IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2008: No. 183

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE BERMUDA IMMIGRATION AND PROTECTION ACT 1956

AND IN THE MATTER OF A DECISION BY THE MINISTER OF LABOUR, HOME AFFAIRS AND PUBLIC SAFETY REFUSING THE APPLICANT PERMISSION TO RESIDE IN THESE ISLANDS

JUDGMENT

Date of hearing: 12th day of January, 2009
Date of Judgment: 12th day of January, 2009

Mr. Ray DeSilva, Conyers Dill & Pearman, for the Applicant
Mr. Huw Shepheard, Attorney-General's Chambers, for the Respondent

Introductory

1. The Applicant applies by Notice of Motion dated August 20, 2008 for the following relief set out in the Notice of Application for Leave to seek Judicial Review filed on August 15, 2008:

    (1) an order of certiorari to quash the Minister's decision to deport the Applicant communicated on or about August 8, 2008;
    (2) an order of mandamus to require the Minister to reconsider the deportation decision; and/or
    (3) a declaration that the Applicant is entitled as a father of Bermudian minor children and a former spouse of a Bermudian to apply for an extension of his spousal rights of employment pursuant to section 60(3) of the Bermuda Immigration and protection Act 1956.

2. The Applicant has since August been detained at Westgate Prison and I previously refused the interim relief which was also initially sought in this regard. Four substantive grounds were advanced in support of the application. Three grounds make one broad complaint: the Minister breached the rules of natural justice by summarily deciding to deport the Applicant with out affording him any prior notice of the basis of the deportation decision. The fourth ground, which was not seriously pursued, was the complaint that the decision was irrational having regard to the Applicant's right to apply for an extension of his spousal right of employment.

3. The Respondent's case is that the Applicant was (a) at a September 2004 meeting given a letter notifying him that as he had not applied to regularise his position following his marital separation, consideration was being given to revoking his permission to reside in Bermuda, (b) involved in an investigation of whether or not he ought to be allowed to remain in Bermuda in light of his being the father of a Bermudian child in that he was interviewed twice by the Department of Child & Family Services (who were asked by the Immigration Department to prepare a Report on this issue) in February 2006, and (c) on September 26, 2006, personally given a letter dated September 19, 2006 (and orally told) that his permission to remain in Bermuda had been revoked and that he must leave the island by October 31, 2006, subject to his exercising his appeal rights within seven days.

4. The Applicant's case stands or falls on the threshold factual issue of whether or not the Court finds as a fact that the Applicant was not given notice of the September 19, 2006 decision on September 26, 2006. Having regard to the presumption of regularity in relation to the acts of public officials, it is clearly for the Applicant to prove that it is more likely than not that he was not given the requisite notice.

5. Both counsel accepted in principle that their opponent was entitled to succeed if this factual issue was determined in their favour.

Factual findings

6. The Applicant and Ms. Smith, his romantic partner of some six to seven years, both gave evidence. Ms. Smith clearly had strong emotional reasons for supporting the Applicant by denying any knowledge of his having visited the Department of Immigration ("DOI") or expressed concerns about his status. But she was unable to directly support his evidence on the crucial September 26, 2006 alleged visit to the DOI. Her evidence had limited relevance or weight and I see no need to make any positive findings in relation to it.

7. The Applicant himself had even stronger reasons for portraying the facts as he would like them to be rather than as they actually are. His evidence was not sufficiently convincing to be accepted in the absence of some independent

evidence tending to suggest that his denial of visiting the DOI on September 26, 2006 is sufficiently inherently probable as to justifying rejecting the non-partisan evidence adduced by the Crown.

