BARRY JACKSON v ATTORNEY-GENERAL(1979) Z.R. 167 (H.C.)

HIGH COURT

SAKALA, J.

24TH MAY, 1979

1979/HP/636

Flynote

Civil procedure - Certiorari - Whether available against the decision of the Minister pursuant to s. 22 (2) of the Immigration and Deportation Act.

Immigration and deportation-deportation - Section 22 (2) of Immigration and Deportation Act - Minister's decision that applicant's presence "inimical" to public interest - Whether courts can interfere.

Headnote

This was an application for certiorari to remove into the High Court and quash the decision of the Minister by which he issued the applicant with a deportation order on the ground that his presence in Zambia was inimical to public interest in terms of s. 22 (2) of the Immigration and Deportation Act. The applicant appealed to the Minister and his appeal was rejected.

In his application he contended that he should have been given a right to be heard, and further that in rejecting his appeal the Minister acted judicially and as such acted arbitrarily and contrary to the rules of natural justice. The respondent contended that under s. 22 (2) the Minister was not required to give reasons for his decision or give the applicant a hearing.

Held:

(i) The High Court has jurisdiction to grant orders of certiorari against certain decisions of Ministers, public bodies or officers exercising powers which involve the duty to decide judicially.

(ii) It is not for the courts to decide what is inimical to public interest, but for the Minister, and when making an order under s. 22 (2) he is not a judicial officer but he acts administratively. He is an executive officer bound to act in the public interest, and it is left to his judgment whether upon the facts a non - Zambian may be declared inimical to the public interest. The question of an inquiry of affording the party an opportunity to be heard does not therefore arise.

(iii) Certiorari cannot issue against an order made under that section.

(iv) A person declared inimical under s. 22 (2) is only entitled to be heard by way of written representations, and is not entitled to be given reasons for rejection of his representation.

Cases referred to:

(1) R. v Electricity Commissioners, [1924] 1 K.B. 171

(2) R. v Manchester Legal Aid Committee, ex parte Brand, [1952] 1 All E.R. 480

(3) R. v Criminal Injuries Compensation Board, ex parte Lain, [1967] 2 All E.R. 770

(4) R. v Governor of Brixton Prison, ex parte Soblen, [1963] 2 Q.B. 243

(5) Rex v Leman Street Police Station Inspector, ex parte Venicoff, [1920] 1 K.B. 72

Legislation referred to:
Immigration and Deportation Act, Cap. 122, ss. 22 (2) and 24.

For the applicant: S. M. Patel, Solly Patel Hamir & Lawrence.
For the respondent: K.R.K. Tampi, Asst. Senior State Advocate.

Judgment

SAKALA, J.: On the 4th May 1979, in an *ex parte* application I granted the applicant, Barry Jackson, leave to issue a notice of motion for an order of certiorari. The applicant is seeking for an order of certiorari to remove into the High Court and quash the decision of the Honourable Minister of Home Affairs by which he held that the applicant was not entitled to remain in Zambia on the grounds that the Honourable Minister had in writing declared his (applicant's) presence in Zambia to be inimical to the public interest.

The application is supported by an affidavit and statement on application. The respondent filed no affidavit in opposition. There is no dispute as to the basic facts. These facts as per affidavit and statement are that the applicant has been a continuous resident in Zambia since November 1976. He is employed by International Computers (Zambia) Limited as Bureau Manager. On the 22nd March 1979, the Minister of Home Affairs declared his presence in Zambia to be inimical to the public interest in terms of s. 22 (2) of the Immigration and Deportation Act Cap. 122. On the 3rd April 1979, he was served with a Notice of Prohibited Immigrants to leave Zambia within forty-eight hours through the International Airport to the United Kingdom. On the 4th April 1979, the applicant through his advocates filed an appeal with the Honourable Minister of Home Affairs. On the 27th April 1979, his advocates by a letter from the Permanent Secretary, Ministry of Home Affairs, were informed that the Honourable Minister of Home Affairs had rejected his appeal. The applicant states in his affidavit and statement that sometime at the beginning of January 1979, there was a misunderstanding between the management and employees of International Computers (Zambia) Limited. This misunderstanding was cleared up with the help of the Principal Labour Officer to the satisfaction of both parties. The applicant states that he has not been involved in any criminal activity and has a clean police record. He says that should he leave Zambia, it would cause undue hardship on him and his family. On these facts the applicant contends that he be entitled to remain in Zambia because the Honourable Minister of Home Affairs was wrong in law in rejecting his appeal.

