

THE CHIEF IMMIGRATION OFFICER AND THE HONOURABLE MINISTER OF HOME AFFAIRS AND THE ATTORNEY-GENERAL (1983) Z.R. 11 (H.C.)

HIGH COURT
KAKAD, J.
12TH MARCH, 1983
(1983/HP/417)

Flynote

Administrative Law - Judicial Review - Administrator's subjective powers with regard to aliens - Review of.

Immigration and Deportation - Time limit for departure - Expiry of - Option to extend.

Constitutional Law - Fundamental Rights - Future Derogation therefrom - Actionability.

Constitutional Law - Fundamental Rights - Article 24 (3) - Nature of right conferred.

Administrative Law - Judicial Review - Chief Immigration Officer's subjective discretion over extension of permit - Review of.

Administrative Law - Appeal - Chief Immigration Officer's action - Appeal to Minister.

Headnote

The applicant sought a declaratory order to the effect that he was entitled to continued residence in Zambia, and to have his temporary resident permit (which had already been extended several times in the past) extended by the authorities until such time when all the actions commenced by him have been fully disposed of by the Zambian Courts. He contended *inter alia*, that the Chief Immigration Officer acted under dictation in refusing to extend the permit further, and that his fundamental rights provided for under the Constitution would be contravened by a refusal to allow his continued residence in Zambia.

Held:

- (i) The courts will show special restraints in applying tests of legality, where an executive power, the exercise of which is not subject to appeal, is used to exclude, remove or deport aliens or other non-patrial persons on policy grounds, and under the law, reasons for the administrative action need not be given.
- (ii) The authorities are not obliged to give a further time limit within which the applicant should leave Zambia.
- (iii) The courts will not entertain an allegation of a future derogation.
- (iv) The provisions of Article 24 (3) of the Constitution do not confer on a non - Zambian, a right to remain continuously and indefinitely where that would be incompatible with or in contravention of the statutory provisions of the Immigration and Deportation Act or any law in force.

p12

- (v) The powers to extend the permit are vested solely in the Chief Immigration Officer and there being no evidence that he acted under dictation or in bad faith, there was no Jurisdiction to review his decision.
- (iv) There is no appeal against the Chief Immigration Officer's action lying to the Minister

under the Immigration and Deportation Act, s. 24.

Cases cited:

- (1) Patel v A.G. (1968) Z.R. 99.
- (2) Shipanga v A.G. (1977) Z.R. 53.4

Legislation referred to:

Constitution of Zambia, Cap. 1, Arts, 20 (9), 24(1), (2), (3).
Immigration and Deportation Act, Cap. 122, ss. 17, (1) (2), (4), (5), 22 (1), (2), (3), 23 (1), (2), (3), 24 (4), (5), 24.

For the applicant: Dr B. Mushota, Lusaka Chambers and Mr C.C. Chimansa, Nkwazi Chambers.
For the respondents: Mr C. Munyema, Ssolicitor - General and Mr A. Kinariwala, Senior State Advocate.

Judgment

KALAD, J.,

The applicant seeks declaratory Order (1) that he is entitled to a continued and continuing residence in Zambia and (2) to have his temporary resident permit extended by the authorities until such time when all the actions commenced or soon to be commenced by him have been fully disposed of by the Courts in their jurisdictions.

The events leading to the present application, as are apparent from the affidavits in support of the application and the exhibited documents, are as follows:

It is evident that the applicant was in Zambia on 6/3/81 from the fact that on that same day he was in fact served with a notice declaring him to be a prohibited immigrant (*see* exhibited "Notice to Prohibited Immigrant to Leave Zambia"). In the said notice, the applicant, as required under s.23 of the Immigration and Deportation Act, Cap. 122, (hereinafter referred to as the Act, Cap. 122) was ordered to leave Zambia within 7 days w.e.f. 6/3/81, by air to U.K.

Thereafter before the expiry of 7 days, i.e. on 12/3/81, the applicant as provided under s.22 (3) of the Act, Cap. 122, applied for a temporary permit under the provisions of s.17 of the said Act. He was granted a temporary permit under the provisions of s.17 of the Act, Cap. 122, to remain in Zambia for the purpose of winding up his business. The said temporary permit was initially valid up to 12/4/81, subsequently, at his request, it was renewed from time to time and for the period as follows:

Extended on 10-4-81 valid up to 12-6-81
Extended on 10-6-81 valid up to 12-8-81
Extended on 11-8-81 valid up to 12-10-81
Extended on 9-10-81 valid up to 12-1-82

p13

Extended on 6-1-82 valid up to 12-7-82

Extended on 8-7-82 valid up to 12-11-82

Extended on 8-11-82 valid up to 12-3-83

On 2-3-83 the applicant applied to have his temporary permit extended further which the Chief Immigration Officer refused to do.

S.22 ss (1), (2) and (3) of the Act, Cap.122, provides as follows:

22. (1) Any person who belongs to a class set out in the "Second Schedule shall be a prohibited immigrant relation to Zambia.

(2) 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.

