

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUITS M25/94: M34/94

BEFORE: THE HON. MR. JUSTICE MALCOLM
 THE HON. MR. JUSTICE BINGHAM
 THE HON. MR. JUSTICE LANGRIN

IN THE MATTER OF AN APPLICATION BY
 SERGEANT KEITH AUGUSTUS PICKERING
 ETAL FOR LEAVE TO APPLY FOR ORDER
 OF CERTIORARI.

AND

IN THE MATTER OF JAMAICA CONSTABULARY,
 FORCE ORDERS SERIAL NO.2441 SUB. NOS.
 10 & 27 DATED MARCH 17, 1994, IN RESPECT
 OF THE PURPORTED RE-ASSIGNMENT AND/OR
 TRANSFER OF THE APPLICANTS.

AND

IN THE MATTER OF THE ALIENS ACT, THE
 CONSTABULARY FORCE ACT, THE POLICE
 SERVICE REGULATIONS 1961 AND THE BOOK
 OF RULES FOR THE GUIDANCE AND GENERAL
 DIRECTIONS OF THE JAMAICA CONSTABULARY
 FORCE, 1988.

Mr. A. Kitchen instructed by H.G. Bartholomew & Company for Applicants.

Mr. Neville Fraser Snr. Asst. Attorney General and Mr. A. Foster
 instructed by Director of State Proceedings for the Respondent.

Heard: March 13, 14, & April 7, 1995

LANGRIN, J.

On the 14th March, 1995 the Full Court granted an order of
 Certiorari in this matter and promised to put our reasons in writing.
 This we now do.

This is a Motion for an Order of Certiorari to quash Jamaica
 Constabulary Force Orders Serial Nos.2441 Sub. Nos. 10 & 27 dated
 March 17, 1994, whereby it was ordered by the Governor General that
 the Applicants' respective appointments as Immigration Officers be
 revoked.

The grounds upon which the order was sought are inter alia:-

- (1) The Governor General and/or the Police Service Commission
 and/or the Commissioner of Police acted without or in

excess of jurisdiction and/or in breach of the principles of Natural Justice, in that;

- (i) There was no enquiry or hearing held and no opportunity given to the applicants to state their respective cases or be heard at all prior to their revocation of appointments as Immigration Officers.
 - (ii) The action of the is based on speculation and is an arbitrary and an unlawful exercise of power.
 - (iii) The said J.C.F. Orders are tantamount to punishment and deprivation of status and benefits and reasonable expectation of the same which will ultimately lead to termination of employment.
- (2) Alternatively, the said J.C.F Orders are unconstitutional and in contravention of the Police Service Regulation 1961 and the Aliens Act.

The facts relevant to this issue are as follows:

The applicants were Immigration and Police Officers with ranks varying from Constable to Sergeant. They were appointed as Immigration Officers at different times by the Governor General in exercise of his powers under the Aliens Act, and thereafter assigned to duty at the Donald Sangster International Airport, Montego Bay in the parish of Saint James. Consequent upon their appointment as Immigration Officers they were assigned a different uniform and numbers distinctly different from that assigned to the regular members of the Jamaica Constabulary. In addition they receive a regular meal and housing allowance apart from their salary.

On or about the 18th March, 1994 Superintendent Daley, accompanied by Inspector Thompson and Sergeant Carter all from Immigration Headquarters visited Sir Donald Sangster International Airport and called a meeting of the entire Immigration Department for the parish of St. James.

At the meeting held at the Airport some forty Immigration Officers including the applicants attended. Superintendent Daley

informed them that he had brought a copy of the most recent Jamaica Constabulary Force Orders No. 2441 dated March 17, 1994 and that some of them were being reverted and transferred to other divisions while others would be transferred to Immigration Headquarters. Superintendent Daley said that the reason for the reversions and transfers was due to an "Indian Racket" going on and news had reached Immigration Headquarters and the Commissioner of Police that they were all involved in the "Indian Racket".

By 'Indian Racket' Superintendent Daley meant the illegal travel of Indians, Sri Lanka~~ns~~ and Chinese on false documents obtained in Jamaica and used to obtain entry to Canada or the United States of America where the said illegal travellers would seek and usually obtain political asylum. Since the said travellers are invariably processed through Immigration on their departure from Jamaica it is alleged that Immigration Officers must be assisting the said illegal activity for financial reward.

