

THE STATE

v

THE DIRECTOR OF IMMIGRATION

ex parte

FRANK ALBERT THOMAS

[HIGH COURT, 1993 (Fatiaki J), 26 February]

Revisional Jurisdiction

Immigration- revocation of residency permit- applicability of rules of natural justice- requirement for giving of reasons-Immigration Act (Cap. 88) Sections 8(1), 8(2), 13, 14, 18(1).

A residency permit was revoked before it expired. The High Court HELD: the applicant should have been given an opportunity to make representations before his permit was cancelled.

Cases cited:

Lloyd v. McMahon [1987] 1 A.C. 625

Salemi v. McKellar (No. 2) 137 C.L.R. 396

Schmidt v. Sec. of State for Home Affairs [1969] 2 Ch.D. 149

Judicial Review by the High Court.

S.P. Sharma for the Applicant

A. Cope for the Director of Immigration

Fatiaki J:

In this action the applicant seeks judicial review of 2 decisions taken against him firstly, by the Director of Immigration, on the 20th May 1991 revoking an earlier extension of the applicant's residency permit and then by the Minister of Immigration on the 15th of August 1991 dismissing an appeal by the applicant against the aforementioned decision.

The grounds upon which the review is sought are threefold, namely:

- (1) that in making their decisions the Minister and the Director of Immigration were actuated by extraneous considerations;
- (2) that they acted in a matter contrary to and in breach of the rules of natural justice; and
- (3) that the Director acted unreasonably, arbitrarily and irrationally in revoking the earlier decision extending the

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applicant's residency permit.

A It is necessary briefly to consider the facts of the case so far as they appear to be common ground between the parties and which I have taken from the admitted paragraphs of the applicant's founding affidavit dated the 28th of August 1991.

The applicant, a retired civil servant in his early to mid seventies and holding a British passport entered Fiji on the 21st of November 1987 on a visitor's permit valid for a month. His visitor's permit was extended several times thereafter and finally on the 15th of June 1988 the applicant was granted a residency permit valid for 3 years until the 2nd of June 1991.

B In early April 1991 prior to the expiration of his residency permit the applicant sought and obtained on the 11th of April an extension of his permit for a further three years.

C Then barely 5 weeks later in a letter dated the 20th of May 1991 the applicant was advised that the extension of his residency permit earlier granted on the 11th of April 1991 had been reconsidered and was effectively withdrawn. By the same letter the applicant was "advised to make arrangements to leave Fiji on or before 02.06.91" (i.e. within 2 weeks).

D The applicant on receiving the Director's letter lodged an appeal through his then solicitors with the Minister of Immigration and by letter dated the 15th of August 1991 the applicant was advised that his appeal was unsuccessful and he was now given "seven (7) days to leave the country".

E In neither letter has any reason (s) been proffered for the respective decisions but it is clear that between the grant of the extension of the applicant's residency permit on the 11th of April 1991 and its revocation on the 20th of May 1991 something occurred to cause not only a reconsideration of the extension but also its revocation or withdrawal.

F What that something was is not entirely clear but annexed to the primary affidavit opposing this application is an affidavit dated the 30th of April 1991 sworn by the applicant's own daughter-in-law deposing to what can only be described as very serious misconduct on the part of the applicant both in England and Fiji. These allegations are categorically denied by the applicant in a supplementary affidavit filed by him on the 18th of June 1992.

G The Principal Immigration Officer however has deposed that the allegations of misconduct "were not the basis of any decision made to withdraw the applicant's permit on 11th April 1991" and need not concern the Court any further.

Indeed in the very next paragraph (23) of the Principal Immigration Officer's affidavit the reason(s) for the withdrawal of the applicant's residency permit are set out. These may be broadly described as being a failure on the applicant's part to furnish truthful information in his original application for a residency

permit and his then solicitor's covering letter dated 6th May 1988.

In particular the affidavit sets out inter alia:

"23. In the instant case the Department conducted enquiries which revealed that Villa 335 at Pacific Harbour, Deuba (the address given in the Applicant's application (form) belonged to one Katalina Rakai. The Department was further advised by the Administration Office at Deuba that Villa 336 belonged to one Howard Richard Thomas who I believe is the son of the Applicant ... The Applicant had on 19.5.88 informed the Department that he was in the process of buying Villa 336 at Pacific Harbour for \$28,500 and the transaction was done by Bale and Associates ..."

Before considering more closely the reason given by the Department for the revocation of the applicant's residency permit it is convenient to deal at this stage with two submissions made by counsel for the applicant. These were, firstly, that the applicant was entitled to be told why the earlier extension of his permit was being withdrawn and secondly, that the applicant was entitled to be notified of any adverse material and be given an opportunity of refuting it.

In opposing both submissions learned counsel for the respondents argued that there was no duty either by statute or at common law requiring reasons to be given in a case such as this, nor were the rules of natural justice applicable in this instance.

In Lloyd v. McMahon [1987] 1 A.C. 625 Lord Bridge said of the rules of natural justice at p. 702:

"... the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expressed the underlying concept, what the requirements of fairness demand when any body domestic, administrative or judicial has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the Courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional safeguards as will ensure the attainment of fairness."

A It is necessary to consider the statutory context in which this present action finds itself that is the Immigration Act (Cap. 88) which in terms seeks to restrict and control the entry of persons into Fiji.

