**JAMAICA**

**IN THE COURT OF APPEAL**

**APPLICATION NO COA2020APP00202**

**BEFORE: THE HON MR JUSTICE BROOKS P**
**THE HON MRS JUSTICE FOSTER-PUSEY JA**
**THE HON MISS JUSTICE SIMMONS JA**

**BETWEEN KINGSLEY CHIN APPLICANT**

**AND ANDREWS MEMORIAL HOSPITAL LIMITED RESPONDENT**

**Lemar Neale instructed by NEA | LEX for the applicant**

**Christopher Kelman and Stephanie Ewbank instructed by Myers Fletcher and Gordon for the respondent**

**1 and 19 March 2021**

**BROOKS P**

[1] On 1 March 2021, after hearing the submissions of counsel, we granted Dr Kingsley Chin leave to appeal from the decision of a judge of the Supreme Court (the learned judge), who refused his application for leave to apply for judicial review. We also granted a stay of execution of an order for costs that the learned judge made. These are our reasons for those decisions.

[2] Dr Chin is an orthopaedic spine surgeon. In 2015, Andrews Memorial Hospital Limited (the hospital) granted him clinical privileges to admit and treat patients at its

facility. In June 2020, after having suspended his privileges for approximately 18 months, the hospital informed him that it was unwilling to restore those privileges.

[3] He applied to the Supreme Court for leave to apply for judicial review of the hospital's decision. The learned judge after hearing submissions from both parties, ruled, in part, that the hospital, being a private entity, lacking statutory authority, was not susceptible to have its decisions made the subject of judicial review. She refused Dr Chin's application, awarded costs against him and also refused leave to appeal. The learned judge, in her ruling said, in part:

> "[The hospital] is a private entity lacking statutory authority and its grant to the applicant to use its facilities for medical purposes does not fall within the purview of public law, but is a matter best suited for the sphere of private law. Furthermore, the applicant's affidavit does not disclose whether the suspension of his use of the said hospital facility has affected his ability to carry out his duties to his patients which could be classified as an element of public concern."

[4] Dr Chin has renewed his application for leave to appeal for hearing by this court. He contends that the learned judge erred in ruling as she did and asks that he be allowed to appeal from the learned judge's decision.

[5] The main substantive issue in this application is whether Dr Chin's proposed appeal has a real prospect of success, as he seeks to show that the learned judge was wrong in finding that the hospital, being a private entity, did not perform a public function, thereby rendering its decisions susceptible to judicial review. A secondary issue is whether the hospital's decision, in Dr Chin's case, is susceptible to judicial review.

[6] The issue as to the award of costs at the leave stage is also a matter that the parties considered as important.

**The submissions**

[7] In answer to the court, Mr Neale, representing Dr Chin, argued that the procedure of approaching this court for leave to appeal is appropriate. Learned counsel argued that since there was a hearing before the learned judge, with both parties making submissions, it would not have been appropriate to ask for the application to be renewed by a single judge in open court.

[8] Mr Neale is correct on that submission. Rule 56.4 of the Civil Procedure Rules (CPR) stipulates that an application for leave to apply for judicial review, should first be considered before a judge of the Supreme Court. That judge may give leave without hearing the applicant, but is also empowered to order a hearing. The judge, on ordering a hearing, may order that notice of the hearing should be given to the respondent and to the Attorney General. In cases where there has been a hearing, and if the issue does not involve the liberty of the subject, rule 56.5(3) of the CPR prevents a renewal of such applications before a judge of the Supreme Court, in open court.

[9] On the substantive issue, Mr Neale acknowledges that the learned judge, in ruling as she did, exercised a discretion open to her. He further accepts that this court will not disturb the learned judge's ruling unless it is satisfied that she made an error in her consideration of the matter. Learned counsel correctly cited, as authority for that principle, **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1.