Superintendent Daley said, according to the affidavit evidence:

"The Indian racket was in Kingston before he took office and when he came to Kingston the racket was going on and it was he who 'mash it up' by transferring three men, including 2 Sergeants and it has happened again; so the said racket has now switched to Montego Bay. The Commissioner of Police had directed him to get rid of all the present members of Immigration in the parish of St. James, but he told the Commissioner that that was not practical since there were not enough men available to replace all of us; in addition to which it was still the winter tourist season and the said airport was busy."

The applicants went on to assert that Superintendent Daley then introduced Inspector Thompson as the new "leader" in Saint James Division who would replace Inspector Lawrence as of the 1st April, 1994 as directed by the Commissioner of Police and said that the transfer and reversions were done to shock them and whoever want to leave may do so.

The Commissioner of Police in reply deposed that the applicants were all members of the Jamaica Constabulary Force while at the same time being Immigration Officers. However, the gravamen of his response are stated as follows:-

12. That upon my recommendations made to the Police Service Commission who in turn submitted their recommendations to the Governor General, the abovenamed applicants' appointment as Immigration Officers was revoked by the Governor General with effect from the 15th March 1994. That this was Gazetted in the Jamaica Gazette Vol. CXVII (No.31A) Thursday May 26, 1994.
13. That by virtue of Section 3(2) (a) and Section 14 of the Constabulary Force Act the abovenamed applicants were transferred to various divisions of The Jamaica Constabulary Force.
14. That, Immigration Officers are given a meal allowance because of the nature of their work which may include long hours and unavailability of canteen facilities. All other allowances are similar to other branches of the Jamaica Constabulary Force.
15. That the transfer of the applicants herein was not as a result of any disciplinary measure. That it was in keeping with my policy for the proper administration of the Jamaica Constabulary Force, the objective of which is to ensure that members of Jamaica Constabulary Force are exposed to as many areas of the Force as possible which allows them on attaining senior ranks to be more effective and competent."

The relevant provisions of the statutes are stated as under:-

Constabulary Force Act

"Section 3(2) (a): Subject to the Force shall consist of a -

- (a) Commissioner who subject to the orders of the Minister shall have the sole command and superintendence of the Force;

Section 14: Subject to the provisions of Section 3 -

- (a) An officer shall have such command and such duties as the Commissioner may direct;

Constabulary Force Rules (1988) promulgated under Section of the Constabulary Force Act.

Rule 1.6 Transfers

"Transfers shall be effected in the best interest of the Service and the public in general, and not used as a punishment to a member. As far as possible his welfare shall be taken into consideration."

The Aliens Act:

"Section 4(1): The Governor General may appoint a Chief Immigration Officer and also immigration Officers for all or any specified parts of the Island for the purpose of carrying out the provisions of this Act and of any other enactment relating to immigration or deportation."

Mr. Kitchen, Learned Counsel for the applicants argued that the Commissioner of Police acted in excess of jurisdiction in his refusal to afford the applicants a hearing in order to exculpate themselves before the revocation of their appointments as Immigration Officers. He further argued that the failure of the Commissioner to traverse the allegation in the applicants affidavit amounted to an acceptance of those allegations. The deprivation of the office of the applicants without a hearing clearly establishes a breach of Natural Justice. He cited in support of his arguments, Ridge v. Baldwin (1963) 2 AER 66; R.v. Commissioner of Police Exparte Tennant (1977) JLR 15, p.79 and Endell Thomas v. Attorney General of Trinidad & Tobago (1982) A.C. 113.

Mr. Neville Fraser, Learned Counsel for the Respondent replied, that the function of the Commissioner of Police in transferring the applicants was an administrative one and in accordance with Section 3 of the Constabulary Force Act. The question of fair hearing does not apply in the instant case since no disciplinary measures were taken against the applicants.

I must now make certain observations on the law as I understand it. The celebrated case of Ridge v. Baldwin (1964) AC 46; 1963 2 ALL ER 66 H.L. is the leading authority on the principles of natural justice or fairness. The Chief Constable of Brighton had been dismissed by the local police authority without a hearing. They had statutory powers to deprive him of his position for incapacity or misconduct but not otherwise. The House of Lords held that he was entitled to a hearing for two reasons.

- (I) he had been deprived of a public office (not just an ordinary job)
- (II) the power to dismiss was limited by statute so that the authority did not have a policy discretion

to dismiss him.

Lord Reid emphasized that the right to be heard should depend upon the consequences of the decision to the individual and not upon whether the decision is administrative. He went on to say in his judgment that there is an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.

