

Raihl v Ministry of National Development

(2010) SLR 66

Frank ALLY for appellant
Samantha AGLAE for respondent

Judgment delivered on 20 May 2010

Before Domah, Hodoul, Fernando JJ

This is an appeal against the judgment of the then Chief Justice who, in an application for judicial review before the Supreme Court, upheld the decision of the respondent which had revoked a planning permission previously granted to the appellant.

The appellant has appealed against that judgment on the following four grounds:

1. The learned Chief Justice failed to take into account the more recent development in the powers of judicial review of administrative decisions by the High Court in England, which powers may similarly be exercised by the Supreme court by virtue of section 5 of the Courts Act (Cap. 52).
2. The learned Chief Justice failed to take into account the fact that since the enactment of section 13 of the Town and Country Planning Act (Cap 237) the Constitution of the Republic of Seychelles was enacted, under which, by virtue of Article 26(1) every person is given the fundamental right to own and peacefully enjoy property.
3. In this case the granting of planning permission on 7 November 2002 after all the procedures which had been gone through raised a legitimate expectation on the part of the Appellant, owner of the land, of a substantive benefit to her as she could develop her land. To frustrate such expectation for no new reason was so profoundly unfair as to render the decision of the Minister, ex propriomotu, to revoke such planning permission an abuse of power and is, therefore, void.
4. At least, in the circumstances the Minister should before revoking the planning permission, have given the appellant the right to be heard or make representations after giving reasons, if any, for the change of policy.

The appellant in this case owns property at Glacis, Mahe. It is title no 1534. She decided to construct a three bedroom dwelling-house thereon. She made an application, which is dated 1 August 2002, to the Town and Country Planning Authority (the Authority). There followed a number of enquiries, visits, meetings and

discussions on the plan so that modifications might be brought to conform to the special requirements of the place and the law. Eventually, on 7 November 2002, the Authority granted the permission, with conditions. One of the conditions was that the development should begin within two years of the date of the permission and be completed in every respect in accordance with the detailed plans and particulars. The others were general, with documents attached: the standard conditions, the environmental authorizations with conditions and the PUC (E) conditions.

However, by notice dated 31 December 2003, the Minister for Land Use and Habitat Authority revoked the permission on the ground that the proposed development would adversely impact on the aesthetics of the area and "in view that the development proposed would adversely impact on the aesthetics of this area and that the land is to remain in its natural state where no development is to take place."

Aggrieved by the revocation, the petitioner applied to the Supreme Court for an order annulling the decision on the ground that her constitutional right to enjoy her property was being infringed and that she was not given an opportunity to be heard before the decision adversely affecting her was taken.

The Supreme Court, after a hearing on the merits, declined the application on the ground that the Court will only interfere in the discretionary powers of the executive where they "have not been exercised in conformity with the rules of natural justice, and other grounds on which they could be challenged by judicial review."

As may be seen, that was exactly the contention of the appellant namely, that the Authority had exercised its discretionary powers not in conformity with the rules of natural justice in that she had not been afforded a hearing before the revocation had been effected. The Supreme Court took the view that the "petitioner (now appellant), her architect, and agent were given ample opportunities since 1999 to 2002 to conform to planning requirements to preserve the aesthetic value of the area." The appellant could not, therefore, rely on the ground that she was not given a hearing in the particular circumstances of the case.

When we examined the facts of this case, it was pretty clear to us that both the executive and the Supreme Court decisions could not stand. The former could not stand for breach of natural justice and the latter could not stand for incorrectly applying the very proposition of law that the Chief Justice had correctly cited.

With regard to the executive decision, the plea of the respondent was as good as a disguised admission of breach of natural justice. Paragraph 3 of the affidavit reads:

The Respondent whilst he was appraised of the whole facts: issues and laws arising out of the Petitioner's Planning Application and this Petition and that therefore there was in law no need for the Petitioner to be heard personally or through representatives before the revocation was effected.

The golden rule jealously guarded in administrative law by the courts is that no executive decision adversely affecting the rights of the citizen, more particularly, his property rights, may be taken behind his or her back, without affording him or her an

opportunity to be heard: *Ridge v Balwin* [1964] AC 40; *Dimes v Grand Junction Canal Proprietors*(1852) 3 HL Cas759; *Perrine v The Port Authority and Other Workers Union*(1971) MR 168.

No matter how valid and warranted the executive considered the facts and circumstances were, in its eyes, which justified the order of revocation, it could not do so without affording the citizen a right to be heard. In the case of *Cooper v Wandsworth Board of Works* (1863) 143 ER 414, reference is made to the example given in the Bible. Even God did not deem it fit to pronounce sentence upon Adam as well as upon Eve without giving them a hearing as to why they had partaken of the forbidden fruit from the apple tree- As per Byes J:

God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam' (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou should not eat?" And the same question was put to Eve also.

If God, Almighty and All-Powerful, did that, *quaere* puny man. Hence the appellation natural justice.

Now for the judgment of the Supreme Court. If the judgment was maintained, it would be tantamount to saying that if negotiations, visits, discussions and representations take place before any approval is given, all the events and activities which took place before the approval is given are deemed to be a hearing for the purposes of an eventual revocation of the permission given. That would be a dangerous precedent to introduce in our administrative law in Seychelles or anywhere else in a democratic society. Administrative law does not countenance a doctrine of retrospective hearing.