B In particular Section 6 is a general prohibition against the entry of any person into Fiji "... without being in possession of a valid permit lawfully issued to him under the provisions of (the) Act" and Section 8(1) empowers the Permanent Secretary "to issue a permit in the appropriate form to any person entitling him to enter and reside ... in Fiji". By Subsection (2) he "... may at his discretion extend a permit" (to enter and reside).

Then Section 13 reaffirms the Permanent Secretary's discretion to grant and to extend any permits issued under the Act.

C Further Section 14 makes it unlawful "... for any person to remain in Fiji after the expirations or cancellation of any permit issued to ... him under the provisions of (the) Act ..." and finally Section 18(1) provides:

D "Any person aggrieved by a decision of an immigration officer under the provisions of this Act may appeal therefrom by petition in writing to the Minister who may, in his discretion, uphold, vary or revoke such decision ..." and

E By Subsection (2) the Permanent Secretary may grant an appellant an "interim permit" allowing him to remain in Fiji pending the determination of his appeal or Court action.

F In my view bearing in mind the above provisions and the general scheme and purpose of the Immigration Act and the nature of the decision an immigration officer is often called upon to make sometimes on the spur of the moment, for example to grant or refuse an entry permit to a visitor on arrival at an airport or port of entry, I am satisfied that such a decision is an administrative one to which the general propositions enunciated by Barwick C.J. in Salemi v. McKellar (No. 2) 137 C.L.R. 396 applies, when he said at p. 402:

G "The Parliament in this legislation is dealing with a national interest of paramount importance, namely, the composition of the nation determining who shall enter and who shall stay.. The decision of those questions is not hedged, nor can it be hedged, around with principles of the kind that the judiciary are wont to consider : nor is it necessary, or convenient, or indeed desirable that reasons be assigned for the determination of those questions. The Act has provided the mechanism by which the particular application of its provisions will

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ex-parte Frank Albert Thomas

be effected. It gives an officer authority to grant an entry permit. But though an officer may grant an entry permit and has a discretion in that respect in the sense that he is not obliged to make the grant he will be bound, in my opinion. To act in its exercise in accordance with government policy. He does not have a discretion to be exercised upon principles dictated by the reasoning of Courts of law. The policies of government in a matter such as migration into the country and inclusion in its people cannot, in my opinion, be circumscribed and confined by any such limitations upon the officer's authority to grant or refuse an entry permit."

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Having said that however the particular circumstances in his case are somewhat different from those pertaining before an immigration officer at a port of entry or airport. Here, the applicant had been permitted to enter the country and had had his visitors' permit extended on several occasions before he was granted a residency permit.

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Furthermore his residency permit had been extended and in my view he had a reasonable expectation that he would be permitted to stay until its expiry or if it was cancelled before its expiry that he would, at the very least, be given the opportunity to make representations to the relevant authorities prior to its cancellation.

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It is noteworthy that in similar circumstances Denning M.R. said of an alien in Schmidt v. Sec. of State for Home Affairs [1969] 2 Ch.D. 149 at p. 171:

"If his permit is revoked before the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time."

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In the circumstances I have no hesitation in saying that whilst generally speaking immigration officers are not bound by the rules of natural justice and need not give reasons for their decisions, nevertheless, in the particular circumstances of this case there has undoubtedly been a breach of the rules of natural justice in the revocation or cancellation of the applicant's residency permit and accordingly certiorari shall issue to the Director of Immigration quashing his decision contained in his letter of the 20th of May 1991.

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Having thus quashed the decision of the Director of Immigration what then ought this Court to do? Counsel for the applicant forcefully argues that no useful purpose would be served in returning the matter to the Director for his consideration in view of the applicant's categorical denials contained in his supplementary affidavit.

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A I cannot agree. It is no part of this Court's function to seek to usurp the statutory functions of the Director of Immigration nor might I add would it be in the interests of the proper administration of the Act for it to do so. The discretion to grant or refuse a permit under the Immigration Act is vested exclusively in the Director and Minister of Immigration and this Court would do well to restrict itself to an examination of the decision-making processes and procedures adopted by them whilst leaving the ultimate decision to grant or refuse a permit under the Act to them.

B In this latter regard it may be noted that the applicant's supplementary affidavit has not been considered by the Director and further the applicant's denials are only very generally worded in so far as they relate to the provision of "true information regarding the purchase of a house". The allegation made as earlier set out refers to a specific date ("19/5/88"); specific information namely in the process of buying; a specified villa ("No. 336") through a named firm of solicitors ("Bale and Associates") and for a specified amount (\$28,500).

C The applicant's sworn denial is clearly inadequate in the circumstances to dispel the not unreasonable suspicion that he was less than candid in the information he furnished in his original application for a residency permit.

D Needless to say an applicant for a permit under the Immigration Act who submits false information in his application cannot be heard to complain if departmental investigations subsequently confirms the falsity of the information provided. Furthermore in my view such an applicant can have no legitimate expectation to be heard on the original grant or refusal of a permit under the Act.

E The cancellation or withdrawal of a subsisting permit however is a different matter for which this Court has said an applicant ought to be given an opportunity of making representations.

F For the sake of completeness I would say that the decision of the Minister of Immigration on an appeal under Section 18 of the Immigration Act need not be taken after an oral hearing nor ought his discretion to be fettered by a requirement that he furnish reasons for his decision.

G The decision of this Court in effect is that the Director of Immigration is required to give the applicant an opportunity to make any representations he may wish to make regarding the proposed cancellation of his residency permit and then and only then to take a decision in the matter after considering such representations.

(Motion allowed)