

CHIO v TAVE

(2011) SLR 157

F Ally for the petitioners
S Rouillon for the respondents

Ruling delivered on 10 June 2011 by

RENAUD J: This is an application for the exercise of supervisory jurisdiction under rule 12(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunal and Adjudicating Authorities) Rules, entered by the petitioners on 21 March 2006.

The petitioners are represented by their attorney and agent Mrs Rosita Parcou of Beau Vallon, Mahe, Seychelles who deponed in the affidavit in support of the petition that the facts contained in the petition are true and correct.

Petitioners' Allegations

The petitioners are husband and wife. They are Filipino nationals presently domiciled and resident in Philippines.

The first petitioner was resident and gainfully employed in Seychelles as wine master with one Lise Church who was trading as SeyVine, under the gainful occupation permit issued by the Immigration Division of Seychelles on 4 August 2005, and the second petitioner was the first petitioner's dependent who was residing in Seychelles at the material time.

The first respondent is and was at all material times the Director-General of Immigration who is responsible for the administration of the Immigration Decree and is in charge of the immigration officer at the Immigration Division.

By letter dated 21 December 2005, Mrs Lise Church terminated the first petitioner's employment. That letter was delivered to the first petitioner by one Mr Jean-Claude Adrienne of the Ministry of Foreign Affairs on 30 December 2005, together with air tickets for the petitioners to leave Seychelles for Manila the next day (instead of Zamboanga City, from where they originate). When they protested, Mr Jean-Claude Adrienne allegedly threatened them with detention and deportation by the immigration officer.

On 29 December 2005, the first petitioner had lodged his grievance at the Department of Employment against the termination of his employment as he considered his termination unlawful, unjustified and unfair.

Immediately after the first petitioner had lodged his grievance at the Department of Employment he went to the Immigration Office and applied for permission to stay in Seychelles until his grievance was heard or until relatives, who were on holiday in South Africa, returned to Seychelles.

On or about 5 January 2006 the petitioners were given notices that they had been declared prohibited immigrants under the Immigration Decree for reason that their gainful occupation permits had been revoked and they were given 48 hours to leave Seychelles.

Upon receipt of the notices, they refused to leave Seychelles until the first petitioner's grievance was heard or until they were given air tickets to their native town of Zamboanga City rather than to Manila.

As a result of the petitioner's refusal they were taken to the Immigration Office and forced to leave the country. They asked the immigration officer for permission to retain the services of legal counsel and to appeal to the second respondent against the said notices but they were allegedly denied such rights and an opportunity to do so.

As a result of their refusal to leave Seychelles the petitioners were detained at the police station until 12 January 2006, when they were taken to the airport by the police and forced into Qatar Airways to Manila via Dubai.

In view of the denial of opportunity to make representations to the Minister responsible for immigration against the said notice within the time limit prescribed by law the petitioners on 13 February 2006 appealed to the second respondent to give them leave or entertain their representations out of time and to reverse the decision, declaring them prohibited immigrants, which to date the second respondent has not decided.

The petitioners averred that the decisions to revoke their permits and to declare them prohibited immigrants was therefore null and void, unjustified, illegal and/or unreasonable and they were reached in a procedurally improper manner.

The petitioners further averred that up to the date of entering their petition, the second respondent has failed to take a decision with regard to their appeal to him referred to above.

The petitioners averred that the petition is made in good faith and they have sufficient interest in the matter as they are personally aggrieved by the aforesaid decisions or failure to decide their appeal.

The petitioners are, therefore, desirous of having a writ of certiorari quashing the respondent's said revocation of the permits and the first respondent's declaration of the petitioners as prohibited immigrants of 5 January 2006 or a writ of mandamus compelling the second respondent to decide their appeal.

Prayers of the Petitioners

The petitioners prayed this Court as follows:

- i. To grant the petitioner leave to proceed with this petition;

- ii. To direct respondent to disclose to the petitioner all the documents relating and incidental to the revocation of their permits, their declaration as prohibited immigrants and their appeal to the second respondent; and
- iii. To issue a writ of certiorari quashing the decision revoking their permits;
- iv. To issue a writ of certiorari quashing the decision dated 5 January 2006, declaring the petitioners as prohibited immigrants; or
- v. To issue a writ of mandamus compelling the second respondent to declare the petitioners' appeal to him of 13 February 2006.

