Timonina v Government of Seychelles
(2007) SLR 258

Frank ELIZABETH for the petitioner
Ronny GOVINDEN for the respondent

[Appeal by the appellant allowed on 14 August 2008 in CA 38/ 2007]

Judgment delivered on 12 December 2007 by:

PERERA J: The petitioner, a Russian national, was employed by "Creole Holidays" on a gainful occupation permit (GOP) which expired on 25 July 2007. Admittedly, before the GOP expired, she was served with a notice by the Immigration Officer on 8 June 2007 upon a declaration made by the Minister for Internal Affairs declaring her a "prohibited immigrant" and ordering her to leave Seychelles by 14 June 2007, as her presence was "inimical to the public interest."

The instant application for judicial review was filed on 11 June 2007. The petitioner seeks -

(1) An order of certiorari quashing the decision of the Immigration Officer dated 8 June 2007, and declaring that it was illegal, unreasonable and null and void.

(2) An order of prohibition on the respondents from deporting or otherwise requesting her to leave Seychelles until further order of the Court.

This Court, by order dated. 11 June refused to grant leave to proceed. Upon an appeal filed against that order, the Court of Appeal by order dated 22 June 2007, granted a stay of the removal order until this Court determines the present application on merit. Hence the second order sought in the prayer to the petition does not arise for consideration now.

Mr Elizabeth, counsel for the petitioner, submitted that the ground on which the Minister had relied on to declare the petitioner a prohibited immigrant was based on section 19(1)(i) of the Immigration Decree, namely "any person whose presence in Seychelles is declared in writing by the Minister to be inimical to the public interest,"

He referred the Court to article 25(5) of the Constitution which provides that:-

> (5) A law providing for the lawful removal from Seychelles of persons lawfully present in Seychelles shall provide for the submission, prior to removal, of the reasons for the removal and for review by a competent authority.

He submitted that the statutory reason given in the declaration was alone inadequate for purposes of article 25(5) of the Constitution. This matter was canvassed by the petitioner before the Constitutional Court in case no 5/2007. In that case, the petitioner sought: -

1. An order declaring the decision of 8 June 2007 amounts to a contravention of her constitutional rights under article 25(1).

2. A declaration that the failure, refusal, or omission to appoint a "competent authority" to review the said decision contravened her constitutional rights.

That Court decided that prayer (1) should be left to be decided by this Court exercising supervisory jurisdiction. As regards prayers (2) the Court held that "no specific law as envisaged in Article 25(5) has established a “competent authority" to review an order of removal" in the same manner as the "Immigration Appeals Tribunal" of the United Kingdom. That Court also relied on section 21 of the Immigration Decree which provides for representations to be made to the Minister, and the availability of the supervisory jurisdiction of this Court. That Court also relied on paragraph 2(1) of Schedule 7 of the Constitution which provides that "except where it is otherwise inconsistent with this Constitution” an existing law shall continue in force on or after the date of coming into force of this Constitution, and held.

> Hence until such time in the future when the creation of a specific "competent authority” in the same manner as in the United Kingdom becomes necessary, and the legislature so decides, the existing review procedure is not inconsistent with the provisions of article 25(5).

Mr Elizabeth, challenging the decision of the Minister on the ground of illegality, submitted that the Court should take into consideration that the Immigration Decree was enacted in 1981, and that provisions which are inconsistent with the present Constitution should be considered as void. That is a matter to be decided by the Constitutional Court, upon a specific application being brought before that Court under article 5 of the Constitution. Until then, the declarations of prohibited immigrants and their consequent removal from the country should be considered within the framework of the Immigration Decree. All existing laws which could be considered as being inconsistent with the Constitution did not become null and void on the day the Constitution came into force.

Hence until the Immigration Decree is amended or there is a specific finding of the Constitutional Court as to any inconsistency with article 25(5), there is a presumption of constitutionality attaching to the Immigration Decree, by virtue of the transitional provision in the Constitution. Therefore the ground of illegality fails.

The petitioner also relied on the ground of irrationality, which is the same as

unreasonableness. Lord Diplock, considering the concepts of illegality, irrationality and procedural irregularity in the case of *CCSU v Minister of Civil Service* [1985] 1 AC 374 at 410 (commonly referred to as the "GCHQ case") stated that by illegality is meant that the decision-maker must understand correctly the law that regulates the decision making power and must give effect to it.

By "irrationality" or "unreasonableness" he meant, where a decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question could have arrived at it.

In the present case, the file maintained by the Department of Internal Affairs (Immigration Division) in respect of the petitioner, which was forwarded to this Court pursuant to Rule 10 of the Supervisory Jurisdiction Rules, discloses that the GOP of the petitioner was valid from 26 July 2006 to 25 July 2007. However, the Immigration Officer issued a notice dated 8 June 2007, in form IMM/9 prescribed in the first schedule to the Immigration Regulations 1981, on the petitioner declaring her a prohibited immigrant under section 19(1)(i) by reason of her presence (being) "inimical to the public interest".

