applicant further avers at paragraphs 10 – 15 as follows:

10. That sometime in or about April 2021, I was called into a meeting of the Airport Authority personnel, inclusive of United States personnel and Mrs. Stephanie Demeritte from the Airport Authority, who took my badges and other equipment that was necessary for me to move about the airport to carry out my work with Jet Blue Airline.

11. That at the time of the taking of my badges, and other equipment, I held the view that an impartial investigation would be done with me being allowed to speak to any findings/charges and a decision with reasons.

12. That on the 9th July, 2021, after receiving a final paycheck from my employer, I was advised by them that they would have to separate from me until I receive my badges and other equipment back from the Airport Authority. I was further advised by employers that I will always have a job with Jet Blue Airline once the Airport Authority return my badges.

13. That on the 9th July, 2021, I called and spoke to Mrs. Demeritte and enquired about the return of the items taken from me and that she responded, “Evans, I told your bosses back in April, 2021, that we will not give you back the badges”.

14. That in the same conversation of 9th July, 2021, Mrs. Demeritte further informed me that the United States sent a letter from Washington, D.C., saying that they do not want me working around US carriers, also that there was no procedure to appeal this decision. She concluded the conversation by stating that they were not prepared to return the badges back.

15. That at no time during meeting at the Airport Authority was I ever informed of or given any information of any breach of the terms of my job. Nor was I given any opportunity to put a defence to the allegation or complaint.

4. In response, the Respondent proffered the affidavit of Gregory Neymour, Deputy Director for Security, in which it was averred that:

3. That the Respondent duties are encapsulated in the Airport Authority Act, Civil Aviation Act and the Memorandum of Co-operation between the Government of the United States of America & the Government of the Commonwealth of the Bahamas on Civil Aviation Security for Preclearance Operation at Designated Last point of departure airports in the Bahamas (herein Memorandum of Co-Operation) signed on 25" July A.D., 2013 in relation to airport security.

4. That the contents of the Memorandum of Co-operation cannot be disclose as a matter of national and international security. That now shown and marked "GN-1" is the top page of the Memorandum of Co-operation.

5. That the Respondent accepts Applications for airport access through airline providers for their staff. The applications are vetted through local and international agencies. Additionally, the background checks and vetting are in compliance with the oversight of the Civil Aviation Act and Memorandum of Co-operation.

6. That on Friday 16" February A.D., 2021, I received information about 4 kilos of cocaine being found on a JetBlue Aircraft No. 1394 at Sir Lynden Pindling Airport.

7. That the Applicant along with four other Jet Blue employees were arrested by the Drug Enforcement Unit of the Royal Bahamas Police Force.

8. That as a result of this, various investigation by the Respondent and Royal Bahamas Police Force began.

9. The Respondent, Royal Bahamas Police Force and U.S. Custom and Boarder Protection reviewed the surveillance footage and the recommendation by the Respondent and the U.S. Custom and Boarder Protection was to confiscate the access of the Applicant and four employees.

10. That the Applicant and JetBlue were advised in a meeting that the access would not be return[ed] as the attempt to [traffic] cocaine through the airport on an international flight is a serious security breach.

11. That in compliance with the Airport Act, Civil Aviation Act and Memorandum of Co-operation, the Respondent in executing its duties in relation to safety of the airport has not return the access to the Applicant.

5. Seeking further clarity on the question of the date of any relevant decision, the court required further evidence to be provided. Pursuant to a direction of the court, the Respondent provided a second affidavit of Gregory Neymour, filed 24th March 2023, to which Mr. Neymour exhibited a letter dated 1st April 2021, written to Mr. Alan Sweeting, Station Manager of JetBlue, stating that “The Airport Authority wishes to advise that based on adverse report from the Police, your employee Mr. Glennard Evans issued Airport identification badges was confiscated pending the results of an ongoing investigation.”

APPLICANT’S CASE

6. The Applicant submits that Mr. Evans has applied promptly, and clearly has a sufficient interest in the matter, as the taking of his badges resulted in a loss of employment. He is therefore affected by the decision in question.
7. The Applicant submits he has an arguable case and a realistic prospect of success, in that, in breach of the rules of natural justice, he was not granted a fair or any hearing or involvement in the process which led to the taking of his badges and the resultant loss of his livelihood. It is further submitted that the judge should refrain from performing an in-

depth analysis of the matter but rather the court should only concern itself with the rationality of the decision.