[10] Learned counsel submitted that the learned judge erred when she failed to take into account the public health function that the hospital performs. He argued that a number of factors demonstrate that the hospital should "properly be regarded as a functional public authority, whose core business and activities are matters of public interest and concern" (see paragraph 18 of his written submissions). Included among those factors, Mr Neale submitted are the fact that:

a. it is registered under and regulated by the Nursing Homes Registration Act;

b. the fees that it pays for registration are paid into the Consolidated Fund;

c. it has a public reach, in that the care of its patients is a matter of public concern; and

d. the government can enter into private arrangements with it, and has done so by virtue of a Memorandum of Understanding whereby it accepts an overflow of patients from the Kingston Public Hospital, emanating from the pressure on the public hospital for bed space due to the COVID-19 pandemic.

[11] In support of these submissions, Mr Neale cited **Karen Thames v National Irrigation Commission** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 04341, judgment delivered 11 November 2011 (upheld in part, on appeal) and **R (on**

**the application of A) v Partnerships in Care Limited** [2002] EWHC 529 (Admin); [2002] 1 WLR 2610.

[12] Learned counsel went on to argue that if it is held that the hospital is susceptible to judicial review, it will also be necessary to decide if its decision to revoke Dr Chin's privileges may be made the subject of judicial review (see paragraph 35 of his written submissions). Mr Neale cited a number of authorities, which, he submitted, demonstrated, that whereas the refusal of an initial grant of privileges to a medical doctor, is not subject to judicial review, the withdrawal of such privileges is so subject. Among the cases cited in support of that principle is **Balkissoon v Capitol Hill Hospital** 558 A2d 304 (DC 1989), decided 27 April 1989. In that case, the Court of Appeals of the District of Columbia, the entire court, including the sole dissenting judge, agreed with the following statement by Gallagher, Senior Judge, at page 308:

> "The Hospital's obligation to follow its bylaws does not arise only from a contractual relationship with appellant. The public has a substantial interest in the operation of hospitals, public or private.
>
> Hospitals exist to provide health care to the public. In addition to serving the needs of their patients, hospitals also provide a place of employment for doctors and other professionals. The privilege to admit and treat patients at a hospital can be critical to a doctor's ability to practice his profession and to treat patients. Both doctors and their patients can suffer if otherwise qualified doctors are wrongly denied staff privileges.
>
> *Nanavati, supra* note 6, 107 N.J. at 248, 526 A.2d at 701. Thus, while sharing the interest of hospitals that only qualified doctors be given staff privileges, the public also has an interest in assuring that staff decisions are not made arbitrarily. A hospital's failure to comply with

> material procedures delineated in its bylaws is inherently arbitrary. *Cf. United States v. Heffner,* 420 F.2d 809, 812 (4th Cir.1969) (arbitrariness inherent in agency's violations of its own procedures). As with an administrative agency of the government, requiring a hospital to follow its bylaws reduces the risk of arbitrary decisions without unnecessary interference with those who have the duty and the expertise to make the decisions. Thus, although the bylaws may create contractual rights, the Hospital's obligation to act in accordance with its bylaws is independent of any contractual right of appellant.
>
> If the bylaws are to be meaningful, the Hospital cannot technically comply with them while defeating the purpose inherent in the process they create. The Hospital's bylaws create a decision-making process that affords appellant certain protections and assures that the Hospital does not deny a doctor's staff privileges on the basis of unsupported accusations or on an arbitrary and capricious basis. The task of the Governing Body upon an appeal from a negative recommendation of the Medical Executive Committee – to ensure that the decision is not arbitrary – reflects this purpose."

[13] Mr Neale also argued that principles of natural justice arise in this case as Dr Chin's privileges were suspended without him being afforded a hearing. This, he argued, also required a judicial review. In this regard, Mr Neale referred to **Mahmoodian v United Hospital Center, Inc** 404 S E 2d 750, decided April 25, 1991, a decision of the Supreme Court of Appeals of West Virginia in the United States of America.

[14] Mr Neale also argued that the learned judge was in error in ordering costs against Dr Chin. Rule 56.15 of the CPR, he submitted, established the general principle that costs ought not to be awarded in judicial review matters unless a party had been

shown to have acted unreasonably. The learned judge, he submitted, made no such finding in respect of Dr Chin's approach to this case.

