

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , S. Domah (J.A) , J. Msoffe (J.A)]

Civil Appeal SCA 33/2016

(Appeal from Supreme Court Decision 111 /2016)

Duraikannu Karunakaran

Appellant

Versus

The Constitutional Appointment
Authority

Respondent

Heard: 06 April 2017

Counsel: Mr. Philippe Boullé for Appellant

Ms. Alexandra Madeleine for Respondent

Delivered: 14 April 2017

JUDGMENT

S. Domah (J.A)

(1) Karunakaran Judge was suspended from his office as a Judge pending an enquiry by Tribunal. He applied for leave to challenge this initial process before a Judge of the Supreme Court. The judge decided that his application is premature and dismissed the application. Karunakaran Judge has appealed against that judgment. This is what we are concerned with.

(2) Article 134 of the Constitution of Seychelles provides:

- (1) A Justice of Appeal or Judge may be removed from office only –
 - (a) for inability to perform the functions of the office, whether arising from infirmity of body or mind or from any other cause, or for misbehavior; and
 - (b) in accordance with clauses (2) and (3).

- (2) *Where the Constitutional Appointments Authority considers that the question of removing a Justice of Appeal or Judge from office under clause (1) ought to be investigated –*
 - (a) *the Authority shall appoint a tribunal consisting of a President and at least two other members, all selected from among persons who hold or have held office as a Judge of a court having unlimited original jurisdiction or a court having jurisdiction in appeals from such a court or from among persons who are eminent jurists of proven integrity; and*
 - (b) *the tribunal shall inquire into the matter, report on the facts thereof to the Authority and recommend to the President whether or not the Justice of Appeal or Judge ought to be removed from office.*
 - (3) *Where, under clause (2), the tribunal recommends that a Justice of Appeal or Judge ought to be removed from office; the President shall remove the Justice of Appeal or Judge from office.*
 - (4) *Where under this article the question of removing a Justice of Appeal or Judges has been referred to a tribunal, the President may suspend the Justice of Appeal or Judge from performing the functions of a Justice of Appeal or Judge, but the suspension.*
 - (a) *may, on the advice of the Constitutional Appointments Authority, be revoked at any time by the President;*
 - (b) *shall cease to have effect if the tribunal recommends to the President that the Justice of Appeal or Judge ought not to be removed from office.*
- (3) The Constitutional Appointments Authority duly informed him that complaints have been made against him. These complaints necessitate an investigation by the Tribunal of Enquiry, a specialized body under the Constitution which is. The Tribunal comprises a Judge of the Commonwealth and two judges of the Supreme Court. The complaints relate to alleged misconduct of Karunakaran J. A copy of the complaints is annexed to this judgment as it forms part of the proceedings in the Court below. They were made by the Chief Justice to the CAA.
- (4) The above mentioned constitutional procedure is a 1994 provision with the experience on the matter having been gathered over the years in Commonwealth judicial system. We say this because each jurisdiction has its own home-grown system even if they ensure that the security of tenure of the judges is jealously guarded and whoever is under investigation is afforded all the constitutional guarantees of due process or fairness. Such is the protection given by our democratic Constitution against removal that no one has the power to determine any complaint made against a Judge except a Tribunal of Enquiry.

Neither the Chief Justice who sends the complaint nor the Constitutional Appointments Authority which receives the complaint/s is empowered by law to conduct any formal enquiry against a Judge in office. Enquiry may only be carried out by a duly appointed Tribunal which is basically made of peers and is impartial and independent.

- (5) On taking cognizance of the complaints, therefore, and on a factual and legal assessment of same, the Chief Justice appraised the CAA of them. The CAA, equally incompetent to conduct any enquiry but competent to take cognizance of the complaints, referred instituted the Tribunal of Enquiry. This Constitutional system ensures that there is no lurking political, personal or ill-motivated reason when it is a matter of investigating complaints against them. Once satisfied that the complaints warrant further action, the Chief Justice can do no more than transmit them to the CAA and the CAA, once equally satisfied that the matter needs to move forward, can do no more than appoint a Tribunal for the conduct of the enquiry. The Tribunal is not an adjudicating body as such. It is an enquiring body. If it finds at the end of the enquiry that the complaints are not justified or are minor, it will make recommendations to that effect to the President. If it finds that at the end of its enquiry that the complaints are justified and are serious enough, it will make the appropriate recommendation to the President.
- (6) Thus, fairness of proceedings is built in our system of removal of judges. The Republic of Seychelles is part of the Commonwealth of Nations and as such adhere to its corporate principles: in this area, The Commonwealth Latimer House Principles, which advocate that the procedure for the removal of judge from office “should include appropriate safeguards to ensure fairness.” The Latimer House Guidelines lay down that a judge facing removal “must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.”
- (7) The case of *Rees v Crane* is often cited for the principle that fairness generally requires that the judges should be given an opportunity to respond to the allegations informally before the investigation is concluded, since a decision to commence tribunal proceedings is likely to damage the reputation of a judge and affect his or her ability to commend the confidence of litigants. We shall refer to this decision later.

