COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jalloh v. Insurance Council of British Columbia,* 2016 BCCA 501

Date: 20161220
Docket: CA43451

Between:

Mohamed Alie Jalloh

Appellant
(Petitioner)

And

Insurance Council of British Columbia, Financial Institutions Commission, and Financial Services Tribunal

Respondents
(Respondents)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated January 14, 2016 (*Jalloh v. Insurance Council of British Columbia*, 2016 BCSC 47, New Westminster Registry S148756).

Counsel for the Appellant:	E.G Wong
Counsel for the Respondent Financial Institution Commission & Attorney General of British Columbia:	K.A. Horsman, Q.C. S.A. Wilkinson
Counsel for the Respondent Financial Institutions Commission:	F.A.V. Falzon, Q.C.
Counsel for the Respondent Financial Services Tribunal:	D.T. McKnight M.T. Hoogstraten
Place and Date of Hearing:	Vancouver, British Columbia December 5, 2016
Place and Date of Judgment:	Vancouver, British Columbia December 20, 2016

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

Summary:

The appellant, an insurance sales licensee, petitioned for judicial review of administrative decisions imposing a four-year suspension of his license. On judicial review, he alleged, for the first time, ineffective assistance of counsel before both the first-instance tribunal and the appellate tribunal. The chambers judge dismissed his petition for judicial review. HELD: Appeal dismissed. The chambers judge committed no reversible error in considering the statutory scheme and prejudice, including the delay and apparent strength of the appellant's case, in declining to exercise his discretion to grant relief.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] This is an appeal of an order dismissing Mr. Jalloh's petition for judicial review in which he alleged the outcomes of a hearing at first instance and then on appeal were tainted by procedural unfairness caused by ineffective assistance of counsel and resulting in a miscarriage of justice. The issue of ineffective assistance of counsel was raised for the first time on judicial review.

Background and Procedural History

[2] Mr. Jalloh was an insurance salesperson licensed by the Insurance Council of British Columbia ("Council"). After a failed personal relationship, his former partner made a complaint to the Insurance Corporation of British Columbia ("ICBC") alleging Mr. Jalloh had improperly accessed her private information on ICBC's database. An investigation followed. Mr. Jalloh gave exculpatory statements to the investigators rationalizing his conduct and explaining inconsistencies in earlier statements.

[3] The Council gave notice of an intention to cancel Mr. Jalloh's license for four years. Mr. Jalloh then exercised his statutory right to a *de novo* hearing before a three-member hearing committee of the Council.

[4] Mr. Jalloh retained Mr. Pyper, a lawyer, to represent him. Mr. Pyper did not attend the hearing personally but delegated the task to a very junior associate, contrary to Mr. Jalloh's expectations. The complainant, ICBC staff, and Council investigators were called as witnesses. The statements to the investigators were admitted into evidence, over the objection of Mr. Jalloh's counsel who asserted

breaches of s.10(b) of the *Charter*, even though Mr. Jalloh had not been arrested or detained. He also unsuccessfully asserted breaches of ss.11(c) and 13 of the *Charter* relating to proceedings in criminal and penal matters, even though Mr. Jalloh had not been charged and was not at risk of imprisonment. Counsel for Mr. Jalloh cross-examined the witnesses. The complainant contradicted the explanations Mr. Jalloh had given to the investigators. Mr. Jalloh's theory was that the complainant was not credible and that he was the victim of a conspiracy. He called a witness in support of that theory. Counsel's main arguments were that Mr. Jalloh's statements to the investigator were inadmissible because they breached his *Charter* rights, and that the relevant standard of proof, which approached the criminal standard, had not been met. Mr. Jalloh was not called to testify to contradict the evidence against him.

[5] The Council rejected these arguments, made findings of fact against Mr. Jalloh noting the absence of exculpatory evidence from him or direct evidence supporting his theory, and recommended a four-year cancellation of his license.

[6] In his affidavit in support of his argument that he received ineffective assistance of counsel, Mr. Jalloh deposes that he wanted to testify at the hearing and attempted to arrange a meeting with Mr. Pyper to prepare. He received no response. He was surprised to see an inexperienced junior counsel at the hearing to represent him. During the course of the hearing, Mr. Jalloh called Mr. Pyper to demand his presence at the hearing and to discuss giving evidence. He was told not to give evidence, that it could be used against him, and that, in substance, it was better "to let them go wrong", because what happened at the Council did not matter; it would be fixed in court.