On behalf of the applicant, Mr Patel argued that the applicant does not know the reasons why the order of prohibited immigrant was served upon him except because of a labour dispute at his place of work which dispute was amicably settled between the management and the employees with the help of the Principal Labour officer. Mr Patel pointed out that the conditions of the settlement were that the applicant was not to renew his contract which expires at the end of July and that he had to apologise

in writing if he had offended any of the employees. Mr Patel argued that the applicant could not be said to have been hostile to Zambia or its citizens as suggested by the word "inimical". Mr Patel concedes that the Minister's powers under s. 22 (2) of Cap. 122 are discretionary aimed at "safeguarding the security of the State but submitted that discretionary powers should be exercised in good faith and not arbitrarily or capriciously. Mr. Patel contended that when the Minister makes an order of deportation he acts administratively. But when he decides on any representations made against the order then he acts judicially. He submitted that in the circumstances an order of certiorari would issue to a body not ordinarily called a court against acts not necessarily termed judicial. Mr Patel also submitted that in general a judicial act is one which involves the exercise of some right or duty to decide a question affecting individual rights. He

pointed out that although judges still speak as if the availability of certiorari depends on whether the act impugned is judicial or imports an implied duty to act judicially it is enough for a competent authority to be under a duty to act fairly. He also submitted that a duty to act judicially in conformity with natural justice may be inferred from the impact of an administrative act or decision on individual rights. He submitted that the impact of the Minister's decision in the particular case is tremendous. He argued that although the Minister is not obliged to give reasons for his decisions, if proved that he did not act judicially the court should infer that he acted unreasonably and in bad faith. Mr Patel further contended that the Minister is obliged to act in accordance with the rules of natural justice, namely, that he should be disinterested and unbiased and a party to be given an opportunity to be heard. He submitted that in the instant case the applicant was only given forty-eight hours which was not in conformity with natural justice.

On behalf of the respondent, Mr Tampi asked the court to take judicial notice that the applicant as a non Zambian is employed on a permit under Cap. 122. He submitted that s. 22 of Cap. 122 is applicable to all persons not citizens of Zambia. He argued that there are no conditions under s. 22 which the Minister has to fulfil before declaring the presence of a non Zambian inimical to the public interest. Mr Tampi vigorously argued that it was not the intention of the legislature to give a non Zambian the right to be heard before the Minister declared his presence inimical. He contended further that the language of s. 22 (2) of Cap. 122 clearly shows that Parliament has decided to confer on the Minister of Home Affairs unfettered discretion to declare the presence of any person or any alien to be inimical without giving any reasons at all. He submits that as the law stands it would be invidious to go behind the Minister's decision and determine its reasonableness because to do so would be dangerous to the security of the State. Mr Tampi submitted that the Minister's discretion in matters of deportation is unfettered and is not bound to give any reasons and is not bound to give any hearing. Consequently no certiorari lies in such cases.

Both learned counsel cited very useful authorities in support of their submissions. At the outset, I would like to mention for my part that I do not doubt the High Court's powers or jurisdiction to grant orders of

certiorari against certain decisions of Ministers, public bodies or officers exercising powers which involve the duty to decide judicially. (See O. 53/1/4 of the Rules of the Supreme Court, 1979 Edn of the White Book.)

In the case of *R v Electricity Commissioners* (1) Atkin, L.J., at pp. 204 to 205 outlined the acts in which certiorari may issue and the extent of its operations as follows:

". . . Certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction; and doubt less in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

In *R v Manchester Legal Aid Committee, en Exparte Brand* (2) Parker J., at pp. 487 and 489 put it as follows:

"That the local committee was a body of persons having legal authority to determine questions affecting the rights of subjects was admitted and, indeed, is clear. The real contest in the present case is whether they also had the duty to act judicially . . . The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively."

In *R v Criminal Injuries Compensation Board, ex parte Lain* (3) Lord Parker CJ, at p. 778 put the extent of certiorari as follows:

"The ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially."

From these authorities the principle established seems to be that certiorari is intended to control acts of those with the authority to determine questions affecting the rights of the subjects. The control, however, depends on whether those authorities have a duty to act judicially. In my humble opinion, the phrase "duty to act judicially" is synonymous do with the phrase "duty to act fairly". That the Minister has a legal authority and duty to declare an alien whose presence in Zambia in his opinion is inimical to the public interest is beyond question.

