

**Benker v Government of Seychelles & Or
(1999) SLR 48**

Antony DERJAQUES for the applicant
Lucy POOL for the respondent

Judgment delivered on 1 December 1999 by:

KARUNAKARAN J: The applicant Gordana Benker is a national of Yugoslavia. She is a young woman and an artist by profession. She first entered Seychelles on 6 July 1995 as a visitor. She remained in Seychelles as a visitor until she left the Republic on 7 September 1995. Again she returned to Seychelles on 17 September 1995. On both occasions of her entry into Seychelles she was granted a visitor's permit by the second respondent, hereinafter called "the respondent", namely the Seychelles Immigration Authorities, in respect of her stay in Seychelles.

On 5 October 1995, when the applicant was in Seychelles she went to the Immigration Office at Independence House, accompanied by one Mr Jimmy Contret, a Seychellois national, and applied for extension of her visitor's permit. Following a guarantee/security bond executed by Mr Jimmy Contret she got her visitor's permit extended until 17 December 1995. On 11 December 1995, during the extended period of her permit, the guarantor Mr Contret went back to the Immigration office. He told them that he was withdrawing the guarantee he had furnished in respect of the applicant's visitor's permit. He also informed the respondent that the applicant was his girlfriend and they had been living together for some time in Seychelles. Besides, Mr Contret gave a statement to the immigration authorities in writing alleging that the applicant was then using dangerous drugs and also going about with some people who were not of good character. In support of the drug allegations Mr Contret produced to the Immigration Officers two photographs of the applicant with potted plants similar to marijuana in the background. Following the withdrawal of the guarantee by Mr Contret, on 13 December 1995 the respondent notified the applicant in writing that her visitor's permit would not be renewed upon its expiry on 17 December 1995. On 19 December 1995 the applicant requested a further extension of her visitor's permit. Again on 20 December 1995 Mr Contret also supported her request and asked for a further extension of her visitor's permit until 31 January 1996 in order to allow her time to sort out her affairs before leaving the Republic. Considering the final request by the applicant, the respondent eventually gave her time until 15 January 1996 extending her visitor's permit until then.

In the mean time on 3 January 1996 a third party, one Mr J Jeremy wrote to the respondent in support of the applicant's request for a further extension of her visitor's permit. This request was turned down by the respondent. The applicant was given a grace period of about two weeks i.e. until 27 January 1996 for her to leave Seychelles. During the grace period of her stay in Seychelles, that was on 19 January 1996, the applicant got married to Mr Jimmy Contret and on 26 January 1996 Jimmy Contret applied for her dependant's permit under section 14 of the Immigration Decree. His

application for the dependant's permit was turned down. The applicant thus continued to dodge the requests of the immigration authorities. In view of all of the above and the surrounding circumstances the respondent, by its final letter dated 19 February 1996, conveyed its decision to the applicant that she should leave the Republic on or before 28 February 1996. Aggrieved by the said decision of the respondent, the applicant has come before this Court now for a judicial review of the said decision. In this application she prays for a writ of certiorari quashing the said decision and also seeks a writ of mandamus compelling the respondent to review his decision.

Counsel for the applicant, Mr Derjaque, in essence submitted as follows -

- (a) The respondent has failed to give any reason for his decision.
- (b) The said decision of the respondent is unreasonable and irrational in terms of the *Wednesbury* principles. See *Associated Provincial Pictures Limited v Wednesbury Corporation* [1947] 1 KB 223 as applied by the Seychelles Court of Appeal in the case of John Desaubin v MESA and Competent Officer (unreported) Civil Appeal 52/1998.
- (c) The order made by the respondent against the applicant to leave Seychelles is draconian in nature as it breaks up a stable Seychellois family and hurts a Seychellois man by taking away his legally wedded wife from him. Mr Contoret has a right to have a family and to stay with a woman whom he loves. Moreover, Mr. Derjaques submits that if the applicant is sent back to Yugoslavia she might end up in Kosovo. In the circumstances, he contends that the decision of the respondent to deport the applicant from Seychelles is unreasonable and irrational.

On the other side counsel for the respondents, Miss L Pool, submitted that the respondent has acted rationally or reasonably in the circumstances. The decision in question is not arbitrary but grounded on valid reasons. According to her since drug offences are on the increase in the country no foreigner can be allowed to come in and get mixed up with drug dealers. The sudden marriage of the applicant to a Seychellois national was only intended to continue her stay in Seychelles. Therefore, she contended that the respondent has taken the decision to deport the applicant as he is empowered to do so in the national interest in terms of section 23(1) of the Immigration Decree. By the way, with due respect to the views of counsel I do not think the Court is now reviewing any deportation warrant issued under the hand of the Minister concerned in terms of section 23(1) of the Decree. It is also not the case of the applicant. In any event, counsel submits that the impugned decision of the respondent is reasonable and rational in the circumstances. Therefore, she seeks dismissal of the instant application and to uphold the decision of the respondent in this matter.