Leave to Proceed

The Court considered the petition and the affidavit of the petitioners and granted leave for this petition to proceed.

The Court also directed the respondent to disclose to the petitioner all the documents relating and incidental to the revocation of their permits, their declaration as prohibited immigrants and their appeal to the second respondent. The respondents obliged by disclosing the documents as ordered by the Court.

Objections of Respondents

The respondents objected to the petition and raised four pleas *in limine litis*, two points of which they later abandoned and maintained only the following two:

1. The acts, matter or thing done or omitted to be done or purported to be done, giving rise to the plaint in this matter was done or omitted to be done or purported to be done in good faith in the performance or exercise or the intended performance or exercise of a duty or power conferred by or under the Immigration Decree and therefore this suit or legal proceedings has been wrongly or unlawfully instituted and has to be struck off.
2. The petition is frivolous and vexatious and has to be struck off in that it is not supported by the admissible evidence and at any rate the evidence in support is not on a standard acceptable in law.

On the merits, the respondents denied all and in singular the several averments contained in the petition save and except those which are specifically admitted.

The respondents replied that they have no knowledge of the averments found in the opening paragraph of the petition which refers to the fact that Rosita Parcou is the attorney and agent of the petitioners and accordingly put the petitioner to strict proof of the averments found in this paragraph.

In further answer the respondents averred that in the event that Rosita Parcou is the agent and attorney of the petitioners, Mrs Rosita Parcou can only act for and on behalf of the petitioners in matters which are allowable by law. Accordingly, the respondents objected to all and any averments found in the petition of which Rosita Parcou has no personal knowledge.

The respondents averred that the validity of the first petitioner's gainful occupation permit was from 15 August 2005 to 14 August 2006.

The respondent also averred that the Immigration Division received a letter on 20 December 2005 dated 20 December 2005 from Mrs Lise Church of SeyVine, the content of which purports to terminate the first petitioner's employment on the ground of misconduct.

The respondents further averred that they have no knowledge of the fact that the termination letter and the air tickets were served upon the first petitioner and the second petitioner by Jean-Claude Adrienne of the Ministry of Foreign Affairs and the fact and circumstances surrounding this service and at any rate averred that service of such kind of letters and documents does not form part of their statutory obligations or duties.

The respondents have no knowledge of the fact that the air tickets were served for the petitioners to leave Seychelles the next day. The respondents therefore put the petitioners to strict proof of these averments.

The respondents have no knowledge in respect of the justification, legality or fairness of the termination of employment of the first petitioner.

The first respondent averred that Mr Brian Julie on behalf of the first petitioner only wrote a letter to the first petitioner and informed him that he had filed a grievance procedure under the Employment Act with the Ministry of Economic Planning and Employment on behalf of the first petitioner and that he wanted this case to be heard before the first petitioner left the country and if favour could be granted for him to stay in Seychelles in the meanwhile. At any rate it is averred that by that time the first respondent had already written the letter to the first petitioner.

The respondents averred that on 29 December 2005 a representative of the first respondent had already written to the first petitioner and had informed him that his gainful occupation permit had been cancelled and that the first petitioner and the second petitioner had no valid status to reside in Seychelles and that as the petitioners had refused to leave the country as per their ex-employee air ticket and that they were in breach of the immigration laws of the Seychelles and as such had rendered themselves prohibited immigrants and that they were to leave Seychelles by 31 January 2005. The notice which the petitioners referred to therefore was not the first notice to be issued on the petitioners.

In further answer, the respondents averred that the said letter and notice were served upon the petitioners in accordance with the provision of the law and the respondents averred that according to section 19(l)(d) of the Immigration Decree, any person in Seychelles in respect of whom a permit under the Decree has been revoked or has expired is considered a prohibited immigrant and can be notified to leave the Seychelles jurisdiction within a required period.

The respondents denied that the petitioners refused to leave Seychelles because the air ticket was issued to Zambouanga City rather than to Manila City and further

averred that this refusal was at any rate unreasonable given that Manila is the most accessible destination in the Philippines.

