

JOANNEAU v SIBA

(2011) SLR 262

F Ally for the petitioner
C Lucas for the respondent

Ruling delivered on 29 July 2011 by Renaud J:

Application under Rule 12(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authority) Rules

This application was entered on 16 March 2010.

The petitioner is an employee of Lotus Holding Company Limited, a company incorporated under the Companies Act 1972 of Seychelles (hereinafter "Lotus Holding"), which carries on business as an international corporate service provider (hereinafter "ICSP") under the International Corporate Service Providers Act (hereinafter "ICSP Act"). An ICSP provides international corporate services, ie renders services connected with the formation, management or administration of a specified entity as defined in the ICSP Act.

The respondent is a body corporate established under the Seychelles International Business Authority Act 1994.

Lotus Holding, as an ICSP, and its employees are regulated by the respondent in terms of the ICSP Act.

The respondent has originally determined the petitioner to be a "fit and proper person" under the ICSP Act.

By letter of 15 January 2010, addressed to Lotus Holding the respondent removed the petitioner's "fit and proper" status under the ICSP Act. Prior to the issue of that letter, the respondent had on 12 January 2010, addressed a letter to the petitioner requesting her to clarify her position and that of Lotus Holding vis-a-vis the content of a series of publications within the public domain which appear to relate to the petitioner's directorships on a number of companies.

On 14 January 2010, Lotus Holding replied to the respondent's letter of 12 January 2010, stating the position of the petitioner and Lotus Holding.

The presence of the petitioner at the office of the respondent was initiated by a verbal request by officer(s) of the respondent inviting the petitioner for a friendly chat. The respondent's officers and the petitioner met on the 14 January 2010 to discuss the said publications.

The publications referred to by the respondent in its letter of 12 January 2010 to the petitioner, relates to articles published in the *Dominion Post*, a newspaper published in New Zealand, in relation to SP Trading, a New Zealand company which was

allegedly involved in an arms scandal. In that article the petitioner was referred to as a person who holds the directorship in 338 companies incorporated in New Zealand.

In matters that come before this Court for judicial review, this Court is not concerned so much as to what decision the adjudicating authority took but how the decision was reached. It is the process of the decision-making which is therefore reviewed.

In the instant case the petitioner is praying this Court to issue a writ of certiorari. A writ of certiorari, if granted, has the effect of quashing a decision of an authority which exercised judicial, quasi-judicial or administrative functions, if such decision was taken through an excess or abuse of power or which is illegal. The criteria for deciding which acts or decisions are subject to certiorari was expressed by Lord Atkin in the case of *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co* [1920] 1 KB 171, as -

whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the following jurisdiction of the King's Bench Division.

A writ of certiorari is also available to quash or nullify actions or decisions that are ultra vires or in breach of natural justice or where traditionally there has been an error of law on the face of the record. As Lord Slynn suggested in the case of *Page v Hull University Visitor* [1993] 1 All ER 97 at 114b, the scope of certiorari may be interpreted widely, when he said:

..... it is accepted, as I believe it should be accepted, that certiorari goes not only for such an excess or abuse of power but also for a breach of the rules of natural justice.

The interpretation of the duty to act judicially has been widened considerably since the case was decided. Since the case of *Ridge v Baldwin* [1964] AC 40, courts have interpreted the phrase to include those bodies that have the power to decide and determine matters which affect citizens. This means that certiorari generally may be available to review all administrative acts.

The formulation of 'acting judicially' commonly used today is that favoured by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 309, that it is enough to show that the body or person has legal authority to determine questions affecting the common law or statutory rights of other persons. Judicial review deals primarily with the question of law. Lord Widgery G in the case of *R v Huntington District Council, ex parte Cowan* [1984] 1 WLR 501, identified a proper case for judicial review -

as being a case where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or made in consequence of an error of law.

In the case of *Vidot v MESA* (CS 217/98) it was held that -

a petition under the supervisory jurisdiction is a review of a decision of a Subordinate Court etc. Hence the determination of the Courts is based on the record of such body and not on evidence.

In the case of *Yulia Timonina v Government of Seychelles and The Immigration Officer SCA 38/07*, the Seychelles Court of Appeal at 15 of its judgment in reviewing the role of the judiciary in judicial review applications stated that it is -

... to ensure that what is done by the Executive is proper and in accordance with given laws and procedures. Where a law gives power to the Executive, it is a fundamental principle that such power be exercised by the Executive judiciously and within the limit provided, the key concept being fairness. In other words, where a law requires the Executive to give reasons for its decision, the required reason should be adequately given. Failing to do so, a citizen or whoever is affected by that failure has the right to come to court seeking the necessary redress.

The Seychelles Court of Appeal in the case of *Doris Raihl v Ministry of National Development 6 of 2009* provides much guidance and the quotes that follow are pertinent excerpts from that case -

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*; *Perrine v The Port Authority and Other Workers Union* (1971) MR 168.

In the case of *Cooper v Wandsworth Board of Works* (1863) 143 ER 414 reference is made to the Bible. It says that even God did not deem it fair 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 Byles 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 shouldst not eat?" And the same question was put to Eve also. "If God, Almighty and All-Powerful, did not do that, quare puny man. Hence, the appellation "Natural Justice.

Administrative law does not countenance a doctrine of retrospective hearing - meaning 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 a permission given.

The Seychelles Court of Appeal in *Raihl* stated that an authority exercising quasi-judicial powers such as the Minister in the case -

which is by law invested with power to affect the 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.

The Seychelles Court of Appeal quoted the above excerpt from the case of *Cooper v Wandsworth* (1863) 14 CB (NS) 180.

The Seychelles Court of Appeal went on to state that -

Administrative law is not about judicial control of Executive power. It is not 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.

