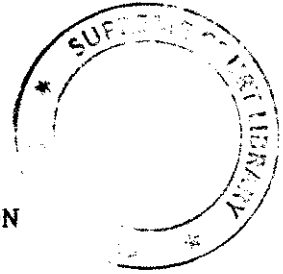


IN THE SEYCHELLES COURT OF APPEAL

MONICA CHETTY

V.

PRINCIPAL SECRETARY
MINISTRY OF ADMINISTRATION
AND MANPOWER



Civil Apppeal No. 21/95

Before: H. Goburdhun, P., E.O. Ayoola, JA, M.A. Adam, JA

Mr. J. Hodoul for the Appellant

Mr. A.F.T. Fernando for the Respondent

JUDGMENT OF THE COURT

This appeal arose from an application by the appellant, Mrs. Monica Chetty, for an order of mandamus "requiring the Government, represented by the Principal Secretary, Ministry of Administration and Manpower and Secretary of the Public Sector Commission to communicate the reasons for the non-renewal of the applicant's contract of employment and to pay damages."

Sometime in 1991 the appellant entered into an agreement with the Government of Seychelles ("the Government") whereby she agreed to be engaged in the office of Director-General of Tourism for a continuous period of two years starting on 1st January 1991 and ending on 31st December 1992. The contract was subject to termination on ground of misconduct of the appellant; or, by either party at any time giving the other three months' notice in writing or paying the other two months' basic salary in lieu of notice; or, simply by effluxion of time. The appellant, by

the agreement, was entitled to an 'end of contract payment' on a satisfactory completion of her term. All these terms, and several others, were embodied in an Agreement dated 1st day of January 1991 ("the Agreement") signed by the appellant and by the Principal Secretary, Ministry of Administration and Manpower on behalf of the Government.

The Agreement was made pursuant to a Contract System for Senior Executives of the Public Sector which became operative on 1st January 1991, whereby all senior executives of the public sector were appointed on renewable fixed term contract, initially for a period of one or two years. The President, set up a Public Sector Commission ("the Commission") for approving all contracts and renewal of contracts for senior executives in the public sector. The Commission is chaired by the President himself. The Minister responsible for Administration is a permanent member. Technical and secretarial assistance to the Commission is provided by a Technical Committee comprising of Principal Secretary (Administration and Manpower) and Economic Adviser (President's Office).

Upon the expiration of initial period of two years for which the appellant was employed, her contract was extended, initially until 30th September 1993. Subsequently, it was renewed for another term of a year, to expire on 1st October 1994. By a letter dated 1st August 1994 signed by the Secretary of the Public Sector Commission, now "the respondent" in this appeal, the appellant was informed that her contract of employment would not be renewed upon its expiration on 30th September 1994. The appellant requested the Respondent to inform her of the reasons for the decision not to renew her contract, first, verbally and subsequently, in writing through her Attorney. The latter was eventually informed by a letter signed by the Respondent and dated 15th September 1994 that "the reason for

termination" (of her employment) was "upon the expiry of her last contract on 30th September 1993 but which continued to have effect until 30th September 1994." Apparently not satisfied with that information she commenced proceedings for judicial review seeking the reliefs earlier mentioned.

The appellant alleged by her affidavit that the reasons on which the decision not to renew her contract was based constituted official information relating to her, held by the Commission and to which she had a right of access by virtue of Article 28 of the Constitution of the Republic of Seychelles. Further grounds of grievance on which she relied are: that the decision not to renew her contract and to terminate her employment and her career in the Public Service without any valid reasons known to her was made in disregard of her constitutional right "to work and to just and favourable conditions of work" guaranteed by article 35 of the Constitution; and, that the decision had caused her anxiety, distress and loss of some specified and special benefits such as security of employment, opportunity of directorship in public parastatals, and foreign travel on official missions for which she claimed damages.

Before Perera, J. who heard the matter, counsel on behalf of the Government raised a preliminary objection to the application on the main ground that what existed between the Government and the appellant was a mere contract of employment which was an entirely private law affair. Perera, J. was of the view that as the appellant did not hold an "office of status" and the appellant's rights which were "private and personal" in nature ceased with the termination of the contract by effluxion of time; the remedy of judicial review which is appropriate in public law was not available to her. In the event, he upheld the objection.