Section 22 (2) of the Immigration and Deportation Act, Cap. 122, reads as follows:

"Any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be a prohibited immigrant in relation to Zambia."

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Both counsel, I think, concede that the Minister's powers to declare the presence of a non - Zambian to be inimical to the public interest is discretionary. Both counsel further concede that the Minister in declaring a person inimical to the public interest is not obliged to give any reasons and is not obliged to give the party so declared an opportunity to be heard before declaring him inimical to the public interest. I entirely agree with both learned counsel's submissions on the discretionary powers of the Minister of Home Affairs when he makes a declaration under s. 22 (2). This view is supported by several decided English authorities. In the case of *Regina v Governor, ex parte Soblen* (4) at p. 298 is a passage in the judgment of Lord Denning, M.R., which reads as follows:

> "The third ground of challenge was that it was said that the Home Secretary could not make a deportation order unless he had first given the person affected the opportunity to be heard, and in this case the Home Secretary had made this deportation order against Dr Soblen without any such opportunity being given. I quite agree that when a public officer is given the power to deprive a person of his liberty or his property, the general principle of our law is that that is not to be done without his first being given an opportunity of being heard and of making representations on his own behalf. That has been the tenor of the decisions of these courts for nearly 100 years. But there are exceptions. A statute may expressly or by necessary implication provide that the person affected is not to be given a right to be heard. Such an exception has been held to exist in the case of deportation orders. In 1920 it was held by a Divisional Court in *Rex v Leman Street Police Station Inspector, Ex parte Venicoff* that an alien has no right to be heard before a deportation order is made against him. That case has been questioned before us and it has been suggested that it was wrongly decided. All I need say about it is that in 1953, without any

dissent in Parliament, an Order was made in the very self-same words as the Order considered in Venicoff's case. It is a reasonable assumption that Parliament proceeded on the assumption that Venicoff's case was good law. And when I look to the objects of this legislation, it seems to me that much of the purpose of it would be defeated, if it were necessary for the Home Secretary always to give every alien the rights of being heard before a deportation order is made. Reasons of security themselves might be such as to make it unwise and undesirable to give him advance notice of the intention to make a deportation order. He might well take advantage of it so as to absent himself and to avoid apprehension. I think, therefore, that there is no right to be heard before a deportation order is made."

In an old case of *Rex v Leman Street Police Station Inspector, ex parte Venicoff* (5) in which a provision similar to s. 22 (2) of our Act was considered the Earl of Reading, CJ, at p. 78 put the matter as follows:

". . . I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to public good.

Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and has imposed no conditions."

At pp 79 to 80 he went on to say:

"In dealing with a regulation such as that, with which we are now concerned, the value of the order would be considerably impaired if it could be made only after holding an inquiry, because it might very well be that the person against whom it was intended to make the deportation order would, the moment he had notice of that intention, take care not to present himself and would take steps to evade apprehension. I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act for the public good and it is led to his judgment whether upon the facts before him it is desirable that he should make a deportation order. The responsibility is his."

For my part, I entirely agree with all these views. It is not for the court to decide what is inimical to the public interest but for the Minister of Home Affairs. Parliament has seen it fit to leave such a decision to the Minister of Home Affairs. I am satisfied for my part that when the Minister of Home Affairs makes an order under s. 22 (2) of Cap. 122, he is not a judicial officer in whatever context. He acts administratively. He is an executive officer bound to act for public interest and it is left to his judgment whether upon the facts before him it is desirable to declare a non - Zambian inimical to the public interest. The question of an inquiry of affording the party an opportunity to be heard does not therefore arise.

Mr Patel's arguments and submissions on behalf of the applicant do not challenge the Minister's order when made under s. 22 (2). I agree with Mr Tampi that no certiorari can issue against an order made under that section. As already observed, there are several authorities supported by this position. Paragraph (4) of the statement on application for leave to apply for an order for certiorari reads as follows:

"In the premises the applicant is entitled to remain in Zambia and the Honourable Minister of Home Affairs was wrong in law in rejecting the applicant's appeal to the Honourable Minister."