- (8) By its Constitution, (Article 48), interpretation of the Constitutional provisions should take into account universal international standards. The IBA Minimum Standards: CDL-AD (2010)004, para 33-34 is reflected in Article 134 of our Constitution in that “the actual decision on whether to remove a judge should be entrusted to an institution that is independent to the executive, and should “preferably be vested in a judicial tribunal.”
- (9) The Republic of Seychelles is a committed member of the United Nations. Regarding the decision to initiate tribunal proceedings, the UN Basic Principles Article 17 reads:
“(t)the examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.”
- (10) The Republic of Seychelles swears by the Separation of Powers and as such boasts of an independent and impartial Judiciary. Article 25 of The Beijing Statement of Principles of the Independence of the Judiciary in LAWASIA Region reads:
“There should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced.”
- (11) It adds: *“Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.”*
- (12) Interpretation of our Constitution also requires that we take into account decisions of other democratic nations. In **Agyei Twum v Attorney-General and Bright Akwetey [2005-2006] SCGLR 732**, the Supreme Court of Ghana decided that the President was required to form the view that there was a prima face case against the Chief Justice before forming a tribunal to inquire into his conduct. The key words here are “form a view.” In the case of **Republic v Chief Justice of Kenya and Others, ex p. Ole Keiwua [2010] eKLR (High Court of Kenya**, decided that a fair decision making process at the preliminary stage should provide the judge suspected of misconduct with an opportunity to respond informally to the allegations against him or her, before taking a decision is made to institute tribunal proceedings. In **President of the Court of Appeal v Prime Minister [2014] LSCA 1**, the Lesotho Court of Appeal decided that natural Justice does not require a formal hearing. The facts of a case may by themselves be such as to attract the constitution of a Tribunal on account of its public nature. We can understand why the hearing must be informal: it is to make a preliminary legal and factual assessment at source. But if the misconduct is so obvious to the judge, it would be an exercise in futility

to await an informal hearing offering the Judge a further opportunity to misconduct himself and probably delay matters further. In **The Bangalore Principles of Judicial Conduct**, we read: “Removal can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge’s ability to perform judicial function.” See also **Re Chief Justice of Gibraltar [2009]**.

- (13) Article 17 of the UN Basic Principles on the Independence of the Judiciary highlight the need for proceedings to be completed without delay, “processed expeditiously and fairly under an appropriate procedure.”
- (14) The appellant relies heavily on the pronouncements in the Privy Council case of **Evan Rees & Ors v Richard Alfred Crane, [1994] 2AC 173** a case of disciplinary proceedings against a judge where the judge commenced judicial proceedings on the basis of breach of his right to be heard at the very initial stage of a complaints procedure. However, each jurisdiction has its own system anchored in its past history. We have ours, set up in 1994. In Trinidad and Tobago, the suspension was not done by the authority empowered, i.e. the Judicial and Legal Service Commission, but the Chief Justice himself, even if confirmed by the JLSC. **Rees v Crane**, therefore should be relied on with that distinction in mind. All she did was to remit the complaints to the CAA.
- (15) For all intents and purposes, Karunakaran J is at present in this initial phase of the process where the CAA has informed him of the nature and the number of complaints against him. It has requested him to appear before the Tribunal to give his version of facts and to rebut the complaints so that the Tribunal may decide, at the end of the day, whether the complaints are justified or not. That is the chartered constitutional route for Karunakaran J to take as per our Constitution.
- (16) But Karunakaran J. has chosen the judicial route at this embryonic stage. His view is that he should have been heard by the CAA first before the CAA referred the matter to the Tribunal. Also, while his case was *sub judice*, his counsel sought to gain mileage through a section of the media. That is by now public knowledge.
- (17) The action which Karunakaran J brought before the Supreme Court was one of Judicial Review. He evoked a number of grounds. The main one was that he should have been heard first before the CAA appointed the Tribunal. The learned Judge decided, after hearing both sides that his application does not meet the conditions for a Judicial Review

and it is premature. The learned Judge cited Court decisions and the law before he so decided.

- (18) We are set in this appeal to decide whether the learned Judge who dismissed his application for leave to proceed with a Judicial Review action was right or wrong. Karunakaran J has put up nine reasons in support of his appeal to us.
- (19) Before we look at the nine reasons and see whether they are valid or not, we think it is befitting to give a short insight on the law which applies. Our task in hand is to determine this matter under the constitutional principle of the rule of law and no other. We have stated time and again, we are blind to status and adhered to principles.
- (20) A Judicial Review action in Seychelles is derived from English law and practice. A litigant challenging the decision of a public authority which affects him undergoes a process comprising two stages: the Leave Stage and the Merits Stage. There are Rules which govern the procedure and common law jurisdictions have similar rules. They are found in Rules of the Supreme Court (Supervisory Jurisdiction Courts, Tribunals, Adjudicating Bodies) Rules 1995 (“The Rules”). The Rules applicable to Leave Stage are Rules 2 to 6. The action is by way of petition and an affidavit to which he has to attach all the materials on which he relies. This is important as it is the materials on which the judge will rely one way or the other to grant or not to grant leave.
- (21) Rule 2 reads:
- “(1) An application to the Supreme Court for the purposes of Rule 1 (2) shall be made by petition accompanied by an affidavit in support of the averments set out in the petition.*
- (2) The petitioner shall annex to the petition a certified copy of the order or decision sought to be canvassed and originals of documents material to the petition or certified copies thereof in the form of exhibits.”*

Rule 5 reads:

“Every petition made under Rule 2 shall be listed ex parte for the granting of leave to proceed.”

Rule 6 reads:

“The Supreme Court shall not grant the petitioner leave to proceed unless the Court is satisfied that the petitioner has a sufficient interest in the subject matter of the petition and that the petition is being made in good faith.”