Judicial Review in the new age

It is pertinent to note here, that the law in the field of judicial review has witnessed considerable development since the time Lord Denning stated "only 50 years ago- at the end of his little book *Freedom under the Law* thus:

Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not. Just as pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age.... We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove equal to the challenge.

This challenge has been met today with considerable development of law evolved over several decades in the field of judicial review. In the present century of the welfare State, the Government has concerned itself with every aspect of individual's life from womb to tomb. Consequently, the administrative action of the executive is proliferating. They increasingly affect the life of the ordinary man. There is always a danger to his rights and to the rule of law. Hence, the administrative actions are now increasingly and effectively being scrutinised and controlled by judicial review. This development is inevitable in order to meet the changing needs of time and society. This is evident from the classic statement on the scope and range of judicial review in Lord Diplock's speech in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950 where he says:

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds.

The impugned decision

Obviously the matter herein involves a judicial review of the respondent's decision contained in his letter dated 19 February 1999 in which the applicant was asked to leave Seychelles on or before 28 February 1996. The letter reads as follows:

Dear Ms. Benker,

APPLICATION FOR DEPENDANT'S PERMIT FOR SELF

I refer to your above application dated 25th January 1996.

After careful consideration has been given to the application, I regret to inform you that it has not been approved.

Consequently, it has been decided that you make necessary arrangements to leave Seychelles on or before 28th February 1996.

I wish to point out that no further appeal on your part will be entertained and this decision is final.

Yours faithfully,
Sd B. Potter
For. Director of Immigration

In fact, this is the decision which the Applicant is complaining or and constitutes the subject matter in the instant case for judicial review. The applicant alleges that the said decision is irrational or unreasonable. Applying the yardstick of Lord Diplock (supra) it is clear that the ground alleged herein by the applicant falls under the second ground of classification. That is "irrationality". Therefore, the fundamental question before this Court for determination is this -

Whether the said decision of the Immigration authority in this matter is tainted with irrationality or unreasonableness?

To find an answer to this question of what the Court should do, Lord Greene gives the answer in the case of *Wednesbury Corporation* (supra) which stands as guiding principle, if I may say so. This runs as follows -

In considering whether an authority having so unlimited a power has acted unreasonably, the Court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be taken or disregarded matters that ought to be taken into account. The Court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its powers.

In the light of the above guiding principles now let us investigate the entire facts and circumstances surrounding the impugned decision in order to see if the authority has taken into account any matter which ought not to be taken and the vice versa.

Administrative Discretion

Basically a visitor's permit granted to any foreigner is only a privilege accorded to him or her to enter and to remain within Seychelles until such permit expires. In fact, no foreigner can claim it as a right. Granting a visitor's permit obviously falls within the discretion of the Immigration Officer. This is evident from section 16(1) of the Immigration Decree. It is couched in the following terms:

16. (1) On application being made in writing, an immigration officer **may**,

(emphasis supplied) subject to such conditions as he may deem necessary, issue a visitor's permit to any person who-

- (a) is not a prohibited immigrant; and
 - (b) is not the holder of a dependant's permit or a residence permit or a gainful occupation permit.
- (2) A visitor's permit....
- (3) The director of immigration may revoke a visitor's permit if there has been breach of any condition attached thereto or he considers it in the public interest so to do.
- (4) Any person aggrieved by the revocation of a visitor's permit under subsection (3) may appeal to the Minister whose decision shall be final and shall not be challenged in any Court.
- (5) Subject to this Decree, a visitor's permit shall authorise the holder to enter and to remain within Seychelles until such permit expires.

Here it is pertinent to note that the discretion conferred on the immigration officer under Section 16 subsection (1) above regarding the issuance of visitor's permit is an administrative discretion not a quasi judicial discretion. I find it so, because the Decree itself does not specify the ground upon which the discretion of the immigration officer is to be exercised. Hence, this is an absolute administrative discretion conferred on the Immigration officer. This is what Woodman C. J had to say in his judgment in *R v Superintendent of Excise & Anor; ex parte Confait* (1947) SLR 154 at 161:

There are cases in which the very nature of the discretion conferred excludes the possibility of it being an absolute discretion. There are other cases in which the Act itself specifies the ground upon which the discretion of the competent authority has to be exercised. Where the Act itself so limits the discretion of the competent authority it is clear that that discretion is not an absolute discretion and the Court have readily held in such cases that the competent authority was under an obligation to act judicially.

