



[2020] JMSC Civ. 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV01875

IN THE MATTER of the Pharmacy Act, 1975

AND

IN THE MATTER of the Pharmacy Regulations,
1975

AND

IN THE MATTER of an application by Angella
Robinson for Administrative Orders.

BETWEEN

ANGELLA ROBINSON

APPLICANT

AND

THE PHARMACY COUNCIL OF JAMAICA

RESPONDENT

IN CHAMBERS

Mr. Lemar Neale instructed by Nea/Lex for the Applicant

Ms. Kamau Ruddock instructed by Director of State Proceedings for the Respondent

HEARD: July 7, 2020 & July 30, 2020

Application for leave for Judicial Review - Whether the Applicant has an arguable case - Breach of natural justice - Legitimate expectation- Availability of an alternate remedy

WOLFE-REECE, J

INTRODUCTION

[1] By way of Notice of Application for Court Orders filed on June 10, 2020, the Applicant, Miss Angella Robinson, seeks the following orders:

1. Leave to apply for judicial review of the decision of the Respondent not to renew the registration of the Applicant's pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Center" as contained in letters dated March 27, 2020 and May 19, 2020, by way of:
 - I. An order of *Certiorari* to remove into this Honourable Court and quash the decision of the Respondent not to renew the registration of the Applicant's pharmacy "Angella Robinson t/a Ann care Pharmacy & Gift Center" as contained in letters dated March 27, 2020 and May 19, 2020.
 - II. A declaration that the Applicant was not given a hearing prior to the Respondent's decision not to renew the registration of the Applicant's pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Center" as contained in letters dated March 27, 2020 and May 19, 2020 in breach of principles of natural justice.
 - III. In the alternative a declaration that the Respondent's decision not to renew the registration to the Applicant's pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Centre" as contained in letters dated March 27, 2020 and May 19, 2020 is unreasonable, irrational and in breach of the principles of legitimate expectation.
 - IV. An order of Mandamus directing the Respondent to renew the registration of the Applicant's pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Center"

- V. In the alternative, an order of Mandamus directing the Respondent to hold a hearing in order to consider the Applicant's application to renew the registration of the Applicant's pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Center" with due expedition.
 - VI. A stay of any pending criminal proceedings instituted against the Applicant arising from the Applicant's operation of the pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Centre" during the period that the Respondent refused to re-register the said pharmacy, pending the outcome of this application.
2. Costs to be costs in the claim.
 3. Such further or other relief as this Honourable Court may deem necessary or appropriate.

BACKGROUND

- [2]** The Applicant is a sole trader who operates a pharmacy known as 'Ann Care Pharmacy & Gift Centre' with business 55 Young Street, Spanish Town in the parish of Saint Catherine.
- [3]** The Respondent is a body established by virtue of section 3 of the Pharmacy Act whose functions are specified under section 4 of the said Act as being:
- (a) to register pharmacists, pharmaceutical students, pharmacies and owners of pharmacies;*
 - (b) to regulate the training of pharmaceutical students;*
 - (c) to register persons as authorized sellers of poisons;*
 - (d) to ensure the maintenance of proper standards of conduct by persons registered under this Act;*
 - (e) to ensure compliance with the requirements of this Act.*

- [4] The genesis of the conflict that has led to the current proceedings is contained in letter dated March 27, 2020 by which the Pharmacy Council has refused to renew the registration of the branch of Ann Care Pharmacy located at 55 Young Street, Spanish Town in the parish of Catherine and instead instructed the applicant to take the necessary steps to permanently close the pharmacy. After an exchange of correspondence between the parties, on May 19, 2020 The Pharmacy Council again wrote to the Applicant in the following fashion:

Dear Mrs Robinson

Re: Closure of Ann Care Pharmacy- Spanish Town

Reference is made to our letter dated 27 March 2020, in which you were informed that the Council would not renew the registration of Ann Care Pharmacy, located at 55 Young Street, Spanish Town, St. Catherine.

Please be reminded that Ann Care Pharmacy re-registered on 12 July 2019, for the registration period of 01 April 2019- 31 March 2020. Three (3) months later you were without the services of a registering pharmacist. The Pharmacy Council experienced great difficulty in effecting an inspection of the pharmacy.

The Council, taking into consideration the challenges with the operations of Ann Care Pharmacy, at its meeting in March 2020, took the decision not to renew its registration.

You may appeal the decision of the Council through the Registration Appeal Tribunal. [Emphasis Mine]

- [5] The Applicant being aggrieved by the decision of the Council not to re-register her pharmacy is seeking leave to apply for judicial review of the said decision.