- (22) This is derived from English law that no application for judicial review shall be made unless leave or permission of the court has been obtained. An application for leave is made ex-parte to a judge who may determine whether or not to grant the leave for judicial review without a hearing.
- (23) The leave stage “enables the court to prevent abuse by busybodies, cranks, and other mischief-makers” as was stated in **R v Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd [1982] Act 617**. The purpose of the requirement for permission is to eliminate at an early stage claims that are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the Court is satisfied that there is a case fit for further consideration: see The White Book, para 54.4.2. This practice has been adopted in comparable jurisdictions: see for example, **Derrick Chitala v Attorney General (1995) ZR** where it was said that this up-front screening was meant -
- (a) to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless; and
 - (b) to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration.
- (24) There has also developed what is referred to as the ripeness doctrine whereby a case is justiciable if the harm asserted has matured sufficiently to warrant judicial intervention: **Warth v Selding 422 U.S 490 1975**. Hence, if a dispute is only at the brewing stage and a decision is yet to be taken, the court should not be bothered until the matter is ripe or justiciable.
- (25) This appeal has challenged the understanding and the application of the law by the learned Judge of *ex parte* applications made at the Leave Stage for Judicial Review. We shall limit ourselves to that.
- (26) First, as to what is an *ex parte* application. There was a misapprehension among lawyers and the courts at one time as to the process which an *ex parte* underwent. It was assumed that an *ex parte* application meant that the Judge was to grant an application without hearing the other party, even without the other party being named in the application. This Court dispelled that misapprehension. An *ex parte* application did not mean that the matter was to be decided in the absence of the defendant. It only meant that it is to be

listed as an *ex parte* application but the applicant still needs to appear and satisfy the court that the orders prayed for in the *ex parte* application may justifiably be given *ex parte*, account taken of the rules of natural justice and constitutional rights of those against which the orders were sought. We did state in the case that there is no such thing as an *ex parte* hearing properly speaking. There is such a thing as an *ex parte* listing in a context where the defendants even remained unnamed. It would appear that learned counsel in this case is still under that misapprehension that orders in an *ex parte* application are to be given as a matter of course where the Judge is a mere conduit pipe. That is not so. That was made clear in the case of **Ex parte Fonseka SCA 28 of 2012**.

(27) The law is quite settled as regards the manner in which an *ex parte* application, with regard to Leave Stage in Judicial Review should be dealt with. The case of **R v Secretary of State for the Home Office Ex parte Doorga (1990) C.O.D. 109** is the classical authority for same. This case was an *ex parte* application before the Judge, as the reference itself suggests. Lord Donaldson of Lymington MR laid down the following procedure for same. The Judge should undertake an up-front screening as follows:

“(a) *those in which there are prima facie reasons for granting judicial review;*

(a) cases that are wholly unarguable and so leave must be refused;

(b) an intermediary category where it was not clear and so it might be appropriate to adjourn the application and hold a hearing between the parties.”

(28) In short, Judges make a preliminary assessment on the application with the affidavit as a screening exercise. He filters it as follows: if *prima facie* reasons exist, he grants it forthwith; if the matter is wholly unarguable, he rejects it. If it falls in between, he seeks an *inter partes* hearing. This is exactly what the learned judge did in the matter. It is not in the nature of the judging that Judges should be mere conduit-pipes of *ex parte* applications.

(29) The above English decision of **Ex parte Doorga [supra]** is dated 1990. It has been followed by the Supreme Court of Seychelles in the decision of **Cable & Wireless (Seychelles) Ltd v. Minister of Finance and Communications & Anor (Civil Side No. 377 of 1997)**, and has been with us for some 20 years ago now. Accordingly, when

learned counsel is raising grounds which are plainly against the current of our jurisprudence and he places reliance on a foreign decision of a foreign jurisdiction, we are bemused. The learned Judge who was relying on our case law and distinguishing the foreign decision was entitled to do the same as regards the citation.

- (30) The appellant challenges the reasons of the learned Judge under nine grounds. What are they? We are afraid they are not easily intelligible. Courts whether in England but, in Seychelles or elsewhere, have continued impressing upon counsel to write plain English. We sympathize with the reader if the grounds of the Appeal are painful to understand. We would have expected that Karunakaran J. who is after all a judge gave us an English that would have been easier for everyone to understand. Be that as it may here are the grounds verbatim.

GROUND OF APPEAL

1. *The process of jurisdiction of the learned judge which totally ignored the fact that there is no objection or dispute regarding the issue of “sufficient interest” which was not relevant to the objection for “leave to proceed” based on the ‘good faith’ issue raised by the respondent.*
2. *The core issue of “good faith” raised by the Respondent found in Rule 6(i) of the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 was erroneously determined on the basis of the statement in the judgment in Believe v/s Government of Seychelles & Ors to the effect that the “Good faith is not to be considered in contra-distinction with the concept of bad faith. It involves the notion of uberrima fides to the extent that the Petitioner when filing the petition should have had an arguable case”, which statement is legally unsound and totally unsupported by jurisprudence or a valid juridical reasoning.*
3. *The Learned Judge erroneously failed to follow and apply the presumption of ‘good faith’ which is abundantly supported by sound legal principles, laws and authorities.*
4. *The findings of the Learned Judge that there was no arguable case, through the process of determination of the validity of arguments and interpretation of the laws and authorities, with respect, is a flawed adjudication of the issues of “leave to proceed” which*

