

JERSEY / JUDGMENT

X v AG [2023] JRC 216 (14 November 2023)

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judgment

the bailiff: 1. This is an application for leave for judicial review of a decision of the Attorney General taken on or about 25 August 2022 that no prosecution would be brought against an officer of the Jersey Financial Services Commission (the "JFSC"). 2. The Applicant is referred to in this judgment as X for the reasons that will appear hereunder. 3. For the purposes of this application, the factual background may be simply stated: (i) X is a female who has transitioned from being a male. She holds gender recognition certificates in both the United Kingdom and in Jersey; (ii) She is the director and shareholder of a Jersey limited liability company and had been so before she transitioned to her current gender; (iii) On 8 April 2022 she wrote to a senior officeholder in the JFSC ("the Officeholder") about matters concerning the corporate entity of which she was a director and shareholder. In that letter she asked that the Officeholder deal with the matter personally and not to disclose the contents of the letter or, indeed, that she had previously been a man, to any other party. She was highly sensitive about this issue because certain close friends and indeed her then partner were not aware that she had formerly been male. (iv) Without reference to her, the Officeholder forwarded her correspondence to a junior colleague to be dealt with. It is not known whether he read the letter or whether he forwarded it unread or unconsidered. The junior colleague then sent the documentation to a generic email address and replied from that address. (v) X took the view that such dissemination on the part of the Officeholder and indeed his more junior colleague amounted to an offence under Article 18 of the Gender Recognition (Jersey) Law 2010 ("GRL") and made a complaint about it. Article 18(1) provides as follows: "It is an offence for a person who has acquired protected information in an official capacity to disclose the information to any other person." (vi) On 8 July 2022, the States of Jersey Police wrote to X in response to her complaint indicating that the Law Officers' Department had decided that no prosecution lay against the Officeholder. That letter states, in essence, that the Law Officers' Department were of a view that Article 18 of the GRL did not relate to this information specifically and that in any event the Officeholder would have a defence under Article 196 of the Companies (Jersey) Law 1991, Article 196(2) of which states: "Any functions of the Registrar under this Law may, to the extent authorised by the Registrar, be exercised by any officer on the staff of the Commission." (vii) X then sought the review of that decision using the victim's right to a review and, by letter dated 25 August 2022, the Director of the Criminal Division in the Law Officers' Department confirmed that decision. (viii) In that letter, the Director of the Criminal Division confirmed that he had reviewed the original decision and: "My review has

concluded that the initial decision was correct and therefore there will be no prosecution in this matter." (ix) He went on to add: "In my review, I considered the GRL and the particular provision under Article 18(4)(j) - there are a number of ways in which an offence is not committed and here there is a specific provision under 18(4)(j) which engages Article 196 of the Companies Law and therefore does not give rise to an offence." 4. It is with regard to that decision that the Applicant seeks judicial review. 5. Because of the sensitive nature of this matter, and the Applicant X's right to preservation of confidentiality, the Court agreed that, at the application for leave stage, the Applicant's anonymity would be maintained. Whether that anonymity ought to be maintained were leave to be granted would be a matter for the Court sitting to deal with the application for judicial review itself. 6. It is apparent from the above factual circumstances that two issues of law potentially arise. The first issue is whether or not a decision of the Attorney General not to bring a prosecution is amenable to judicial review. The second issue is, in the light of the contents of the letter of 25 August 2022, whether the Attorney General is correct in his analysis of the legal position set out in that letter based upon which the decision not to bring a prosecution was justified. 7. There is a third issue raised by the Attorney General before me at the leave stage which is the discretionary bar to judicial review proceedings of delay. On any analysis, the Applicant is long past the three months which is normally the upper limit for bringing a judicial review and, so it is argued on behalf of the Attorney General, the Court should not at this late stage permit the judicial review to proceed. 8. The law on application for leave to bring judicial review proceedings has been often stated in judgments of this Court. By way of example, in *W E (Jersey) Limited v Minister for the Environment*

[2022] JRC160 the Court characterised the test in the following terms: "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...but 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." 9. It is that test that I apply, in other words, I must determine with regard to the first and second questions above whether the case brought by the Applicant is arguable. I must then also consider whether or not delay operates as a bar in this case. 10. I do not think at the leave stage it would be appropriate for me to seek to resolve the two legal questions set out above. Accordingly, I will limit myself to a brief review of the question such as is sufficient to determine whether or not the legal points are arguable. Whether a decision not to prosecute can be subject to judicial review 11. In the Respondent's written submissions in response to the application, the Respondent asserts: "It is not clear that a decision of the Attorney General not to prosecute may be susceptible to Judicial Review. It is accepted that the wide language of RCR16/1(1) might encapsulate prosecutorial decisions by the Attorney, but the picture is far from clear and at the very least, the bar is set high." 12. The Respondent then goes on to refer to a number of cases. In *McMahon v Attorney General*

