

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando**

H.C.A. S-463 of 2005

**IN THE MATTER OF AN APPLICATION BY CELIA BALROOP
OF NO. 41 RIVER ESTATE CIRCULAR RIVER ESTATE DIEGO MARTIN,
FOR JUDICIAL REVIEW AS OF RIGHT PURSUANT TO SECTION 39 OF
THE FREEDOM OF INFORMATION ACT (AS AMENDED) (“THE SAID ACT”)**

AND

**IN THE MATTER OF THE ILLEGAL AND/OR UNLAWFUL FAILURE
AND/OR REFUSAL BY THE PUBLIC SERVICE COMMISSION TO MAKE A
DECISION ON THE APPLICANT’S APPLICATION OR REQUEST FOR
CERTAIN INFORMATION PURSUANT TO THE PROVISIONS
OF THE SAID ACT**

AND

**IN THE MATTER OF THE UNREASONABLE DELAY ON THE PART OF THE
RESPONDENT IN MAKING A DECISION ON THE APPLICANT’S REQUEST FOR
CERTAIN INFORMATION PURSUANT TO AND UNDER THE PROVISIONS OF
THE FREEDOM OF INFORMATION ACT AND/OR PROVIDING
THE REQUESTED INFORMATION TO THE APPLICANT**

BETWEEN

CELIA BALROOP

APPLICANT

AND

THE PUBLIC SERVICE COMMISSION

PROPOSED RESPONDENT

2005: June 2nd

Appearances:

For the Applicant: Mr Ramlogan and Mr N Lalbeharry

For the Proposed Respondent: Ms A. Humphrey holding for Ms R. Thurab

DECISION

PEMBERTON J.

[1] Ms Balroop is a public servant in the Public Service of Trinidad and Tobago.

Pursuant to the provisions of the Freedom of Information Act 1999, Ms Balroop applied to the Public Service Commission for certain information in three categories. Due to the nature of the subject matter I prefer not to elaborate at this stage.

[2] Sometime passed and the Commission supplied information in two of the categories as requested. With respect to the third category the Commission replied that the information “can only be provided by the Ministry of Works and Transport.....”

[3] This proved to be unsatisfactory to Ms Balroop, who instructed her Attorneys to seek leave of this Court to review the Commission’s decision. The

application was filed on 18th March 2005. The matter came up before Jamadar J. who gave certain directions, among which were that the matter be heard inter partes and the parties submit on the following:

- (1) Requirement for leave;
- (2) Whether the matter can be heard by a Judge in Chambers; and
- (3) Alternative redress under the Freedom of Information Act.

[4] At the hearing of this matter on 25th April 2005, the Court stayed the matter to allow the Applicant to pursue her request through the Ministry of Works.

[5] By Affidavit filed on 31st May 2005, the Applicant deposed that her efforts in that regard were fruitless. She now seeks leave to pursue her application for Judicial Review.

[6] Counsel for each of the parties set out detailed skeletal arguments on the issues which I shall express as:

- (1) Nature of the Judicial Review process under the Freedom of Information Act;
- (2) Whether recourse to the Ombudsman is an alternative remedy;

(3) If so, then if the Applicant's failure to use this avenue constitutes an abuse of process as to vitiate the entire proceedings;

(4) If not, can the Applicant apply for Judicial Review?

[7] In the interest of brevity, I would not reproduce Counsel's submissions, but confine this decision to my reasoning and decisions. I hasten to add that I do so meaning no disrespect to Counsel but craving their deepest indulgences.

[8] **[1] Nature of Judicial Review under Freedom of Information Act.**

The procedure to be followed by an Applicant for Judicial Review does not change except as expressly provided for by statute. **THE FREEDOM OF INFORMATION ACT** does not create a regime separate and apart from that contained in the **JUDICIAL REVIEW ACT** as governed procedurally by Order 53 **RULES OF SUPREME COURT 1975**. The **FREEDOM OF INFORMATION ACT**, Section 39 does not stand alone nor does it create a new species of rights. The Judicial Review Act and Order 53 state that an applicant must first seek leave of the Court before applying for Judicial Review. Thus an Applicant under the **FREEDOM OF INFORMATION ACT** must conform to the substantive and procedural requirements as contained in the "parent" Act and Rules of Court.

[9] Further the reference to the hearing of the application by a Judge in Chambers merely seeks to preserve the tenor and integrity of the subject matter attended by the Freedom of Information Act. Nothing more.