APPLICANT'S SUBMISSION

- [6] The essence of the Applicant's case is captured at paragraph 31 of Mr. Neale's skeletal submissions where he expressed as follows:

"The Applicant submits that the decision made by the Respondent on March 27, 2020 and confirmed in its letter dated May 19, 2020 was made in breach of the principles of natural justice as it seeks to deprive the

applicant of a privilege which she has the legitimate expectation that she would continue to enjoy”

- [7] Counsel for the Applicant argued that there was a breach of natural justice because Miss Robinson was not given a hearing prior to the Respondent’s decision not to renew the registration of ‘*Ann Care Pharmacy*’.
- [8] The applicant filed two affidavits in this matter on June 10, 2020 and July 7, 2020, respectively. She outlined that at the time of the alleged breach the pharmacy was closed and had in fact been closed since November, 2019 in keeping with previous directions given by the Respondent to close the pharmacy given that no registered pharmacist was there. She explained that the drugs were properly secured and the dispensary was closed during the said period. She argued at paragraph 21 of her affidavit that the decision of the Council not to renew her registration was unreasonable and irrational having regard to the circumstances of her case.
- [9] Mr. Neale applied the privy council decision of **Sharma v Brown-Antione** [2006] UKPC 57 in arguing that the applicant has an arguable case with a realistic prospect of success and that there was no discretionary bar which would prevent the court from granting leave.
- [10] It was submitted that the issue of delay did not arise in the instant case as the final decision was made on May 19, 2020 and the application for Leave for Judicial Review was made on the June 10, 2020.
- [11] Learned Counsel indicated that the applicant has an alternative remedy by virtue of section 16 of the Pharmacy Act which gives a person aggrieved by refusal of the Council to register him as a pharmacist or a pharmaceutical student or the owner of the business carried on in pharmacy to appeal to the Registration Appeal Tribunal. Counsel noted that the applicant made attempts to appeal to the tribunal, however, she has discovered that the tribunal is inaccessible.
- [12] Counsel urged the court to accept that judicial review is more suitable than the appeal the Registration Appeal Tribunal. Counsel relied on the dicta of Jackson-

Haisley, J at paragraph 46 of the case of **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMFC Full 2 where her Ladyship expressed that the existence of an alternative form of redress does not always mean that the claim must fail.

- [13] Mr. Neale argued that the Respondent's refusal to renew the applicant's licence without affording her a right to a fair hearing was in clear breach of the principles of natural justice. Counsel submitted that breach of principles of natural justice is a recognized ground for judicial review, which entitles the applicant to an order of certiorari to quash the decision of the court.
- [14] Counsel also submitted that the applicant had a legitimate expectation that her application would be renewed given that she was previously registered to practice in 2017, 2018 and 2019.

RESPONDENT'S SUBMISSION

- [15] Mr. Radcliffe Goulbourne, Registrar of the Pharmacy Council of Jamaica swore in an affidavit dated July 2, 2020 that the Respondent had become concerned with the operation of Ann Care Pharmacy as far back as 2018. Mr. Goulbourne exhibited an email from one Roxana Mullings, who is allegedly a pharmacist previously employed to the Applicant. In her email dated January 2, 2018, Ms. Mullings alleged that she did not have autonomy over the dispensary. She further indicated that the dispensary is often operated in the absence of a pharmacist.
- [16] As a result of Ms. Mullings' allegations the Pharmacy Council caused an inspection to be done which led to a revelation of the following breaches:

- (i) *A person who was not a pharmacist was operating alone in the dispensary;*
- (ii) *There was no registered pharmacist on duty at the material time;*

(iii) The requisite reference text “the Complete Drug Reference” was not seen during inspection;

(iv) Food items were beings stored in the refrigerator which was designated for the storage of medication only;

[17] Mr. Goulbourne explained that as a result of the aforementioned breaches the Council wrote to the Applicant inviting her to a meeting to discuss the issues. The meeting was held on the February 22, 2018 and ended with the applicant giving the commitment of hiring a new pharmacist who had given the commitment of working with her.

[18] Following the Applicant’s commitment to have a replacement pharmacist work with her, it was discovered by the Council that the said pharmacist was employed on a fulltime basis to another institution. The Council expressed its concerns to Ms. Robinson who later provided a commitment letter from one Sanjae O. Watson dated July 8, 2019 who expressed that he would be in control of the Spanish Town location.

[19] According to Mr. Goulbourne a few months later, on October 3, 2019, the Council received an email from Mr. Watson, a copy of which was exhibited to his affidavit, wherein Mr. Watson notified the Respondent that he was no longer employed to the pharmacy and cited several discrepancies, irregularities and breaches of the Pharmacy Act in the applicant’s operation of the pharmacy.