The respondents averred that upon the petitioners refusing to leave the country as per the notice declaring them prohibited immigrants, they were both detained at the Central Police Station pending further arrangement to reschedule their departure with the airline in accordance with section 20(4) of the Immigration Decree.

The respondents further denied that the petitioners were denied rights to retain the services of counsel or to appeal to the second respondent whilst in custody. The respondents admitted that the petitioners were detained up to 12 January 2006 and left Seychelles on Qatar Airways bound for Manila via Doha, and the respondents strictly denied that they were forced into the aircraft.

The respondents admitted that the petitioners through their counsel wrote to the second respondent in order to be given leave or entertain their representation out of time and to revoke the decision declaring them prohibited immigrants.

The respondents averred that in law there was no obligation for the petitioners to have been heard or given any opportunity to be heard before their permits were revoked.

The respondents averred that the decision to revoke the permits of the petitioners and to declare them prohibited immigrants is therefore proper, justified, legal and reasonable and were arrived at in a procedurally correct manner.

The respondents averred that the second respondent was denied the opportunity of making a decision with regard to the petitioners' appeal, by the petitioners filing of this petition in Court.

The respondents averred that this Court should not issue any writ of certiorari quashing the decision to revoke the gainful occupation permit and the first respondent's declaration of the petitioners as prohibited immigrants and the Court should not issue a writ of mandamus compelling the second respondent decide their appeal, this for reasons which appears in this objection.

The objections of the respondents were supported by an affidavit of facts deponed by the Director-General of the Immigration Division, Mr Ronald Fock Tave.

Submissions of Petitioners

Mr F Ally counsel for the petitioners, in his final submissions to Court summarised that the petitioners were Philippines nationals who were working in Seychelles under a contract of employment with "SeyVine". The first petitioner was employed as a wine master and second petitioner was the wife of the first petitioner and she was the first petitioner's dependent. The employment was terminated by the employer and as a result a grievance was lodged with the Ministry responsible for employment. The petitioners asked the Ministry for Immigration to allow them to remain in Seychelles until the conclusion of their grievance and that was refused by

the Immigration Department. They were then declared prohibited immigrants, detained and deported from Seychelles.

The petitioners claimed that the first respondent denied them the opportunity to make representation to the Minister responsible for Immigration against the notice. They alleged that the revoking of their gainful occupation permit (GOP) and making them prohibited immigrants (PI) was therefore null, unjustified, illegal, and unreasonable and were reached in a procedurally improper manner.

Counsel for the petitioners submitted that it is established under the Constitution and rules provided for the exercise of the supervisory jurisdiction by the Supreme Court over tribunals, adjudicating authorities and other bodies. He added that in this case, the decision of the Director of the Immigration, or the President of the Republic acting as the Minister holding the portfolio for Immigration, is subject to be supervised by this Court.

Counsel for the petitioners also submitted that under part 2(ii)(a) of Schedule 1 of the Employment Act provision is made for cases where the contract of employment of a non-Seychellois is terminated. Special provisions are clearly set out relating to non-Seychellois workers and it goes on to set out exactly how a grievance should be heard within the time limit, that it should be disposed off, and even makes it the obligation of the employer to bear the cost of accommodation and also feed the worker during the intervening period.

Counsel for the petitioners further submitted that a public officer should know and even if it was not in the law, he is expected to give a non-Seychellois worker, whose contract of employment has been terminated, the right as any other worker to go before the Ministry of Employment and to lodge his grievance and to have his grievance heard, and for him to be able to get redress from the grievance. When an employer simply terminates the employment of a worker as in this case, the Director of Immigration gives him a time limit to leave the country, and makes him a prohibited immigrant, counsel for the petitioners argued it becomes an abuse of power, it becomes a improper procedure, the person has no right to be heard. Counsel for the petitioners further argued that at least the first petitioner should have been given the opportunity to make representations before the Director-General of Immigration as to the status of his case. That could not have happened under our present Constitution, as we cannot simply give somebody a GOP to work in this country and then at the caprice of the employer, the Immigration Office simply rubber-stamped a letter of termination of employment of the worker and simply throw the worker out of the country without the right to seek redress. According to counsel for the petitioners this is a practice that should stop and he cited the case of *Timonina Pierre v Director General of Immigration* (2008) SLR 251 in which it has been set out very clearly that when a person has a GOP, there is the expectation that he will be living in Seychelles until the end of his contract.