The applicant's appeal to the Minister of Home Affairs was made pursuant to s. 24 (1) of the Immigration and Deportation Act. The main ground of that appeal as set out in the exhibit marked "BJ2" attached to the applicant's affidavit in support of the application is that should the appellant leave Zambia it would cause undue hardship to him and his family. The document also sets out matters on which the applicant relies for his argument not to leave Zambia. Section 24 (1) (2) reads as follows:

> "Any person required by notice under section twenty-three to leave Zambia who on receipt of such notice has lawfully remained in Zambia longer than seven days may, within forty-eight hours of receiving such notice, deliver to any immigration officer, police officer or prison officer written representations to the Minister against such requirement and such representations shall be placed before the Minister without delay.

> If, after considering such representations, the Minister does not think fit to exercise his powers in relation to the issue of permits or the exemption of persons from the classes set out in the Second Schedule, the person who made such representations shall be notified that his representations have been unsuccessful."

Mr Patel's argument is that in rejecting the applicant's appeal the Minister of Home Affairs acted contrary to the rules of natural justice. He contends that the applicant was not given adequate notice and was not given an opportunity to be heard. He argues that to give a person forty-eight hours within which to leave Zambia clearly suggests that the Minister did not act judicially and not in accordance with the rules of natural justice.

The crux of the matter as I see it is whether the Minister of Home Affairs in the instant application acted in excess of his powers (jurisdiction) and unfairly or unjudicially when he rejected the applicant's appeal for this court to order the issue of certiorari. The applicant, after the Minister made an order under s. 22 (2) of Cap. 122, was in terms of s. 23 served with a notice to leave Zambia. The section provides the requirements to be complied with by a person served with that notice. Among others, the person is required to leave Zambia within forty-eight hours after service of notice if he has not made representations in terms of s. 24 (1). This means therefore that the forty-eight hours period is not a matter decided upon by the Minister or an immigration officer. It is a requirement by law. In the circumstances, I cannot accept the argument that because the applicant was given forty-eight hours, this in itself suggests bad faith on the part of the Minister in rejecting the appeal. With regards to the other argument it has already been conceded that the Minister is not obliged to have reasons for making an order under s. 22 (2) and he is not obliged to give the party against whom the order has been made an opportunity to be heard. It follows in my view that it would defeat the very purpose of s. 22 (2) if at the time of consideration of the representations, the Minister should now hear the applicant and give him reasons for his decisions. If the legislature intended that to be the procedure it would have said so. It is significant to observe that s. 24 (1) clearly states that representations to the Minister be delivered in writing. There is no requirement that the applicant shall be heard in person. The Minister, after considering the written representations has a further discretion to reject them if he "does not think fit to exercise his powers" of exempting the applicant.

In the case of *Regina v The Governor of Brixton Prison, ex parte Soblen* (4) Lord Denning reserved his opinion on the question whether after a deportation order is made and before it comes to be executed by removing the person out of a country an alien may not in some circumstances have a right to be heard. In that case, the question did not arise because the Home Secretary had stated his willingness to hear and consider any representations which the person affected desired

to make. In the instant case, I do not need to reserve my opinion. The act specifically entitles a person who has been declared inimical and who has been served with a

notice to leave Zambia to make written representations. The applicant did just that. After the Minister considered the representations, he rejected them. In these circumstances it is argued that the applicant is entitled to remain in Zambia because the Honourable Minister of Home Affairs was wrong in law in rejecting the appeal. The question is not one of hardship. But was the Minister wrong in law to reject the appeal? In my view, it has not been shown that in rejecting the appeal the Minister was wrong in law or acted contrary to the rules of natural justice.

In passing, I wish to observe that I have myself grave doubts as to whether an order of certiorari can issue against the Minister's rejection of written representations made by a person whose presence had been declared inimical to the public interest. I make this observation taking into account the objects of the Immigration and Deportation Act which are to regulate entry into, and the remaining within Zambia of immigrants and visitors, and also to provide for the removal from Zambia of criminals and other specified persons. I make no decision on the matter as the facts of this case do not necessitate it. I leave the issue to be decided in an appropriate case. But in my view the necessary implication from the provisions of the Immigration and Deportation Act is that a person declared inimical under s. 22 (2) is only entitled to be heard by way of written representations. He is not entitled to be given reasons for rejection of his representations. For reasons already given, I refuse to make the order of certiorari. The application is accordingly dismissed.

Application dismissed