The main contention of the appellant, on this appeal, put trenchantly by counsel on her behalf are first: that the matter arose in public law as opposed to private law (i) because the body which took the decision not to renew the appellant's contract was a public adjudicating authority and the appellant was at the material time a public officer; (ii) the public authority employer of the appellant had a duty under public law to treat her fairly by observing the rules of natural justice before coming to the decision not to renew her contract, and (iii) the duty to treat her fairly arose from the legitimate expectation she had that she would be treated fairly and that her contract would be renewed; and, second; that Perera, J. was wrong to have held that "the instant matter could be decided without reference to the constitutional aspect raised by the petitioner", namely right to access to information enshrined in article 28(1) of the Constitution and right to work contained in article 35 thereof.

For the respondent it was argued that notwithstanding that the appellant's employer was a public authority the infringement complained about, of a contract of employment, was enforceable by ordinary action in private law and not by invoking the supervisory jurisdiction of the Supreme Court by an application for judicial review; that the Commission was not an "adjudicating authority" as contemplated by article 125(7) of the Constitution; that there was no basis in fact and in law for invoking the principle of legitimate expectation; and, that if, as Perera, J had held, there was no right to maintain these proceedings question of reference of constitutional issues therein to the Constitutional Court would not arise.

The issues that arose in the proceedings in the Supreme Court were whether the Government was under a duty to communicate to the appellant the reasons on which the

decision not to renew her contract of employment was based; and, whether if such duty existed, there was a breach thereof, and if so, whether the appellant was entitled to damages. It is clear that Perera, J was in partial apprehension of those issues when he came to the conclusion, in effect that the appellant could not look outside the contract of employment for the duty she must establish as basis for the right which she asserts to reasons why her contract had not been renewed, there being, in his view, no public element involved in the relationship of the appellant as employee and the Government as employer. A fuller apprehension of the issues would have revealed an allegation of contravention of constitutional rights.

In the final analysis the main issue on this appeal must turn not so much on the distinction between "public law" and "private law" as on the questions of procedure and forum. It is because the appellant has asserted that proper procedure had been adopted and that proceedings had been initiated in the appropriate forum that the questions have arisen (i) as to the relationship of the appellant to the Government and (ii) whether there were facts which could and did justify the importation of a public law question into the controversy that has arisen between the parties. It is to dispose of these contentions which had engaged so much of the attention of the learned judge and counsel at the Supreme Court that these questions are now discussed.

The remedy in an ordinary employer - employee relationship lies in private law on a claim by a party to a right under the contract. The measure and nature of the parties' rights and obligation in an ordinary contractual employer and employee relationship are determined by the terms of the contract. (See Ridge v. Baldwin (1963) 2 All ER 66, 71 G - H). That the employer is a public authority does not per se import a public law element as would make a

contract of employment enforceable by judicial review. (See R. v. British Broadcasting Corporation ex p Lavelle (1983) 1 WLR 23, R. v. East Berkshire Health Authority ex p Walsh ((1985) QB 152). In ex p Walsh (supra) where the Health Authority had dismissed an employee, an allegation that the dismissal was in breach of contract was held not to raise an issue of public law at the procedural level. An extract from the judgment of Lord Donaldson MR in that case is apposite. He stated at that :

"The ordinary employer is free to act in breach of his contract of employment and if he does so his employee will acquire certain private law right and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the public authority to dismiss, thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies."

Another form of underpinning would be a statutory duty to incorporate specified terms into the contract of employment in which case mandamus would be available to compel the public authority to contract in accordance with the statute.

In the present case, the Agreement is the charter of the relationship of the parties. If while the Agreement was running its course a party had committed a breach of its terms, the remedy of the aggrieved party is in private law. The relationship of the parties in this case was clearly one of employer and employee without any statutory underpinning as would give the appellant a public law right. Counsel for the appellant however contends that there has been imported a public law element into the issue by reasons of: (i) legitimate expectation; (ii) allegation of contravention of

the Constitution; and (iii) the nature of the Commission as an "adjudicating authority or body or public authority" with a duty to act fairly. It is evident that the factors which, it is argued, introduced an element of "publicness" into the dispute are outside the Agreement. Legitimate expectation as a term in public law implies absence of legal right in private law to the benefit or privilege claimed. It was in this sense that the term was used in Council of Civil Service Union v. Minister for the Civil Service (1985) 1 AC 374 where at 400 Lord Fraser said:

"But even where a person claiming some benefit or privilege has no legal right to it, as matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the court will protect his expectation by judicial review as a matter of public law."