The copy of that notice on file shows that she refused to sign as recipient. A footnote on that notice draws the attention of the recipient to section 21(1) which provides that within 48 hours of receiving the notice she could make written representations to the Immigration Officer or the Minister against such notice.

The petitioner failed to comply with section 21(1) and to make written representations within 48 hours, However, there is on file a letter dated 14 June 2007 sent by Mr Frank Elizabeth, her counsel, addressed to the President, who was also the Minister for Internal Affairs at that time, appealing against the decision of the Immigration Officer declaring her a prohibited immigrant. That was the day after she was required by the notice to leave Seychelles. In that letter, it was stated that the petitioner -

(1) Is Group and Incentive Executive at Creole Holidays pursuant to a valid GOP issued by the Government of Seychelles.

(2) Has not done anything wrong whilst in the Seychelles.

(3) No reason has been given why she has been declared a prohibited immigrant <u>despite several requests.</u>

There is nothing on file to show that any written requests were made of the Immigration Officer as to the reasons for the declaration or for particulars of allegations against her. In the petition and affidavit filed in this case the petitioner does not aver that any requests were made for particulars of the reason stated, nor has she sought a writ of mandamus to compel the Minister to disclose particulars of that reason.

The petitioner's counsel was informed by letter dated 21 June 2007 that the appeal had been given due consideration but had not been successful. Under section 21(3) that

decision of the Minister was final and could not be challenged in any Court. However, it is settled law that the supervisory powers of Courts supersede ouster clauses, as was held in the case of *Chief Constable of North Wales Police v Evans* [1987] 1 WLR 1155 at 1173 where it says "judicial review is concerned not with the decision, but with the decision-making process."
In the present case, the Minister has given the reason, which is one of the reasons provided in section 19(1) of the Immigration Decree upon which a foreign national can be declared a prohibited immigrant. The reason specified in paragraph (i) of section 19(1) is the only instance which requires a written declaration by the Minister; the others can be made by the Director of Immigration. The reason obviously is due to the fact that a decision that a person's presence in the country is inimical to the public interest can be taken as a matter of state policy exercisable only by the executive powers of a Minister.

Such power, which is primarily vested in the President of the Republic under article 66(1) of the Constitution, is exercisable through the Ministers. In the present case, the declaration was made by the President in his capacity as the Minister responsible for Internal Affairs.

Article 25(3) provides that one of the restrictions to the freedom of movement can be prescribed in law necessary in a democratic society "(a) in the interest of defence, public safety, public order, public morality or public health". They are distinct concepts, though not always unrelated. The term "public interest" in section 19(1)(1) of the Immigration Decree generally encompasses all these concepts which are in essence matters of national security although of varying degrees of gravity.

The pivotal issue is whether there is a duty on the part of the Minister to give particulars of the reason under section 19(1)(i) which is based on national security in the broad sense of the term. In the case of *Ex Parte Michael Scheele* (unreported) CS 73/1992, which was decided prior to the promulgation *of* the present Constitution, it was held that the statutory reason that a person's presence in Seychelles was inimical to the public interest, without furthermore, satisfied the duty to give reasons.
However, as was held in *The Zamora* [1916] 2 AC 77 at 107 -

> Those who are responsible for national security must be the sole judges of what national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law otherwise discussed in public.

In the case of *R v Secretary of State for Home Affairs, ex parte Hosenball* [1977] 3 All ER 452, a United States citizen working as a journalist in London was informed by a letter from the Home Office that the Secretary of State had decided in the interests of national security to make a deportation order against him under the Immigration Act, and that if he wished, he could make representations to an Independent Advisory Panel.

The journalist (Mr Hosenball) through his solicitors, requested particulars of what was

alleged against him, but was refused. The Court of Appeal held that it was well settled that the Courts must accept the evidence of the Crown and its officers on matters of national security. The Court however held that the ordinary principles of natural justice were modified for the protection of the realm and that public policy required the preservation of confidentially for security information, and that accordingly, the Secretary of State, who had given the matters his personal consideration, need not disclose the information he had to the applicant. Lord Denning MR however observed that the Court would have interfered if the applicant had not been given an opportunity to make representations. The Court of Appeal therefore upheld only the refusal to provide the particulars.

In the present case the petitioner was given an opportunity to exercise her right to make representations, despite being out of time.

In the case *Salvat v Attorney-General* (1998) 2 CHRLD 45, the applicant, a French citizen settled in Grenada in 1991, had been granted a work permit. That permit was renewed annually until 1996, when it was refused. That decision was taken without first informing the applicant of the intended grounds of refusal or affording the applicant the opportunity to be heard in relation to the matter. The Immigration Authorities ordered him to leave the country. He challenged that decision on the ground that it violated his constitutional right to a fair hearing and also exposed him to the threat of a denial of the right to freedom from expulsion from Grenada. The respondents contended that the decision was taken as he constituted "a threat to national security", and that hence judicial review was precluded.

The Supreme Court of Grenada held inter alia that -

1, Even in cases involving considerations of national security, the rule of fairness applies and must, whenever possible, be implemented albeit in modified form depending on the circumstances of each case.

