EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
A.D. 2020
(CIVIL)

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2020/0095

In the matter of an Application by Timothy Abbott and Maxine Stanley (in their personal capacities as well as in their representative capacity) for Leave to Apply for Judicial Review of the removal of 186 names from the Register of Voters for Constituency Saint Christopher No. 4 by the Supervisor of Elections;

And

In the matter of Sections 2, 29, 34 and 96 of the Constitution of Saint Christopher and Nevis;

And

In the Matter of the National Assembly Elections Act and the Election Registration Regulations;

BETWEEN:

TIMOTHY ABBOTT and MAXINE V. STANLEY (In their personal capacities and in their capacity as Representatives for 184 persons whose names have been removed from the Register of Voters for Saint Christopher No. 4)

Applicants/Intended Claimants

And

ELVIN BAILEY
(In his capacity as Supervisor of Elections and Chief Registration Officer)
ICELMA FYFIELD
(In her capacity as Registration Officer For Saint Christopher No.4

Respondents/Intended Defendants

Before: **The Hon. Mr. Justice Trevor M. Ward QC**

Appearances:-

Mr. Sylvester Anthony, Mrs. Angelina Gracy Sookoo-Bobb and Ms. Renal Edwards of Counsel for the Applicants/Intended Claimants.

Mr. Christopher Hamel-Smith S.C., Mr. Douglas L. Mendes S.C., Mrs. Simone Bullen-Thompson, Solicitor General and Mrs. Tashna Powell-Williams for the Respondents/Intended Defendants.

2020: June 03, 04, 12

JUDGMENT

[1] **WARD, J**.: On 4th June, 2020, after hearing submissions, the court dismissed an application for leave to apply for judicial review and interim relief in relation to 178 persons appearing on a schedule attached to the application for leave and in respect of whom the applicants sought to act in a representative capacity. These are my written reasons for so doing.

[2] General Elections in Saint Christopher and Nevis were scheduled to be held on 5th June, 2020. By Notice of application dated 2nd June, 2020 the applicants, in their personal capacities and as intended representatives of 184 persons, moved the court on an urgent basis seeking leave to apply for judicial review of the decision to remove their names from the Register of Voters for the electoral district of Saint Christopher No. 4 (Constituency No. 4). In addition to the applicants, Timothy Abbott and Maxine Stanley, four of the persons named in the schedule swore affidavits in support of the application. These were Lisa Davis, Tamara Davis, Kellisa Davis and Vincia England (together referred to hereafter as "the six deponents") The names of the other 178 persons whom the applicants sought to represent were contained in a schedule attached to the application for leave. However, a Notice of Discontinuance was filed in respect of Ken Caines whose name appeared at number 17 on that schedule.

[3] In summary, the six deponents each averred that in 2015 they were registered to vote in one or other polling division within Constituency No. 4. They each averred that their names appeared on the Register of Voters for Constituency No. 4 in 2015 and that they did in fact vote in those elections in Constituency No. 4. However, when the Register of Voters was published on 22nd May,

2020 they checked the list but discovered that their names had been omitted, and, further, that their names did not appear on any other list for any other constituency. Each asserted that prior to their names being removed they did not receive from the Electoral Office any notice of objections relating to them nor did they receive any information of any decision from any such hearing or at all. Not having been furnished with any such information, they are unable to say when their names were removed from the Register of Voters. Given that the Electoral Office posted a sign notifying the public that its offices would be closed from Tuesday June, 2nd (Monday 1st being a public holiday) to Friday June 5, 2020, they were unable to lodge a complaint with the Electoral Office.

[4] Being fearful, therefore, that they would be deprived of their Constitutional right to vote in the 2020 elections on 5th June, the applicants moved the Court for leave to apply for judicial review and for interim relief in the form of an Order mandating the First Respondent to restore forthwith to the Register of Voters for the said elections, the names of the applicants as they appeared on the Annual List of Voters published prior to January 28, 2020.

[5] The Supervisor of Elections filed an affidavit in reply on 4th June, 2020. He stated that the standard practice that was followed at the relevant times was that notice of objection to registration would be provided by registered post. He stated that he was not yet in a position to respond substantively to the allegation that, in the case of the six deponents, they did not actually receive such notice.

[6] In view of this, Mr. Mendes indicated that given the short time available for response, the Supervisor of Elections was not in a position to refute or confirm the allegation that the names of the six deponents were removed unlawfully and without due process. Accordingly, Mr. Mendes properly conceded that the six applicants who had sworn affidavits had met the threshold for leave to apply for judicial review and for interim relief.

[7] However, no such concession was forthcoming in relation to the other 178 persons whose names were contained in the said schedule attached to the application for leave. This judgment is therefore concerned with the application for leave and interim relief in relation to those persons.