[7] Neither Mr. Pyper nor junior counsel has offered any evidence to explain their conduct or strategy, even though they were served with the materials in the court below. We are left without any basis to conclude, for example, that they had a considered strategy that Mr. Jalloh could only damage his interests further by testifying or that they decided they had no choice but to run apparently meritless

arguments in face of the strength of the case faced by Mr. Jalloh in the hope that something might emerge that could be used to his advantage. They have not contradicted Mr. Jalloh's evidence and nothing in that evidence suggests that they explained their strategy, if indeed there were one, to him. Mr. Pyper essentially told Mr. Jalloh to trust him and not worry. On the face of the record as it stands, and without finding any facts, it certainly appears that Mr. Jalloh was poorly represented before the Council. This is not to say, however, that better representation would have led to a better result in light of the case against him.

[8] Mr. Jalloh appealed the Council's decision to the Financial Services Tribunal ("FST"). He continued to retain Mr. Pyper.

[9] The appeal before the FST proceeded on the record and by written submissions. Mr. Pyper filed written submissions for Mr. Jalloh. The Tribunal described Mr. Pyper's argument as "made pithily, with minimal reasoning or argument." Mr. Pyper again challenged the admissibility of Mr. Jalloh's statements to the investigators. Mr. Pyper also argued the Council improperly drew an adverse inference against Mr. Jalloh because he did not testify. No issue of the quality of Mr. Jalloh's representation before the Council was raised in the appeal. This fact forms the principal basis for arguing that Mr. Pyper's representation of Mr. Jalloh on appeal was ineffective.

[10] On December 7, 2012, the FST rejected Mr. Jalloh's arguments and confirmed the Council's decision (though it varied the four-year cancellation to a four-year suspension).

Judicial Review

[11] On January 30, 2013, Mr. Jalloh filed a petition for judicial review of the FST decision, again challenging the admissibility of the statements, the alleged reliance on an adverse inference, as well as alleging he was the victim of a conspiracy. Mr. Jalloh represented himself at this time, but was assisted in preparing the petition

by Mr. Pyper or his firm. Although he was acting for himself, he did not raise ineffective assistance of counsel at that time.

[12] Approximately one year later, on January 7, 2014, the petition came on for hearing before Madam Justice Maisonville, but Mr. Jalloh was granted an adjournment, by consent, to obtain counsel by February 4, 2014. Mr. Jalloh retained new counsel, and approximately fifteen months after filing the petition, on October 16, 2014, Master Muir permitted an amendment to the petition, abandoning all of the previous grounds, and for the first time, setting out Mr. Jalloh's allegation of ineffective assistance of counsel. The grounds he abandoned were very serious allegations of misconduct against the decision makers.

[13] At the hearing of the petition for judicial review, Mr. Jalloh argued that his counsel's representation before both the Council and the FST was ineffective. He complained that a junior associate appeared at the hearing and not senior counsel. He deposes that he had wanted to testify to rebut the complainant and to explain confusions and imprecisions in his statements to investigators, but counsel would not let him and erred in advancing hopeless arguments, including that a criminal standard of proof was required to make adverse findings against him. The chambers judge succinctly summarized the allegations in the amended petition at paras. 17 and 18 of his reasons:

> [17] The allegations in respect of the deficiencies in the services of Mr. Jalloh's counsel focus on:
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> > (1) the decision of Mr. Elworthy at the Council hearing not to call Mr. Jalloh to refute the evidence given by Ms. Y.B. that she had not spoken to Mr. Jalloh after June 1, 2010. This statement contradicted Mr. Jalloh's contention that she contacted him on the dates the Council found he had accessed her ICBC information and on other dates, in what he suggested was an attempt to first extort money from him; and when that failed, to subsequently implicate him in the actions which founded the Council complaints. Mr. Elworthy's failings were said to be likely a result of inexperience, inadequate preparation, and a lack of supervision by Mr. Pyper; and
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> > (2) the conduct of Mr. Pyper in failing to bring forward Mr. Elworthy's supposed incompetence before the Council on the appeal to the Financial Services Tribunal. Mr. Jalloh's allegations relating to this second failure of counsel are that Mr. Pyper was in a

> conflict of interest in assessing the competence of Mr. Elworthy, a junior member of his firm, and that he himself failed to appreciate the significance of the failure to call Mr. Jalloh to give evidence.
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> [18] In the petitioner's view, this sequence of failings in the adequacy and effectiveness of counsel, first before the Council and then before the Tribunal, requires that both the decisions be set aside and a new Council hearing be ordered to allow Mr. Jalloh to receive a fair hearing in relation to the original complaints.