He added that if you terminate his contract of employment during the period that he is given a permit to reside in Seychelles and work in Seychelles, at least he should be given the right to take his case to the appropriate body; otherwise it defeats the whole purpose of natural justice for the immigration to be used by employers simply to throw a person who is a non-Seychellois worker out of this country without any

redress, without any possibility to challenge the righteousness of the decision and for the employer to evade their obligation, if necessary, to pay their workers their dues under the contract of employment and also under the law.

Counsel for the petitioners added that under all the grounds for judicial review, there is to a large extent the issue of legitimate expectation. This is an element which has been brought into administrative law – that everyone has a legitimate expectation that he/she will be consulted in many situations and he added that in fact in three cases in particular - *Smith v Sundry of State for Home Affairs*, *Cinnamon v British Airport Authority*[1980] 2 All ER 368, *Mackins v Onslow Felli Fane* [1978] 3 All ER 211, *Council of Legal Service Union v Minister of Civil Service* [1985] AC 374 (*GCHU case*) where the House of Lords made it very clear that one may have expectation of prior consultation, another may be an expectation of allowing time to make representations especially where the aggrieved party is seeking redress as in this case.

According to counsel for the petitioners, in this case what Mr and Mrs Chio were simply doing was persuading the Immigration Department saying we have a grievance, we are here under a gainful employment permit at least allow us to be heard. You should not revoke our permit, you should have consulted us before revoking our permit or at least extend our permit or give us a specific permit for us to reside in the country/or for us to take our case further.

This, according to counsel for the petitioners, is a legitimate expectation that the petitioners wanted. He added that in fact very often it is the ground for judicial review that the decision was unreasonable. He said that Lord Diplock in the *GCHU case* has qualified unreasonableness as what one does not expect from a reasonable tribunal and if one looks in the case, what is meant by the reasonableness that the petitioners expected from the authority, was at least to act in a manner that they should not have acted and that by giving them the opportunity for them to be heard by the Immigration Department to hear them and to give them the opportunity to get redress. A government department would not be acting reasonably if it denies a person who is present in the country his legal right to seek redress before the appropriate or competent court or tribunal. This would be a governmental authority or an officer of the government who would have taken leave of their senses; and when a public officer or a government authority takes leave of their senses, of their administrative senses and denies a person who is lawfully in Seychelles the right to seek redress and to take appropriate action, this decision would be unreasonable. The question one would ask on the reading of the petition is what the Immigration Department gains by not allowing the person the chance to seek redress before the appropriate and competent tribunal, or what did the officer of the government department loss or gain by ordering him to leave the country?

The employment was between two persons - Lise Church trading as SeyVine and the petitioners. What the petitioners simply wanted was to go before the competent officer and prosecute a claim for unjust termination of employment, nothing else.

Furthermore, counsel stated, an appeal was made to the second respondent and the second respondent failed to take a decision. This is simply a proper procedure that

they had to appeal and the second respondent also failed to take the appropriate decision on appeal.

The documents that have been provided set out the letter of termination. A letter written by Mr Julie who was representing the petitioners states that;

You are informed that the GOP expired next June 2006, he has filed a grievance with the Ministry of Economic Planning and Employment and he wants his case to be heard before he leaves the country. Grateful if you could grant him that favour in the interest of justice.

As can be seen, it was handwritten very quickly to plead to the Immigration Division saying please allow them to remain in the country and prosecute their claim. Unfortunately on 29 December they were given a notice that they were prohibited immigrants.

The ground for being made a prohibited immigrant is set out under section 19 of the Immigration Decree. It is clear, although the permit has been revoked, that what the petitioners are pleading in this petition is to say that the Director-General of Immigration abused his authority and did not give them a fair hearing by not allowing them to be heard - declaring them PI, and preventing them from taking their case at least to the Ministry of Employment. As a result the decision declaring them PI was unreasonable in the circumstances of this case and should be quashed.