(3) Save as provided in section seventeen, the presence within Zambia of any prohibited immigrant shall be unlawful."

It should be noted that the applicant, as stated in the said notice, was declared a prohibited immigrant on the grounds that he fell under Class E (ii) and F of the second schedule to the Act, Cap. 122.

S.17 subsections (1), (2), (4) and (5) of the Act, Cap. 122, provides:

"17 (1) An immigration officer may issue temporary permit to a prohibited immigrant.

(2) An immigration officer shall issue a temporary permit to any person in respect of whom the Minister directs that such permit be issued.

(4) A temporary permit shall specify:

(a) such prescribed conditions for observance by the holder as the immigration officer thinks fit; and

(b) the period of its validity.

(5) Subject to the provisions of this Act and regulations made thereunder and to the conditions therein specified, a temporary permit shall authorise the holder to enter and re-enter into and to remain in Zambia until such permit expires."

It is conceded that the applicant, by virtue of him being declared prohibited immigrant on 6-3-81 and in absence of that order being revoked, as today remains a prohibited immigrant, albeit subject to the grant of temporary permit which expires on 12-3-83 i.e. today. As I have said before, the extension of the applicant's temporary permit was refused by the Chief Immigration Officer. In the result, he, unless this Court grants the claimed declaration or unless he is further authorised to remain in Zambia, must leave Zambia soon after midnight on 12-3-83. In that situation, the applicant craves for the said declaratory order.

From the learned Counsels' submissions and looking at paragraphs 96, 97 and 98 of the affidavit in support of the application, the following

p14

issues, have been raised:

1. Freedom of rights is provided under Article 20 (9) and Article 24 of the Constitution of Zambia, Cap. 1;

2. The denial of further extension of the temporary permit;
3. Whether a further notice to leave, under the provision of s.23 (b) of the Act, Cap. 122, is necessary or required to be served on the applicant;
4. Whether the applicant, who has lodged an appeal against the refusal to extend his temporary permit to the Minister of Home Affairs, has a right to remain in Zambia pending the notification of the appeal decision to the applicant.

I will first consider the issues under ss. 17, 22, 23 and 24 of the Act, Cap. 122, as raised by Mr Chimansa for the applicant before I deal with the Issues concerning the applicant's constitutional rights raised by Dr Mushota, for the applicant.

At this stage, I cannot resist from commenting on the applicant's need to devote 94 paragraphs in his affidavit to justify his pending civil litigations against the State in Zambian Courts. In my view he could have easily established such by quoting case numbers, parties and the alleged nature of claims in brief. In my opinion it was totally unnecessary to fill up the affidavit with facts that were not so relevant to the application before this Court. However, I would not comment much on that because he has every right to do so in support of his application.

In paragraphs 96 and 97 of the applicant's affidavit, the applicant alleges that the Chief Immigration Officer on 2-3-83 refused to extend his permit on a directive of a State Advocate and as such the said refusal was unlawful. As I see it the applicant thereby implies that the decision not to extend the said permit was motivated by the State Advocate and was therefore not that of the Chief Immigration Officer. In rebuttal the Assistant Chief Immigration Officer, who has considered the applicant's application for extension, in his affidavit on record has deposed to the contrary. He asserts that the decision not to extend the applicant's permit was his and only his .

I must state that neither of the Counsels for the applicant addressed this Court on the question of the officer's Refusal to extend the applicant's permit. In any case as the matter has been raised in the applicant's affidavit, it is incumbent to consider whether the Assistant Chief Immigration Officer in refusing to grant the extension had acted unfairly or in bad faith. It is not in dispute that the said officer had the powers to extend or not to extend. Equally I am satisfied that under the provisions of s. 17 of the Act, Cap. 122, the discretions to extend or not to extend in this case was vested solely in the Chief Immigration Officer or an officer or authorised by him. There is no law that reasons for administrative actions must be given.

p15

In Judicial Review of Administrative Action, 3rd edition at p.261 de Smith states:

"Broadly speaking, however, one can say that the Courts will show special restraints in applying tests of legality where (i) power is exercisable in 'emergency conditions'; (ii) an executive power, the exercise of which is not subject to appeal, which is used to exclude remove or deport aliens or other non-patrial persons on policy grounds; or (iii) the 'policy' content of the power is large and it affects large numbers of people."

The learned Solicitor - General has argued that the Chief Immigration Officer, by virtue of the provisions of s. 17 (4) of the Act, Cap. 122, had no power to extend the applicant's permit beyond two Detours from its grant. I have carefully perused the said s. 17 (4) and with respect to the Solicitor - General, I cannot say that the Chief Immigration Officer had no power to extend a temporary permit granted under s. 17 of the Act, cap. 122, beyond two years. The provisions of the said section 17 (4) though appears to suggest the views expressed by the learned Solicitor - General I must say, do not specifically and clearly specify that the maximum period of a temporary permit granted under s. 17 should not exceed two years.

