

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2021/CLE/GEN/0023

BETWEEN

BETRAM PAUL

Applicant

AND

THE AIRPORT AUTHORITY

1st Respondent

**THE ATTORNEY GENERAL AND MINISTER OF LEGAL
AFFAIRS
OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF
LEGAL AFFAIRS**

2nd Respondent

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mr Bjorn Ferguson for the Applicant
Mr David Whyms for the Respondent

Hearing Date: 1st December, 2021

**Public Law – Judicial Review – The Airport Authority- Decision to withhold
Work Identification Badge – whether section 33 of the Civil Aviation Act
applies – threshold for leave to apply for Judicial Review – Alternative remedy**

RULING

DARVILLE GOMEZ, J:

1. This is an application for leave to apply for judicial review against a decision made on April 21, 2021 by the First Respondent, The Airport Authority, to withhold the Applicant's work identification badge thereby depriving him of the ability to continue with his employment at Nassau Flight Services.
2. I have granted the Applicant leave to apply for Judicial Review which decision I rendered orally. I promised to put my reasons in writing which I now do.

Facts

3. While there may be slight differences in the facts articulated by each of the parties, there is no divergence of views regarding the main issue in contention which has formed the basis for the leave to apply for judicial review application. The Applicant's version of the facts are contained in his Affidavit filed on July 21, 2021 and the Respondents' version is found in an Affidavit of Stephanie Demeritte, the Director of Security for the First Respondent filed on November 25, 2021.
4. On February 16, 2021 the Applicant, an employee of Nassau Flight Services was arrested (along with others) by officers of the Drug Enforcement Unit (DEU) after four (4) kilos of cocaine was found on board a JetBlue Flight going into the United States of America. He was detained, his belongings seized and within forty-eight (48) hours, he was released without charge. His personal effects including his work identification badge and cell phone were taken by the DEU. His cell phone was later returned, however, DEU advised that his work identification badge was returned to his employers, Nassau Flight Services. The Applicant sought through his attorney to retrieve his badge from his employer who advised that the badge was never returned to them and was actually in the possession of Stephanie Demeritte, the Director of Security for the Airport Authority, the First Respondent.
5. The Applicant's numerous attempts to retrieve his badge have proven unsuccessful and because it has not been returned, he has been unable to work for six weeks and has not been paid for seven weeks. The First Respondent has refused to issue the identification badge on the basis that the Applicant is a safety or security risk and have sought to rely on the Lynden Pindling International Airport Security Programme.

The Application

6. The application for leave to apply for judicial review was made ex parte on notice to the Respondents.
7. The Applicant sought the following relief:
 - (i) Judicial review in the form of an order of certiorari quashing the said decision of the First Respondent made on 21st April, 2021;

- (ii) Judicial review in the form of mandamus compelling the First Respondent to properly exercise its powers, rights and duties.
 - (iii) A declaration be made that the First Respondent had acted unreasonably in its decision to refuse the issue of an identification badge to the Applicant
 - (iv) A declaration be made that the First Respondent had acted irrationally towards the Applicant.
 - (v) A declaration be made that the First Respondent acted in a way which displayed procedural impropriety.
 - (vi) A declaration that the First Respondent acted in a way that failed to observe the basic rules of Natural Justice.
8. The Respondents have objected to the said application by Summons on the basis, inter alia, that there is an alternative remedy available to the Applicant.
9. The Respondents have filed an Amended Affidavit of Basil Cumberbatch on November 25, 2021 which sought to address the alternative remedies that the Applicant ought to have pursued to have the issue of the revocation of his work identification badge resolved.
10. The Court for reasons hereinafter set out has granted leave to the Applicant to apply for judicial review.

The Issues

11. The issues which arise for consideration are:
- (i) Whether the applicant has met the threshold to apply for judicial review;
 - (ii) Whether there is an alternative remedy available to the Applicant.

Issue 1: Whether Bertram Paul has met the threshold test for grant of leave

12. Pursuant to the Rules of the Supreme Court, Order 53, rule 3(1) the leave of the Court is required to commence an action for judicial review.
13. The additional requirements are:
- (i) that the application must be made within six (6) months from the date when the grounds for the application first arose, unless the Court considers there is good reason for extending the period within which the application shall be made. [Order 53, rule 4(1)]
 - (ii) that the Court must be satisfied that the applicant has “a sufficient interest” in the matter to which the application relates. [Order 53, rule 3(7)].
14. The Court found that both requirements of the Rules of the Supreme Court have been satisfied by the Applicant and additionally, the Respondents have conceded the same.

Issue 2: Discretionary bar to leave: The alternative remedy

15. The Court must consider whether there is an alternative remedy available to the Applicant.

16. The Respondents maintain that there is an alternative remedy and therefore, the Applicant's application for leave ought to be dismissed. I refer to the relevant portions of their submissions as follows:

"15. The Respondents contend that the application made by the Applicant for leave to apply for Judicial Review is at its highest having almost no realistic prospect of success and bound to fail and at its lowest is premature having regard that he has failed to exhaust available remedies available to him.