The respondents' submissions

[8] On behalf of the respondents, learned Senior Counsel, Mr. Douglas Mendes, submitted that there was no evidence before the court that the other 178 persons were in the same position as as the six deponents in respect of whom concessions were made. The affidavit evidence, he submitted, went no higher than asserting that these persons were once on the list; it failed to speak to the circumstances under which their names came to be omitted therefrom. There is no evidence that they did not have notice of objections being raised to their names being on the list. Yet further, submitted Mr. Mendes, there is no evidence that their names do not appear on some other list in another constituency. Mr. Mendes urged the Court not to assume that the circumstances detailed in the affidavits of the six deponents applied to the 178 persons. This was so, he submitted, because their affidavits are personal to them as they speak only in the first person and even when the term "the applicants" is used, it is clear from the context that it refers only to Timothy Abbott and Maxine Stanley.

[9] Mr. Mendes submitted that there must be some evidence, whether on information and belief or otherwise, speaking to the circumstances under which the names of those 178 persons were omitted from the Register of Voters. Thus the court could not, without evidence of their circumstances, simply order that their names be placed on the list for Constituency No. 4. Mr. Mendes submitted that the evidence adduced at this stage in relation to these persons failed to establish an arguable case sufficient to meet the threshold for leave to apply for judicial review.

The claimants' submissions

[10] On behalf of the claimants, learned counsel, Ms. Sookoo-Bobb, explained that given the short time available it was impractical to secure affidavits from all of the persons whose names appear on the schedule. Nonetheless, learned counsel submitted that the evidence adduced suffices to establish that the other 178 persons were in similar circumstances as the six deponents. Learned counsel sought to support this submission by resort to paragraphs' 2 and 3 of the affidavits of Timothy Abbott and Maxine Stanley.

[11] These paragraphs state:

> "[2] I am authorized on behalf of the other 182 persons named in the schedule attached to the Application to represent them in the

captioned matter. I am also authorized to swear this Affidavit on their behalf.

[3] I have read the grounds of the application and verily believe same to be true to the best my information, knowledge and belief and for the facts stated below. We also give an undertaking in damages."

[12] In further support of the argument that the evidence established an arguable case and that the persons on the scheduled list were similarly circumstanced as the six deponents, reliance was placed on the scheduled attached to the application which bears the caption "List of voters in Constituency Saint Christopher No. 4 whose names have, in addition to the Applicants, been removed from the Register of Voters without due cause and/or due process."

[13] Learned counsel submitted that the combined effect of the foregoing factors is to establish through the pleadings that the persons on the list were omitted from the 2020 Register of Voters for Constituency No. 4 without due process.

ISSUE

[14] The limited issue that fell for resolution on this application for leave to apply for judicial review was whether the evidence adduced met the threshold for leave to apply for judicial review in relation to 178 persons whose names appear on the scheduled attached to the application.

Discussion

[15] Undergirding the requirement for leave to apply for judicial review is the necessity to filter out unmeritorious claims. Part 56.2(1) **CPR 2000** requires an applicant for leave to establish that he has sufficient interest in the subject matter of the application. This he may do by demonstrating, *inter alia*, that he has been adversely affected by the decision which is the subject of the application. He must demonstrate that he has an arguable case that a ground of judicial review exists that merits thorough examination at a substantive hearing and that there are no debarring factors such as delay in bringing the application or availability of an alternative remedy.

[16] The appropriate test is as formulated by the Privy Councils in in the case of **Sharma v Browne-Antoine**[1]:

> "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…It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen." (Pages' 19-20)

[17] The onus is on the applicants, therefore, to establish on the balance of probabilities that, as it relates to the 178 persons, there is an arguable ground for judicial review with a realistic prospect of success that their names were removed from the Register of Voters List unlawfully and without due process.

[18] To succeed, the arguability of the case and its prospect of success must be grounded on evidence that satisfies the court to the requisite standard. More particularly, there must be some evidence that prior to their names being removed, the 178 persons whose names appear on the scheduled list, did not receive from the Electoral Office any notice of objections relating to them nor did they receive any information of any decision from any such hearing. This is a condition precedent before the court can proceed to assess the fairness or otherwise of the decision making process.

[19] Further, as it relates to persons seeking to act in a representative capacity, **CPR 21. 1** provides that where five or more persons have the same or similar interest the court may appoint one or more of those persons or a body having a sufficient interest in the proceedings to represent some or all of the persons with the same or similar interest. At issue therefore was whether the evidence established that the applicants and the persons whom they sought to represent shared the same or similar interest in that their names were all removed from the Register of Voters in Constituency No. 4 without due process.