Submissions of Respondents

Counsel for the respondents, Mr Govinden submitted that section 17 of the Immigration Decree deals with GOP. He said that that section provides that -

No person shall be gainfully occupy except and in accordance with GOP. Section 17 (2) prescribes the different conditions that the Director of Immigration may permit somebody to be gainfully employed; Section 17(3) the different considerations that should be brought to mind. Section 17 (4) the Minister may in any case either refuse or grant subject to such condition and limitation without assigning any reason for that decision. Section 17 (5) the Minister shall provide..... Section 17(8) gainful occupation permit..., Section 17 (9).

He added that, this is still law, unless and until it is abrogated by the Constitutional Court or amended by a subsequent Act.

He also quoted section 19(1)(d) of the Immigration Decree which sets out when a person becomes a PI. In this particular case, he said, the GOP of Mr Chio was revoked by the respondents. Having so revoked that permit, the petitioners had no right to reside or to be gainfully employed in the Republic of Seychelles. He submitted that the permit was revoked because the contract of employment upon which that GOP relied was terminated and no longer operational. It was *sub judice*. The law provides that upon termination of a contractual relationship there are other mechanisms that come into play. But this is subject to their legal status in the Republic of Seychelles - it is one's right to go and prosecute before any legal tribunal or foreign tribunal. If that person has to be lawfully present, the lawfulness of the

presence depends on the permit. Indeed in this particular case, it is not contested that Mr Chio did approach the authorities for a permit to stay to prosecute their grievance and this permission was refused.

According to him, under section 18 of the Immigration Decree, the Director of Immigration has an absolute discretion. The Decree says that the Director of Immigration may issue a temporary permit to a PI and shall do so, as the law allows him to do so, in his discretion.

It is also the submission of the respondents that this discretion, ie the refusal to issue a temporary visa, was reasonable and judicious in the circumstances. Any matter could and indeed have been dealt with very competently through counsel and representative of the two non-Seychellois. Mr Brian Julie wrote a letter to the respondent and Mr Julie could have properly and competently dealt with any grievance procedure in the absence of the two parties.

In this particular case the parties are before the Court and Mr Ally is actually pursuing the judicial review in the absence of the parties. So physical presence of the parties is a *sine qua non*, it is not an absolute, argued counsel for the respondents.

Counsel for the respondents submitted that in this particular case the gentleman sought an order from the Industrial Relations Tribunal and the Authority acted on the basis of that order. So the fact differs in this particular because there was no tribunal or court order, it was only them approaching the Authority.

Pleas *in Limine Litis*

The first plea *in limine litis* is under the provisions of section 27 of the Immigration Decree Cap 93.

Counsel for the respondents pointed out that in the petition the issue of bad faith is not raised and obviously it cannot be inferred or presumed; it has to be proved and to that extent the respondents are asking the Court, given that everything was done in good faith, that this action be dismissed.

The second objection is one based on evidence. Counsel for the respondents said that this petition is unsupported by admissible and competent evidence which is called for by the law. He said that the rules provide for a petition to be supported by an affidavit and it cannot be by any affidavit; it must be an affidavit of facts which this Court can readily rely upon as being admissible evidence. He added that in this particular case one person by the name of Rosita Parcou deposed that she lives at Beau Vallon, and she is the attorney and agent of the first and second petitioners. The respondents claimed not to know that. It is simply a one line averment to the extent that she is the attorney and agent. Does she mean that she is the attorney at law, or that she holds a power of attorney on behalf of the two persons, these are not known. If that was the case, at least, the least that she would have done was to attach a copy of this power of attorney to the petition, argued counsel for the respondents.

He added that even if she was an attorney at law, or she held a power of attorney, she would not have been a competent deponent to the affidavit because that does not in law allow her or permit her to testify on behalf of the principal. It allows her to do certain legal acts but not to depone or swear affidavits of oral evidence on behalf of the principal.

Response of Petitioners

Counsel for the petitioners responded and stated that one of the points is with regards to employment. He said that in fact when one looks at section 46 of the Employment Act it says, “contracts of employment shall bind the parties until lawful termination of the contract” and he added that lawful termination of the contract has been read and interpreted as the day the competent officer takes the decision. So, he said, the contract of employment is never terminated until the court orders or competent authority says, “I declare it terminated and the termination is justified”.