Allegation of contravention of the Constitution is also a factor outside the contract. Where a public authority enters into a contract which contravenes the Constitution or which enables the Constitution to be infringed in its performance, any proceedings initiated should be as to the power of that authority to enter into such contract and not in enforcement of any rights under the contract.

Legitimate expectation may give access to a remedy in public law where none would have been available in private law, but legitimate expectation does not alone by itself translate a purely private law dispute into a public law matter. Certain criteria are useful in determining whether the court is concerned with a public law issue or not. These include: (1) the source of power of the person or body whose act or omission occasioned the dispute; (2) the existence of use of governmental powers; (3) the limitation inherent in the scope of prerogative remedies themselves; and, (4) whether the dispute involved a challenge to the

jurisdiction of the person or body. (For a fuller exposition: see J. Beaton "Public and Private" in English Administrative law 1987 LQR 34). It follows that where (i) the source of authority questioned is not derived either from statute or prerogative, or (ii) the power exercised is not governmental power; or (iii) the issue involved is one in which in any event a prerogative relief would not have been appropriate or available, or (iv) the issue does not involve a challenge to the power which has been committed to the jurisdiction of the authority in question, there cannot be said to be a public law question. The criteria earlier enumerated may not be beyond criticism, but they do offer a rough and ready guide to the determination of the existence of a public law element in a dispute. Where the application of any of these criteria leads to a conclusion that the dispute is in the domain of public law, the existence of legitimate expectation may give the aggrieved party sufficient interest, where none would have otherwise existed, to invoke the supervisory jurisdiction of the court.

The cases often cited as expounding the doctrine of legitimate expectation show that the doctrine has been applied where the subject had already been shown to be in the domain of public law. In the case of O'Reilly v. Macman 1982 3 All ER 1124 what the appellants sought to establish was that a disciplinary award of forfeiture of remission of their sentences made by the Board of Visitors of the Prison in which they were serving was null and void because the Board failed to observe the rules of natural justice. That the remedy of judicial review under RSC Order 53 rule 3 would be available to the appellants if the allegation on which they relied had been true was not contested. What was in issue in the appeal was whether the appellants should not have sought relief by the procedure of judicial relief instead of by writ or by originating summons. It is pertinent to observe, for the purpose of the present

appeal, that in that case powers of the Board of Visitors to make disciplinary awards were conferred on them by subordinate legislation and that to discharge their functions they were under a duty to act in accordance with the audi altram partem rule of natural justice or fairness, legitimate expectation was brought into the case as basis on which the appellants could stand to launch proceedings since each of the appellants could not contend that the decision of the Board awarding him forfeiture of remission had infringed or threatened to infringe any right of the appellant derived under private law, whether a common law right or one created by a statute, since under the relevant Prison Rules remission of sentence was not a matter of right but of indulgence. It was thus that resort was had to the doctrine of legitimate expectation, not to determine whether what was in issue was a public law matter or not, but to give each appellant sufficient interest to challenge the legality of the adverse disciplinary award made against him by the Board on the ground of failure to observe the rules of natural justice. In Council of Civil Service Unions v. Minister for the Civil Service (1985) 1 AC 374 the executive action challenged derived from prerogative and one of the questions in the case was whether it was thereby immune from judicial review. The "source of authority" criterion for determining public law element factor was very much present in the case to put the matter in the domain of public law. Legitimate expectation was brought into the matter in the absence of duty otherwise imposed by common law or statute in regard to the manner of exercise of the minister's power particularly as regards consultation with the employees of GCHQ through their Union before giving the instruction which was the subject of the proceedings. It was in that context that Lord Fraser said in the passage already quoted in this judgment but now repeated, that:

"But even where a person claiming some

benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law."

and also that:

"Legitimate expectation such as are now under consideration will always relate to a benefit or privilege to which the claimant has no right in private law, and it may even be to one which conflicts with his private law rights."

The conclusion of the matter is this: for legitimate expectation to give an aggrieved party sufficient interest enabling him access to a public law remedy, such as that of judicial review, the situation itself must be one which in itself lies in the domain of public law as determined by the criteria earlier noted.