- a) *went to the merits without hearing the full arguments of the parties thus confusing the notion of an arguable case and a meritorious case.*
- b) *showed in itself that there was an arguable case by the elaborate consideration of the law and the facts to arrive at the decision, albeit without fully hearing the parties in breach of the audi alteram partem rule.*

5. *The critical finding of the learned trial Judge that “I am not persuaded that this application passes the test of good faith or arguability” introduces a flawed alternative criterion per incuriam, as it imports a requirement under the Court Rules which does not exist and furthermore the finding that it does not pass distinct notion of “good faith” is not underpinned by any valid and necessary finding of fact, leaving it weightless.*

6. *In the final conclusion and Ruling of the learned Judge, the critical and core issue of “good faith” is completely ignored in favour of the erroneous and in per incuriam ruling based solely on “arguable case”, by stating “I remain unconvinced that the Petitioner has an arguable case and for these reasons given I decline to grant leave to proceed.*

7. *The only pronouncement of the Court on the core and critical issue of “good faith” is found in the statement of the Learned Trial Judge which reads “To say that the Court is acting frivolously and being derailed reflects on the good faith of the Petition as if he had things to hide” is, with respect, ultra petita and without juridical foundation for the reason that it is incorrect as counsel did not utter such statement and is a clear distortion of facts in the face of the words uttered by Counsel set out in paragraph 8 of page 3 of the judgment which never laid the comment at the door of the Court which had never sat on the case.*

8. *The finding of the Learned Trial Judge that the dutiful and valid objection of counsel to a breach of the Court Rules was a “Rhetoric”, bears heavily on the process of adjudication and against the entire judgment.*

9. *The finding of the learned trial judge that the Supreme Court has no jurisdiction to review the decision of the Tribunal is erroneous and arrived at*

- a) *without due consideration for relevant authorities and constitutional rules of interpretation, and;*

b) *without hearing the parties, thus in violation of the petitioner right to a fair hearing and to be heard on a legal point raised proprio motu by the court.*

(31) The grounds as formulated are so abstruse both in content and language that we could have rejected this appeal which goes against the basic principles of pleadings. Or we could have ordered compliance with our Rules of Court for pleadings so that Appellant presents his Grounds of appeal in plain English so that everyone in such an important matter understand him clearly. But, in the interest of time, we shall proceed to the meat of the matter extracting a sense out of each one of the grounds.

GROUND 1

(32) Ground 1 which is worded this way:

“The process of jurisdiction of the learned judge which totally ignored the fact that there is no objection or dispute regarding the issue of “sufficient interest” which was not relevant to the objection for “leave to proceed” based on the ‘good faith’ issue raised by the respondent.”

(33) What that means is anybody’s guess. We guess that it means the following: an application for leave for judicial review should be granted only on the basis that the applicant has a “sufficient interest” in the matter. Since the Respondent had not raised any objection to the issue of “sufficient interest”, leave to proceed should have been granted and there should have been no need to consider “good faith.” If that means something else, then the ground is unclear and on that ground alone, it should be dismissed.

(34) None the less, we shall consider the above contention of learned counsel – as we understand it. An application for Leave for Judicial Review is screened up-front – referred to as the Leave Stage - and allowed or rejected on a consideration of two matters. The first is that the applicant should have *locus standi*. This means that only those applicants are allowed through the sieve who are affected by the decision. An applicant will not be allowed if he is a mere busybody. The Latin term *locus standi* has been substituted in our laws as “sufficient interest.” Once an applicant shows that he has sufficient interest, the application passes the first test. The second test is that the application should be made in good faith. The applicant should show by his affidavit and

the materials he has attached thereto that the case he makes on the material produced is a genuine case as opposed to a frivolous one. Our law uses the word “good faith” just like many other comparable jurisdictions. When addressing good faith, the applicant should show that the issue/s he raises in his application is/are arguable. If he passes these two tests, the judge makes an order for the case to move to the Merits Stage. The ripeness doctrine holds that a case is justiciable if the harm asserted has matured sufficiently to warrant judicial intervention: see **Warth v Selding 422 U.S 490 1975**. Therefore on this point alone the application lacks justiciability. We did state earlier that where a process is only at an embryonic stage as this process is, courts would regard it as justiciable only where it has ripened. The Tribunal is yet to complete its work where Karunakaran Judge will have the full opportunity to answer all the complaints. Under our system, neither the Chief Justice nor the CAA was empowered to hear him but only to form a view which they respectively did.

(35) Further, in this case, the mere fact that there was no objection by Respondent that the applicant had sufficient interest did not mean that the applicant automatically qualified to move to the Merits Stage. He still had to undergo the acid test of arguability to pass through that sieve for the purpose of moving to the Merits Stage. When we read the proceedings, this is exactly what happened. Sufficient interest was unquestionable. But the matter had to be decided on good faith. This is the manner in which the proceedings progressed. Ground 1 has no merit.

(36) Ms Madeleine, Learned counsel for the Respondent, submitted that the learned Judge was clear as to the real issue before him at the Leave Stage. She referred to the record and cited the relevant part of the judgment:

*“In deciding whether or not to grant this application I need to consider the following issues: **whether the application was made in good faith, whether the Petitioner has an arguable case and whether I have jurisdiction.**”*

(37) In the circumstances, we take the view that the learned Judge was never confused on the legal principles, laws and precedents relevant to the requirement of good faith and arguability in applications for exercise of supervisory jurisdiction. Even a plain reading would show that that is the case. If confusion there is, it is certainly not in the mind of the

learned Judge who used chapter and verse for his application of the law. Ground 1 has no merit.