Counsel for the petitioners responded that the Civil Code makes it very clear that the power of attorney can be oral, can be written or can be an authentic document depending on the circumstances.

He further submitted that section 46 of the Employment Act says that – “workers under contract of continuous employment are entitled to benefits under this Act from the date of employment until lawful termination of the contract”. He added that the lawful termination of the contract has been interpreted as – “on the day that the competent officer takes the decision”, so it should be within the 42 days.

With regards to power of attorney, counsel for the petitioners submitted that it is very clear in the Civil Code under the law of agency as to what a power of attorney is. It can be written, it can be oral and it can be by way of authentic document. In certain circumstances for example a notary will verify the signature. Under the Land Registration Act, a power of attorney has to be in a prescribed order and verified by an attorney.

Counsel for the petitioners also addressed the other point brought forward, under section 27 of the Immigration Decree. This, he submitted, is a matter and is not a suit. It has to be a legal proceeding for damages and this is not what the matter is. The matter in issue is brought under the Constitution article 27 which says very clearly that the Supreme Court can supervise the decision of persons like the Director-General of Immigration.

Counsel argued that if the Supreme Court comes to supervise and the Director-General of the Immigration hides under section 27 of the Immigration Decree it would be a serious danger to our democracy and also to section 27. It will be a section of an ordinary law which is coming in the way as an obstacle to our Constitution, which the Constitution will never allow it to stand.

Ruling on the Pleas in *Limine Litis*

I will now address the first plea in *limine litis* raised by counsel for the respondents under section 27 of the Immigration Decree which states that:

No *suit* or other legal *proceedings for damages* shall be instituted in any court against Government or any immigration officer or any public officer for or on account of or in respect of any act, matter or thing done or omitted to be done or purported to be done, in good faith in the performance or exercise, or the intended performance or exercise, of a duty or power imposed or conferred by or under this Decree, and the provisions of this section shall extend to the protection from liability as aforesaid of any person deputed by delegation under any written law for the time being in force to perform or exercise any such duty or power. (emphasis mine)

It is trite that the present process before Court is neither a suit nor a legal proceeding for damages. It is no more than a petition inviting this Court to exercise its constitutional functions.

If the Supreme Court is exercising its constitutional supervisory jurisdiction over subordinate courts, tribunals and adjudicating authorities, and the Director-General of the Immigration seeks protection under the provision of section 27 of the Immigration Decree it would be constitutionally anomalous and absurd. If that is to be the case, it will be tantamount to a section of an ordinary law coming in the way of and as an obstacle to our Constitution and this cannot be allowed to stand.

For reasons stated above, I find no merit in this point of law which I accordingly dismiss.

The second plea *in limine litis* raised by counsel for the respondent is procedural, to the effect that the petition is frivolous and vexatious and has to be struck out in that it is not supported by admissible evidence and at any rate the evidence in support is not to a standard acceptable in law. This point arose out of Rule 2(1) of the Supreme Court (Supervisory Jurisdiction over Subordinate Courts, Tribunals and Adjudicating Authorities) Rules, 1995, which states:

An application to the Supreme Court for the purpose of Rule 1(2) shall be made by petition accompanied by an affidavit in support of the averments set out in the petition.

The affidavit in support of the petition is sworn by one Mrs Rosita Parcou who declared herself to be the attorney and agent of the petitioners and deponed that the statements set forth in the petition are true and correct.

I have had the benefit of reviewing all the relevant records of the respondents and the exhibits attached thereto. I have compared the contents of the affidavits of the first respondent to the one sworn to by the attorney and agent of the respondents and found no material factual differences between these two affidavits.

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.

I have, in this matter, accordingly relied on the record provided by the first respondent, hence the plea raised by the respondents is irrelevant and of no consequence in the determination of the matter in issue. In the circumstances I find no merit in the plea raised and proceed to accordingly dismiss it. I will now proceed to determine this matter on its merits.

On the Merits

In the case of *Yulia Timonina v Government of Seychelles and Immigration Officer* (2007) SLR 251, 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 The Ministry of National Development* (2010) SLR 66 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*; *Perrina 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 should 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 that 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 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 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) 143 ER 414.