[10] [2] **Whether the Ombudsman is an alternative remedy under the Act.**

There is no dispute that referral of matters to the Ombudsman is an alternative to the court/litigation process. However, when can an applicant avail himself of this avenue?

[11] **THE FREEDOM OF INFORMATION ACT** provides at Section 38A

(1) A person aggrieved by the **refusal** of a public authority to grant access to an official document, may within twenty-one days of receiving **notice of the refusal under Section 23 (1)**, complain in writing to the Ombudsman.....

(emphasis mine).

One can see that the language of the section is unambiguous. The fundamental condition for invoking the Ombudsman's jurisdiction is the receipt of the notice of refusal from the public authority pursuant to Section 23 (1) of the Act.

[12] **Section 23 (1)** provides:

Where in relation to a request for access to a document of a public authority, a decision is made under this Part that the applicant is NOT entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the public authority shall cause the applicant to be given notice in writing of the decision

When one examines the relevant portion of the communication to the Applicant i.e. that the “information can only be provided by the Ministry of Words and Transport,” it does not to my mind communicate to the Applicant a refusal to provide the information. It says, “go elsewhere”. That is not the notice contemplated by Section 23 (1) and therefore not a refusal within the meaning of the Section. Thus if there is no refusal within Section 23 (1) the provisions of Section 38A cannot apply.

[13] **[3] Abuse of Process.**

Having answered (2) in the negative, the answer to (3) must be that the Applicant’s application to the court for Judicial Review in this matter is not an abuse of process.

[14] **[4] Judicial Review under Freedom of Information Act.**

Section 39 provides:

- (1) For the removal of doubt, a person aggrieved by a decision of a public authority under this Act may apply to the High Court for Judicial Review of the decision.
- (2)
- (3) In this section “decision of a public authority” includes the failure of a public authority to comply with Section 15 or 16 (1).

[15] For our purposes the provisions of Section 15 are relevant. They read:

A public authority shall take reasonable steps to enable an applicant to be notified of the approval or refusal of

his request as soon as practicable **but in any case not later than thirty days after the day** on which the request is duly made.
(emphasis mine).

Ms Balroop deposed that on 28th April 2005 she transmitted to the Permanent Secretary, Ministry of Works and Transport by facsimile and postage her request in the approved form. There was no response to the correspondence as of 31st May 2005, the date of her affidavit.

[16] This it would seem would put the Ministry of Works and Transport in a direct collision course with Section 15 and pave the way for Ms Balroop to seek redress under Section 39.

[17] Thus in answer to the questions as posed:

(1) Section 39 of the **FOI ACT** does not enable an Applicant to approach the Court for Judicial Review as of right. The Judicial Review Act and Order 53 RSC govern Judicial Review Proceedings notwithstanding a direct reference to such proceedings. This is so in any statute unless the statute expresses otherwise. **FREEDOM OF INFORMATION ACT** does not enable an Applicant to approach the Court for Judicial Review as of right.

(2) The Ombudsman is an alternative remedy available to an Applicant under the Act provided there is an active refusal by the Public Authority to satisfy the request for information and notice of that refusal is

communicated in accordance with the Act. This is the conjoined effect of Section 23 (1) and 38A of the Judicial Review Act.

(3) Judicial Review proceedings are not an abuse of process once the Ombudsman's jurisdiction cannot be invoked.

(4) Judicial Review proceedings may be invoked once Section 39 is satisfied.

[18] In this instance the inaction of the Ministry of Works puts the Applicant in the position of being a suitable candidate to seek Judicial Review.

[19] Having come to those conclusions, I entertain favourably Mr Ramlogan's application to add a party to these proceedings. I therefore find that the Minister of Works ought to be made a Respondent in these proceedings, that the proceedings be amended to reflect same and that leave be granted to the Applicant to pursue her relief.

It is therefore **ORDERED** as follows:

- (1) That leave be and is hereby granted to the Applicant to add the Minister of Works as a Respondent to these proceedings.
- (2) That leave be and is hereby granted to the Applicant to amend the proceedings accordingly.
- (3) That leave be and is hereby granted to the Applicant to apply for Judicial Review herein.

- (4) That the Amended proceedings be filed and served on the Respondents on or before 8th June 2005.
- (5) Returnable 5th July 2005 at 10:30 a.m.

CHARMAINE J. PEMBERTON
HIGH COURT JUDGE