RESPONDENT'S CASE

9. Put succinctly, the Respondent accepts that the Applicant has an interest in the matter, and is therefore a proper party to initiate these proceedings. However, the Respondent submits that the badge was taken when the Applicant was arrested on 17th February 2021, while the application was not submitted until 6th October 2021. The Respondent therefore submits that the application is out of time, that no application has been made to extend time, and no reasons have been given for the delay. They therefore submit that leave should be refused.
10. The Applicant further submits that no grounds are pleaded in the application for leave, and as such the court cannot be satisfied that an arguable case exists. Again, they submit that leave should be refused on this basis.

DISCUSSION

11. The requirement for leave of the court to commence judicial review proceedings is set out at Order 53 Rules of the Supreme Court, which provides as follows:
 - 3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.**
 - 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 shall be made. (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.**
12. The test to be applied at this stage has been set out by the Privy Council in **Sharma v. Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago) [2006] UKPC 57 (30 November 2006)** at paragraph 14(4) as follows:

(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628; Fordham, Judicial Review Handbook, 4th ed (2004), p 426.

13. The Respondent submits that the Applicant has stated no grounds in the application, with the result that there is no arguable case. This submission ignores paragraph 2 (2.1) of the application, where the Applicant “seeks an order quashing the decision of the Airport Authority that revoked the Applicant’s badges and clearance on the grounds that it was arrived at in breach of natural justice....”.
14. The level of examination of the evidence at this stage has been considered in **IRC v National Federation of Self-Employed and Small Business Ltd [1982] AC 617** in which Lord Diplock stated:

“ If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief: The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”
15. On the evidence of the Applicant, there was no hearing or opportunity to be heard afforded to him prior to the taking of the badges. Indeed, no such hearing or consideration is mentioned in the evidence relied upon by the Respondent. It is therefore clear that a breach of natural justice is alleged on the papers, and is arguable on the facts presently before the Court.
16. With respect to the issue of whether the application is subject to a discretionary bar such as delay, it is my view that some difficulties exist. The rules require that application be made promptly and in any event within six months of the decision complained of. The evidence of the Applicant is that “in or about April 2021” he was called into a meeting

with Stephanie Demeritte who took his badges and other equipment necessary to move around the airport. The application for leave was filed on 6th October 2021.

17. To my mind this creates a serious issue, as it is difficult to tell if the application is being brought within the six month period. This is important, as much of the attention of the Respondent was directed to the issue of delay in applying for leave.
18. The Respondent contends in submissions that the items were taken in February when the Applicant was arrested, and submits that the application was thus filed one month and twenty-one days past the six-month period. The difficulty with this submission is that the affidavit of Neymour, which is quoted at paragraph 3 above, does not specifically say when the items were taken. It mentions the discovery of the drugs on 16th February 2021, and in separate paragraphs mentions the arrest of the Applicant, an investigation including the review of surveillance footage, and a meeting at which the Applicant and his employers were advised that the items would not be returned. There is an unfortunate absence of precision in the drafting of that document, and the documents before the Court, which leaves the Court to extrapolate and draw inferences. Given the evidence, I decline to draw any inference that the badges were confiscated in February 2021.
19. The Court's position on this is fortified by the second affidavit of Gregory Neymour, exhibiting the letter to Jet Blue dated 1st April 2021, advising of the confiscation of the badges. In my view, this letter does not support the contention that the badges were taken in February 2021.
20. I also bear in mind that 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.”

21. It is therefore clear that the application should first of all be made promptly. Moreover, an application might be made within the statutory period and yet not be made “promptly” for the purposes of this provision. As the Privy Council said in **Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5 at paragraph 36** :

“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.”