2. The Court does not have the power to intervene in matters involving national security or to review the substantive decisions taken by the Minister, within the limits of his authority, in the exercise of the prerogative discretionary power in such matters. The Court can only ensure that procedural requirements are complied with and that rules of fairness are followed in the process of decision making.

In that case however, it was held that the respondents had failed to establish that the interest of national security required the Minister to avoid the obligation to act fairly in relation to the applicant before making his decision.
In the present case, the Minister gave the statutory reason albeit without particulars. The petitioner's appeal was considered by the Minister. In these circumstances, does the failure to give particulars of the reason_impugn the decision-making process in a matter involving national interest?

In *Ex Parte Hosenball* (supra) Lane LJ, dealing with the necessity for reasons in cases involving national security or national interest stated -

> There are occasions, though they are rare, when what are more generally the rights of an individual, must be subordinated to the protection of the realm. When an alien visitor to this country is believed to have used the hospitality extended to him so as to present a danger to security, the secretary of State has the right and, in many cases, has the duty of ensuring that the alien no longer remains here to threaten our security. It may be that the alien has been in the country for many years. It may be that he has built a career here in this country, and that consequently a deportation order made against him may result in great hardship to him.
>
> It may be that he protests that he cannot understand why any action of this sort is being taken against him. In ordinary circumstances, you can call it natural justice if you wish, would demand that he be given the names of who are prepared to testify against him and, indeed probably the nature of the evidence which those witnesses are prepared to give should also be delivered to him. But there are counter-balancinq factors.
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> Detection, whether in the realms of ordinary crime or in the realms of national security, is seldom carried out by cold analysis or brilliant deduction. Much more frequently it is done by means of information received....
>
> The reasons for this protection are plain. Once a source of information is disclosed, it will cease thereafter to be a source of information. Once a potential informer thinks that his identity is going to be disclosed if he provides information, he will cease to be an informant.

In *Berthelsen v Director General of Immigration* (1988) LRC 621, a US citizen who had been granted an employment pass in Malaysia, was served with a notice of cancellation of that pass before its validity period has expired, informing him that his "presence was or would be prejudicial to the security of the country." His application for judicial review filed in the High Court was refused on the ground that it was futile as the Court could not go behind the decision of the executive in a matter of national security.

The applicant filed an appeal to the Supreme Court, but left the country. It was held, on the facts of that case that no

> …dire consequences of catastrophic magnitude would or possibly could have ensued if the appellant had been accorded a right to make representations prior to the contemplated exercise of the power to cancel his employment pass…

and that all l that was needed to be given was an opportunity to make representations,

and that the question of security would only arise in the event he sought particulars of the allegations that his presence in the country was or would be prejudicial to the security of the country.
In the present case, the petitioner was given ample opportunity to make representations despite the fact that she had acted in defiance by refusing to receive the notice and also despite the appeal to the Minister being filed out of time. It has not been averred that she had a legitimate expectation that her GOP would have been extended beyond 25 July 2007. In fact, the Director General of Immigration has averred in paragraph 7 of his affidavit that he is "instructed by the Minister responsible for Internal Affairs that the gainful occupation permit of the petitioner which will expire on 27th July 2007 would not be renewed..." Section 17(9) of the Immigration Decree specifically empowers the Minister to "revoke a gainful occupation permit if there has been a breach of any condition attached thereto or he considers it in the public interest so to do." Upon such revocation, a person becomes a prohibited immigrant under Section 19(1)(d), and becomes liable to be deported.

Even when an application for a GOP is made initially, section 17(4) provides that -

> The Minister may, in any case, either refuse or grant the application subject to any condition or limitation, without assigning any reason for that decision."

Hence the obtaining of a GOP is not a right but a privilege. It can therefore be revoked in the public interest. If an initial application can be refused under section 17(4) without assigning reasons therefore, it can also be revoked under section 17(9) in a similar manner without reasons. A fortiori. where the Minister declares that the presence of a person who had been granted such GOP has become inimical to the public interest, he or she can be declared a prohibited immigrant under section 19(1)(i) of the Immigration Decree with the concomitant result that that person's GOP becomes revoked. In these circumstances, the decision of the Minister is neither illegal nor irrational.

As the petitioner has failed to establish both grounds of illegality and irrationality pleaded in the petition, the petition is dismissed with costs.

The petitioner therefore continues to be a prohibited immigrant since 25 July 2007 when her GOP expired. She has also no residential status, as the validity of her National Identity Card lapsed on the same day. Hodoul JA in his order dated 22 June 2007 stated -

> As regards her application for a temporary suspension of the "order of removal", I am of the opinion that under article 25(5) of our Constitution, she has a right not to be removed from Seychelles until the "order of removal" is reviewed by the "Competent Authority". But that right must be exercised in conformity with the public interest. Accordingly, I suspend the execution of the "order of removal" until the determination of her application by the Supreme Court, upon which the matter will be submitted

to this Court for further consideration.

With respect, this Court is functus officio to make any further order after making the present order dismissing the petition.

Record: Civil Side No 173 of 2007