[14] The chambers judge noted that the first time the claim of ineffective assistance of counsel was raised was in the amended petition. The allegation had not been advanced on appeal to the FST. He noted that the allegation of ineffective assistance of counsel was premised on an assertion that the entire proceedings rendered a miscarriage of justice. In his view, the circumstances justifying giving effect to this assertion, on judicial review, are very limited. He considered the statutory authority for appeals based on a "miscarriage of justice" in criminal cases under s. 686(1)(a)(iii) of the *Criminal Code*, and the guidance offered in the civil context, to the extent they may be applicable, where *Charter* issues may be engaged, or the best interests of children, for example, *D.B. v. British Columbia (Director of Child, Family and Community Service),* 2002 BCCA 55. The chambers judge also considered *Wood v. Van Bibber*, 2013 YKCA 15, which canvasses the principles applicable to allegations of ineffective assistance of counsel in the civil context, and agreed that ineffective representation of counsel is a ground of appeal in only the rarest of cases, such as where there is an overriding public interest, interests of vulnerable persons are engaged, or a party is somehow complicit in the failure of the opposite counsel.

[15] The chambers judge concluded that none of the circumstances that would warrant giving effect to Mr. Jalloh's submissions were engaged in this case. At paras. 27 and 35 he concluded:

> [27] In this case, there are no issues arising from the record, nor are there any alleged breaches of fairness or natural justice pertaining to the procedure of either authority. The grounds advanced relate to the adequacy or effectiveness of counsel, referencing matters between Mr. Jalloh and his counsel that were not brought to the attention of either administrative body

> and only come to this Court by way of the affidavits filed following the amendments to the petition in October 2014.
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> […]
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> [35] In this case, the matter has gone beyond the appeal stage and there is no issue of procedural fairness relating to the administrative bodies below. The case does not raise any *Charter* issues, and while the decision is of course of significance to Mr. Jalloh, there is no public interest component to the application. I find no circumstances here by way of the application for judicial review that give rise to a hearing as to whether there has been a miscarriage of justice. Even if such jurisdiction should be found available, the Court is of the view that as a discretionary matter, and as a result of the following:
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> > (1) the matter proceeded on the present grounds at a very late stage in the development of the case and were only finally presented 22 months after the appeal decision was known; and
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> > (2) the applicant faces such significant challenges to acceptance of his evidence based upon his previous admissions and the strength of the case advanced against him that there is very little prospect of success.
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> The circumstances are such that the extraordinary jurisdiction I have described relating to a putative miscarriage of justice should not, in any event, be made available.

Parties' Positions on Appeal

[16] On this appeal, Mr. Jalloh contends that the chambers judge erred in law by concluding there was no jurisdiction to hear the issue of ineffective assistance of counsel in an application for judicial review. Alternatively, the chambers judge erred in failing to exercise his discretion in favour of Mr. Jalloh. As I understood his argument, he says that there must be a general jurisdiction to ensure procedural fairness in hearings before administrative bodies and that ineffective assistance of counsel leading to a miscarriage of justice is available as a ground of judicial review, even where, as here, the lack of procedural fairness does not arise because of the conduct of the administrative tribunal.

[17] The respondents' adopt each other's arguments, which focus on three themes. The first raises a threshold issue. The FST argues that as a matter of administrative law principle, a licensee raising a procedural fairness objection, such as ineffective assistance of counsel in the first-instance tribunal, must advance that

objection to the FST (the statutory appellate tribunal) for adjudication before the issue can be considered on judicial review. The FST argues that the scheme of the legislation, which contemplates appeals to the FST, requires any such challenge to Council proceedings to be brought first to the FST, which is authorized to make a "final and conclusive" decision on appeal. It is the legal responsibility of a licensee to advance those arguments first to the FST, even where, as here, arguably a licensee may not have appreciated that he or she had been ineffectively represented and where that procedural unfairness may be seen as tainting both the original hearing and the appeal. Counsel for the FST acknowledged that in certain cases, there may be a basis for the FST to reopen an appeal under s. 53 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 (the "*ATA*"). That did not happen here.