GROUND 2

- (38) On Ground 2, learned counsel for the appellant argues that the core issue of “good faith” as the criterion laid down in Rule 6(i) of the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 was erroneously applied in the determination of this case in that it was decided on the basis of the statement in the judgment in **Omaghomi Believe vs Government of Seychelles & The Immigration Office CS 141 of 2003 [2003] SCSC 14** to the effect that the “*Good faith is not to be considered in contra-distinction with the concept of bad faith. It involves the notion of uberrimae fidei to the extent that the Petitioner when filing the petition should have had an arguable case.*”
- (39) In the submission of Mr Boullé, this proposition of law is legally unsound and totally unsupported by jurisprudence or a valid juridical reasoning. In support learned counsel has submitted the authority, inter alia, of **Mara Carolina P. Aruallo & Ors vs Benigno Siemon III President of the Republic of Philippines & Ors G.R. No. 209287, February 03, 2015.**
- (40) Mr Boullé is basically challenging not only the precedent in **Believe v/s Government of Seychelles & Ors** which was applied by the learned judge but, by extension, all the English decisions on the matter. He argues that when the learned judge used the notion of *uberrimae fidei* in his consideration of the application, he went wrong.
- (41) If Mr Boullé is challenging a settled law both in England and in Seychelles, we would have expected him come up with clear relevant and latest decisions on the matter. It seems to us that he has been advocating the jurisprudence of civil law to apply to administrative law. The procedure for judicial review has been borrowed from English law. There is no dearth of authorities in English law and Seychelles law as to how good faith is examined in point of law and fact. Good faith is the statutory criterion and arguability is the judicial test for checking the seriousness or levity of an application for leave. If the issue raised in the application is arguable, it would follow that it has been made in good faith. If the issue is not arguable and only made frivolously, with levity and

with the intention of challenging authority simply for the sake of it, if it is made as an ego trip, then there is no arguability, consequently no good faith.

- (42) We have gone through the proceedings. The learned Judge did not err in the measure he used to gauge good faith. That measure is sound jurisprudence in English law, Seychelles law, Mauritian law as well as Commonwealth law. It is clear to us that the learned Judge knew his law and applied same to the letter:

“The English Courts from which Seychelles law on judicial review is inspired does not lack authorities on good faith.”

- (43) On the issue of good faith, the following matters may be further noted. First, it is the petitioner who should by way of material facts presented show the arguability of his case. Arguability of the case is basically a question of fact based on materials and not on speculative persuasion at an *inter partes* hearing. It is that at the time of filing itself that the petition with the accompanying documents should demonstrate that the issue raised is arguable.
- (44) Second, the record does bear out that the learned Judge relied on the correct precedent to see whether the case was objectively arguable: **R v Secretary of State for Home Office, Ex parte Doorga, (1990) C.O.D. 109**. He found that: (a) there were no *prima facie* reasons for granting judicial review; (b) the case was not wholly unarguable and so that leave should be refused; but (c) the application fell in “the intermediate category.” Accordingly, he decided to “adjourn the application and hold a hearing between the parties.”
- (45) Ms Madeleine submitted before us that the learned judge rightly determined the issue of “good faith” on the basis of the statement referred to in the Judgment of **Believe v/s Government of Seychelles & Ors** which should be the relevant authority applicable in our jurisdiction for the determination of “good faith” in applications for judicial review/exercise of supervisory jurisdiction under article 125(1)(c) of the Constitution and not the Philippines authority of **Augusto L. Syjuco Jr. Phd and Petitioners v The Honourable Executive Secretary Paquito Nochoa Jr and Respondents G.R. No. 209287, February 3, 2015** relied on by the Appellant. Her position, contrary to the appellant’s position, makes complete sense to us. She adds that, for all that, the learned judge did not ignore the Filipino authority. He

questioned its relevance to case at hand and did give her reasons for following local and English authorities on the matter. We agree with her.

- (46) The case of **Mara Carolina P. Aruallo vs Benigno Siemon III President of the Republic of Philippines** relates to the presumption of good faith in civil matters. We are here concerned with the principle of free and frank disclosure in Administrative matters. In any case, the decision goes against the Applicant in that it speaks not of the good faith of an applicant as such but of the good faith of the administrative maker. In this case, therefore, on the citation of his own judgment, the decision of the Chief Justice and the Constitutional Appointments Authority cannot be regarded as made in bad faith because good faith is presumed in favour of the administrative decision maker.
- (47) Article 48 of the Constitution allows us to go to the Philippines Court not for the purposes of precedents but for the sake of taking judicial notice thereof. As for the case of **Cannock Chase District Council v Kelly (1978) 1 WLR**, it does not speak of good faith but lack of good faith. This is not relevant to us.
- (48) The decision of **Believe** has been followed in the case of **R v Secretary of State for the Home Office, ex parte Doorga (1990) COD 109** on the question of arguable case and more recently in **Javotte v Minister of Social Affairs (2005) SLR 24**. Both these cases draw their principles from English law and not from laws of Philippines. We would have welcomed the Philippines decision as persuasive authority if learned counsel had only shown to us that our laws do not have settled jurisprudence on the matter. But our laws on the issue of good faith is quite settled both in civil law and administrative law. There is no dearth of authority in Seychelles law, English law and Commonwealth jurisprudence in the area.
- (49) Learned counsel's objection seems to be on the use of the Latin term "uberrimae fidei." We agree that this term is more prevalent in Insurance Law than in Administrative Law. But the need for utter good faith is not any less in Administrative Law which requires that an applicant should make a full and frank disclosure in his application to satisfy the element of good faith. There is a duty to disclose all material facts. These include all materials known to the petitioner and those that he would have known had he made proper enquiries prior to applying: see **R v Lloyd's of London, Ex p. Briggs [1993] 1 Lloyd's Re. 176**; **R v Secretary of State for Home Department, Ex p. Ketgaoglo, The**

Times, April 6, 1992; R v Jockey Club Licensing Committee, Ex p. Barrie Wright (1991) C.O.D. 306.

