

Trajter v Morgan

(2013) SLR 329

Domah, Twomey, Msoffe JJA

30 August 2013

SCA 24/2013

Counsel C Lucas for the petitioner
 J Chinnasamy for the respondent

The judgment of the Court was delivered by

TWOMEY JA

[1] This is an appeal, with leave and stay of execution granted by MacGregor, President of the Court of Appeal, on August 2013 against the dismissal by Karanukarun J in the Supreme Court on 22 July 2013 of the appellant's claim for judicial review. The proceedings were brought to challenge the decision of the Minister for Home Affairs and Transport, Joel Morgan, made on June 2013, to deprive the appellant of his Seychellois citizenship on the ground that the same had been obtained by the making of a false declaration.

The facts

[2] The appellant, Marek Trajter, is a Slovak national by birth. He arrived in Seychelles for the first time on 29 September 2012 and stayed on the island of La Digue where he befriended Ansley Constance, a former Member of the National Assembly. Soon after his arrival, he started making voluntary donations to projects in La

Digue. He donated Euro 10,000 to La Digue School and in early 2013 donated R 1,000,000 to the Disaster Relief Fund.

[3] On a date unknown he decided to apply for Seychellois citizenship and in that endeavour received the assistance of Ansley Constance to complete the requisite application procedures: namely, an application to the President of Seychelles for citizenship based on 'special circumstances' and a notice of intention to apply for citizenship of Seychelles which under s 5(2) of the Citizenship Act 1994 has to be published in the *Gazette* and a local newspaper for two consecutive days. The form he submitted states that his date of first entry into Seychelles was 14 February 2007. He subsequently conceded that the date 14 February 2007 was written over the previous crossed entry of 29 September 2012 on the application form.

[4] On 5 April the appellant was granted citizenship. Two weeks later, on 25 April 2013, the Government of Seychelles received a 'red alert notice' from Interpol informing them that the appellant was wanted in Slovakia for criminal investigations into a case of murder. On 2 May 2013, the respondent deprived the appellant of his citizenship on the grounds that he had obtained the same by means of 'false representation and concealment of material fact.' Simultaneously, the Immigration Division pursuant to s 11(1) of the Citizenship Act 1994 issued a 'prohibited immigrant notice' to the appellant on the grounds that his presence was inimical to the public interest.

[5] On the service of this notice the appellant was arrested and detained in police custody for the purpose of being deported. He sought a writ of habeas corpus in the Supreme Court and an order that his detention was unlawful under the provisions of art 18(8) of the Constitution of Seychelles. Both remedies were granted, the Chief

Justice rightly finding that the appellant had neither been given notice in writing informing him of the ground on which it was proposed to revoke his Seychellois citizenship nor information of his right to have the case referred for enquiry as is required by s 11(2) of the Citizenship Act 1994.

[6] On 13 May 2013, the respondent issued a fresh notice to the appellant. He was informed of the Ministry's intention to deprive him of citizenship on the ground that a red alert notice had been issued by Interpol together with a request by Slovakia for his return for investigation in a murder case. He was notified that he had not disclosed the truth and facts about his past and of the said investigation when he applied for Seychellois citizenship.

[7] A further notice was issued to the appellant by the respondent four days later informing him of an additional ground on which it was proposed to deprive him of citizenship, namely that his notice of intention to apply for citizenship contained false declarations. As a result of these notices the appellant requested the respondent to refer the matter to a Commission of Inquiry.

The Commission of Inquiry

[8] Accordingly, a Commission of Inquiry presided over by Justice Anthony Fernando was set up and conducted. The Commissioner reported on 10 June 2013, dismissing the first ground for deprivation of citizenship both on the evidence and the concession by the Attorney-General that the appellant had submitted his application for citizenship prior to the red alert notice and that it could not be proved that he knew he was a 'wanted' person in Slovakia. Hence, there could be no question of concealment of fact on this particular ground.

[9] However, the Commissioner did find that there was ‘strict liability’ on the part of the appellant in making the entries on the application form (Form IMM 3) correctly and truthfully and that incorrect entries amounted to the concealment of material facts which could lead the Minister to deprive him of citizenship. The Commissioner made no recommendation leaving the ultimate decision to the discretion of the Minister. On 24 June 2013, the Minister issued an order depriving the appellant of his citizenship, on the ground that the same had been obtained ‘by making false representation.’