The evidence

[20] I turn to examine the evidence in relation to the issues for determination. A convenient starting point is the Notice of Application which clearly identifies who the applicants are. It states:

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[1] [2007] 4 LRC 10

> "The Applicants/Intended Claimants **Timothy Abbott** of Station Street, Old Road and **Maxine Stanley** of Conyers, Saint Kitts apply to the court…"

[21] And further, at paragraph 3 of the said Notice, under the caption "Applicants" the following words appear:

> "The Applicants, Timothy Abbott and Maxine Stanley reside at Station Street, old Road Saint Kitts and Conyers, Saint Kitts respectively ("the Applicants"). They are also the intended representatives of 184 persons whose names are listed in the schedule hereto and whose were removed from the Voters List for Constituency Saint Christopher No. 4."

[22] The foregoing is important to provide context when examining the contents of the affidavits of Timothy Abbott and Maxine Stanley. It seems to me that all references to "the applicants" in the supporting affidavits can only be a reference to these two persons.

[23] Counsel for the applicants argued that paragraphs' 2 and 3 of the affidavits of the applicants, together with the caption to the scheduled list attached to the application (terms of which are set out at paragraph 11 above), provides a basis for saying that the 178 persons had their names removed from the Register of Voters without due process.

[24] In my view, paragraph 2 goes no further than to assert that the deponent is authorized to represent the persons listed in the schedule. Paragraph 3 says that the deponent has read the grounds of the application and verily believes same to be true to the best of his/her information, knowledge and or belief. The grounds of the application are set out at paragraph 10 of the Notice of Application. The gravamen of the complaint is set out at paragraph A which reads:

> "The Applicants intend to rely on the following grounds in support of the relief claimed:
>
> A. The Denial of the Opportunity to be heard
>
> i. The Respondents failed to give the Applicants notice in writing in accordance with regulation 23(1), of any hearing to consider any claims and/or objections against them or at all. The Applicants never received any notices of Objection but checked the purported Register of Voters for No. 4, published on May 22, 2020 and noticed that their names had been removed

from the Register. The Applicants are not aware of when their names were removed as they never received any notification thereof…

ii…..

iii…

iv. The Respondents therefore ought to have given the Applicants a hearing before they removed their names from the Register of Voters and their failure to avail the Applicants of such a hearing amounts to a breach of regulation 23(1), natural justice and the principles of fairness and which ought to nullify the decisions and the productions of a Register of Voters devoid of the Applicants' names."

[25] In my view, all that is said therein relates specifically to the applicants Abbott and Stanley. There is no allegation in the grounds that the 178 persons listed in the schedule were denied due process. The language cannot be stretched to read it as applying to all 178 persons.

[26] It may also be useful to set out in detail the other material parts of Mr. Abbott's affidavit in support of the application:

"8. I am also a qualified voter for Constituency No. 4. I have been registered to vote since before 1993 and have always been registered in Constituency No. 4, polling division 2. In or about 2007, I participated in the reconfirmation process and was reconfirmed to vote in Constituency No. 4, polling division 2. I was also issued a National Identification Card. A true copy of my National Identification Card is now produced and shown to me and marked "**T.A.1**".

9. After the participating in the reconfirmation process, I voted in the 2010 elections and thereafter in the 2015 elections. At both elections I voted in Constituency No. 4, polling division 2.

10. My name appeared on the Register of Voters for the 2015 elections. I

> did not check the Register of Voters thereafter until the most recent Register was published on May 22, 2020. Having checked the Register, I noticed that my name was removed as being a registered voter for Constituency No. 4. I did not request for my name to be removed from the Register of Voters for Constituency No. 4 or at all. My name does not appear on any other constituency's list."

[27] Undoubtedly, in these paragraphs Mr. Abbott speaks exclusively to his individual circumstances as they relate to the removal of his name from the list. I can see no basis for reading them as suggesting that the circumstances outlined therein apply equally to each of the 178 persons whose names appear in the schedule.

[28] The affidavits of Lisa Davis, Tamara Davis, Kellisa Davis and Vincia England similarly speak only in the first person when addressing the circumstances under which their names were removed. In circumstances where none of the deponents speak to, or even reference, the circumstances under which the 178 persons' names were removed, nor even states that they spoke to them, this defect cannot be cured by a generalized caption appearing in the schedule to the effect that the namesin the schedule were removed from the Register of Voters for Constituency N0. 4 without due process.

[29] The allegations made on this application are very serious, alleging a denial of due process impacting the constitutional right to vote. There is therefore a concomitant obligation on the applicants to adduce cogent evidence to meet the threshold for leave. As was said by Lord Bingham in **Sharma v Brown-Antoine,** citing **R (N) v Mental Health Review tribunal (Northern Region)**[2] in relation to arguability:

> "…the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the

[2] [2005] EWCA Civ 1605

strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

[30] Given the state of the evidence as rehearsed above I was not satisfied that the applicants had met the threshold in relation to these 178 persons. I accordingly refused to make the orders sought in relation to them.

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar