

IN THE SUPREME COURT OF JAMAICA

IN THE FULL COURT

IN MISCELLANEOUS

SUIT NO. M 27 OF 1988

COR: THE HON. MR. JUSTICE MALCOLM J.
THE HON. MR. JUSTICE BINGHAM J.
THE HON. MR. JUSTICE GORDON J.

REGINA

v.

Minister of Labour and Employment

and

Ocean Textiles Limited Exparte
Roberto Agutaya and Godfredo Fernando
(on behalf of thirteen (13) fellow
employees of East Ocean Textiles Limited)

APPLICATION FOR ORDER OF CERTIORARI

Dennis Goffe and Donovan Jackson for the Applicants instructed by Myers, Fletcher and Gordon, Manton and Hart.

Patrick Robinson and David Henry instructed by the Director of State Proceedings for the Minister.

Robert Baugh watching on behalf of East Ocean Textiles Limited.

June 30; July 1 and 4 1988; and April 5 1989

BINGHAM J:

On July 4, 1988, following a hearing in this matter which lasted for some three days we granted the reliefs sought in the Motion applying for an Order of Certiorari and quashed the decision of the Honourable Minister of Labour made on May 16, 1988, cancelling the work permits of the two applicants and thirteen (13) of their colleagues employed in Jamaica by a company, East Ocean Textiles Limited. We also ordered costs in favour of the applicants and promised at that time to put our reasons into writing at a later date. This we now do.

The statement of the grounds upon which the reliefs were sought were that:

- "1. The work permits were cancelled without the applicants being given an opportunity of a hearing contrary to the rules of natural justice;
2. The only reason given by the Minister for his decision was that the applicants' employer had requested the cancellation;

3. The decision was communicated to the applicants' Attorneys-at-Law at a meeting called by the Minister for the ostensible purpose of mediating in the dispute between the applicants and their employer yet no attempt at conciliation was made and instead the Minister announced his decision;
4. The cancellation of the work permits and deportation will deprive the applicants and their thirteen (13) colleagues of remedies they are entitled to under Jamaican Law and which are expressly recognised in their employment contracts".

The affidavit of Roberto Agutaya, one of the applicants filed in support of the application sets out the facts and the circumstances leading up to the decision of the Minister which is now being challenged. In so far as there has been no response made by the Respondent, not only to this affidavit but to that deposed to by Godfredo Fernando another of the applicants and Donovan Jackson, the Attorney-at-Law who acted on behalf of the applicants in this matter, at the time that the Honourable Minister made his decision to cancel the work permits, these facts are not disputed.

The events leading up to the decision of the Honourable Minister on the uncontroverted facts set out in these affidavits disclose that the applicants and their thirteen (13) other colleagues are Fillipino Nationals who were up to May 1988 all employed to the company, Eastern Ocean Textiles Limited which operated from the "Free Zone" in Kingston and who were employed in various capacities.

These workers were all engaged by virtue of written contracts entered into with the company, East Ocean Textiles Limited, which contracts were for a period of two years, and are due to come to an end in April 1989.

Under a term of the contract entered into by each worker, (Article 14), "disputes arising from the contract were to be submitted to an appropriate and competent body or agency in Kingston, Jamaica in accordance with the Labour Laws of Jamaica."

Such a dispute arose in relation to the salary which these workers were actually receiving as against the salary contracted for. The workers contend that this act on the part of the company was in breach of their contracts of employment.

In order to protect their interests the workers banded themselves together into a body called "The Fillipino United Club". The applicants, Roberto Agutaya and

Godfredo Fernando were two of the executive members of this association being the President and Business Manager, respectively.

The question of 'shortpayment' of wages was taken up by the group by way of a complaint to the Phillipines office of Employment Administration in January 1988.

On May 7, 1988 the management of the company sought to transfer Roberto Agutaya to Hong Kong at short notice without any details as to his new assignment. When he requested particulars of this assignment none were furnished, but the company responded by a letter of dismissal directed to him on May 11, 1988. In this letter the applicant was informed that his services were being terminated and he was being offered a sum of US\$3,080 in settlement based on a monthly calculation of \$280, the sum which he was being actually paid, and which represented the total sum due for the remainder of the life of the contract.

This was followed by letters of dismissal, sent on May 14, 1988 to the Business Manager Godfredo Fernando and the other thirteen (13) employees associated with this application all of whom are coincidentally members of the Fillipino United Club.

The Business Manager, Fernando was offered three months salary in lieu of notice.

The group, following the directive to the President Roberto Agutaya, sought to obtain legal advice and following the dismissal letters their Attorneys-at-Law sought to take up the matter with the company.

A meeting between the representatives of the company and the Attorneys-at-Law for the aggrieved workers was arranged for May 16, 1988.

On Saturday May 15, there was a News Item on a local Radio Station which announced that a meeting aimed at attempting to resolve the matter would be held at the Ministry of Labour on Monday May 16. A News Item on the front page of the Daily Gleaner of that day captioned "Bid today to end Fillipino work crisis", confirmed the earlier radio announcement.

On Monday May 16, the Attorneys-at-Law representing the dismissed workers attended at the offices of the Ministry of Labour in accordance with the NewsItem. Also present were the representatives of the company.

The Honourable Minister met and had dialogue with the representatives of the company, but did not hold audience at the same time with the Attorneys-at-Law representing the 'dismissed workers'. They were told to wait as the Minister was

engaged in a meeting with the representatives of the company which meeting lasted up to 11 a.m. when the Attorneys-at-Law for the workers were eventually taken to the Minister's office where present were the Honourable Minister of Labour and a Mr. A. G. Irons, the Director of Industrial Relations.

At this meeting, the Attorneys-at-Law for the workers were not invited or allowed to make any representations or to put the workers case. They were advised by the Honourable Minister that "at the request of the employers the work permits of the 'dismissed workers' were being cancelled and that the Immigration Authorities' were being advised." This meeting with the Minister and the Attorneys-at-Law for the workers lasted for a mere fifteen minutes.

Following the meeting the Honourable Minister issued an official press release. It is of importance as it bears out in substance the Minister's decision which was conveyed to the Attorneys-at-Law for the workers when they were summoned to his office at 11 a.m. on May 16. It may be convenient to set out the entire contents of this documents. It stated that:

"Press Release

The Honourable J.A.G. Smith, Minister of Labour, met separately today at the Ministry of Labour with representatives of East Ocean Textiles Limited and Messrs. Gregory Reid and Donovan Jackson, Attorneys -at-Law of Myers, Fletcher & Gordon, Manton and Hart, representing Mr. Roberto Agutaya.

From the discussions it transpired that the only problem with Mr. Agutaya was one over the correct rate of pay. His contract with East Ocean stipulates a certain salary, while he contends that the rate of pay sanctioned by the Phillipine Overseas Employment Administration was of a higher rate.

One of the points arising out of the meetings was that East Ocean is in possession of an Affidavit signed by Mr. Agutaya in the Philippines agreeing to accept the lower rate. This matter will be the subject of further investigations by the Ministry.

The company today asked the Ministry of Labour to cancel the Work Permits of 14 supervisors whom they no longer employ. This has been done and the Immigration Authorities have been so advised.

Ministry of Labour
May 16, 1988"

It suffices to state that the contents of this Press Release bears out the incontrovertible facts as deposed to in the affidavits filed in support of this application.

It was following this Press Release that with the presence of the

'dismissed workers' and their right to remain in Jamaica now being placed in jeopardy by the Minister's act of cancellation of their work permits that this Motion was sought challenging the exercise by the Honourable Minister of his power to act in the manner that he did.

The Arguments:

Before we proceeded to hear the substantive arguments as to the merits of the application, our attention was engaged for almost two days in hearing a point taken in limine.

The main contention for the respondent in this regard was that as the contracts of employment were terminated by the employer the basis for the work permits had ceased to exist and having lost their life and force, the act of cancellation by the Honourable Minister was merely a formal exercise of his statutory powers under Section 7 of the Foreign Nationals and Commonwealth Citizens Act, in effect a mere "housekeeping exercise".

As the question of the continued existence of the contracts of employment is in the light of the purported acts on the part of the management of the company in seeking to unilaterally terminate these contracts, one which is presently the subject of pending litigation and in respect of which the question of whether these contracts were lawfully terminated or are in effect still extant, has yet to be determined, any argument which has as its basis the assumption that such a question does not fall to be resolved by the duly constituted Courts set up to determine such questions, must of necessity be fallacious and without any foundation being based upon an entirely false premise. Such justiciable matters are for the Courts not for the Honourable Minister to determine.

It was with this view in mind that we proceeded to over-rule the submissions in limine. Moreover, it is clear that by virtue of the facts disclosed in the affidavits filed in support of the Motion that the applicants are strongly contending that their contracts of employment are still in existence.

As no affidavits have been filed by the respondents in answer to the facts as set out in support of the Motion the sole question which properly engaged our attention, therefore, was as to whether the Honourable Minister when he acted as he did on May 16, 1988, in cancelling the work permits of the applicants and their other thirteen (13) colleagues, had a reasonable basis for so acting.

Does the Matter fall for Judicial Review?

The conduct on the Minister's part was one in which he sought to exercise his discretionary power under Section 7 of the Foreign Nationals and Commonwealth Citizens Act to cancel the work permits previously granted to the applicants by virtue of Section 4 of the Act.

It may be convenient at this stage to set out these sections.

Section 4 states:

- "1. An application for the grant of a work permit shall be addressed to the Minister, who may in his absolute discretion grant the permit either conditionally or without conditions or may refuse to grant it.
2. A work permit shall be in such form as the Minister may think fit and different forms of work permit may be issued as respects different classes of persons and as the circumstances require."

Section 7 enacts:

- " The Minister may in writing at any time vary or cancel a work permit."

On an examination of Section 4 of the Act it is clear that the Honourable Minister had very wide powers in determining whether to grant or refuse a work permit. Such an exercise being one which is based upon policy considerations are properly matters for the Executive Authority, this being the Honourable Minister and not the Courts to determine what is the appropriate action to take in respect of such matters.

As to his powers to cancel the same, however, when Section 7 is examined, it is equally clear that here the Minister's powers are not unfettered. The power here being of a discretionary nature, the manner of his exercise of this power, therefore, can be called into question and it is open for Judicial review as to whether such an exercise was or was not based upon reasonable grounds. The rules of natural justice also apply in determining as to whether in so acting, the Honourable Minister acted fairly and without procedural impropriety in effecting the cancellation of these work permits.

It is clear from the News Item on the radio station which received coverage in the Daily Gleaner of Monday May 16, 1988, that there was a meeting scheduled at the Ministry of Labour for that day having as its main purpose to

attempt to resolve the dispute between the company and the dismissed workers.

It is further clear from what transpired at the meeting and from the subsequent press release that the Honourable Minister met with the representatives of the company and heard their side of the matter.

It is further clear and, beyond question that he did not hear from the legal representatives acting on behalf of the dismissed workers. He merely summoned them in his presence to advise them as to his decision to cancel their work permits. In so acting the Honourable Minister acted unfairly and in clear breach of the principles of natural justice and in breach of the audi alteram partem rule in particular.

It is of some significance that the affidavits sworn by the applicants and their Attorneys, Donovan Jackson have not evoked the slightest response from the respondents. The Honourable Minister can be presumed, therefore, to have sought to rest his case for seeking to justify his decision upon it being that of an executive or ministerial order. It may be a timely reminder which bears repeating that such acts in so far as they relate to even prerogative orders do not exclude the power of the Courts to review the basis for the order.

The situation in this case in so far as the arguments for the respondent falls to be examined is further compounded by the fact that apart from the Press Release, the contents of which is fully supportive of the facts contained in the Affidavit of Donovan Jackson, there is nothing coming from the respondent countering the facts deposed to in the affidavits filed in support of the application.