8. What is most problematic about the Applicant's evidence is it requires the Court to find that too many public officers have conspired to fabricate documentary evidence against him (not to mention give perjured evidence against him) in circumstances where he was unable to advance any motive for such persons engaging in such a catalogue of blatantly criminal acts. This is because he denies attending a comparatively inconsequential September 2004 meeting at the DOI which was attended by three Immigration officers, documented by one of them and sworn to have taken place by two officers. I accept the Respondent's evidence as to the September 27, 2004 meeting and reject the Applicant's evidence in this regard. It is still open to me to reject this aspect of the Applicant's case and accept the crucial aspects of it, even though this portion of his testimony undermines his general credibility as a witness.

9. The crucial evidence for the Respondent came from Immigration Inspector Eugene Walker. What was most impressive about his evidence was that he freely admitted that he had no actual recollection of his dealings with the Applicant independently of (a) reference to a note made by him on September 26, 2006, and (b) his usual practice in relation to serving revocation of permission to reside letters. He testified that his usual practice is to (i) arrange for the individual to come into the DOI to collect the revocation letter, (ii) look in the file so as to be able to identify the individual when they arrive at the DOI reception area, (iii) call the individual into a private room where the letter is served and he orally confirms that they understand the essential elements of the decision contained therein, including their appeal rights.

10. The September 19, 2006 revocation letter contains two handwritten and signed notes which were identified by Mr. Walker as having been written by him. Firstly: "*I delivered the original letter to I.A.C.S. 25/9/06*". I.A.C.S is the acronym for Immigration Advisory and Consulting Services (or some similar name) which was apparently acting for the Applicant at the time. This evidence was not challenged. So the unchallenged evidence is that the Applicant, despite his limited education and inability to read, was being assisted by consultants who were given a copy of the crucial letter on his behalf.

11. The second and controversial note was the following: "*A copy of this letter was served on Mr. Graham at the Hamilton H.Q. on 26/9/06*". It is difficult to see why, if this was done on September 25, 2006, anybody else (not Mr. Graham) should have attended the DOI the following day and held themselves out as being the Applicant. It is equally difficult to see why Mr. Walker would have either (a) recorded serving Mr. Graham personally or (b) departed from his usual practice of confirming who he was serving and ensuring that they understood the purport of the letter in question. If I.A.C.S. had denied receiving a copy of the letter, some

doubt would have been cast by truly independent witnesses as to the accuracy of Mr. Walker's record-keeping. But no such challenge was mounted. There is accordingly no tangible basis for doubting that the DOI's official records as explained by Inspector Walker accurately record what actually happened in terms of communicating the revocation decision to both the Applicant personally and his representatives. The bare denials by the Applicant that he was personally served and that he received no notice of the decision at all prior to his arrest pending deportation in 2008 must be rejected on the grounds that his case is both highly improbable and simply unbelievable.

12. Accordingly, I am bound to find that the Applicant was given both actual and constructive notice of the decision that he must leave Bermuda by October 31, 2006 during the period September 25-26, 2006.

Conclusion

13. It follows that the application must be dismissed as it is not arguable that the deportation decision was on the facts as found by this Court unlawful by reason of either (a) a breach of the rules of natural justice, or (b) irrationality.

14. It was suggested that the DOI ought to have advised the Applicant of his right to apply for an extension of his spousal employment rights. This complaint rings somewhat hollow on the facts of the present case where the DOI went out of their way to investigate what was in substance the same issue. They obtained an independent Report on whether the Applicant should be permitted to remain in Bermuda in the interest of his Bermudian child. The Applicant may well disagree with some of the findings of the Report; but he elected not to pursue his appeal rights after receiving notice of the revocation of his permission to remain in Bermuda on September 26, 2006. Had he done so, he could have pursued any material complaints on appeal or in a timely judicial review challenge in relation to the September 19, 2006 decision. It is too late to raise those complaints now. In my judgment, the DOI has dealt with the Applicant's case in an unimpeachably fair and reasonable manner

15. As the Applicant is legally aided, it seems inevitable that the appropriate costs disposition should be to make no order as to costs. I will of course hear counsel on this and any other matters which may arise should this be required.

Dated this 12th day of January 2009 _____
KAWALEY J