[20] As a result of the report made by Mr. Watson, the Respondent wrote to the Applicant by way of letter dated December 12, 2019 seeking clarification about the pharmacy and also indicating to the Applicant that several visits have been made by the Council’s inspectors with a view to conducting inspections however on each visit the pharmacy was closed. The Council wrote as follows:

Dear Mrs. Robinson,

Re: Ann Care Pharmacy- Spanish Town

The Pharmacy Council requires an explanation regarding the status of Ann Care Pharmacy located at 55 Young Street, Spanish Town, St. Catherine.

This Pharmacy was issued a Certificate of Registration on July 12, 2019 with Mr. Sanjae Watson as the committed full-time Pharmacist. It is noteworthy and of concern that the registration was completed later than three months after the expiration of the previous certificate which expired March 31, 2019.

Less than two months after registration on September 3, 2019, the Council received a letter from Mr. Watson with notification that he had resigned as the registering pharmacist. The inspectors of the Pharmacy Council have made numerous visits to Ann Care Pharmacy, from October 22, 2019 to November 20, 2019 and have not been able to conduct an inspection. They have reported that the pharmacy was closed on each visit and did not appear to be [sic] in operation.

In view of the Council's inability to inspect this facility, you are being asked to advise the Council on the current status of the business. Hence responses to the following questions must be provided within one week of receipt of this letter:

- 1. Is the business still being operated as a pharmacy?*
- 2. If it is in operation, what are the business hours?*
- 3. Is there a registered pharmacist at the location?*
- 4. If there is a pharmacist or pharmacists covering the hours, please provide the name/s to the Pharmacy Council along with a schedule.*

It is imperative that a response be provided within the time specified so that the Council is able to determine whether or not the provisions of the Pharmacy Act are being complied with as outlined in sections 23(1)(a) and (1)(b) of the Pharmacy Act.

[21] Mr. Goulbourne argued that the Applicant failed to acknowledge or respond to any of the Council's letter. He explained that this aroused the Council's suspicion and they formed the impression that she was being deceptive. The failure on the part of the applicant to respond to the Council's letters prompted the Respondent to send a third letter to the Applicant dated January 29, 2020 wherein the Applicant was urged to respond to the Council's letters of October 10, 2019 and December 12, 2019, he also reiterated the point that the inspector was making attempts to access the pharmacy but was unable to do so. In the said letter, the Respondent invited the Applicant to a meeting on Monday February 10, 2020 at 2:00 p.m.

[22] At paragraph 21 of his affidavit, Mr. Goulbourne explained that the Applicant responded to the Council's letter by way of an email dated February 19, 2020

wherein she explained that she was not made aware of the meeting of February 10, 2020. In the said email she expressed concerns about the fact that the Council had told distributors not to sell list 2 drugs to her because she had missed the February 10 meeting.

[23] In March, 2020 the Respondent wrote to the Applicant again expressing his concerns that a registered pharmacist was not employed to the pharmacy and that the inspectors were trying to gain access but were unable. Mr. Goulbourne expressed that the Applicant failed to address the Council's concerns which led to the decision being made not to renew the Applicant's registration. This was expressed in letter dated March 27, 2020 and reiterated by way of letter dated May 4, 2020.

[24] Learned Counsel, Miss Ruddock, who appeared for the Respondent argued that the failure to grant the Applicant a formal hearing did not breach the principles of natural justice because the Pharmacy Act did not impose an obligation to have a formal hearing prior to the refusal to renew the registration. Counsel submitted that section 13(6) stipulates instances in which a hearing is required and that the breaches which it is alleged that the Applicant committed did not require that a formal hearing be conducted. She relied on the decisions of **Aston Reddie v the Firearm Licensing Authority and Others** unreported Claim number 2010HCV01681 delivered November 24, 2011 to support her point.

[25] Miss Ruddock argued that the decision of the Council was not irrational and/or unreasonable. Counsel cited the case of **Council of Civil Service Unions and others v Minister for the Civil Service** - [1984] 3 All ER 935 for the point that this ground only applies to:

“a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.”

Counsel submitted that the applicant did not have the services of a registered pharmacist since October, 2019 to command, control, manage or supervise the dispensary and the storage of drugs. Therefore, the Respondent was justified in exercising its function by refusing to renew the registration.

[26] On the issue of whether the applicant had a legitimate expectation, Learned Counsel submitted that the applicant did not have a legitimate expectation of her registration being renewed as she failed to meet the standards and requirements set out in the Pharmacy Act.

[27] The Respondent therefore submitted that an order of certiorari should not be granted in the circumstances because the Applicant is not entitled to the grant of same.