[1993] JLR 35, the Court dealt with an applicant who was seeking judicial review of the Attorney General's decision under the Investigation of Fraud (Jersey) Law 1991. The Court said: "Nor could there be judicial review of the Attorney General's decision. There was no Jersey authority for the proposition that the court had any general supervisory power over the Attorney General, whose position was unlike that of the States and its Committees engaged in the administration of the Island. The Attorney General, in exercising his discretion in matters arising from criminal investigations in Jersey and abroad, was acting as principal law officer of the Crown and was answerable neither to the States or to the Royal Court except when it was sitting as a court of trial. In any event, the Attorney General's decision to issue the notice was a political one affecting the public interest generally and was accordingly outside the range of discretionary action which the court should review." 13. The Court went on to make reference to the English case of *DPP v Humphreys* which states in effect that if there is a power to stop a prosecution on indictment at the threshold then it should be exercised in only the most exceptional circumstances. 14. The Court then went on to say at page 51 that: "The decision to prosecute or not to do so is not, in the opinion of this Court, reviewable by the Royal Court although after a prosecution has been started and the matter is before the Court, it has a general supervisory jurisdiction to put right any matter concerning the prosecution which is considered to be unfair. To anticipate that is to usurp the functions of the Attorney General." 15. Paragraph 43 of the written contentions of the Respondent, it is candidly stated: "It is accepted that matters have moved on somewhat since 1993 with the full development of judicial review as a remedy in Jersey under the Royal Court Rules 2004" 16. Some additional authority was put before me on this point. I do not propose to make further reference to it because, so it seems to me, whether or not the Attorney General's decision not to prosecute should be capable of being judicially reviewed is very much an arguable one. It seems to me that there is a distinction that may be material between review of a decision to prosecute, which ultimately will have with it all of the protections contained within the trial process and the undoubted jurisdiction of the trial court to deal with injustice if any arises, with a decision not to prosecute which if it cannot be judicially reviewed effectively is final. 17. I conclude therefore that the Attorney General's decision not to prosecute is arguably amenable to judicial review and that the extent of it could, in an appropriate case should, be subject of full argument and determination before the Court. Whether the Attorney General's decision on the law set out in the letter is accurate 18. I deal even more briefly with the question as to whether or not the Attorney General was right in law. It seems to me that there is potentially, and I put it no higher than that, a tension between the provisions of the GRL and Article 196 of the Companies (Jersey) Law 1991 and how they should interact. Argument at some length has been deployed by both sides in the leave application before me but I conclude I should not, at this point, seek to determine this matter. In my judgment, it is arguable that the Attorney General's interpretation of the interaction between those two statutory provisions is wrong. 19. It seems to me also that this is a matter that is relevant to the question of whether or not the Attorney General's decision would be amenable to judicial review. I can see that an argument that the Attorney