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 ER 141).

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 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 hollowed 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".

The Seychelles Court of Appeal in the case of *Yulia Timonina v Government of Seychelles and The Migration Officer* (2007) SLR 251 provides further enlightenment on the matter. At [13] of its judgment the Seychelles Court of Appeal said:

Article 25(i) of the Constitution of the Republic of Seychelles provides for the freedom of movement. That freedom includes the "right not to be expelled from Seychelles". However, such right is subjected to restrictions as are prescribed by law necessary in a democratic society. Such a law would then provide (where necessary) for "the lawful removal of persons who are not citizens of Seychelles from Seychelles" (Article 25(3)(e)). (emphasis added)

Article 25(5) is equally important. It states:

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

The Seychelles Court of Appeal went on to find that such law anticipated by the Constitution has yet to be enacted. As a consequence thereof, there is no "competent authority" of the type constitutionally proposed to review such removal orders whenever issued. In the absence of such a law Cap 93 is deemed to be that law. However, Cap 93 was enacted prior to the 1993 Constitution, and lacks explicit reference to "competent authority". In fact the words "competent authority" are neither defined in the Constitution itself nor in Cap 93. The Court of Appeal concluded by stating that in the circumstances of that case, the Supreme Court effectively played the role of a "competent authority" as envisaged under the Constitution.

I am here echoing the Seychelles Court of Appeal when I say that the constitutional provisions would speak in general terms of the matter while specific provisions of an enactment would be more elaborate and go to the nitty gritty of the issue to be covered.

Article 25(3) of the Constitution of Seychelles provides grounds under which a person may be deported from Seychelles - these include:

- (a) in the interest of defence, public safety, public order, public morality or public health;
- (b) for protecting the rights and freedoms of other persons;
- (c) for the prevention of a crime or compliance with an order of a court;
- (d) for extradition of persons from Seychelles; or
- (e) for lawful removal of persons who are not citizens of Seychelles from Seychelles.

The Immigration Decree, Cap 93, on the other hand, provides the following grounds for deportation at section 19(1):

The following persons not being citizens of Seychelles are prohibited immigrants -

- (i) any person who is infected or inflicted with or is a carrier of a prescribed disease ... capable of infecting any other persons with such a disease or of transmitting to him such disease;
- (ii) any prostitute...

- (iii) any person who under any law in force at the time has been deported or removed from, required to leave or prohibited from entering or remaining within Seychelles;
- (iv) any person in Seychelles in respect of whom a permit under this Decree has been revoked or has expired;
- (v) any person who
 - (i) likely to become a charge on the Republic...
 - (ii) has contravened any provision of this Decree...
 - (iii) has made false representation or concealed any information from an immigration officer which is relevant to his entry into or presence in Seychelles;
- (vi)
- (vii)
- (h)
- (i) Any person whose presence in Seychelles is declared in writing by the Minister to be inimical to the public interest.

Despite the provisions of Cap 93 as enunciated above, it remains that article 25(3) of the Constitution binds the respondents to give reasons so that the said ground is substantiated. This was not the case in so far as the petitioners are concerned. It is the deportees ie the petitioners who need to know and understand the reason(s) for their deportation. I have no doubt that in this case the petitioners were not afforded that opportunity. So I find.

Section 20(2) of Cap 93 requires that a notice of prohibited immigrant shall specify in relation to the persons on whom it is served, the following:

- (a) The reason why he is considered to be a prohibited immigrant;
- (b) The period within which he is required to leave Seychelles; and
- (c) The manner and route by which he shall travel in leaving Seychelles.

Having found that no sufficient reason was afforded to the petitioners, the requirement under section 19(1)(i) of Cap 93 were therefore not fully complied with. Accordingly, I quash the decision of the first respondent for non-compliance with section 19(1)(i) of Cap 93.

The facts of the present case indicate that the decision arrived at by the Director-General of Immigration is fraught with procedural impropriety as he failed to give an opportunity to the petitioners to present their case before declaring them prohibited immigrants.

