

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS, P
THE HON MRS JUSTICE SINCLAIR–HAYNES, JA
THE HON MR JUSTICE D FRASER, JA**

APPLICATION NOS COA2023APP00180 & COA2023APP00245

BETWEEN	JOEL LEWIS	APPLICANT
AND	CLIFFORD CHAMBERS	RESPONDENT

Hugh Wildman and Duke Foote instructed by Hugh Wildman & Company for the applicant

Ms Faith Hall, the Director of State Proceedings, for the respondent

11, 15 and 20 December, 2023

Civil Practice and Procedure – Application for leave to appeal – Judicial review – Police officer – Refusal to re-enlist to the Jamaica Constabulary Force – Commissioner relying on a reason which he said the applicant should not worry about – Procedural error in filing application – Whether fatal – Regulation 37 of the Police Service Regulations 1961 –Rule 2.14 Court of Appeal Rules 2002 – Rule 26.9 of the Civil Procedure Rules 2002

BROOKS P

[1] I have read, in draft, the judgment of Sinclair-Haynes JA. Her reasoning reflects my own reasons for the orders that were made in this case.

SINCLAIR-HAYNES JA

[2] On 15 December 2023 we made the following orders:

1. The application for extension of time to apply for leave to appeal is granted.

2. The application for leave to appeal is granted.
3. The applicant shall file and serve his notice of appeal on or before 12 January 2024.
4. No order as to costs.

[3] We now provide our reasons.

[4] The applicant, Mr Joel Lewis, has sought leave to appeal the following orders of Carr J made on 21 July 2023:

1. Notice of application for leave to apply for judicial review is refused.
2. No order as to costs.
3. Respondent's attorneys-at-Law to prepare, file and serve this order.
4. Application for leave to appeal is refused.

[5] On 9 December 2022, the applicant sought leave of the Supreme Court to review a decision of the Commissioner of Police ('the Commissioner') refusing to re-enlist him. Assistant Commissioner of Police Clifford Chambers ('the Assistant Commissioner'), who signed the letter informing the applicant of his non re-enlistment is the respondent herein. On 21 July 2023, the learned judge refused the applicant's application for leave and also refused leave to appeal.

[6] The applicant, however, contends that the Assistant Commissioner was not so empowered and argues that this refusal breached regulation 37 of the Police Service Regulations of 1961, which stipulates:

"37. A member acquitted of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge arising out of his conduct in the

matter, unless such other charge is substantially the same as that in respect of which he had been acquitted.”

[7] The applicant has sought to renew his application for leave to appeal before this court in accordance with rule 1.8(2) of the Court of Appeal Rules 2002 ('CAR'). It is for this court to now determine the issue of leave in light of this renewed application before this court.

Background/History

[8] The genesis of the matter is a criminal case against the applicant in the Saint Catherine Parish Court. He was charged with several serious offences, alleging dishonesty in connection with a stolen vehicle. However, those charges were dismissed on 18 February 2019, when the prosecution offered no further evidence against him.

[9] The applicant's date for re-enlistment was 29 November 2022 and he applied for re-enlistment within the stipulated time. He received a letter dated 17 November 2020, signed by an Assistant Commissioner of Police, which indicated that his application had not been recommended. The reason given was connected to the charges for the criminal offences mentioned above. He challenged the basis for the adverse stance and continued to carry out his duties until he met with the Commissioner on 27 July 2022 when the matter of his non-re-enlistment was discussed.

[10] He asserts that at that meeting the Commissioner indicated that if those charges constituted the only charges against him, he had “no need to worry”.

[11] Despite that assurance, the applicant received a letter dated 12 September 2022 informing him that his application for re-enlistment had not been approved and that his discharge from the Force took effect from 29 November 2020.

The application for leave to appeal

[12] The applicant has listed several grounds (i. through to xii.) in his notice of application for leave to appeal. For convenience, this court has categorised them under four simple headings. Those are:

- a) whether the learned judge erred by failing to recognise that there was insufficient evidence to support the allegation that the applicant was found in possession of a stolen motor vehicle and failed to take into account that the charges against the applicant in that regard were dismissed;
- b) whether the learned judge erred in failing to recognise that the refusal to re-enlist breached section 37 of the Police Service Regulations of 1961;
- c) whether the judge erred in finding that the respondent acted on the Commissioner of Police's behalf in discharging the applicant from the Jamaica Constabulary Force; and
- d) whether the learned judge erred in failing to recognise that the Commissioner of Police had rejected the sole basis for the adverse recommendation in respect of the applicant's re-enlistment.

Discussion

Leave to appeal

[13] Rule 1.8(7) of the CAR stipulates that generally permission to appeal is granted either by the court below or this court only where the court has found that "the appeal has a real chance of success". As stated in the case of **Evanscourt Estate Company Limited and Others v National Commercial Bank Jamaica Limited and Others**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008, at page 9, the general rule can however be displaced in cases concerning "exceptional circumstances", including the "*public interest*". It has not been argued and it does not appear that this case falls outside the general rule, therefore, the applicant must prove that the case has a "real chance of success". That is, a "'realistic' as opposed to a 'fanciful' prospect of success - see **Swain v Hillman** [2001] 1 All ER 91 which was applied by this court in **Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No. 103/2004 delivered May 25, 2005." (see

also page 10 of **Evanscourt Estate Company Limited and Others v National Commercial Bank Jamaica Limited and Others**).