In the light of these incontrovertible facts it would be idle to contend that when examined, ^{they} do not disclose what was clearly with respect to the conduct of the Honourable Minister, . . . amounted to a flagrant breach of the rules of natural justice in so far as it sought to deny the applicants of what was their undoubted right to a hearing before such extreme action was taken.

In this regard the case C.S.S.U. vs. Minister of Civil Service [1985] 1 A.C. 374 a decision of the House of Lords an authority on which both sides have sought to rely for support of their respective arguments, when examined, most of the English authorities cited by Counsel before us were reviewed. This is relevant to the instant case in so far as it recognised that the power of judicial review was not excluded on the basis that the act in question was that of the executive merely because it was carried out in pursuance of a power derived from a common law or prerogative rather

than a statutory source, as there was the same duty on the Minister's part to act fairly no matter what source the power was derived from. The case is, however distinguishable from the instant case in so far as:

1. The Court in that case was dealing with a situation in which the Prime Minister sought to justify her actions by claiming to have acted in the national interest.
2. The respondent sought to counter the facts deposed to in the affidavits filed in support of the Motion seeking relief by way of the prerogative Order of Certiorari by sworn affidavits.

In the instant case the only reason advanced by the Honourable Minister for acting as he did appears to me to be what one could extract from the Press Release and when the contents of that release is examined it is my opinion that far from seeking to justify his actions it lays bare his conduct amounting to a failure on his part to act fairly in arriving at the decision to which he came.

It seems almost inconceivable to believe that the Honourable Minister had due regard to the wishes of the employers while at the same time a total disregard for the interest of the workers.

Based upon the authorities cited and the clear wording of Section 7 of the relevant Act previously referred to, we were of the unanimous opinion that the Honourable Minister having heard from the representatives of the company was in duty bound to grant a hearing to the legal representatives of the dismissed workers before seeking to invoke his statutory powers to cancel their work permits.

Further we were also of the unanimous view that in so far as the Honourable Minister came to his decision without affording the applicants a hearing, **this** amounted to a procedural impropriety giving rise to the reliefs sought. See C.C.S.U. vs. Minister for Civil Service (referred to supra) at page 411 g - h per dictum of Lord Diplock following dicta in Criminal Injuries Compensation Board Ex Parte Lain [1967] 2 Q.B. 864.

"As respects "procedural propriety" I see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative. Such indeed was one of the ground that formed the subject matter of judicial review in Reg v. Criminal Injuries Compensation Board, Ex Parte Lain [1967] 2 Q.B. 864. Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure

will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made."

Although there were several other authorities referred to by both sides which sought to touch upon the power of the courts to review the exercise by a Minister of his discretionary powers; on the facts in this matter none of these authorities need be resorted to as the facts when examined clearly give rise to what was in effect on the Minister's part a flagrant breach of natural justice which per se gives rise to the Court's jurisdiction to review the matter.

Both on the grounds of the right of the applicants to a hearing, which they were denied as well as what on the facts amounted to a procedural impropriety, in the light of the interpretation to be placed upon Section 7 of the relevant Act the relief sought was granted with the consequential orders which followed therefrom.

GORDON J:

I have read and agree with the reasoned judgment of Bingham J. I wish to make but a short contribution.

The Minister's power to cancel a work permit is contained in Section 7 of the Foreign Nationals and Commonwealth Citizens (Employment) Act which simply states:

"The Minister may in writing at any time vary or cancel a work permit."

Section 10 of the same act goes on to provide : 10(1)

"The Minister may make regulations generally for giving effect to the provisions of this Act, and without prejudice to the generality of the foregoing may make regulations -

- (d) with respect to the surrender or cancellation of work permits and certificates issued by the Minister pursuant to subsection (7) of Section 3."

The power to grant a work permit is unfettered, the power to cancel cannot be perceived to be unfettered. Where there are regulations they would prescribe the method to be used by the Minister in exercising his power to cancel; where no regulations exist, and it was submitted that there were none in existence, then

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the audi alteram partem rule of natural justice must apply.

MALCOLM J

I agree.