Issues

- I. Whether there is a discretionary bar against leave being granted?**
- II. Whether the Applicant has an arguable case with a realistic prospect of success?**

Law and Analysis

[28] Part 56 of the Civil Procedure Rules (CPR) govern the procedure to be followed when dealing with public law matters. The specific public law remedy being pursued by the Applicant is that of Judicial Review, which is the process by which the Supreme Court exercises a supervisory jurisdiction over persons or bodies that perform public law functions or make decisions which affects the public. It is important to note that judicial review is to be distinguished from an exercise of a court's appellate jurisdiction. In judicial review matters the court is not concerned

with whether the decision is correct but whether the public body acted fairly in arriving at its decision.

- [29] The starting point is rule 56.3(1) of the CPR which states that a person wishing to apply for judicial review must first obtain leave. It is common ground between the parties that the test to be applied by the court in determining whether to grant leave to apply for judicial review is that which was set out by the Privy Council in the decision of **Sharma v Brown Antoine** [2007] 1 WLR 780, where Lords Bingham and Walker stated at paragraph 14(4) of their joint judgment as follows:

“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

- [30] Based on the foregoing it is clear that in the exercise of its supervisory function, the court will only act if the applicant has an arguable case with a realistic prospect of success. Furthermore, in **Sharma v Brown Antoine**, (supra), their Lordships made it clear that even where the Applicant has an arguable case the court may refrain from granting leave in instances where there is a discretionary bar such as delay or where the applicant has an alternative remedy at his/her disposal.

- [31] The requirement for the applicant to first obtain leave may be viewed as the court exercising its role as a gatekeeper by keeping out frivolous and vexatious applications. This position was expressed by Mangatal, J (as she then was) in the case of **Digicel (Jamaica) Limited v The Office of Utilities Regulations** [2012] JMSC Civ. 91 where she expressed as follows:

It is part of the Court’s function when it dons its “review hat” to be astute to avoid applications being made by busybodies with hopeless, weak, misguided or trivial complaints. Public authorities need protection from unwarranted interference and plainly, the business of government could grind to a halt and good administration be adversely affected if the Courts do not perform this sifting role efficiently and with care.

Whether there is a discretionary bar to grant leave

[32] The issue of delay is an important consideration in determining whether to grant leave for judicial review. CPR 56.6 (1) states that:

“an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.”

The issue of whether an application was made promptly will depend on the specific facts of each case as the authorities have shown that filing for leave to apply for judicial review within 3 months does not necessarily mean that the party acted promptly (see **Andrew Finn-Kelcey v Milton Keynes Council** [2008] EWCA Civ 1067).

[33] Neither party to the current proceedings have raised the issue of delay. The undisputed fact is that by letter dated March 27, 2020 the Pharmacy Council expressed to the Applicant its decision not to renew the registration of the pharmacy. This decision was reiterated in letter dated May 19, 2020 when Mrs Robinson was advised of her right to appeal the decision through the Registration Tribunal. The Application for Judicial Review was filed within the three-month period on June 10, 2020. Given the facts as presented to this Court, I find that the application was made promptly.

[34] As pointed out earlier, Lords Bingham and Walker in the case of **Sharma v Browne Antoine** (supra) identified the availability of an alternative remedy as a discretionary bar to granting leave to apply for judicial review. Similarly, CPR 56.3(d) imposes a duty on the applicant to convince the court why judicial review is the most appropriate remedy where an alternate remedy is available. The specific rule stipulates that the applicant must state:

whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued

[35] When one interprets the words of the rule, it is clear that it was never intended that the availability of an alternative remedy would serve as an absolute bar to leave

being granted to apply for judicial review. Sykes, J was likeminded in his interpretation of the provision when he expressed at paragraph 75 of the decision of **Everton Tabannah & Worrell Latchman v The Independent Commission of Investigations** [2016] JMSC CIV 101 that:

The wording of this provision must rest on the assumption that there may be other means of redress available and the applicant needs to justify why judicial review is more appropriate. If this is correct then it is no longer correct to say that judicial review can only be pursued if no alternative form of redress exists. What he can do is show why judicial review is more favoured than the others.

[36] When the aforementioned matter was brought before the Court of Appeal in the case of **The Independent Commission of Investigations v Everton Tabannah & Worrell Latchman** [2019] JMCA Civ. 15, Brooks JA endorsed the reasoning of Sykes, J and further expressed at paragraph 62 of the judgment as follows:

It is unnecessary to decide definitively in this judgment whether rule 56.3 of the CPR allows for leave to apply for judicial review where an alternative remedy exists. A reading of the rule certainly suggests, as the learned judge held, that at the leave stage the existence of an alternative remedy is not an absolute bar to the grant of leave....” The issue is whether the alternative is more suitable than judicial review. In this case it is.