In the present case, the relationship of employer and employee of the parties determined when the appellant's term expired. There was no duty, contractual or otherwise, on the Government to renew that contract of employment. Failure to renew the contract did not involve exercise of any power at all whether derived from statute or prerogative. Rather, it was an assertion of a liberty which an employer, or for that matter an employee, has to enter or not to enter into a contract. Barring express contractual terms or statutory provisions compelling the renewal of a contract except for stated reasons, the decision of an employer not to renew the contract of an employee is one which the employer has the liberty to take unilaterally in his own interest, much in the same way as the decision of an employer not to offer an employment to an applicant for job is one for which he cannot be compelled to offer reasons. In short, it is inapt to talk of "legitimate expectation" in circumstances such as in this case.

The argument by counsel for the appellant that because the decision not to renew the appellant's contract was by a public adjudicating authority judicial review is available to review such decision, overlooks the nature of the relief sought, to whom it was directed, and, the nature of the public law remedy of judicial review. It is stretching matters too far to describe the Commission as a "public adjudicating authority." It is manifest that the Contract System for Senior Executives of the Public Sector envisaged an arrangement whereby the Government remains the employer, using the agency of the Commission for approving and renewal of contracts related to the system, while the Technical Committee performs functions of purely technical and non-decision making nature. It follows from the arrangement that, where a senior executive to which the system applies claims a right under the contract, the Government represented by the Attorney-General is the proper party to be sued. The purpose of the procedure of judicial review, put in a nutshell, is to call in aid the supervisory jurisdiction of the court to ensure that an inferior body keeps within the perimeters of its mandate, jurisdiction or power. No pronouncement is made or called for in this judgment regarding the nature of the Commission, or whether its decisions are amenable to review by the procedure of judicial review, since the Commission is not a party and the point has not been argued whether or not it is an entity which could be made a party. Assuming that the Commission is an agency whose decisions are open to judicial review in appropriate circumstances, since the application for mandamus has not been directed at the Commission but to the Principal Secretary who was a member of the Technical Committee, the application itself was fundamentally flawed. Reason for a

decision not to renew the contract of the appellant, if the decision was that of the Commission, could only be given by the Commission to whom the relief sought ought to have, but had not, been directed. A belated attempt made by the appellant on this appeal to seek relief against the Commission by her notice of appeal, is palpably futile since the Commission was not a party to the proceedings either in this Court or in the Supreme Court. It is thus not strictly necessary to decide whether the Commission is a "public adjudicating authority."

Another branch of the argument by counsel on behalf of the appellant is that: Having decided that the Supreme Court "was not empowered to exercise the powers vested in it under Article 129(1) of the Constitution when it sits as the Constitutional Court," the trial Judge was wrong to have found that "the instant matter could be decided without reference to the constitutional aspect raised by the petitioner" namely, the alleged contravention of the petitioner's right of access to official information enshrined in article 28 of the Constitution and right to work enshrined in article 35; and, to have ignored article 46(7) of the same constitution.

The allegations of contravention of the Charter of Freedom and Rights ("the Charter") enshrined in the Constitution of the Republic 1993 ("the Constitution") are contained in paragraphs 19 and 22 of the affidavit in support of the application. In paragraph 19 the allegation was that reasons for the decision not to renew the appellant's contract constituted official information relating to her held by the Commission performing a governmental functions and in paragraph 22 the allegation was that the decision not to renew her contract was made in disregard of her constitutional right to work and to just and favourable conditions of work guaranteed by article 35 of the Constitution.

The judge having noted these allegations held the view that he could not exercise the jurisdiction of the Constitutional Court while sitting in the Supreme Court exercising a supervisory jurisdiction, and also that the matter could be determined without reference to the constitutional aspect raised. His reason for the latter view was that the matter was a private law matter for which the remedy of judicial review would not be available. The appellant now contends that he was wrong on both grounds.

Before this issue is discussed, it is pertinent to observe that a fuller comprehension of the appellant's case reveals that although she had explained her contractual relationship with the Government, the rights she claimed of access to information and to work were not contractual rights but rights which she alleged she was entitled to by virtue of the Constitution. Whether she had such rights and whether if she did, those rights have been infringed do not involve a determination of the nature of her employment with the Government or whether she acquired a "public law" right by virtue of her employment as would give her access to administrative law remedies. A person who alleges that a provision of the Charter contained in the Constitution has been or is likely to be contravened need only show that such actual or likely contravention is in relation to him in order to have a standing to initiate proceedings in the Constitutional Court. It is for this reason that if the appellant's allegations are seen as of contravention of the Charter in regard to her, the prominence given by the judge and by counsel at the trial and on this appeal to a consideration of the nature of the appellant's contract and whether a breach thereof raised public law issues is misplaced. The jurisdictional issue is the decisive one.