Applicant's submissions

[14] A major plank of counsel for the applicant's written submissions is that the letter which discharged him from the force did not reflect that the Commissioner took any step to discharge him from the force pursuant to section 5 of the Constabulary Force Act. The letter stated that the Commissioner directed that he be informed that his application for re-enlistment was not approved and that his discharge from the force was effective on 29 November 2020. Learned counsel argued that the Assistant Commissioner had usurped the Commissioner's authority.

[15] Learned counsel contended that the notice, which was dated 17 November 2020 and served on him on 26 November 2020, was relevant. Thus, Carr J erred when she found that it was the Commissioner who discharged or failed to re-enlist the applicant. This argument, he submitted, was reinforced by the utterances of the Commissioner when he met with the applicant and his attorney-at-law.

[16] Learned counsel's argument is also that at that meeting, no reason was given for the appellant's discharge and thus it is in breach of his right to be given a reason. He relies on the cases of **Glenroy Clarke v Commissioner of Police** [1996] 33 JLR 50 and **Barnard v National Dock Labour Board** [1953] 2 QB 18, and section 5 of the Constabulary Force Act, for his argument that, unless delegated, only the Commissioner has the administrative power/function to refuse re-enlistment and there is no proof of such delegation of that power. The applicant contends, that the Commissioner's power was usurped by the respondent.

[17] Reliance is also placed on regulation 37 of the Police Service Regulations for the contention that a member of the force cannot be dismissed or punished for a criminal matter for which he has been acquitted. However, he may be dismissed or punished regarding:

“...any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted.”

Respondent's submissions and application to refuse leave to appeal

[18] The respondent contends that:

- 1) the application for permission to appeal was filed out of time; and
- 2) no decision was made to dismiss the applicant from the force.

[19] Learned counsel for the respondent also relied on the authority of **Corporal Glenroy Clarke v Commissioner of Police et al**. She argued that, similar to that case, the Assistant Commissioner acted on the instructions of the Commissioner. The Assistant Commissioner was not the proper respondent, and the applicant could not succeed in this context.

[20] A notice of application requesting that leave to appeal be refused for the following reasons:

1. The matter has no real prospect of success;
2. the application for leave to appeal was filed out of time; and
3. An affidavit of Andrew Lewis (Assistant Commissioner of Police) was filed in support of the application which stated that no decision was made to dismiss the applicant from the force but he was not approved for re-enlistment.

Decision of this court

[21] It is settled law that there is no automatic right to re-enlistment as noted by Carey JA (as he then was) in **Corporal Glenroy Clarke v Commissioner of Police et al** at

page 53. Moreover, section 5 of the Constabulary Force Act stipulates that "Sub Officers and Constables of the Force **may** be enlisted for a term of five years" (emphasis added). It is apparent that a decision was made not to re-enlist the applicant and thus any appeal regarding a dismissal would have no real prospect of success because he was not dismissed but rather was refused re-enlistment. The very authority on which the applicant relies supports this point at page 52. It also cannot be argued that the reason for the decision to not re-enlist the applicant was not communicated to him because it is pellucid that this was done by way of correspondence dated 17 November 2020 and 4 November 2021.

[22] However, the issue is that it is his uncontroverted assertion that the Commissioner told him that he need not worry about the allegations involved in the criminal case in the Saint Catherine Parish Court, yet that is the very reason that has been tendered for his non re-enlistment. That inconsistency is a matter that this court should consider on appeal.

[23] In relation to the argument that the application for leave to appeal was filed out of time, this court notes that a notice of appeal was filed on 31 July 2023 and an amended version was filed on 10 October 2023 wherein permission was sought to appeal. The decision of T Carr J was made on 21 July 2023 and being an interlocutory decision further to rules 1.11 (b) and 1.8(1) of CAR, a request for permission to appeal should have been filed within 14 days. Thus, the deadline was 4 August 2023. Implicit in the amendment which was made to the notice of appeal which was filed is that there was some error in the drafting of the document, which was identified by 10 October 2023.

[24] What is apparent is that a document was filed prior to the deadline which indicated an interest in having the matter heard before this court and leave to appeal was sought and refused in the lower court which also reflects that the applicant was aware that leave was required. This was apparently an error in the form of the document which was filed and thus, this court, in good conscience, cannot utilise that error as a basis for not hearing the request for leave. It relies on rule 2.14 of CAR and 26.9 of the Supreme Court of

Jamaica Civil Procedure Rules (2002) conjunctively. The respondent's filing of a notice of application requesting the refusal of leave to appeal appears to have been otiose and Ms Hall properly withdrew it. No costs would be awarded for that application. The respondent could have simply noted their objections/arguments in skeleton submissions.

Conclusion

[25] Although the applicant is not on good ground in arguing that he was dismissed by the Assistant Commissioner, he has an arguable ground of appeal with some prospects of success because, on his unchallenged evidence, the Commissioner assured him that the charges in relation to the stolen vehicle would not be considered, yet that is the only reason advanced for refusing his re-enlistment. The applicant should be given an opportunity to have this seeming inconsistency tested on appeal.

[26] In the premises, this court has found that leave to appeal ought to be granted and made the orders mentioned in para. [2] above.

D FRASER JA

[27] I, too, have read, in draft, the judgment of Sinclair-Haynes JA and agree that they accord with my reasons for agreeing with the decision that was handed down.