[15] Mr Kelman, for the hospital, argued that the learned judge was correct in her reasoning and cannot be said to have erred. He contended that the decision being challenged does not contain any public element and has no public reach. Accordingly, Mr Kelman submitted, Dr Chin's claim was of a private nature and that his prayer for an award of damages demonstrated that point. Learned counsel accepted that a private hospital could have a public function, but that the matter of the arrangements between the hospital and its doctors, although not contracts of employment, nonetheless, were contractual and constituted commercial arrangements.

[16] Learned counsel also argued that there was no statute addressing doctors' privileges which could make this matter susceptible to judicial review. Mr Kelman rejected the cases from other jurisdictions, cited by Mr Neale, which suggested that the hospital's decision is open to judicial review. He argued that the relationships between hospitals and doctors in other jurisdictions may not be applicable in this country.

[17] Learned counsel also argued that even if Dr Chin's case was to be considered a dismissal case, the relief of quashing the decision, which is one of the remedies that Dr Chin sought, was not available to him. He contended that a declaration was available in the context of a claim in civil law, and specifically, in contract, which, he submitted, is where Dr Chin should seek his relief, if he was entitled to any. Learned counsel asserted

that the issues of breach of procedural fairness raised by Dr Chin could also be pursued through the avenue of the civil law.

[18] On Dr Chin's complaint about the order as to costs, Mr Kelman submitted that there had been some general acceptance that costs should not generally be ordered in cases of application for leave to apply for judicial review, but there was a basis for arguing to the contrary.

**Analysis**

[19] It is important to note, as was accepted in **Gorstew Limited v Her Hon Mrs Lorna Shelly-Williams and Others** [2017] JMCA App 9, that "the test to be applied by this court in considering an application for leave to appeal is set out in rule 1.8(9) of the Court of Appeal Rules [CAR]" (paragraph [2]). The CAR has since been amended. Rule 1.8(9) is now rule 1.8(7). It states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

That will be the guide used in this analysis.

[20] It is a basic principle that judicial review is generally restricted to the decisions, acts and omissions of public authorities. Private entities are normally exempt from having their decisions made subject to judicial review. Their dealings are subject to the principles of private law, including contract and tort.

[21] Mr Neale is correct in his assertion of the principle that a private entity may, by the public function that it performs, have its decisions susceptible to judicial review. The

reasoning of Phillips JA, to that effect, at paragraph [36] of **Karen Thames v National Irrigation Commission Limited** [2015] JMCA Civ 43, is respectfully accepted as accurate. That reasoning only demonstrates, however, that in considering whether the principle applies, each entity must be examined according to the function that it performs.

[22] It may be that a hospital can have a special place in the scheme of things. The extract from **Balkissoon v Capitol Hill Hospital**, cited above, certainly seems to suggest that. Whether those principles cited by Senior Judge Gallagher are applicable in this jurisdiction may be a matter to be investigated. The learned judge's failure to contend with those principles in this case, may be a basis for stating that she erred in refusing to grant leave to apply for judicial review.

[23] The authorities highlighted by Mr Neale, including **Balkissoon v Capitol Hill Hospital**, show that Dr Chin's complaints warrant further investigation. He, therefore, has a realistic prospect of succeeding in his argument that the hospital, and its decision to withdraw his privileges, are both susceptible to judicial review.

[24] The issue of an award of costs at the leave stage has been the source of some disagreement in the court below. The cases of **Danville Walker v The Contractor General** [2013] JMFC Full 1A and **Gorstew Limited v Her Hon Mrs Lorna Shelly-Williams and Others** [2016] JMSC Full 8 demonstrate the disagreements. That disagreement was recognised, but not resolved, by this court in **Gorstew Limited v**

**Her Hon Mrs Lorna Shelly-Williams and Others** [2017] JMCA App 34. This case gives an opportunity for resolution of the issue.

[25] It is for those reasons that I agreed that leave to appeal ought to have been granted.

**FOSTER-PUSEY JA**

[26] I have read in draft the judgment of my brother Brooks P. His reasoning reflects my own reasons for granting the orders referred to in paragraph [1] above.

**SIMMONS JA**

[27] I too have read the draft judgment of Brooks P. I accept that it reflects my reasons for granting the orders to which he has referred in his judgment.