In this particular case, section 16(1) does not limit the discretion of the Immigration officer by specifying any grounds upon which the discretion of the authority has to be exercised. Therefore, this Court tends to view this discretion per se as administrative and so not subject to review. The authority is under no obligation to act judicially in this respect. On the other hand if the Decree had specified the grounds limiting the discretion, then any decision taken on the basis of that discretion would of necessity, be judicial and subject per se to judicial review by the courts. Therefore, I find the decision of the Immigration officer on the issuance of visitor's permit under section 16(1) of the Decree is not subject to judicial review.

For similar reasons given above, I find the discretion conferred on the authorities under section 14(1) in respect of dependant's permits is also an administrative discretion and is not subject to judicial review. Therefore, in summing up, any decision of the executive based on his administrative discretion is simply an administrative decision. They are not judicial or quasi-judicial decisions. In that case, the executive is under no obligation to act judicially. Hence they are not subject to judicial review.

Having said that I have to state for avoidance of doubt, that the above proposition should not be misinterpreted as meaning that the Court has no jurisdiction to correct the decision of the Immigration Officer or executive when he falls into an error of law while exercising that discretion or acts ultra vires or out of his jurisdiction. In other words the courts have no control over or cannot interfere in his administrative discretion so long as he exercised his discretion in accordance with law and kept it within his jurisdiction.

Prohibited Immigrant

Turning to the facts of the case, undisputedly the final extension of the visitor's permit granted to the applicant expired on 15 January 1996. However, the applicant, despite notice, chose and continued to remain in Seychelles without any legal status after the said permit had expired. Therefore, she became ipso jure, a prohibited immigrant. Indeed, a "prohibited immigrant" in Seychelles is defined and listed under section 19 of the Immigration Decree, which reads as follows:

- 19(1) The following persons, not being citizens of Seychelles, are prohibited immigrants:
- (a) ...
 - (b) ...
 - (c) ...
 - (d) any person in Seychelles in respect of whom a permit under this Decree has been revoked or has **expired (emphasis supplied)**

Therefore, the applicant, not being a citizen of Seychelles became a "prohibited immigrant" as from 16 January 1996 since she was in Seychelles and the visitor's permit issued under the Decree had expired.

In the circumstances, it is evident that the applicant got married to Mr Contoret in Seychelles on 19 January 1996 when she was, in fact, a prohibited immigrant in the Republic.

Dependant's Permit

The law governing dependant's permits is laid down under section 14 of the Immigration Decree. It reads as follows:

14(1) On application being made in the prescribed manner, the Minister **may** issue a dependent's permit to any spouse or minor child of a citizen of Seychelles who is not -

- (a) a prohibited immigrant; or
- (b) a holder of a residence permit or a gainful occupation permit (emphasis added).

In fact, on 26 January 1996 Mr Contoret, being a citizen of Seychelles, applied for a dependent's permit for his spouse, namely for the Applicant. On that day undoubtedly the applicant had no status or at the least was a prohibited immigrant. Therefore, she was not eligible nor had any legal right to obtain or cause to obtain a dependant's permit by virtue of section 14(1)(a) of the Decree. The respondent therefore rightly refused the application for a dependant's permit in accordance with the law. In the circumstances, I find the decision by the respondent refusing a dependant's permit for the applicant is legal, rational and proper.

Reason for decision

It is a settled position of case law that in an administrative action when the decision is a quasi-judicial decision and amenable to judicial review then the decision-making authority ought to give other parties the reasons for their decisions. This is evident from the English case *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] 1 All ER 655. The same position is maintained in the case of *R v Passport Officer, ex parte Kathleen Pillay* (1990) SLR 250.

Coming back to Mr Dejacques' contention that no reason was given for the decision of the respondent in this matter I find it is not supported by facts. On the face of the letter of 19 February 1996 to the applicant it is clear that the respondent has communicated the basic reason for its decision to the applicant. In fact, that decision consists of two parts namely,

- (a) The application for the dependant's permit was not approved; and
- (b) The applicant should leave Seychelles.

As regards part (a) above, I have already found supra that the decision to grant or not to grant a dependant's permit squarely falls within the administrative discretion of the respondent. It is not a quasi-judicial decision. Therefore, the decision-maker is under no obligation to give the reason/s for his decision in this respect.

In any event, an application for a dependant's permit can be made only by a citizen of Seychelles. See section I -14 of 1983. If at all any reason required to be given by the respondent as to any decision on that application, it should be communicated only to that citizen of Seychelles who did apply for the permit, not to any other person or foreigner whose name has been mentioned in that application. Therefore, the

respondent is under no obligation to communicate the reasons, to the present applicant, that too when she was a prohibited immigrant.

As regards part (b) of the decision above, the reason explicitly precedes the decision. The applicant has been asked to leave Seychelles because her application (sic) for a dependant's permit was not approved. Impliedly, she had no legal status to remain in Seychelles, leave alone the fact that she was a prohibited immigrant at the material time. Therefore, in my considered view the respondent has communicated the reason to the applicant as to why she should leave Seychelles. Hence the decision cannot be faulted on this ground as well.