[37] Section 15(1) of the Pharmacy Act provides as follows:

There is hereby established for the purpose of hearing appeals from the Council a Registration Appeal Tribunal (in this Act referred to as “the Tribunal”).

[38] Section 16(1)(a) provides that:

Any person aggrieved by the refusal of the Council to register him as a pharmacist or pharmaceutical student or as the owner of the business carried on in a pharmacy, or to register as a pharmacy any shop owned by him may appeal to the Tribunal against such refusal or decision within such time and in such manner as may be prescribed.

[39] A reading of the Act would suggest that the Applicant has an alternate remedy available. Unfortunately, the Applicant submitted that she made several attempts to appeal the decision of the Council through the tribunal but was unable to identify and make contact with the said tribunal. Counsel for the Respondent did not

dispute or oppose the assertions being made by the Applicant, rather she submitted that the tribunal was properly constituted but not yet gazetted. This in itself raises questions about the validity of the tribunal. Nevertheless, this court is called upon to determine whether leave should be granted to review the decision of the Council, I therefore go on to conclude that while in theory the applicant has the alternate remedy of filing an appeal to the tribunal, that avenue has proved to be futile which renders judicial review as a more appropriate option.

Whether the applicant has an arguable case with a realistic prospect of success

[40] The unavailability of the option of the Appeals Tribunal is not an automatic determinant that leave will be granted. The Applicant has to show that she has an arguable case with a real prospect of success.

[41] In the celebrated case of **Council of Civil Service Unions and others v Minister for the Civil Service** - [1984] 3 All ER 935 Lord Diplock laid down three distinct grounds on which administrative action may be subject to judicial review, that is, illegality, irrationality and procedural impropriety. His Lordship expressed as follows:

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

[42] In determining whether to grant leave to apply for judicial review the court will be assessing whether the applicant has an arguable case on any or all of the grounds which were outlined by Lord Diplock.

[43] It is useful to establish what the concept of ‘*arguable case with a realistic prospect of success*’ means. I revert to the joint judgment of Lords Bingham and Walker in the case of **Sharma v Brown Antoine, supra**, where the concept was explained at paragraph 14 (4) as follows:

“...arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis 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 strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

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 processes of the court may strengthen'; Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733.” [Emphasis Mine]

[44] It is clear based on the foregoing that it is not enough to have a rational argument or simply an arguable case, the court must be satisfied that the applicant has a realistic prospect of success. The principle set out in **Sharma v Brown Antoine, supra** has been applied throughout the Commonwealth. The case was described by Lord Justice Underhill as the locus classicus in the case of **R (on the application of Wasif) v Secretary of State for the Home Department [2016] EWCA Civ. 82** where he explained the concept of arguable case with a realistic prospect of success at paragraph 15 of the judgment as follows:

In our view the key to the conundrum is to recognise that the conventional criterion for the grant of permission does not always in practice set quite as low a threshold as the language of “arguability” or “realistic prospect of success” might suggest. There are indeed cases in which the judge considering an application for permission to apply for judicial review can

see no rational basis on which the claim could succeed: these are in our view the cases referred to in the Grace case as “bound to fail” (or “hopeless”). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say “claimant” for short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. On this approach, even though the claim might be said to be “arguable” in one sense of the word, it ceases to be so, and the prospect of it succeeding ceases to be “realistic”, if the judge feels able confidently to reject the claimant’s arguments. The distinction between such cases and those which are “bound to fail” is not black-and-white, but we believe that it is nevertheless real; and it avoids the apparent anomaly identified at para 13 above.

- [45] The principle has also repeatedly been applied in our courts at both the Court of Appeal and the Supreme Court jurisdiction. I particularly like the simplicity with which Mangatal J (as she then was) explained the principle in the case of **Shirley Tyndall, O.J. et al v Hon. Justice Boyd Carey (Ret’d) et al** unreported Claim number 2010HCV00474 delivered February 12, 2010 when she expressed as follows:

“It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success.”

Illegality

- [46] Mr. Neale submitted that the Pharmacy Council acted in breach of principles of natural justice when they refused to renew the applicant’s registration without first affording her a fair hearing. Counsel relied on the case of **Fenton Denny v The Firearm Licencing Authority** [2020] JMSC Civ. 97 to substantiate his point. On the other hand, the Respondent argued that the failure to grant the applicant a formal hearing did not breach the principles of natural justice because the relevant statute did not impose an obligation on the Council to ensure that the applicant was afforded a formal hearing prior to its refusal to renew the pharmacy’s

registration. Counsel relied on the decisions of **Aston Reddie v the Firearm Licensing Authority and Others** unreported Claim number 2010HCV01681 delivered November 24, 2011 to support her point.