Conclusions

It is my considered judgment that the action of the first respondent in declaring the petitioners PI and ordering their remand at the police station and from there taken onto a plane, denied the petitioners the opportunity to make representation to the Minister responsible for Immigration against the notice. I believe that a public officer should know and even if that was not in the law, that he is reasonably expected to

give a non-Seychellois worker whose contract of employment has been terminated the right and the opportunity as any other worker, to go before the Ministry of Employment and to lodge his grievance and to have his grievance heard and concluded before he is thrown out of the country as a PI.

If an employer terminates the contract of employment of a non-Seychellois worker during the period that he had been given a GOP at the request of that employer to reside and work in Seychelles, at least that worker should be given the right and the opportunity to take up his grievance to the appropriate body. It is obvious that if that course of action is not followed it would defeat the whole purpose of natural justice. Employers should not be allowed to throw out of this country a non-Seychellois worker without affording that worker any possibility to challenge the righteousness of the decision. In such case an employer may evade its obligation to pay their workers their dues under the contract of employment and also under the law. Hence the Immigration Authority should take into consideration that it should not be allowed to be seen, as in this case, that it is assisting an employer to deprive a non-Seychellois worker his right to natural justice.

Indeed part 2(ii)(a) of Schedule 1 of the Employment Act provides that –

An employer who terminates a contract of employment of a non-Seychellois who has committed a serious disciplinary offence should notify the Chief Executive of the termination within 48 hours thereof and shall supply the Chief Executive with the relevant particulars, a non-Seychelles worker who is aggrieved by the termination may initiate the grievance procedure within 7 days of becoming aware of the grievance.

I also hold the considered view that it is inherent in all the grounds for judicial review that there is to a large extent the issue of legitimate expectation which is now part of modern administrative law. One such expectation is that he/she will be consulted in any situation where a serious decision is being taken in his/her regard.

In the cases cited by the petitioners - *Smith v Sundry of State for Home Affairs*, *Cinnamond v British Airport Authority*, *Mackins v Onslow Felli*, *Council of Legal Service Union v Minister of Civil Service*, the House of Lords made it very clear that one may have an expectation of prior consultation, another may be an expectation of allowing time to make representations especially where the aggrieved party is seeking redress, as it is in this case.

In the case of *Timonina Pierre v Director General of Immigration* it has been set out very clearly that when a person has a GOP, there is the expectation that he will be living in Seychelles until the end of his contract.

I note that indeed an appeal was made by the first petitioner to the second respondent and the second respondent failed to take a timely or any appropriate decision on that appeal.

The grounds for the Immigration Authority to declare a person a PI are set out in section 19 of the Immigration Decree. It is evident that the first petitioner was declared a PI under section 19(l)(d) of the Decree which states: "Any person in

Seychelles in respect of whom a permit under this Decree has been revoked or has expired.”

For the first petitioner to fall into the category envisaged by the provision of law quoted above, the Immigration Authority has to take a prior decision to revoke his GOP thus leaving him in a situation where he had no legal status to be in Seychelles.

The respondents admitted that indeed in this particular case, Mr Chio did approach the authorities for a permit to stay on in order to prosecute his grievance and this permission was refused.

The Immigration Authority appears to hold a misconceived view that it has an absolute discretion whether to grant a temporary visa when it revoked the GOP of the first petitioner. That misconception ought to be redressed and the correct approach is that such discretion ought to be exercised judiciously and reasonably otherwise it may be subject to judicial review.

What did not take place before the first petitioner landed in that situation was that the Immigration Authority failed to grant the first petitioner an opportunity to be heard. That action or omission on the part of the Immigration Authority amounts to a breach of natural justice. So, I find.

Orders

In the circumstances, this Court hereby:

- (1) Issues a writ of certiorari quashing the decision of the Principal Secretary, Department of Internal Affairs, Immigration Division as contained in a letter ref: I MM/7/1/1180/2005 dated 29 December 2005 signed by Mr Paul Didon, cancelling the gainful occupation permit of the first petitioner and the dependent's permit of the second petitioner.
- (2) I further issue a writ of certiorari quashing the decision of the immigration officer dated 5 January 2006, declaring the petitioners as prohibited immigrants.

I hereby issue a writ of mandamus compelling the second respondent to declare the petitioners' appeal to him of 13 February 2006.