- (50) In our consideration of whether there was free and frank disclosure, two matters stand out. One has been referred to us by Ms Madeleine. The document originally filed on 19 December 2016 challenged the “*process of jurisdiction of the learned Judge.*” On 10 March 2017, this term has been changed to the “*process of adjudication of the learned Judge*”. “Jurisdiction” and “adjudication” mean two different things in law. Such a change of substance should have been made and submitted upon by leave of court. Learned counsel breathed not a word of this difference.
- (51) The other point is more serious. The application represents it as a fact that the CAA took a decision. He should not have used the word “decision” because the CAA in its letter had simply informed the Applicant that it took the “view” that the matter should be investigated. The application should have properly represented the facts of the case. This misrepresentation should have been sufficient for the learned Judge to reject the application because judicial review is about a decision-making process and not about a view-taking *per se*.
- (52) In **Agyei Twum v Attorney-General and Bright Akwetey [2005-2006] SCGLR 732**, the Supreme Court decided that the President was required to form the view that there was a prima face case against the Chief Justice before forming a tribunal to inquire into his conduct. What the CAA did state is that it had taken the view that the matter should be inquired upon by a Tribunal of Enquiry pursuant to article 134 of the Constitution. The petitioner in such an application may not misrepresent facts and expect that the Court will not infer from it good faith. Assuming that the appellant took the view that “view of the CAA” was as good as “the decision of the CAA”, that did not allow the Applicant to state it as a material fact but to state the correct working and argue about it. This adds water to the mill of the respondent of lack of good faith. Misrepresentation of a material fact is a ground for dismissal of such an action at the leave stage. There is a duty of candour imposed upon an applicant at the leave stage: In **R (1) v Secretary of State for the Home Department [2007] EWHC 3103 (Admin)** the Court refused permission for breach of claimant’s duty of candour.

- (53) Mr Boullé also referred to the latest case of **Common Cause and Others versus Union of India and Others from the Supreme Court of India, No. 505 of 2015**. This case does not deal with good faith or arguability. It had to do with the existence or absence of cogent and admissible evidence to direct any investigation. That may be relevant to the Tribunal of Enquiry inasmuch as view of the Constitutional Authority has already been given in the present matter that the facts require investigation.
- (54) Thus, the averments in the application do not correctly represent the material facts of the case of applicant, as is an essential requirement of the Rule 2. Judicial review is an action to challenge the decision taken by an administrative body on the ground that the decision making process was flawed. The petition speaks of the decision having been taken by the CAA. In actual fact, the CAA never stated that it had taken a “decision” to set up a Tribunal of Enquiry to inquire into the complaints. This Ground has no merit. It is dismissed.

GROUND 3

- (55) On Ground 3, learned counsel’s submission is that the Learned Judge erroneously failed to follow and apply the presumption of ‘good faith’ which is abundantly supported by sound legal principles, laws and authorities.
- (56) To Ms Madeleine, the learned judge rightly followed and applied the notion of “good faith” as referred to in the case of **Believe (supra)** in following the case of **R v Secretary of State for the Home Office, ex parte Doorga (supra)** and in turn followed in **Javotte (supra)**. The said authorities are directly relevant to the case at hand since they are cases of judicial review/exercise of supervisory jurisdiction as opposed to the cases cited by Mr Boullé including the reference to the provisions of the civil code on the requirement of good faith in prescription of ten years.
- (57) We need not labour the point further than we have done under Ground 2 except to add that Learned counsel is confusing the practice of civil law with the practice of administrative law. He is arguing a matter of administrative law with the principles and jurisprudence of civil code. He should follow the application of good faith from the jurisprudence of administrative law and not civil law. While it is true that good faith should be presumed, the fact remains that that presumption should arise from the material facts averred in the application and the affidavit. Had not the learned Judge presumed

good faith, he would not have granted an *inter partes* hearing. He would have simply dismissed the application out of hand. We see no merit in Ground 3. It is dismissed.