[47] I have found both authorities cited to be instructive in resolving the issues that are before me. Thomas, J and McDonald-Bishop, J (as she then was) in their respective judgments took the time to examine several authorities on the area and in so doing they have highlighted the key principles to be applied in determining a matter of this nature.

[48] The brief facts of the case of **Fenton Denny v The Firearm Licencing Authority**, supra, are that Mr. Denny was issued a firearm licence by the Firearm Licencing Authority in 2015. His licenced was subsequently renewed twice, in 2017 and 2018. In 2019 Mr. Denny received a letter from the Firearm Licencing Authority advising him that his licence was being revoked on the basis that he was not a “fit and proper person” to be granted a firearm licence. Mr Denny filed for judicial review arguing that the Respondent breached the principle of natural justice which is enshrined in the constitution under the Charter of Fundamental Rights & Freedoms by making the assertion that he is not a fit and proper person without giving him the right to be heard.

[49] Thomas, J examined the functions exercised by the Firearm Licencing Authority under the Firearm Act. In so doing the Learned Judge applied the reasoning of McDonald-Bishop J (as she then was) in the case of **Aston Reddie v the Firearm Licensing Authority and Others, supra** in coming to the conclusion that the Fire Arm Licencing Authority carries out a purely administrative function and it was not at the stage of revocation that Mr. Reddie had a right to be heard, rather it was at the level of an appeal to the Review Board. At paragraph 59 of the judgment Thomas J expressed as follows:

“It is evident, on an examination of the Firearms Act that the Act has made provision for and has laid out the procedure for the Applicant to be heard. It is also recognized that this is not at the stage of revocation but at the level of the appeal to the Review Board (see the case of Aston Reddie

(supra)). I also take note of the fact that despite the Applicant's failure to exercise the right to be heard before the Review Board, he did seize the opportunity to write to the Authority (The FLA) outlining the circumstances of the charge from 1999 and the fact that he attended the Parish Court to have the matter resolved and that it was resolved in his favour".

[50] In the case of **Aston Reddie v the Firearm Licensing Authority and Others**, *supra*, McDonald-Bishop, J came to a similar conclusion which she expressed at paragraphs 39-40 of the judgment as follows:

I form the view, having looked at the whole scheme of the Act pertaining to revocation of a firearm licence, that the insertion of this provision does not, by its terms, expressly impose any obligation or duty on the Authority to conduct a hearing or to act in a quasi-judicial manner. What it has done, in my view, is to leave it to the Authority, in its absolute discretion, to determine the steps it would take and the procedure it would adopt in seeking to carry out on its functions under the Act. It would appear that if the Authority forms the view that it would be necessary and expedient for a hearing to be conducted then it could do so by virtue of 26B(2)(c). In my opinion, it is by no means obliged to do so on the express terms of the statute. So I conclude that section 26B (2), while enlarging the power of the Authority under the Act, has still not expressly cast upon it the burden to conduct a hearing before it revokes a Firearm User's Licence.

When all the terms of the statutory regime for the revocation of the firearm licence are broadly considered, it remains quite clear, as it was in Clough's case, that the Act itself provides for a procedure to be followed upon the revocation of a licence and part of that procedural regime is for the hearing and reception of evidence. This, however, is not at the stage of the Authority but at the stage of a review where there is an application for that to be done. It is at the review stage that the right to a hearing would operate. Parliament by expressly providing for a hearing at that level, and without expressly doing so at the level of the Authority, is taken to have intended not to cast a legal duty or obligation on the Authority to conduct a hearing before revocation of a licence."

[51] Given that the function being exercised by the Pharmacy Council is strictly a statutory function, it requires that I evaluate the relevant provision to determine whether the Council acted outside the ambit of the statute. For the purpose of determining the matter before this court, the relevant provision is section 13 of the Act which is titled 'Registration of Pharmacies and the Owners thereof.' The section provides as follows:

13.-(1) No person shall carry on a business which includes the compounding, dispensing, storing for sale or retailing of drugs unless-

(a) the shop in which such business is carried on is registered under this section as a pharmacy; and

(b) he is registered under this section as the owner of such business, so, however, that the provisions of this paragraph shall not apply during the period specified in paragraph (c) of subsection (5) and in the circumstances mentioned therein.