22. It is clear from the authorities that, on the question of delay, the court has discretion to extend the time, and a lack of prejudice will militate in favor of the extension of time. In the instant case, the Applicant insisted in oral submissions that the matter is not out of time, as the decision being challenged is the refusal to return the badges, which they say was not notified to the Applicant until 9th July 2021.
23. This insistence is not supported by the actual application for leave, which is quoted at paragraph 13 above, and which clearly seeks to quash the decision of the Respondent to revoke the Applicant's badges and clearance. I am therefore unable to agree that the decision being challenged is the refusal to return the badges.
24. However, despite the fact that I am not satisfied that the decision being challenged is the decision not to return the badges, that is not the end of the matter. In the letter exhibited to the second affidavit of Gregory Neymour, it is specifically stated that the badges were confiscated pending a further investigation. The fact that further investigations were pending connotes to my mind that the decision was not final. That decision only became final when the Applicant was notified that the badges would not be returned, which, on his evidence, occurred on 9th July 2021. I therefore hold that time began to run on that date, as I consider it to be the effective date of notification of the decision to confiscate the badges, with the result that the application for leave was made within the six month time period.
25. I am constrained to also note that, pursuant to the **Civil Aviation Act 2021**, there is a specific process mandated for the notification of decisions to revoke, suspend, or vary a licence. The relevant provisions read as follows:

Section 32 Revocation of aviation document

(1) "The Director General may after an inspection, monitoring or investigation carried out under this Act, revoke an aviation document if-

(a) He has been advised by the General Manager of the Airport Authority that they have withdrawn the security clearance of the document holder;

(b) He considers that the revocation is necessary in the interests of aviation safety or security;

- (c) He determines that the privileges or duties for which the document has been granted are not being carried out, or are not able to be carried out, by the holder; or**
- (d) He has been requested in writing to revoke an aviation document by the holder of that aviation document.**
- (2) Where the Director General proposes to take action under this section, he must give notice of such proposal in accordance with section 33, which shall apply as if the proposed revocation were a proposed adverse decision.**
- (3) A person whose aviation document is revoked under this section must immediately surrender the document to the Director General.**
- (4) A person in respect of whom a decision is taken under subsection (1)(a) – (c) may object to the decision in accordance with section 34.”**

Section 33 Notice of Decision

- (1) Where the Director General –**
 - (a) Has suspended an aviation document;**
 - (b) Has imposed a condition upon an aviation document;**
 - (c) Has revoked an aviation document; or**
 - (d) Proposes to make an adverse decision in respect of an aviation document, He shall issue a written notice in accordance with this section.**
- (2) The notice shall –**
 - (a) Notify the person directly affected by the action or proposal referred to in paragraph (1) of that action or proposal;**
 - (b) Inform that person of the grounds for the action or proposal;**
 - (c) Specify a date by which submissions may be made to the Director General in respect of the action, which date shall not be less than twenty-one days after the date on which the notice is given;**
 - (d) Where appropriate, specify the date on which the action will, unless the Director General otherwise determines take effect, being a**

date not less than twenty-one days after the date on which the notice is given;

(e) Notify the person of the person's right of appeal under section 44; and

(f) Specify such other matters as in any case may be required by any provision of this or any other Act.

6 (3) Where the Director General gives a notice under this section, he may upon request, supply a copy of the notice to –

(a) Any person on the basis of whose character the adverse decision arises, where that person is not the person directly affected by the proposed decision; or

(b) Any affected document holder, where the Director General considers that the proposed decision is likely to have a significant impact on the entitlements of the document holder.

Section 34 Objections to proposed decisions

(1) The holder of an aviation document who has received notice that the aviation document has been –

(a) Suspended;

(b) Varied by the imposition of a condition; or

(c) Revoked,

May object to that decision in accordance with section 33(2)(c) and as specified in the notice.

(2) It shall be the responsibility a person referred to in subsection (1) to ensure that all information that he wishes to have considered by the Director General in relation to the proposed decision is received by the Director General within the period specified in the notice or within such further period as the Director General may allow.

27. There is no evidence that this very precise process has been followed, with the result that there is a lack of clarity with respect to the taking of the decision, or any proper notification of the decision, and no indication that the Applicant was advised of his statutory right to challenge

that decision through an internal appeal process, with the concomitant application of the principles of natural justice, which were clearly contemplated by the legislature in enacting the statutory provisions.

28. In all the circumstances of this case, I am satisfied that there is an arguable ground for judicial review, and that the matter is not subject to a statutory bar on the basis of delay. I therefore grant leave to commence judicial review proceedings.

Dated this 17th day of April, A.D. 2023

Neil Brathwaite
Justice