

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: MC 108/2014

[2016] SCSC 21

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED

Providence

Mahe

Petitioner

versus

PATRICK ANDRE

Principal Secretary

Department of Transport

Ministry of Home Affairs and Transport

International Conference Centre

Victoria

Respondent

Heard: 18th November 2015.

Counsel: Mr Bernard Georges for Petitioner
Mr Chinnasamy for Respondent

Delivered: 25th January 2016.

JUDGMENT

McKee J

[1] This is an application for Judicial Review by the Petitioner, a limited company, against an administrative decision of the Department of Transport of the Government of Seychelles, hence the representation on its behalf by a senior member of the Attorney General's Chambers. The Petitioner is a major construction company operating within Seychelles and, so far as I am aware, is a major employer with a large number of employees.

- [2] This is an application under the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules.
- [3] No preliminary objection is taken by the Respondent and both parties are in agreement that the circumstances of this matter are set out in the copy letters attached to the originating Petition. Written Defences were lodged by the Respondent. The Petitioner lodged further written Submissions. The Respondent did not do so and relied on his written Defences. Parties agreed that the matter should be decided upon by the documentation before this court. As a result I dispensed with the need to examine the file from the Department of Transport.
- [4] The circumstances of the case are as follows. During 2013 the Respondent gave approval to the Petitioner to import three buses for the sole purpose of transporting its staff on the public highways of Seychelles. On or around the last week in January 2014 the Respondent issued a formal approval to the Petitioner to register and use three “oversize” buses on the public highways of Seychelles. These buses were to be used for the sole purpose of transporting the employees or workers of the Petitioner from their residential quarters to their places of work in the morning and for the return journeys at the end of the working day.
- [5] By letter dated the 6th February 2014 the Road Transport Commissioner of the Department of Transport suspended this arrangement and advised the Respondent in the following terms, “We are now receiving complaints and objections from the Omnibus operators and other people in the business community that we are depriving them of their livelihood and favouring other sectors to compete with them. In view of the above mentioned situation, we are instructing you to suspend the operation of the three buses until the matter *can be sorted out [my italics]*. We regret to have to take these measures and expect to receive your full cooperation in this matter.”
- [6] This formal letter, not unexpectedly, produced an immediate reply from a Mr Kausal Patel, a director of the Petitioner company, firstly by telephone and then by email. He replied by email dated 7th February 2014 expressing his disappointment but confirming that the Petitioner is a private company and that the three buses were used solely for the

transportation of staff for their betterment and that the buses were a preferable mode of transport to open trucks for his workers in the then rainy season. He stressed that his company was not in competition with other omnibus operators and that the buses were for staff use only. Furthermore, he stressed that the Petitioner had never had any contract with private bus companies for the transportation of its workers. Furthermore, the Petitioner did not intend to use the three buses in any manner to deprive existing operators of business opportunities. The Petitioner merely wishes to provide better transport facilities for its workers. He asked for a lifting of the suspension.

[7] The Road Traffic Commissioner acknowledged this correspondence by email dated 10th February 2014 advising that this, ie the suspension, was a **temporary measure**.

[8] The matter remained unchanged until the end of February 2014. By formal letter dated 28th February 2014 Mr Patel again wrote to the Department of Transport stating that while he understood the reason for the suspension was that the Department had received complaints from some persons in the local business community, he found this difficult to understand. The company had imported the buses to improve the working conditions of its personnel and the company had no intention to rent out the buses to third parties on a commercial basis. Mr Patel asked for an early resolution of the matter.

[9] No progress was made. On 25th June 2014, Counsel for the Petitioner, wrote formally to the Department of Transport again setting out the position and asking for a lifting of the suspension. By letter dated 9th July 2014 a reply issued from the Department of Transport to Counsel advising that a **temporary** ban had been imposed on the use of buses by non licensed operators for the transportation of passengers. It has to be assumed that the Respondent was of the view that the Petitioner was such an operator. This letter further advised that the **temporary** ban was in place “pending the assessment of the existing omnibus operators policy, guidelines and regulations. Once this exercise was completed a decision would be communicated to his client (i.e. the Petitioner) with appropriate justification of any decision taken”.

[10] The final letter in the exchange was from Counsel to the Department dated 12th September 2014. Counsel asked for the legal authority under which the Department

purported to act in imposing the suspension or as he called it in this letter “the temporary ban”.

[11] No further progress was made and hence this present Petition for Judicial Review was lodged with the Supreme Court on 27th November 2014.

[12] No further progress has been made.

[13] The Petition reiterates the above history and avers that the Department is “stonewalling” or failing to make a decision on this matter and that the imposition of the ban is illegal, irrational and unreasonable and should be lifted.