(2) Subject to the provisions of subsection (4) no registration shall be effected under this section unless-

(a) the person proposing to carry on the business mentioned in subsection (1)-

(i) applies to the Council in the prescribed form for registration; and

(ii) satisfies the Council that he has attained the age of twenty-one years and that the business proposed to be carried on in the shop will, so far as it relates to the compounding, dispensing, storing for sale or retailing of drugs, be under the immediate control, management and supervision of a registered pharmacist; and

(iii) pays for the registration of the shop as a pharmacy such registration fee as may be prescribed; and

(b) the Council is satisfied that the shop in which such business is proposed to be carried on is suitable for the purposes of a pharmacy.

(3) The Registrar shall upon the registration of any shop as a pharmacy and upon every renewal of such registration issue to the owner of the business carried on in the pharmacy a certificate of registration in the prescribed form.

(4) ...

(5) The registration of every shop as a pharmacy-

(a) shall, subject to the provisions of subsections (4) and (6), expire at the end of one year from the date specified in the last certificate of registration of such pharmacy;

(b) may be renewed from time to time if application for such renewal, and payment of the prescribed fee therefor, are received by the Council before the expiration of such registration, so, however, that where the Council receives any application for renewal of any registration after the expiration of such registration the Council may, if in the particular circumstances it considers it reasonable so to do, renew the registration;

(c) shall become void on the expiration of one month from the date of any change in the ownership of the business carried on in such pharmacy.

[52] Based on the wording of the Act it is clear that the Council has the discretion to renew the registration upon receipt of an application for such renewal and the payment of the requisite fees prior to the expiration of the relevant registration period. The use of the word 'may' at section 13(5)(a) suggests that the right of renewal is not automatic and is therefore a matter which is left to the discretion of the Council. The Act does not stipulate that an applicant seeking to re-register must be given an opportunity to be heard prior to the Council's decision not to renew. It is therefore safe to conclude that the applicant does not have an arguable case under this head.

Whether there was procedural impropriety or breach of the principles of natural justice

[53] The doctrine of natural justice is based on two fundamental principles which are known in law as 'nemo iudex in causa sua', which translate to '*a man cannot be a judge in his own cause*' and 'audi alteram partem' which means that '*no one is to be condemned unheard.*'

[54] While I concede that at the time when the decision was made, the council was carrying out an administrative function, I must emphasise that the authorities have made it abundantly clear that the duty to act fairly is not confined to courts, tribunals or arbitrators; rather this duty extends to public bodies or persons who make administrative decisions. This point was made in 1996 when Carey J. A. made the following pronouncement in the case of **Corporal Glenroy Clarke v Commissioner of Police and the Attorney-General of Jamaica** (1996) 33 J.L.R.:

In the case of re-enlistment, the Commissioner is exercising administrative functions in which case it is trite law that he must act fairly.

[55] The development of the law in this regard was discussed in details in the **Aston Reddie case** (supra) and the **Fenton Denny case** (supra). In arriving at their respective decisions, both judges relied on the case of **Narayansingh (Bari) v Commissioner of Police** - (2004) 64 WIR 392, which highlighted that even in the exercise of administrative power, the decision maker will be required to act fairly. It was also emphasised that fairness differs from one situation to the next. Lord Brown who delivered the opinion of the board expressed on page 399 as follows:

As for the demands of fairness in any particular case, their lordships, not for the first time, are assisted by the following passage from Lord Mustill's speech in R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560:

'What does fairness require in the present case? My lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest's fairness will very often require that he is informed of the gist of the case which he has to answer.'

[56] This therefore leads me to ask whether in the Applicant has an arguable case with a realistic prospect of success under this ground. Does the applicant have an arguable case when she asserts that the Respondent did not act fairly in refusing

to re-new her registration? I am of the view that this question must be answered in the negative.

- [57]** After receiving complaints about breaches from one Sanjae Watson, a pharmacist previously employed to the Applicant's pharmacy, the Respondent wrote to the applicant by way of letter dated October 10, 2019 seeking an explanation regarding the status of Ann Care Pharmacy. This letter went unanswered thereby prompting the Respondent to send a second letter to the Applicant dated December 12, 2019 wherein the Respondent invited the applicant to a meeting on February 10, 2020.
- [58]** It was only on the 19th February, 2020 when the applicant contacted the Respondent to complain that the Council had instructed distributors not to sell a particular class of drugs to her that she indicated that she was not made aware of the exact date of the meeting which was proposed to be held in February neither did she receive the two previous letters as her old email address was no longer functional.
- [59]** The Respondent repeatedly advised the Applicant of the difficulties being faced by the inspectors in accessing the pharmacy to carry out an inspection. There seems to have been an oral conversation between the parties which led the Council to write to the Applicant in letter dated March 4, 2020 encouraging the Applicant to formalize her request for a meeting with the council.
- [60]** In light of the transaction between the parties I find that there is no evidence put before me to base the assertion that the Pharmacy Council of Jamaica acted unfairly. The Applicant by her own admission was without a pharmacist from October, 2019 to March, 2010. In addition, based on the correspondence between the parties it is clear that Mrs. Robinson was given ample opportunities to respond to allegations made against her but by her own actions she refused or neglected to meet with the council and she neglected to facilitate an inspection of the pharmacy.