General's decision might not be amenable when considering the exercise of a discretion on public interest grounds may be a strong one. However, where the Attorney General's decision is based on an interpretation of the law it may be that that should, so it may be argued, be more amenable to judicial review. Errors of law, if such they be, should not stand unchallenged. 20. In any event, however, in my view it is arguable that the decision of the Attorney General on the law in this matter as communicated in the letter from the Director of the Criminal Division is wrong. 21. Naturally, I have not in this judgment purported to determine the two legal questions set out above. I have merely determined that in my judgment both of the points made by the Applicant are arguable. Delay 22. I now turn to consider the issue of delay: 23. Rule 16/3(1) of the Royal Court Rules 2004 ("RCR") provides: "Subject to paragraphs (2) and (3), an application for leave to apply for judicial review must be made promptly and in any event not later than 3 months from the date when the grounds for the application first arose." 24. Rule 16/3(3) RCR is in the following terms: "An application may be made after the end of the period of 3 months if the Bailiff is satisfied: (a) That there is good reason for the application not having been made within the period; and (b) That if the relief sought were granted, on an application made at this stage, it would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration." 25. It is clear that although the matter of an application being out of time is described as a "discretionary bar" the reality of it is that the period of 3 months is absolute unless the Bailiff is satisfied of the matters set out in Rule 6/3(3). In other words, is there a good reason for the application not having been made within the period and that if the relief were granted on an application made at this stage it would not be likely to cause substantial hardship to or substantially prejudice the rights of any person or be detrimental to good administration. I am not, accordingly, considering the substantive merits of the application and although I do not go so far as to say the merits of an application can never be a relevant consideration, the starting point and in most cases the finishing point will be the test set out under Rule 16/3(3) RCR. 26. The decision was, as has been indicated above, communicated by the Director of the Criminal Division to the Applicant on 25 August 2022. This is effective for the purposes of determining when the 3 month period is to be counted. Accordingly, the 3 month period would have ended on 25 November 2022. The notice applying for leave was filed on 19 April 2023 and is accordingly filed some 8 months after the date of the decision and 5 months beyond the 3 month period. 27. Some portion of the delay since that time appears to be attributable to the Applicant's attempt to secure legal aid for a challenge to the Attorney General's decision. There appears to have been correspondence with the legal aid office and ultimately in March 2023, legal aid was granted. The legal aid office confirmed on 29 March 2023 that legal aid funding would be available. 28. The essence of the Applicant's argument on delay appears to me to be a claim that the application for judicial review could not have been either formulated or advanced without legal aid. I note that the Applicant is the director of a company and, as the Respondent says in its written submissions "has demonstrated an ability to put together a substantive written case to the Attorney General challenging the

initial decision ". Indeed, this formed part of the statement of facts and grounds. 29. On 21 September 2022, the legal aid office had indicated that legal aid was unlikely to be available and there was absolutely no certainty of legal aid until, as indicated above, the confirmation that it would be available was given. Having been told that legal aid was unavailable, the Applicant could nonetheless have applied for judicial review. Neither the Applicant nor the Respondent is able to explain why the legal aid office initially took a negative view on the provision of legal aid and then changed its mind. Be that as it may, however, the Applicant had a substantial period of approximately 6 weeks from being told that legal aid was not likely to be available to make an application and still be within the 3 month period. 30. I do not, accordingly, think that a delay in obtaining legal aid is a sufficient justification for an application that is 5 months past the maximum period afforded to an applicant to apply for leave. The Applicant could have advanced the claim as a litigant in person. 31. Furthermore, it seems to me that any application to overturn a prosecution decision made by the Attorney General must be brought as quickly as possible. There would potentially be substantial hardship to the Officeholder were he now to be prosecuted by the Attorney General. It is more than a year since the decision was communicated not to prosecute and if such a decision was to be challenged it is incumbent on an applicant to challenge it at the earliest opportunity because of the serious nature of a prosecution decision and its consequences on the individual subject to it. It is, to use the words of Rule 6/3(3)(b) RCR " detrimental to good administration to do otherwise ". 32. This is not in my view met by the submission made by the Advocate for the Applicant which, if I understood it correctly, was that the Applicant in fact would be content if no prosecution was brought against the Officeholder but simply that it was established that the Attorney General's decision not to do so was wrong. Should the Court make that determination so long after the decision was taken then whilst such a delay may be a factor that the Attorney General could take into consideration and decline to prosecute on public interest grounds that is not an outcome that is within the gift of the Applicant. Furthermore, it does not seem to me to be appropriate for the Court to stretch so far into the Attorney General's discretionary powers to say, in effect, ' your decision not to prosecute was wrong but we direct you not to prosecute '. 33. In my judgment, the Applicant has failed to satisfy me that there was a good reason for the application not having been made within the appropriate period and, in any event, there is a real possibility of hardship being caused to the subject of the prosecution decision and to allow it to be reviewed at this point would, in my judgment, be detrimental to good administration.

Conclusion

34. In circumstances whilst I believe that the Applicant has an arguable case in law on the two issues raised in the application for judicial review, I cannot, in the light of the delay, properly permit this matter to proceed. 35. It is incumbent upon Applicants to make their application in accordance with the Rules and it is only, in my judgment, in exceptional circumstances

that it would be appropriate for me, after such a passage of time, to permit such an application to be brought. Accordingly, I refuse the application for leave. Authorities Gender Recognition (Jersey) Law 2010. Companies (Jersey) Law 1991. W E (Jersey) Limited v Minister for the Environment

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[1993] JLR 35 . Investigation of Fraud (Jersey) Law 1991. Companies (Jersey) Law 1991. Royal Court Rules 2004. Page Last Updated: 11 Dec 2023 Back to top About JLJB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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