[14] The Defences lodged by the Respondent dated 8th July 2015 are of assistance. It confirmed that the Department had approved the importation of the three buses for the use of the workers employed by the Petitioner and in the month of July 2013 gave the Respondent the necessary approvals to register and use the buses on the public highway. Following their arrival and use it was further explained that the Department had received complaints from other omnibus operators stating that the Petitioner’s buses had deprived the operator interests, they wanted a level playing field and the Department had thus to formulate a policy to give equal consideration to all persons or companies in the transport field. It was stressed that the ban was temporary not permanent. A policy had been formulated and was to be put to Cabinet for approval. The Respondent submitted that it had not violated any right of the Petitioner and sought to take all interests into account.

[15] Counsel for the Petitioner amplified his position in his written submission. He seeks redress by way of Judicial Review on the basis of illegality, irrationality, unfairness and procedural impropriety.

[16] The Petitioner seeks the follow Orders from the Court:

1. A Writ of Certiorari quashing the Order of Suspension dated 6th February 2014, and

2. A Writ of Mandamus ordering the Respondent to lift the ban on the use by the Petitioner of its three buses to transporting staff.

[17] FINDINGS.

[18] It is not disputed that the Department of Transport is a public body exercising a judicial function in the present matter. It is hence an Adjudicating Authority within the provisions of the said Rules. It is not disputed that the Petitioner has sufficient interest to bring this Petition.

[19] I find the position to be as follows. Initial approval was given by the Respondent to the Petitioner for the importation of the three buses to be used for the transportation of workers employed by the Petitioner. This initial approval was granted in the month of July 2013. This approval would have allowed the Petitioner to obtain the three buses and make arrangements to have them transported to Seychelles.

[20] The initial letter issuing from the Respondent dated 6th February 2014 stated “*Last week the Department of Transport issued your company with an approval to register and use on the Public Road three oversize buses*”. It may be that that it took some time for the buses to be delivered to the Petitioner but all the final approvals and permits had granted. I accept, as stated in the supporting affidavit to the Petition, that the Petitioner had been using the buses for a few weeks prior to February 2014. In any event the Petitioner ceased using the three buses on 6th February 2014. I also accept the position to be as at November 2014 as stated at paragraph 9 in the supporting Affidavit to the Petition that the buses had been lying idle for a period of nine months with their condition deteriorating and workers denied this form of covered transport. So far as I am aware the buses remain unused.

[21] I now look to the matter of the suspension of approval referred to above. The letter of 6th February 2014 from the Respondent carries the heading, “TEMPORARY BAN ON THE USE OF NEWLY REGISTERED BUSES”. The email from the Respondent dated 10th February 2014 at paragraph 2 uses the phrase “temporary measure” when referring to the suspension. By its letter to Counsel dated 9th July 2014 the Respondent is still referring to

the suspension as a “temporary ban” although this is the first mention that there is to be an assessment of policy, guidelines and regulations in respect of existing bus operators.

[22] The matter continued in an unresolved state. No progress has been made. There was simply no reply to the further enquiry by Counsel for the Petitioner to the Transport Commission on 12th September 2014. The initiation of judicial proceedings brought any possible further interchange between parties to an end. The in-depth examination of road transport policy in respect of omnibuses was also referred to in the written Defences dated 8th July 2015 with the further information that a formulation of policy was being passed to Cabinet for approval. Hence by July 2014, some five months after the suspension or temporary ban, the whole tenor of the exercise being undertaken by the Respondent had changed without the specific issue concerning the Petitioner being reconsidered.

[23] The position now, i.e. as at 25th January 2016, is that a period of some twenty three months has passed between the date of intimation of the suspension imposed on 6th February 2014 and today’s date. As yet there is no indication that the policy paper have been approved by Cabinet.

[24] Certain definitions are helpful at this stage and I have sought assistance from the Oxford Dictionary.

“temporary” means “to last only for a limited time”.

“suspend” means “to put into abeyance or to defer”,

“ban” means “a formal or authoritative prohibition.

[25] On the evidence before me I find that the order from the Respondent was not a “ban” but was a suspension, which by its very nature was of a temporary nature of an earlier approval granted.

[26] This suspension order has now been in force for some twenty three months. During this period there is no evidence that the Petitioner attempted to circumvent or ignore this earlier order of suspension. The only challenge being made now is through the Courts by Judicial Review.