Legitimate Expectation

- [61] Mr. Neale argued that the applicant had a legitimate expectation that she would continue to have her registration renewed.
- [62] The concept of legitimate expectation was discussed in the case of **Council of Civil Service Unions and others v Minister for the Civil Service** - [1984] 3 All ER 935 where Lord Fraser on page 944 opined that “[l]egitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.” Lord Fraser made sure to clarify that the term ‘legitimate’ should be preferred to word ‘reasonable’, His Lordship indicated his agreement with Lord Diplock’s differentiation of the two words.
- [63] At page 949 of the judgment Lord Diplock explains the concept of legitimate expectation and its place under the public law remedy of judicial review when he expressed the following:

“Judicial review, now regulated by RSC Ord 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the ‘decision-maker’ or else a refusal by him to make a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

- [64] What is important to gather from the pronouncement made by Lord Diplock is that the decision-maker reserves the right to withdraw the privilege, however, such power should only be exercised once the applicant has been given good reasons

for the decision and these reasons must be communicated to party affected by the decision with him being given an opportunity to comment or be heard on the matter.

[65] In the case of **Corporal Glenroy Clarke v Commissioner of Police and the Attorney-General of Jamaica** (1996) 33 J.L.R. Carey J.A. in delivering the judgement on behalf of the board of the Court of Appeal made it abundantly clear that in determining whether a particular applicant should continue to enjoy a particular privilege, the decision maker must be satisfied that the applicant has satisfied the requirements of obtaining such privilege. Carey J.A. expressed the following:

*“In the case of re-enlistment, the Commissioner is exercising administrative functions in which case it is trite law that he must act fairly. It seems to me that in the present case the Commissioner was not sitting as a judge, who must of course divorce from his mind all he may have heard of the matter before undertaking the trial. The Commissioner could properly take a decision not to approve re-enlistment of a member even before an application to re-enlist is made. There is no question of hearing the member when that decision is taken because the member is not on trial for any charge. The conduct of the officer over the various terms of his enlistment would necessarily be the basis of the Commissioner’s decision. The officer may have been charged previously and discipline therefore. That previous misconduct can properly be taken into account in determining whether he is a fit and proper person to remain a guardian and preserver of peace. **There is no such thing as automatic right of re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory.** The level of conduct or performance is to be determined by the Commissioner and certainly the court has no power to set the standard of acceptable conduct in the Force.” [Emphasis mine]*

[66] I find the dicta of Carey J.A. to be quite useful in determining whether it can be said the applicant had a legitimate expectation that the registration of the pharmacy would have been renewed. I must reiterate the point made by Carey J.A. in **Clarke v The Commissioner of Police, supra**, when he noted that

“there is no such thing as automatic right of re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory.”

I find that this line of reasoning applies equally to the current, there is no such thing as automatic renewal of registration and such renewal will invariably be dependent

on the applicant satisfying the Pharmacy Council that the conditions as set out under 13(2) have been satisfied, this includes, the need to satisfy the Council that the business proposed to be carried on in the shop will, so far as it relates to the compounding, dispensing, storing for sale or retailing of drugs, be under the immediate control, management and supervision of a registered pharmacist.

Irrationality

[67] An administrative decision may be struck down where it is found that the decision is outrageous that no sensible person who applied his mind to the question would have arrived at the same decision (see **Council of Civil Service Unions and others v Minister for the Civil Service, supra**). This matter can be addressed succinctly; I am convinced that the applicant does not have an arguable case with a realistic prospect of success in relation to this ground. The Respondent sent several letters to the Applicant between October, 2019 to March, 2020 seeking clarity as to the operation of the pharmacy. In addition, inspectors were sent to the applicant's premises but were unable to gain access, this was communicated to the applicant who made no attempts to satisfy the Council that the pharmacy was being operated in accordance with the stipulations of the Pharmacy Act. It is difficult to conceive how it can reasonably be said that the decision of the Council was irrational or unreasonable in the circumstances.

Disposition

1. The Applicants application for Leave to apply for Judicial Review of the decision of the Pharmacy Council of Jamaica not to renew the registration of the Applicants pharmacy "Angella Robinson t/a Ann Care Pharmacy & Gift Centre (shop) is refused

2. Costs of this Application is awarded to the Respondent to be taxed if not agreed.

.....
Hon. S. Wolfe-Reece, J