A case on all fours with the present one decided by the Supreme Court about 12 years ago is *Susanne Christodoulis v Minister for Land Use and Habitat*, Civil Side, no 105 of 1998, referred to us by one of us at that time in practice. A property owner was granted a certificate of approval for the construction of a three-unit flat, on 11 July 1997. Soon after, on 6 February 1998, the respondent revoked the permission on the ground that "the plot is unsuitable for development from all environmental coastal zone management point of view" and "therefore, the land should be maintained in its natural state as any development thereon will be environmentally hazardous".

The respondent in that case had also as in this case purported to act by virtue of the powers vested in him under section 13(1) and (2)(a) of the Town and Country Planning Act. Section 13(1) reads as follows:

Subject to the provisions of this section, if it appears to the Minister that it is expedient, having regard to the development plan and to any other material consideration, that any permission to develop land granted on an application made in that behalf under this part should be revoked, the Minister may, by order, revoke or modify the permission to such an extent as appears to him to be expedient as aforesaid.

The decision to revoke was challenged on the ground, inter alia, of breach of natural

justice. The officers from the Ministry of Environment had gone on site and had advised the owner on which trees had to be felled and which ones to be planted. Amerasinghe J was persuaded and decided that the decision of *Cooper v Wandsworth*(1863) 143 ER 414 applied. The executive decision was quashed. The Supreme Court held — and we endorse that decision - that an authority exercising quasi-judicial powers such as the Minister in the case -

which is by law invested with power to affect property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that rule is of universal application, and founded on the plainest principles of justice.

Administrative law is not about judicial control of executive power. It is not about government by judges. It is simply about judges controlling the manner in which the executive chooses to exercise the power which Parliament has vested in them. It is about exercise of executive power within the parameters of the law and the Constitution. Such exercise of power should be judicious: it should not be arbitrary, nor capricious, nor in bad faith, nor abusive nor taking into consideration extraneous matters: see *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141. As was stated in *Khawaja v Secretary of State for Home Department*[1983] 1 All ER 765:

Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Having said this, we may as well recall what has been stated in the case of *Council of Civil Service Unions v Minister of Civil Service*[1985] AC 374 with respect to the modern concept of natural justice. The term now used is "the duty to act fairly" -

Principles of "natural justice" is a term now hallowed by time, through overuse by judicial and other repetition. It is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by another term such as "a duty to act fairly".

We might as well make a couple of comments on other aspects of the case which we think are warranted.

From the point of view of procedure, it is not the Minister who should have sworn the affidavit but an Executive Officer duly authorized by him to do so. The respondent stated in his affidavit that he took into consideration "the whole facts: issues and law which arose out of the Planning Application" to revoke the planning permission granted. But he did not expatiate on what those facts and issues were in any manner whatsoever. The Chief Justice concluded by conjecture what those facts and issues were. The same may be said about the laws. What were those laws that made him take the decision to revoke are neither stated nor apparent.

If it is section 13(1) of the Town and Country Planning Act referred to above, it is easy to see that the section refers to "development plan." The development plan is the one for the whole of Seychelles as prepared under section 4(2) of the Act. One

may also refer to section 9(1) of the Act for the purpose. There is nothing to indicate that the revocation related to any development plan as such. The Judge obviously confused the development plan with the planning permission.

If the respondent's argument is that he based himself on "other material considerations" referred to in the relevant sections of the Act, this term connotes matters different from the conditions set out in Document B7 under which the planning approval was granted and the conditions set out in Document B8 under which environmental authorization was granted. The reasons set out in the Revocation Notice namely "development proposed would adversely impact on the aesthetics of this area and to maintain a balanced level of development that promotes the sustained co-existence of built and natural environment" were addressed under conditions pertaining to landscaping, colour scheme, sand and gravel and as set out in Document B7. Likewise for the conditions that landscaping is to be done with anti-erosion vegetation, embankment is to be trimmed to safe slope angle and planted with anti-erosion vegetation and that felling of trees should be kept to a minimum as set out in Document B8.

We also read in the judgment that the Chief Justice states that "the Minister had expert opinion of the Environment Division" as regards the effect of the aesthetic value of the area. We do not find on record the source of this information. What we have on record, on the contrary, is that the Environment Authority had given its approval.

The Chief Justice also stated in his judgment that "the requirement that the development for which the petitioner was given permission should conform to conditions imposed as regards the preservation of the aesthetic value of the area was not a novel reason imposed by the Minister when revoking the permission". If that be the case, the question which arises is whether the Minister acting by virtue of his powers under section 13(1) could in law revoke a planning permission when the section specifies that such revocation may be exercised "having regard to the development plan and to any other material considerations."

The Judge also went on to say that the revocation could have been averted "had the petitioner complied with the directions." The fact of the matter is that the appellant had not even commenced development to breach the conditions imposed. There could not, accordingly, have been a failure to comply with the directions.

In light of our comments on the law, on the facts and on the flaws in the judgment the decision of both the respondent and the Chief Justice would not stand the test of appellate scrutiny, both counsel requested some time to consider their respective stands. Later in the day, they apprised us that the respondent had agreed to reconsider the application of the appellant. That is commendable on the part of the respondent.

Subsequently, on 6 May, the motion was for disposal of the matter to the next session. This matter shall, therefore, be called at the next session, in August 2010, for disposal.

Record: Court of Appeal (Civil No 6 of 2009)