[27] I find that the particular concerns expressed by the Respondent by letter dated 6th February 2014 were immediately addressed by the Petitioner by his email dated 7th February 2014 providing, in my view, sufficient information for the Respondent to make a decision on the particular issue within a short period of time. In any event the sole purpose of the buses were fully known to the Respondent from as early as July 2013. There is no information before this Court that, immediately after the date of 6th February 2014, the Respondent sought to arrange a meeting of all bus operators, including the Petitioner, to resolve this issue or to alleviate any fears which other bus operators might have had.

[28] In my opinion I would have to give a very generous interpretation to the word “temporary” to find that the period of twenty three months falls within this definition. In my opinion, a period of twenty three months, in the ordinary sense of the phrase, cannot be considered a “limited time” as defined in the Oxford dictionary.

[29] In my view it would have been reasonable to expect that the Respondent could have made a firm decision on this particular matter as soon as possible after February 2014 and I would suggest before 9th July when the issue became embroiled in general government policy considerations.

[30] The Respondent suggests that the delay is justified since there is to be a review of future policy guidelines and regulations. Such a review would of necessity take time and in my opinion the Respondent should have balanced that general issue against the fact that:

- a. it had already given its permission to the Petitioner to proceed to obtain buses to be used for the betterment of his employees’ conditions of employment,
- b. its concerns were more probably than not addressed in the response by the Petitioner in its email of 7th February 2014,
- c. the Petitioner, a business concern, had already gone to considerable expense in obtaining the buses on the assurance that it would be permitted to use them for the express purpose proposed, and

- d. A meeting between the Respondent, the Petitioner and any other interested parties could have been arranged at an early date and in all probability have resolved the issues and concerns expressed.

[31] Counsel for the Petitioner at paragraph 11 of his submissions sets out the basic principles which apply in cases of Judicial Review and which he would suggest should apply in this matter. The approach to be considered in Judicial Review matters is flexible and is continually evolving. Counsel refers in particular to the need to observe the rules of nature justice and the need to act fairly. I agree.

[32] Courts have looked to the question of fairness and procedural fairness in administrative decisions.

[33] In *Chio v Tave* [2011] SLR 157 it was held that the purpose of a court's supervisory jurisdiction is to ensure that what is done by the Executive is proper and in accordance with the law and procedures given. The three grounds on which a decision may be subject to a judicial review are illegality, irrationality and procedural impropriety. Procedural impropriety was held to include a failure of an administrative body to follow procedural rules, the failure to observe rules of natural justice, or the failure to act with procedural fairness. It was further held that the concept of natural justice has been replaced by the duty to act fairly.

[34] Lord Donaldson in the case *R v Take-over Panel ex p Guinness plc* [1990] 1 QB 146 160C on this topic stated "the ultimate question would, as always, be whether something has gone wrong of a nature or degree which requires intervention of the court and, if so, what form should the intervention take".

[35] I would also refer to the case of *Osborn, Booth and Reilly v the Parole Board* 2013 UKSC61, paras 67 and 68 where there is reference to the observations of Lord Hoffman in the case *Secretary of State for the Home Department v (AF)(No 3)*[2009] UKHL 28 ; [2010]2 AC 269 para 72 on the virtues of procedurally fair decision making. Para 68 in the *Osborn* case reads as follows" The first [virtue] was described by Lord Hoffman

{ibid)as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made provided they have something to say which is relevant to the decision to be taken.”

[36] In the present matter the decision of the Respondent to suspend the prior approval granted to the Petitioner was done in the exercise of an administrative function. The suspension took immediate effect. The Petitioner immediately sought a reversal of this decision and gave detailed grounds for his application. The Petitioner was not accorded a fair hearing on the issue either in person or in the company of other bus operators within a reasonable time despite the fact that he had been advised that the suspension was a temporary measure. The position is now exacerbated by the fact that the Respondent has failed to make a decision on this suspension, declared to have been a temporary measure, for a period of some twenty three months.

[37] In my opinion, in all the circumstances, the Petitioner is entitled to feel a sense of injustice. I find that this Application by the Petitioner has succeeded and I DECLARE that the Respondent has acted unfairly and in breach of its duty of procedural fairness by failing to make a decision, after formal object by the Petitioner, on the Suspension Order issued on 6th February 2014.

[38] ACCORDINGLY, I make the following Orders:

1. I issue a Writ of Certiorari quashing the suspension Order imposed by the Respondent dated 6th February 2014, and

2. I issue a Writ of Mandamus ordering the Respondent to revoke, with immediate effect, the Suspension Order imposed on 6th February 2014 in relation to the use by the Petitioner of three buses for transportation of employees of Vijay Construction [Proprietary] Limited during the course of their employment.

Signed, dated and delivered at Ile du Port on 25th January 2016.

C McKee
Judge of the Supreme Court