This Court regards this rule as fundamental in circumstances of this nature when deprivation of office is in question. A fortiori when the manner in which the applicants' appointments were revoked casts a slur on the reputation of the applicants. Notwithstanding the remarkable silence of the respondent in his affidavit evidence pertaining to the allegation of the 'Indian Racket', in my view those allegations provided the impetus to the revocation of the applicants' appointment.

The law therefore contemplates a hearing prior to the deprivation of the office held by the applicants and any failure to allow the said hearing would amount to a procedural impropriety and accordingly a breach of Natural Justice.

The ingredients of a fair hearing may be divided into three categories:

- (1) Advance notice of charges or accusations
- (2) Right to see factual evidence in the possession of the decision-maker.
- (3) Right to make representations.

Whichever of these processes is adopted will depend upon the particular circumstances of each case. A formal hearing may well be unnecessary but an enquiry on the facts should be carried out and common prudence should dictate that the report or at least its substance should be shown to the applicants and an opportunity afforded them to comment on it before the final decision was taken by the respondent. The applicants have shown that they have all suffered injustice. In the final analysis fairness is what is necessary to do justice in the particular context and nothing more.

Fairness prevails over administrative convenience, except in cases of confidentiality and national security and leans heavily upon the notion of depriving individuals of rights e.g. depriving the applicants of their office or making accusations of misconduct e.g. being involved in a 'racket'. See R.v. Board of Visitors of Hull Prison ex parte St. Germain No.2 (1979) ALL ER 545.

It is doubtful whether the applicants would have any valid grounds for complaint if all that happened was merely transferring them from one place to another. It can hardly be gainsaid that their appointments as Immigration Officers were revoked which rendered them bereft of that office. No longer could they perform the duty or exercise the power of an Immigration Officer. According to the applicants they lost their status and other privileges attached to that office, including financial benefits in the form of allowances. The argument advanced by Mr. Fraser ignores this point since he regards the respondents' act as a mere transfer of the applicants. Such an argument must clearly be rejected.

I do not doubt the good faith of the respondent in maintaining the proper image of the Force which he leads by acting the way he did but largely as a result of a mistaken notion of the law the rules of natural justice was breached.

The proper approach to this type of case is that the respondent is bound to act fairly in recommending the exercise of the statutory power under the Aliens Act. The decision which was reached did not accord with the standard of fairness because the applicants were not given an opportunity to answer the allegations which obviously led the respondent to the conclusion which was reached.

It should be emphasized that I am far from saying that if the procedure had been fair, the respondent would not have been entitled to reach the decision that it did. The question of fairness or fair procedure is a separate matter from the outcome of the decision and the Courts have always recognised this. A right to be heard should not be rejected because a hearing would not affect the outcome. See R.v. Thames Magistrates Court ex parte Polemis (1974) 2 ALL ER 1219.

Since we were concerned not with the decision but the decision-making process we were content with quashing the decision pertaining to the revocation of the appointment of the applicants as Immigration Officers thereby enabling the respondent to have the wrong put right.

It should be observed that this Court did not grant an order of Mandamus which would reinstate the applicants in their positions as Immigration Officers. That we believe would usurp the function of the Commissioner of Police and ultimately the Governor General. The order that Certiorari should go was in effect one which would require the respondent to deal with this matter in a proper manner.

Accordingly, for the above reasons we would grant the Motion with costs to the applicants to be agreed or taxed.

BINGHAM, J.

I have read in draft the reasons for our decision in the above matter prepared by my brother Langrin J. and I wish to state that I am in complete agreement with the views he has expressed therein.

The circumstances leading up to the decision to revoke the appointments of the applicants in so far as it clearly affected their status as immigration officers while at the same time casting a slur on their reputation as public officers necessitated the commissioner affording them a hearing in accordance with the rules of natural justice before resorting to the course that was taken in revoking their appointments as Immigration Officers. That apart there is nothing further that I could usefully add.

MALCOLM, J.

I have had the opportunity of reading in draft the Judgment of my brother Langrin J. which deals with the issues raised.

I agree entirely with the reasoning of my learned brother.

I cannot help but commenting on a submission made by Mr. Fraser, the Senior Assistant Attorney General (quoted earlier in the leading Judgment of my learned brother Langrin) in which he advanced the view that "the question of fair hearing does not apply in the instant case since no disciplinary measures were taken against the applicants."

The law is abundantly clear that when the facts and circumstances surrounding the revoking of the applicants office casts a slur on the reputation of the applicants the applicants must be given an opportunity to answer the allegation levelled against them before the exercise of the statutory power under the Aliens Act.