Return to Kosovo

The applicant entered Seychelles as a visitor. She was granted a permit to remain in Seychelles as a visitor under section 16 of the Immigration Decree. She never applied for political asylum under art 32(1) of the 1951 Geneva Convention on refugees on the grounds that if she was returned to Yugoslavia or Kosovo she was likely to be killed because of her religious or political beliefs. The immigration authority cannot reasonably be expected to presume a visiting guest as a refugee. They equally cannot and should not take into account Kosovo matters, which are in my view irrelevant to the issue of visitor's or dependant's permit. This is what *Wednesbury* (supra) precludes, as matters ought not to be taken into account. The respondent rightly excluded those matters from consideration, as it was not an application for political asylum.

Protection of Family

Mr Contoret has every right to marry any woman he loves. As Mr Dejaques argues, no one can deny his right or take his wife away from him. At the same time no one can deny the fact that Mr Contoret had a right to choose. Unfortunately for him he chose to marry a prohibited immigrant in Seychelles. That was his deliberate choice and no one forced him or violated his right to choose. He knew at the time of marriage that his spouse was a national of Yugoslavia. He knew that she had no permit to remain in Seychelles. He knew that she got a grace period to sort out her affairs and was ordered to leave Seychelles on 27 January 1996. Having known all these circumstances, if he had genuinely married her, though I find otherwise, he cannot now complain against the immigration laws for the inescapable, draconian consequences of his deliberate act or choice. Of course, family should always be protected being the basic unit of the society, provided that unit is a genuine and lawful union of members under the same roof. Nevertheless, the laws of the country should be protected still more as it involves the interest of the entire society. No one can be allowed to flout the immigration laws for any reason whatsoever.

Is the decision irrational or unreasonable?

In the final analysis:

- (a) It is evident that the applicant had been authorised to remain within Seychelles until her visitor's permit expired on 15 January 1996. In fact, she had no authorisation to remain beyond that expiry date in

terms of section 16(5) of the Decree.

- (b) As from 16 January 1996 the Applicant became ipso jure a prohibited immigrant. Still she continued to stay in the country applying several delay tactics and dubious means.
- (c) When the applicant was a prohibited immigrant in Seychelles she married Mr Contoret knowing - at the least - that she had no permit to continue her stay in Seychelles.
- (d) By a letter dated 11 December 1996, Mr Contoret withdrew his guarantee he had furnished for the applicant's permit. This resulted in the applicant likely becoming a charge on the Republic.
- (e) The applicant was given first notice in mid December 1995 stating that her permit, which expired on 17 December 1995, would not be renewed. However, she simply ignored the notice and was buying time for no plausible reason.
- (f) In the circumstances, one can reasonably and safely infer that the sudden marriage with Mr Contoret at the time when she was about to be deported is undoubtedly a ploy intended to defeat the immigration orders and to circumvent the immigration laws.
- (g) The complaint of Mr Contoret against the applicant about her association with people of questionable character and the alleged drug use and the photographs cannot be given much weight on their own. In any event, the fact remains that the respondent did not revoke or refuse any permit to the applicant on this ground. At any rate, there is no evidence on record to show that applicant was required to leave Seychelles because of this reason.
- (h) The dependant's permit was also refused to the applicant who was obviously a prohibited immigrant at that time.
- (i) The applicant had no other legal status to remain in the Republic.
- (j) Any person who fails to comply with any notice issued to him or her under this Decree shall be guilty of an offence under section 28(1)(i) of the Decree.

In the circumstances, what is the immigration authority expected to do legally and reasonably? Undoubtedly they should require the applicant to leave the Republic. This is exactly what has happened in this case. In view of all the above and having regard to all the relevant circumstances which existed then, I find the decision of the respondent contained in its letter dated 19 February 1996 requiring the applicant to leave Seychelles on or before 28 February 1996 is not irrational or unreasonable. Having

examined the decision in question in the light of *Wednesbury* principles, I am of the view that the respondent has not taken into account any matter that ought not to be taken into account or disregarded matters that ought to be taken into account when it decided that the applicant should leave Seychelles on or before the stipulated date. Therefore, I find the answer to the fundamental question is in the negative. That is that the decision of the respondent in this matter is not tainted with irrationality or unreasonableness and so cannot be faulted.

In my final analysis, in the light of Lord Diplock's speech (*supra*) this Court can only interfere if the decision was illegal, irrational or improper and the like. In my judgment it is not shown to be any of those things. Therefore, I decline to grant the writs sought by the applicant in this matter. The application is accordingly dismissed.

There will be no order for costs.

Record: Civil Side No 58 of 1996