The judicial review

[10] It is this decision which prompted the application by the appellant for an order of certiorari quashing the Minister’s decision. He claimed that the Minister’s decision was irrational since it did not give due consideration to the report of the Commission of Inquiry. He also submitted that he had not committed any fraud or intentionally concealed any material fact since it was not he but a third party (namely Ansley Constance) who had on his behalf completed the application for citizenship and had inadvertently made a mistake when entering his dates of first and last entry into Seychelles. The appellant also submitted that the Minister had not given reasons for his decision. He further contended that the deprivation of citizenship was unfair and unjust as it would render him stateless. Additionally, the appellant contended, the mistake on the prescribed form was minor and the penalty of deprivation of citizenship was unjustified and excessive and did not satisfy the ‘Wednesbury reasonableness’ test.

[11] The Judge Karunakaran hearing the review dismissed the application finding that the Minister’s decision was not illegal,

irrational, unreasonable or procedurally improper. He agreed with the finding of the Commission of Inquiry that there was 'strict liability' on the part of the appellant in making correct and truthful statements in his application for citizenship and that withholding any material fact could reasonably result in a decision of deprivation of citizenship.

Grounds of appeal

[12] The appellant has now appealed to this Court on a number of grounds. They are, to say the least, inelegantly expressed and at first glance would appear to be grounds of an appeal as opposed to grounds for a judicial review. Further, the appellant appears to be asking this Court not only to examine the merits of the decision of the Minister but also the findings and report of the Commissioner of Inquiry. His grounds are long-winded and repetitive but may be summarised as follows:

- 1) An examination of the evidence shows that the appellant had not deliberately concealed any material fact but rather that the wrong entries on the immigration form were a mistake on the part of a third party who had undertaken the completion of the form on behalf of the appellant.
- 2) The Judge was wrong to agree with the Commission of Inquiry's report that the completion of the citizenship forms imposed 'strict liability' on the appellant for any omissions or the entry of wrong information.
- 3) The Judge was wrong to find that the provisions of the Citizenship Act in relation to the deprivation of citizenship were mandatory in cases where such citizenship had been

obtained by means of false representation and concealment of material fact.

- 4) The Judge was wrong to find that in cases of judicial review the court should not review the merits of the case but only the manner in which the decision was taken.
- 5) The Judge was wrong to find that the Minister's letter of 24 June 2013 depriving the appellant of his citizenship disclosed sufficient reasons for his decision.

[13] On the day of hearing of this appeal the appellant moved under rr 31(1) and (2) of the Seychelles Court of Appeal Rules to be allowed to amend his notice of appeal and to produce documentary evidence that had not been available at the hearing of the judicial review. The Court granted leave to produce the documentary evidence *quantum valeat*.

The law on judicial review in Seychelles

[14] The thrust of the appellant's argument is that a judicial review should in this particular case involve a scrutiny of the merits of the Minister's decision to deprive him of his citizenship. As has been oft-repeated judicial review is not an appeal from a decision, but a review of the manner in which the decision was made (*Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141). The jurisdiction conferred by this process determines the legality, as distinct from the substantive merits of the decision of the adjudicating authority, in this case that of the Minister. Judicial review is a means by which the courts necessarily ensure that administrative bodies act within their powers as laid down by law rather than according to a whim or a fancy. The *Wednesbury* principle – reasonableness in

decision making –although initially reluctantly accepted in this jurisdiction, has been firmly adopted by our courts and is now part of our law. As has been pointed out by Mr Lucas for the appellant, the principle imposes on the decision-maker certain duties: he must take into account factors that ought to be taken into account, he must not take into account factors that ought not to be taken into account and the decision he takes must not be so unreasonable that no reasonable authority would ever consider imposing it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

[15] Principles of administrative law were further developed by classifying the grounds for judicial review namely: illegality, irrationality, and procedural impropriety (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). That authority has for a number of years also formed part of our law.

[16] But although “the law must be stable it must never stand still” and *Wednesbury* (supra) dates back to 1948. Continental principles of administrative review have crept into the common law and in recent times, influenced by the decisions of the European Court of Human Rights the *proportionality* principle has been adopted in many cases in Europe, the UK and the rest of the world. In *Soering v United Kingdom* (1989) 11 EHRR 439 the Court stated in relation to the European Convention on Human Rights:

[i]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. [at paragraph 89]

[17] The application of the proportionality test to administrative decisions however is not a simple matter. Wade and Forsyth explain that:

While the principle of proportionality is easy to state at the abstract level (an administrative measure must not be more drastic than necessary) or to sum up in a phrase (not taking the sledgehammer to crack a nut), applying the principle in concrete situations is less straightforward.

(HWR. Wade and C.F. Forsyth, *Administrative Law* 10thed, 306).