[18] The Financial Institutions Commission and the Attorney General focus on a different issue. If the threshold question is decided against the FST, they contend that the circumstances in which ineffective assistance of counsel can be raised as a ground of judicial review is limited. Judicial review is not available based on a general sense of fairness. Miscarriage of justice is not a stand-alone ground of judicial review. In the context of judicial review, tribunals owe a duty of procedural fairness, but where an issue arises between a client and counsel (especially in circumstances where there is not even a right to counsel), judicial review is available, as the chambers judge accepted, only in limited circumstances, such as cases involving *Charter* rights, vulnerable persons or issues of general public importance. The contention is that absent procedural unfairness that is manifest on the record and should have been apparent to the tribunal, issues pertaining to the quality of legal representation are not legitimate grounds of judicial review.

[19] Thirdly, the Council contends that the chambers judge did not, in any event, err in principle in the exercise of his discretion to refuse relief. It argues, amongst other points, that Mr. Jalloh's concerns about his representation before the Council had crystallized during the hearing before it. Mr. Jalloh was in a position, had he confronted those concerns, to raise the matter on appeal to the FST. The chambers judge did not err in taking into account the late stage and time at which the issue

was first raised (well after the FST appeal) and the strength of the case against him in refusing relief.

Discussion

[20] I agree, substantially for the reasons of the chambers judge, that the circumstances in which a court will entertain an allegation of procedural unfairness grounded in ineffective assistance of counsel are very limited. I agree that in the ordinary case, the issue of procedural unfairness engages alleged breaches of duty by the tribunal in the hearing process; alleged breaches which typically can be reviewed on the record before the tribunal. It is common ground here that the issues raised by Mr. Jalloh were not manifest to either the Council or the FST on appeal in such a way that either tribunal could be said to have failed in its duty to him. Mr. Jalloh does not allege any fault or breach of duty by either administrative tribunal.

[21] Secondly, I accept that judicial review is just that: judicial review. At its core, judicial review involves a supervisory review by the court, generally on the record before the tribunal. Judicial review is not an appeal. There are good policy reasons, well reflected in the case law, that courts generally ought not to entertain arguments for the first time on judicial review without the benefit of their consideration first by the tribunal. I agree with counsel for the FST that generally, if not necessarily inviolably, a court on judicial review should have the benefit of the views of a specialized tribunal about the availability of an argument of the kind advanced here, especially where there is, as here, an administrative right of appeal from the decision of first instance and, arguably, a right to request the tribunal to reopen certain appeals under s. 53 of the *ATA*. I accept that this statutory scheme, which involves a decision at first instance and a “final and conclusive” appeal, contemplates, as a matter of legislative policy, that, generally, all relevant issues should be brought on appeal before they can be raised on judicial review.

[22] The chambers judge took the view that Mr. Jalloh was attempting to broaden the circumstances in which ineffective assistance of counsel could be invoked

beyond the limited situations reflected in the case law. I do not think he went so far, as alleged as a ground of appeal, to conclude that there was no jurisdiction to entertain judicial review on the ground that ineffective assistance had resulted in a miscarriage of justice. His judgment does not rest on the categorical conclusion that there is no jurisdiction ever to entertain an application for judicial review based on ineffective assistance of counsel. But, in my view, more significantly, he also dismissed the application by exercising his discretion to refuse a remedy given the particular facts before him. If Mr. Jalloh is to succeed on this appeal, he must demonstrate the chambers judge erred in principle in the exercise of that discretion. In brief, Mr. Jalloh must show that the judge misdirected himself as to the applicable law, made a palpable and overriding error of fact or ignored relevant or relied on irrelevant considerations: see *Penner v. Niagara Regional Police Services Board,* 2013 SCC 19 at para. 27. A failure to demonstrate this is fatal to this appeal.

[23] The judge gave a brief summary of his reasons for refusing to exercise his discretion to grant relief. As set out above, they are (at para. 35):

> (1) the matter proceeded on the present grounds at a very late stage in the development of the case and were only finally presented 22 months after the appeal decision was known; and
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> (2) the applicant faces such significant challenges to acceptance of his evidence based upon his previous admissions and the strength of the case advanced against him that there is very little prospect of success.