GROUND 4

- (58) We understand Ground 4 to mean that the learned counsel dealt with the merits of the application at the stage of leave. We agree with the answer given to this argument by Ms Madeline that this is exactly what the learned judge did not do. She cited **R v Secretary of State for Home Department exp. Rukshanda 1990 C.O.D 107**] in support of her submission: that the learned Judge determined the question of arguable case based on the materials then available to him and as made out in submissions of the parties; that the process of hearing the parties on the question of leave is not flawed and that it was within the power of the Court under rule 7(1) and (2) of the Supreme Court (Supervisory Jurisdiction over subordinate Courts, Tribunals and Adjudicating Authorities) Rules 1995 and not inconsistent with authorities on the issue of leave to decide as he did.
- (59) She has referred to the record of proceedings before the Supreme Court to demonstrate that there was no breach of the *audi alteram partem* rule in respect of either the Appellant or the Respondent. Both parties were given the opportunity to state their case on the objections to leave orally and by way of written submissions which form part of the record.
- (60) The learned judge did not go to the merits of the case as regards any issue. He was quite clear in his mind of the stage of his adjudication. This case fell in the intermediate category of cases where leave may not be determined without hearing the other party. In the very first paragraph, the judge set his jurisdictional limit saying: “I have before me an application for leave to proceed with judicial review.” In course of his determination he applies Rule 2 which deals with applications for leave. He is still within the limits of his jurisdiction when he comes to the application of good faith in application of Rule 6. At paragraph 16 to 24, he has kept on course, without an inch of deviation. He considers good faith as applicable in administrative law relying on Seychelles, English and Commonwealth authorities. He reminds learned counsel who had suggested the contrary that “arguability is a threshold issue.” He was sufficiently aware that the test is of either good faith or arguability. In the final operative paragraph, he has kept with the parameters

of the Leave Stage when he decides: “I remain unconvinced that the Petitioner has an arguable case. I decline to grant leave to proceed.”

- (61) If at one stage the matter of constitutionality was taken by the learned Judge, it was only because that had been in issue. The Respondent had raised the matter of jurisdiction. Even then, he predicated the paragraph by the important qualification using the term “Without going into the merits of the case, it is necessary to have a close look at Article 125(1)(c) and Article 7 of the Constitution.” However the decision is not based on that submission. It is offered en passant.

GROUND 5

- (62) Ground 5 is worded as follows: “The critical finding of the learned trial Judge that “I am not persuaded that this application passes the test of good faith or arguability” introduces a flawed alternative criterion *per in curiam*, as it imports a requirement under the Court Rules which does not exist and furthermore the finding that it does not pass distinct notion of “good faith” is not underpinned by any valid and necessary finding of fact, leaving it weightless.
- (63) This ground adds no new issue to those we have identified and elaborated upon above.

GROUND 6

- (64) Ground 6 is worded this way. “In the final conclusion and Ruling of the learned Judge, the critical and core issue of “good faith” is completely ignored in favour of the erroneous and in per incuriam ruling based solely on “arguable case”, by stating “I remain unconvinced that the Petitioner has an arguable case and for these reasons given I decline to grant leave to proceed.”
- (65) Ms Madeleine has combined Grounds 5 and 6 to submit before us that the notion of good faith in rule 6(1) as explained in the case of **R v Secretary of State for the Home Office, ex parte Doorga (1990) COD** (supra) which was in turn followed in **Believe** and **Javotte** (supra) requires that the Petitioner, when filing the petition, should have an arguable case for the exercise of supervisory jurisdiction by the court and the reliefs sought.
- (66) She submitted that good faith cannot be taken in isolation with arguability and under rule 6(1) and the propositions of law are neither erroneous nor *per incuriam*. The test of arguability required at this stage is whether on the materials then available to the court,

the court thinks that it discloses what might on a further consideration turn out to be an arguable case: *R v Inland Revenue Commissioners, exp National Federation of Self Employed and Small Businesses Ltd* [1982] 644A; *Michael Fordham QC, Judicial Review Handbook, 6th Ed, P.230*].

- (67) On the material then available to the learned Judge as further made out in submissions on behalf of the parties, he rightly came to the conclusion he did. The *a priori* determination of whether a case is arguable *ex facie* petition, affidavit and materials submitted is the proper procedure which obtains at the Leave Stage in the Court's exercise of its supervisory jurisdiction. She has her law right. So has the learned Judge. This ground is misconceived.

GROUND 7

- (68) Ground 7 is worded this way. "The only pronouncement of the Court on the core and critical issue of "good faith" is found in the statement of the Learned Trial Judge which reads "To say that the Court is acting frivolously and being derailed reflects on the good faith of the Petition as if he had things to hide" is, with respect, *ultra petita* and without juridical foundation for the reason that it is incorrect as counsel did not utter such statement and is a clear distortion of facts in the face of the words uttered by Counsel set out in paragraph 8 of page 3 of the judgment which never laid the comment at the door of the Court which had never sat on the case."
- (69) As to the question whether learned counsel uttered those words, fortunately, we have the transcript for the proceedings at our disposal. And the typescript reads the following:

Court: ... Are you prepared to submit on Friday?

Mr Boule: Regrettably I wish to note for the records it has been treated with utmost levity. The Rules specifies that it shall be ex parte and should not be served on the CAA. The Rule goes on to say that "Upon an application being registered under rule 5, the respondent and each of the respondents may take notice of it any time," but no service. The case is already being completely derailed and I wish in the most serious manner place my objections on record."