(from the cases of *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER141.)

It is also stated in the case of *Khawaja v Secretary of State for Home Department* [1983]1 All ER 765, that: "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".

In the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935, the three grounds on which a decision may be subject to judicial review were classified as – illegality, irrationality and procedural impropriety. Procedural impropriety concerns not only the failure of an administrative body to follow procedural rules laid down in the legislative instruments by which jurisdiction is conferred, it includes the failure to observe the rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.

In the appeal case of *Council of Civil Service Unions v Minister for the 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 is 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".

In this instant matter, having had the benefit of reviewing and comparing the contents of the affidavits of the parties and having heard the submissions made by counsel of the respective parties, I will now proceed to make my findings and determination.

I find that the respondent's decision in removing the "fit and proper" status of the petitioner was procedurally improper and that finding is for good reasons including the following:

1. The petitioner was not given an opportunity to be heard or allowed sufficient time to prepare herself to respond to any complaint in that the petitioner was requested by the respondent to attend a meeting at extremely short notice called for the same day.
2. The petitioner was not given a full opportunity to be heard and to defend herself against any complaint regarding the discharge of her duties as an employee of Lotus Holding.
3. The respondent failed to form any complaint regarding the petitioner's performance as an employee of Lotus Holding.
4. The respondent took irrelevant matters and incorrect facts or baseless allegations into considerations to arrive at its decisions specially that the petitioner was associated with SP Trading, when no such association exists and was proven.
5. The respondent failed to conduct a thorough inspection of Lotus Holding's control systems and procedures, as required by law, before removing the petitioner's fit and proper status.
6. If after the meeting the respondent was of the opinion that Lotus Holding's control systems and procedures were deficient the respondent should have conducted an investigation or make a formal complaint to the petitioner or Lotus Holding, which would have been replied thereto.

I also find that the respondent's decision in removing the "fit and proper" status of the petitioner was unreasonable and that finding is for good reasons including the following -

1. The decision of the respondent is based on an article published in a New Zealand newspaper which incorrectly and without any proof linked the petitioner with SP Trading a company involved in an alleged arms scandal.
2. The decision of the respondent was also based on the facts that the petitioner is a director of several companies incorporated in New Zealand which are have not been shown to be either subject to the ICSP Act and any other laws, or is an illegal act in New Zealand.
3. The respondent had no cogent evidence that the petitioner has committed any wrong doing to warrant her removal of fit and proper status, or that she is not a fit and proper person under the ICSP Act, or still, that she is unfit or has become unfit as a result of the finding that the Petitioner is the director of several companies or that renders her unfit or unable to discharge her duties as a member of staff of Lotus Holding for the latter to provide international corporate services under the ICSP Act.
4. The respondent had no cogent evidence that the petitioner being a director of several companies in New Zealand has contravened the laws of New Zealand or that of any other country (including Seychelles) and if she has, the respondent has failed to substantiate such; or that Lotus Holding' clients' interest are threatened; or the petitioner is unable to manage and administer the companies.
5. The respondent conceded that the petitioner is possibly not the only fit and proper person under the ICSP Act who holds directorship in such number of companies in that if it is illegal or improper for a fit and proper person under the ICSP Act to be a director on any specific number of companies the respondent as a regulator should have requested that every such person

declare the number of directorship or run an obligatory questionnaire for all ICSP in this respect.

6. The principal facts, on which the respondent based its decision to remove the petitioner's fit and proper status, are not necessarily facts that the respondent as the Authority under the ICSP Act acting reasonably and judiciously could have reached.
7. The respondent had no cogent evidence or any finding that Lotus Holding has contravened the ICSP Act for the respondent to remove the petitioner's fit and proper status.
8. The respondent took into consideration irrelevant consideration and incorrect or unsupported allegations to arrive at its decisions specially that the petitioner is associated with SP Trading, when in fact it could not be shown that the petitioner had any relationship whatsoever or at all with SP Trading. At best, she was referred to in the article to show how New Zealand law permits one person to be a director in several companies (which has an open registry as opposed to a closed registry like the Seychelles' registry)
9. The petitioner's failure to state at the meeting the exact number of companies on which she is a director ought not to have warranted the removal of the petitioner's fit and proper status, for reasons earlier stated above in the light of how the meeting was convened.
10. The conclusions arrived by the respondent regarding the petitioner's inability and incompetence to manage and administer the companies of which she is a director are unsupported by reasonable evidence and were not subject to any thorough investigation.

I further find that the respondent's decision in removing the "fit and proper" status of the petitioner was illegal, and that finding is for good reasons including the following -

1. The petitioner has not contravened any of the provisions of the ICSP Act especially the provisions set out in the Code of Practice for Licensees under the ICSP Act.
2. It is not illegal in Seychelles or outside Seychelles for any person to be a director of any number of companies otherwise the relevant laws or the respondent as the regulator would have set out a specific number.
3. The respondent failed to conduct a thorough inspection of Lotus Holding's control systems and procedures, as required by law, before removing the petitioner's fit and proper status.
4. In any event there was no finding that Lotus Holding has contravened the ICSP Act for the respondent to remove the petitioner's fit and proper status.
5. The respondent's decision has no legal basis.

I find that the petitioner made this application in good faith and that she has sufficient interest in the matter as the decision of the respondent has been made against the petitioner and her status under the ICSP Act and, in my view she is substantially aggrieved by it.

On the basis of my findings enumerated above, it is my judgment that a writ of certiorari ought to be issued in the circumstances of this case. I accordingly issue

forthwith a writ of certiorari quashing the decision of the respondent to remove the status of the petitioner as "fit and proper" under the ICSP Act.
I award costs to the petitioner.