[24] Before turning to assess whether those factors contain any error in principle, it may be helpful to say that I do not think, as was suggested in argument, that the judge erred in going on to consider this alternative ground for judicial review. Notwithstanding the invitation to decide this appeal on the threshold issue argued by the FST, I would not do so. In my view, a definitive statement along the lines contended for is not necessary to decide this case. While the broad and general principles advanced are clearly powerful considerations embedded in the nature of judicial review and the legislative intent in providing for final and conclusive rights of administrative appeal that no doubt often inform the exercise of discretion, I am not inclined to lay down a rule of universal application that does not admit of exceptions.

There may be unusual or rare circumstances amenable to judicial review where procedural unfairness taints both levels of decision, is not apparent on the record, and does not arise from a breach of the duty of procedural fairness owed to a petitioner. I would not foreclose such a possibility, and it is not necessary to do so here.

[25] Having said that, the considerations outlined above, including the limited circumstances grounding judicial review for procedural unfairness arising from an allegation of ineffective assistance of counsel, were factors informing the judge's exercise of discretion. The judge's decision to exercise his discretion against granting a remedy was informed by, *inter alia,* his awareness of the nature of the allegations against Mr. Jalloh, his knowledge of the evidence against him, most especially the combination of the evidence of the complainant and Mr. Jalloh's statements explaining his conduct, what Mr. Jalloh had to say about the circumstances under which the interviews were conducted, the absence of any procedural unfairness in the administrative hearings beyond the allegation of ineffective assistance of counsel, the frailty of the argument that the alleged errors of counsel led to a miscarriage of justice, and the obligation of a party to raise arguments in a timely way and before the appropriate forum. A fair reading of the judgment suggests the chambers judge was not persuaded that Mr. Jalloh had demonstrated the prejudice component which forms an essential part of the test for ineffective assistance of counsel, at least as articulated in the criminal cases. It cannot have escaped the judge's notice that according to Mr. Jalloh, he was dissatisfied with his representation at the hearing, but neither raised his concerns as a ground of appeal to the FST nor discharged his counsel until after the appeal had failed and many months had elapsed after filing a petition for judicial review which did not raise the issue now advanced.

[26] It is clear that the delay in advancing these issues was a factor in the judge refusing to exercise his discretion in favour of Mr. Jalloh. I do not think he erred in relying on delay as a reason to deny relief. Mr. Jalloh did not raise ineffective assistance of counsel for many months after the appeal decision was made.

Mr. Jalloh avers that he was dissatisfied with his representation at the original hearing, but does not explain why that ground was not raised on appeal or why he continued to be represented by the same firm given his concerns. Mr. Jalloh chose his counsel and continued to be represented by them, even though he now says he was dissatisfied with the competence of their representation. Mr. Jalloh must bear some factual and legal responsibility for not advancing positions available to him earlier. I do not think the judge erred in viewing the delay in advancing his current complaints as a ground to deny a remedy. This factor in the exercise of discretion is not just a question of the time that elapsed before the allegations were made, it also reflects the point in process in which they arose, namely, after the appeal and after an initial petition for judicial review was filed alleging other grounds of review. The judge must be taken to have been aware of the potential prejudice to the respondents and the witnesses in revisiting this matter after such a long period of time.

[27] The judge was also aware of all that Mr. Jalloh had to say about the substance of the case he says he was prevented from advancing by reason of the ineffectiveness of his then counsel. The judge was of the view that Mr. Jalloh faced significant challenges in having his theory accepted in light of the case against him. Although Mr. Jalloh contended based on a comment in one case that the judge should have proceeded to assess whether there had been a miscarriage of justice by assuming that his evidence would have been accepted, I cannot go so far. I do not think the judge erred in bringing his judicial experience to bear in considering in a general way the weight of the evidence against Mr. Jalloh and the difficulty he would face in overcoming that case based on his evidence. In making that assessment, I do not think the judge engaged in improper weighing or assessing of the evidence that would originally have been for the Council to consider. The exercise undertaken by the judge is inherent in assessing prejudice, a component of the law of ineffective assistance of counsel and discretionary decisions of this type.

Conclusion

[28] I am of the view that Mr. Jalloh has not demonstrated that the chambers judge made any error in principle in the exercise of his discretion. That is sufficient to dispose of this appeal. I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:"

"The Honourable Madam Justice Dickson"