16. The legality and the rationality of the decision taken by the First Respondents in revoking the Applicant's badge is grounded not only in the Civil Aviation Act, 2021 but also subsumed in the Lynden Pindling Security Programme.

20. The Respondents also contend that not only is Judicial Review a remedy of last resort but that is also trite that the Constitution of The Bahamas provides that the Supreme Court shall not exercise its power if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

21. The Respondents also will say that the Applicant has not in any way demonstrated that even if he somehow was able to show that he has an arguable case with a realistic prospect of success, that he falls into an exceptional/special circumstances or category.

22. Notwithstanding, in some cases the Court will find exceptional/special circumstances to exist because of the adequacy of the alternative remedy such that an applicant cannot secure the same remedies before the statutory tribunal that it can secure before the Supreme Court on judicial review.

23. However, this is not the case for the Applicant herein. Instead of following the appeals procedure as outlined under the provisions of the 2021 Civil Aviation Act, he has sought to abuse the courts machinery by apply for leave for Judicial Review in order to circumvent the statutory process. The Respondent say further that had the Applicant at least appealed the decision to revoke his badge to the Director, the courts time would not be wasted hearing this application as a favourable outcome may have been achieved from that appeal."

17. The Court has reviewed what the Respondents have referred to as the Appeals procedure in the Civil Aviation Act, 2021 ("CAA 2021"). I have set out below the various provisions in the CAA 2021 which addresses appeals.

18. At the outset the Applicant denies that any of these provisions apply and for reasons that I address later, I agree with him.

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.**

- (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.

- (3) The Director General shall consider

19. The prerequisite for the application of the appeal provisions in the CAA, 2021 is that the work identification badge falls within the definition of an aviation document as set out in the CAA, 2021. It reads as follows:

“Aviation document means a license, permit, certificate or other document issued under section 20 in respect of any of the classes of persons or services or things specified therein;”

20. Prima facie, the definition of an aviation document is broad enough to include the Applicant’s work identification badge. However, the aviation document must be issued under section 20 of the CAA 2021, in respect of, a class of persons or things or services specified in that section. It reads as follows:

- (1) For the purposes of this Act, an aviation document is required by or in respect of any of the following classes of persons or services or things

- (a) Aircraft registration in accordance with section 10;
- (b) An airman
- (c) Air operator conducting general aviation, aerial work or commercial air transport operations;

- (d) Air traffic, aircraft maintenance, aviation security, meteorological or communications services or personnel;**
- (e) An aerodrome or aerodrome operator;**
- (f) Aviation navigation services;**
- (g) Aviation security services;**
- (h) A navigation installation provider;**
- (i) An aviation training organization;**
- (j) Aircraft design, manufacture and maintenance organizations;**
- (k) Aeronautical procedures;**
- (l) Aviation examiners or aviation medical examiners;**
- (m) Any other class of person, product or service or thing that is deemed necessary by the Authority, in the interest of civil aviation safety and security;**

(2) any person who is desirous of engaging in or engages in any activity, function or does any thing for which an aviation document is required in accordance with section 21 –

- (a) Must apply for or have been granted an approval in accordance with section 22**
- (b) Must meet the criteria specified in section 21 for a fit and proper person;**
- (c) Shall ensure that he possesses the requisite experience, qualifications and supporting documents;**
- (d) Shall comply with this Act, any regulations thereunder and any conditions attached to the relevant aviation documents;**
- (e) Shall ensure that the activities or functions for which an aviation document has been granted are carried out by him, and by all persons for whom he is responsible, safely and in accordance with the applicable operating regulations and procedures.**
- (4) The Authority may issue an aviation document for such period specified therein and subject to such conditions as the Authority deems appropriate.**

21. I do not believe that the Applicant falls within the class of persons or services or things as contemplated in section 20. The Applicant was employed as what may be referred to as a baggage handler with Nassau Flight Services. Therefore, even if the work identification badge is construed as falling within the definition of an aviation document, the appeal provisions would still not have provided an alternative remedy to the Applicant.

22. The Applicant further submitted that even if the provisions apply, that the Respondent acted ultra vires these provisions because these provisions contemplate that only the Director General could revoke an aviation document. In the instant case, Stephanie Demeritte revoked the work identification badge and she is not the Director General rather, she is the Director of Security.

23. Whilst the Respondents have also relied upon the Lynden Pindling International Airport Security Programme that document was never disclosed. Therefore, I am unable to address whether this is in fact an alternative remedy available to the Applicant.

24. Accordingly, for the reasons set out, I do not believe that the various appeal provisions of the CAA 2021 (which I have set out above) and upon which the Respondents rely as being an alternative remedy available to the Applicant are applicable.
25. In the circumstances, this is a proper case where the Court ought to exercise its discretion and grant the Applicant leave to apply for judicial review of the decision of the First Respondent.

Dated the 21st day of December, 2021

Camille Darville Gomez
Justice