The relevant provisions of the Constitution are as follows:

Article 126(1) "The jurisdiction and powers of the Supreme Court in respect of matters relating to the application, contravention, enforcement or interpretation of the Constitution shall be exercised by not less than two Judges sitting together."

Article 46(1) "A person who claims that a provision of this Charter has been or is likely to be contravened in relation to the person by any law, act or omission may, subject to this article, apply to the Constitutional Court for redress."

Article 46(7) "Where in the course of any proceedings in any court, other than the Constitutional Court or the Court of Appeal a question arises with regard to whether there has been or is likely to be a contravention of the Charter, the Court shall, if it is satisfied that the question is not frivolous or vexatious or has already been the subject of a decision of the Constitutional Court or the Court of Appeal, immediately adjourn the proceedings and refer the question for determination by the Constitutional Court."

These provisions of the Constitution as well as others must be read and interpreted harmoniously and not in a manner to impute inconsistency, conflict and superfluity. In the present case it is not at all difficult to discern the harmony in the provisions of the articles which have been set out earlier. What emerges as the correct position can be summed up in short propositions thus: Where the main subject of an application is the allegation of actual or likely contravention of the Charter the Constitutional Court is by

virtue of article 46(1) of the Constitution the appropriate forum for redress. Where, however, actual or likely contravention of the Charter arises as a question in the course of any proceedings in any court the question shall be referred to the Constitutional Court pursuant to article 46(7) provided the conditions prescribed by that article for such reference have been met. The distinction between the provisions of article 46(1) and 46(7) seems obvious. The latter provision applies only where the constitutional question arises as an incidental question in the proceedings and is not designed to be a licence for ignoring the provisions of the former provision. It follows that where proceedings were initiated to seek redress for an alleged contravention or likely contravention of the Charter the Supreme Court sitting in its ordinary supervisory jurisdiction and not constituted under article 129(1) as a Constitutional Court is not the proper forum.

In the present appeal, it is evident that the redress sought by the appellant was all based on claims that rights of access to information and to work, both contained in the Charter, have been contravened in regard to her. It is equally evident that if these claims were rejected, the substance of the proceedings would have evaporated.

In view of the above, the views held by the judge cannot be flawed. He was right in the view that his court as then constituted, exercising its supervisory jurisdiction, was not empowered to exercise the powers vested under article 129(1) of the Constitution. His view that "the instant matter could be decided without reference to the constitutional aspect raised by the petitioner", at first blush, appeared to have raised an implication that there were issues in the matter other than the constitutional aspect. However, it is manifest that in regard to the relief of mandamus, the main basis of claim to that relief was an

alleged contravention of a constitutional right of access to information; and, the claim for damages could not stand on its own but must have been intended to be a consequential relief upon finding of a contravention of the Charter. There were thus no other issues to try as regards the substance and merits of the case.


Article 46(7) of the Constitution envisages proceedings properly commenced. Where proceedings have been commenced in a wrong forum or by a fundamentally defective procedure, the court should deal with the question of jurisdiction or the fundamental defect first before considering whether a question fit to be referred to the Constitutional Court arose. It will be a futile exercise to refer a constitutional question of contravention of the Charter to the Constitutional Court before dealing with the question of jurisdiction and fundamental vice in the proceedings. Article 46(9) of the Constitution provides that the court in which the question referred to in clause (7) arose shall dispose of the case in accordance with the decision of the Constitutional Court or of the Court of Appeal, as the case may be. That provision presupposes proceedings instituted in the appropriate court and with the appropriate process. Where as in this case, the procedure of judicial review is not appropriate, allegation of contravention of the Charter would not cure the defect in procedure.


In the present case, it is manifest that the procedure by way of judicial review was inappropriate, and that, in any case, redress had been sought in the wrong forum. There being procedural and jurisdictional defects in the proceedings the appropriate order is not one dismissing the appellant's application which had not been considered on its merits but one striking it out for want of jurisdiction.


An order striking out the application would be substituted for that of dismissal.

In the result and for the reasons which have been stated, this appeal must fail. The appellant's application in the Supreme Court is struck out. The appeal is dismissed. Each party should bear his or her own costs of the appeal.

Dated this 31st day of October 1996.


H. GOBURDHUN
PRESIDENT


E.O. AYoola
JUSTICE OF APPEAL


M.A. ADAM
JUSTICE OF APPEAL