- (70) As to the question whether the process was derailed, we have to say that it was put back on the rail by the learned Judge. The statement *“to say that the Court is acting frivolously and being derailed reflects on the good faith of the Petitioner as if he had things to hide”* by the look of it must have been as a response to the confrontational attitude taken by Mr Boullé before the Court. That is evident in the transcript of proceedings. However, the determination of the “core and critical issue” of good faith was not made on that premise, as rightly pointed out by Ms Madeline. It related to the question of service of the petition prior to the grant of leave. The learned judge had applied the authority of **Believe [supra]** to do so. The learned judge felt, on examination of the petition that it fell, as he stated, in the intermediate category of cases between the two extremes: rejection summarily or acceptance summarily. He chose to do justice to the Applicant and set it for an *inter partes* hearing so that he could take a considered decision. The learned judge could very well have rejected the application straightaway. In fact, there were reasons for same for such a decision we need not go into.
- (71) Respondent has with clear references to texts in the transcript contradicted the content of this ground. The record gives a lie to learned counsel that “counsel did not utter such statement.” As to whether it is a distortion of facts, it is certainly not the learned Judge. The record bears testimony to that.
- (72) Readiness to co-operate with the Constitutional bodies, placing all the cards on the table, using the correct material word and not “decision” for “view”, allowing the Respondent to put in a response to its petition, making public the complete allegations against the appellant, meeting those complaints frontally would have been, inter alia, indicative of good faith. But the appellant wanted none of those things. The question in the minds of an objective bystander, as it was before the Judge is: “Why?”

Ground 7 is devoid of merit.

GROUND 8

- (73) The wording of Ground 8 is:
“The finding of the Learned Trial Judge that the dutiful and valid objection of counsel to a breach of the Court Rules was a “Rhetoric”, bears heavily on the process of adjudication and against the entire judgment.”

On this matter, if learned counsel gave the impression that learned counsel was dealing in rhetoric, we cannot make any comment on that. It must have stemmed from attitude combined with tone which sometimes even the transcript of proceedings cannot fully convey but is discernible. Different counsel have different styles of practicing law. Some have a clinical style and some a rhetorical style. The pleadings in this case itself is eloquent of which counsel is enamoured with which style. However, our reading of the typescript on the proceedings below shows – to put it mildly - that rational intelligence was sacrificed to emotional intelligence. And that is not what legal science is all about. Law is a science is based on logic and common sense. Submission of counsel is full of judgmental hyperboles such words as “treated with utmost frivolity,” “completely derailed”, “must be recorded as a violation”, “disturbingly wrong”, “act of insolence”, “crush the honour”, “nothing but fury”, “lash out,” “filter of cranks.” We shall stop there.

- (74) Learned counsel had taken umbrage of the fact that the petition had been served on the Respondent when he should have granted it ex parte, without service. As the petitioner had a duty of free and frank disclosure and good faith, he should have welcomed the service not be opposed to it. In English practice, there was a time when an application of Judicial Review could be granted leave without the other party or parties involved in the case being served. But this anomalous practice verging on breach of natural justice was removed in the since Year 2000: see **Civil Procedure (Amendment No. 4) Rules 2000**. Furthermore, it is paradoxical that learned counsel would rest his claim on the fact that a “decision” was taken because he had not been heard, yet he would want a decision to be taken against others without hearing them. In the case of **R v Ex parte Fonseka [supra]**, this is exactly what we say. Ex parte Listing is one thing, ex parte hearing quite another and should only be exceptional given in limited number of circumstances.

GROUND 9

- (75) Ground 9 is worded this way.

“9. *The finding of the learned trial judge that the Supreme Court has no jurisdiction to review the decision of the Tribunal is erroneous and arrived at*

- a) without due consideration for relevant authorities and constitutional rules of interpretation, and;*

b) *without hearing the parties, thus in violation of the petitioner right to a fair hearing and to be heard on a legal point raised proprio motu by the court.*”

- (76) Respondent’s answer to Ground 9 is as follows. The learned Judge never held that the Supreme Court does not have jurisdiction to review the decision of the Tribunal. In fact, the learned Judge held that the Appellant did have the “*right to challenge the decision of the Tribunal later at the appropriate stage.*” but that at the stage of the Appellant’s application a challenge against the Respondent was premature and misconceived in that it was “*challenging an initiation process of a matter yet to be heard as opposed to a completed procedure of a final decision arrived at.*”
- (77) That pronouncement is based on article 125(c) and 125(7) of the Constitution read with the articles 134 and 139 of the same Constitution and the case of ***Doris Louis v CAA CS147/2007***. As to the question whether the Supreme Court could or could not review the decision of the Respondent, the record shows that the matter was not raised *proprio motu*. It was an issue canvassed by Respondent in Respondent’s Submissions on Objections to leave.
- (78) Paragraph 45 of the Judgment is not to be interpreted so as to exclude all form of judicial scrutiny of the Respondent, nor was this the intention of the learned judge. The Respondent being a constitutional body performing unique constitutional functions is answerable to the Constitution by way of petition to the Constitutional Court but it is not an adjudicating authority for the purpose of article 125(1) (c) of the Constitution. We find no merit in Ground 9.
- (79) As to the question whether the application is premature, there is the ripeness doctrine according to which a case become justiciable only if the harm asserted has matured sufficiently to warrant judicial intervention as decided in the case of ***Warth v Selding 422 U.S 490 1975***. Therefore on this point alone the application lacks justiciability.
- (80) All the grounds raised having failed, we dismiss the appeal with costs. All we need to state at this stage is that this appeal on the grounds raised must fail. We may wish to refer at this juncture, with regard to the nature and the scope of an action for judicial review. In the case of ***Chief Constable of North Wales Police v. Evans [1982] 1 W.L.R. 1155 at p. 1160, Lord Hailsham*** reminded us of the following:

“It is important to remember in every case that the purpose of the [remedy of judicial review] is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.”

S. Domah (J.A)

I concur:. F. MacGregor (PCA)

I concur:. J. Msoffe (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on [Click here to enter a date.](#)