[18] The proportionality test involves a reasonableness analysis where the merits of a decision may be scrutinised. Common law courts have emulated this approach in judicial review cases in which human rights are involved. The term 'anxious scrutiny' in such cases relates to the examination of the merits of a decision and was used for the first time by both Lords Bridge and Templeman in *R v Secretary of State for the Home Dept ex p Bugdaycay* [1987] AC 514, which can be interpreted as taking a 'hard look' approach to cases involving fundamental rights.

[19] In *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 All ER 720, the House of Lords in examining the reasonableness of the exercise of the Home Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein, stressed that in all cases raising a human rights issue, proportionality is the appropriate standard of review. In *R v Ministry of Defence, ex parte Smith* [1996] QB 517, the Court held that the more substantial

the interference with human rights, the more the court will require justification before it is satisfied that the decision is reasonable. In *Daly v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Bingham said that:

The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

[20] Given the similarity of our Charter of Fundamental Human Rights and Freedoms to the European Convention of Human Rights and the application of art 48 of our Constitution which provides for the consistency of constitutional interpretation with the international obligations of Seychelles, the test of proportionality must logically form part of our jurisprudence.

[21] The question arises as to whether cases involving nationality, citizenship and immigration should involve the use of the proportionality test and the scrutiny of the substance as well as the form of such decisions. Citizenship is a constitutional right as guaranteed by Chapter II of the Constitution of Seychelles. Citizenship and nationality is a:

legal bond having as its basis a social fact and attachment, a genuine connection of existence, interest and sentiments together with the existence of reciprocal rights and duties.

Nottebohm (Liechtenstein v Guatemala) (Second Phase) [1955] ICJ Rep 4

[22] Are such rights and those involving deportation and asylum equivalent or on a par with fundamental rights of life and death, the right to free speech or the right to dignity?

[23] In *D v United Kingdom*(1997) 24 EHRR 423, a case involving the proposed removal of an alien dying of AIDS to his country of origin (St Kitts) where he had no accommodation, family, moral or financial support and no access to adequate medical treatment, the European Court of Human Rights held that the reviewing court in the UK would be required to subject the original decision to ‘anxious scrutiny’ as the administrative measure infringed art 3 of the Convention (the equivalent of the right to dignity and not to be subjected to inhuman or degrading treatment as contained in art 16 of the Constitution of Seychelles). In *Secretary of State for the Home Department v Nasser* [2009] UKHL 23, a judicial review case, involving a claim for asylum Lord Hoffman stated:

It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State’s decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is

based upon an alleged infringement of a Convention right

[24] We are of the view that administrative decisions involving immigration and citizenship require the consideration of the fundamental human rights of an individual and the courts should subject such decisions to ‘anxious scrutiny’ to determine whether the decisions contravene fundamental human rights. Hence we are asked to consider whether the appellant’s loss of Seychellois citizenship will constitute a disproportionate interference with his right to dignity. In performing the test we are conscious that we must also exercise judicial restraint so as not to usurp the role of the executive in exercising its proper discretion.

Applying the principles

[25] These are the principles which guide us when we examine the issues of this case. But, while it is accepted that citizenship and nationality are fundamental human rights as designated by both international conventions and domestic legal instruments and can trigger the operation of the proportionality principle for judicial review, the loss of Seychellois and Slovak citizenship and ultimately the statelessness of the appellant has not been proved. The appellant signed a certificate of concurrent nationality only four months ago and a month before the first notice by the Minister to deprive him of his Seychellois citizenship. The arrest warrant by Slovakia as evidenced by the Red Alert Notice by INTERPOL states that his nationality is Slovak and that interestingly he holds two Slovak passports, one to expire in August 2017 and the other in December 2019. Moreover, the legal opinions of Mgr Dominika Gajarska and Dr Fridrich Bransilav submitted by the appellant are at odds with each other and the 1993 Slovak Act of Nationality. The provisions of the

Act indicate that Slovak nationality can indeed be lost by the acquisition of another nationality but a lengthy process must be initiated. It has not been proven that this process was begun or completed. The ‘deed of loss of nationality’ which would have been conclusive proof of this fact was not produced before any court in this jurisdiction. The letter from the Ministry of Interior of the Slovak Republic confirms that according to the central register the appellant still holds Slovak nationality. Moreover, Seychelles has neither signed the 1961 Convention on the Reduction of Statelessness nor the 1954 Convention relating to the Status of Stateless Persons. We did allow counsel the opportunity at the hearing of the appeal to submit on this issue and we allowed the production of the legal opinion of Dr Bransilav *quantum valeat* but given the considerations above, the submissions of counsel on the issue of statelessness are at best inconclusive and cannot be accepted by us.

[26] The appellant in his ground 5 has also submitted that the Minister in his letter of 24 June 2013 notifying the appellant of his order depriving him of Seychellois citizenship failed to give sufficient reasons. This is a bold but an altogether inaccurate and unacceptable statement given the fact that the letter clearly states that the decision to deprive the appellant of his Seychellois citizenship is made having complied with legal and procedural requirements after having received a report from the Commission of Inquiry and “having been satisfied ... that [the] citizenship of Seychelles ... was obtained by making false representation.” We do not feel the need for further elaboration save to say that ground 5 has absolutely no merit.

[27] The appellant’s first, second and third grounds of appeal are inextricably linked and we deal with them together. They arise from the findings of Judge Karunakaran that since the appellant was under

an obligation to complete his citizenship application forms truthfully, once it emerged that the statements in the form were incorrect the Minister was under an obligation to deprive him of citizenship. The appellant contends firstly that these errors were a mere mistake, a peccadillo so to speak and that notwithstanding the obligation to complete the official form truthfully, these minor transgressions could be excused by the Minister.

[28] Both the Commission of Inquiry and the Judge hearing the judicial review found that the alleged ‘mistakes’ by the appellant or his agent in the citizenship application were false representations of material facts reasonably leading to the decision for deprivation of citizenship. We have also scrutinised the application form of the appellant and are of the view that the appellant’s contention that the alleged ‘mistake’ only consisted of the insertion of the wrong dates of entry is at the least an economy of truth.

[29] We note that in the same notice he also stated that he was gainfully employed ‘carrying on business as partnership’ (sic) since 2007 and that ‘the special circumstances which qualifie[d] him to make [the] application [was that] Seychelles as my second home I want to make a contribution economically ...’(sic). He also signed a declaration at the end of Form IMM2 in which he stated:

- i. that the information furnished by me in this application is true and correct; and
- ii. I understand that incorrect, misleading or untrue information withheld in any material manner which may affect the grant of citizenship of Seychelles may result in the deprivation of that citizenship.

[30] In assessing whether the Minister's decision to revoke the appellant's Seychellois citizenship was a disproportionate response to the misrepresentation of facts by the appellant we also have had to look at the object of the Citizenship Act. Ultimately the Act provides for the registration of citizenship of persons other than Seychellois where these persons have done signal honour or rendered distinguished service to Seychelles or where special circumstances exist which, in the opinion of the President, warrant such registration. Special circumstances are not defined and are ultimately determined by the President. Section 16(1) of the Act makes the procuring of citizenship by any false or material particular or reckless statement punishable by a fine of up to R 5000 and by imprisonment for up to 12 months. Both the application for citizenship and the sanctions for its procurement by false representations are grave matters. Given these provisions it can certainly not be the intention of the state to bestow citizenship on persons who even in the initiation of proceedings for such citizenship are either dishonest or unable to give a correct representation of their relationship with Seychelles.

[31] It is our considered opinion that given these considerations the appellant cannot underestimate the seriousness of his actions. Such misrepresentations are not simple mistakes that can be explained away but amount to fraudulent misconduct. It is difficult to accept that citizenship could have been given away merely on the payment of Euro 10,000 for improvements to a school together with another million rupees to the National Disaster Relief Fund. Further, we cannot put ourselves in the position of second guessing the decision of the President had he been appraised of the true facts. He may well have found that a period of residence of six years in Seychelles together with the operation of a business in Seychelles since 2007 and the contribution to causes in Seychelles demonstrated a genuine tie of

affection and closeness with Seychelles meriting the grant of Seychellois citizenship. Whether he would have done the same had he known that the appellant had only been in Seychelles for four months is highly debatable. We therefore find no merit in Ground 1.

[32] Given our finding on the issue of fraudulent misrepresentation on a number of facts we find it unnecessary to consider Ground 2 and whether the word “may” in s 11(1) in the Citizenship Act is permissive or imperative. Equally we do not think it necessary to consider ground 3 of the appeal and to explore the minutiae of the reasons given for the alleged misrepresentations of facts by the appellant in his citizenship form. He is ultimately and absolutely responsible for making his own citizenship application. Alleged confusion by his agent, Ansley Constance, and the blind belief placed in his integrity by his sponsors namely the members of the National Assembly Marc Volcere, Chantal Ghislain and Natasha Esther are both ill-advised and reprehensible as is the omission by the officers of the Immigration Department in not checking the correct dates of entry of the appellant. They do not and cannot excuse or validate the appellant’s own actions. The decision of the Minister to revoke the appellant’s Seychellois citizenship in the circumstances cannot be faulted for unreasonableness or disproportionality.

[33] For these reasons we dismiss the appeal but make no order as to costs.