It should be noted that the temporary permit granted to the applicant, under the provisions of s. 17 and s. 23 (2) of the Act, Cap. 122, was for the purposes of winding up bus business. Equally it is apparent that the said permit was extended without any difficulty on the applicant's application for period stretching into two years. The question is whether the said officer in refusing to extend the said permit beyond two years had in the circumstances acted unfairly and in bad faith. Firstly, having considered the applicant's affidavit and the affidavit of the Chief Immigration Officer and in absence of any further evidence, I am not inclined to believe that the said Immigration Officer in refusing to extend the applicant's permit beyond 12.3.83, had done so on the directive of a State Advocate as alleged by the applicant. If that was the case, the applicant, I believe would not have got extension stretching into two years. I am for myself satisfied that the decision not to extend the applicant's permit beyond two years, on the facts obtained, was that of the said Chief immigration Officer himself and not of a State Advocate. The applicant, it is not in dispute, was seeking extension to remain in Zambia indefinitely until he had prosecuted all his pending and future claims. Taking this into account and the fact that the applicant's permit was infact extended to a period of two years, I have no justifiable reasons before me to date the said Immigration Officer in finding that the Assistant Chief Immigration Officer in refusing to extend the applicant's permit beyond 12.3.83 had acted in bad faith or unfairly. I don't see any mala fides.

Coming to the applicant's appeal before the Minister of Home Affairs again the decision of the Chief Immigration Officer, I have failed to see any provisions either under s. 17 or any where in the Act, Cap. 122, which provides for an appeal to the Minister of Home Affairs against the decision

p16

of the Chief Immigration Officer exercised under s. 17 of the Act, Cap 122, s. 24 of the Act, Cap. 122, no doubt provides for representations of the Minister of Home Affairs against the Order under s. 22 of the Act, Cap. 122, or against the conditions prescribed in notice under s. 23 of the Act, Cap. 122. S. 24 of the Act, Cap. 122, in my view, does not provide for an appeal again the decisions taken by the Chief Immigration Officer under s. 17 of the Act, Cap. 122. The applicant, as provided under s. 24, had made no representations within the period required or thereafter to the Minister of Home Affairs. Consequently he up to this juncture remains a prohibited immigrant. I am therefore of the view that the Minister of Home Affairs was not obliged to entertain the applicant's alleged appeal. The question of notification therefore does not arise.

As to the requirement of a further notice of a period within which to leave, as stated under s. 23 (b) of the Act, Cap. 122, the learned Counsel for the applicant contends that on the expiry of the period stated in the applicant's temporary permit, the authority, as provided under s. 23 of the Act, Cap.

122, should serve further notice specifying a further period within which the applicant should leave.

s. 17 (a) of the Act, Cap. 122, provides:

"Subject to the provisions of this Act and regulations made thereunder and to the conditions therein specified, a temporary permit shall authorise the holder to enter and re-enter and to remain in Zambia until such permit expires."

Where a prohibited immigrant is notified a period, as required under s. 23 (b) of the Act, Cap. 122, within which to leave Zambia, and where thereafter he is granted temporary permit under s. 17 of the Act, Cap.122, specifying further time in which he should leave, the consequence of the new period to remain in Zambia as granted in the temporary permit, as I see it, is that the new time limit specified in the temporary permit substitutes the time limit specified in the notice to the prohibited immigrant. In the instant case the applicant, on 6-3-81, was served with notice declaring him a prohibited immigrant and in the same notice the applicant as required under s. 23 (b) of the Act, Cap. 122, was given 7 days within which to leave Zambia. Thereafter he was granted a temporary permit under s. 17 of the Act, Cap. 122, which finally expires on 12-3-83 i.e. today. In view of the facts that the applicant up to this juncture remains a prohibited immigrant and that his temporary permit has not been extended further, the applicant's right to remain legally in Zambia under the provisions of s. 17 (5) of the Act, Cap. 122, in my judgment expires immediately after midnight on 12-3-83. In my considered view from the moment the applicant was granted the said temporary permit under s. 17 and wherein a new time limit was specified, the 7 days time limit stated in the notice, served on the applicant on 6-3-81, was deemed to be revoked and the new time limit set in the temporary permit substituted the 7 days limit. For the foregoing reasons I conclude that the date 12-3-83 stated in the applicant's temporary permit replaces and

p17

stands substituted for the 7 days time limit specified in the notice served on the applicant on 6-3-83. The time limit) specified on the applicants' temporary permit, I consider, was in itself notice to the applicant. Therefore the authority, I find, would not be required to give a further time limit as contended by the applicant.

On the constitutional rights of freedom of movement, Dr Mushota, the learned Counsel for the applicant, referring to Article 24 of the Constitution of Zambia, Cap.1, submitted that the provisions of Article 24 confer on the applicant right to remain indefinitely in Zambia, until his civil claims, pending or likely to ho instituted in the Courts of Zambia are finally determined. According to him, para. 3 of Article 24 provides an exception which, if not there, would permit the State to derogate the rights to free movement. He contended that as the applicant was not a threat to public security, the State would have no justification in derogating, the applicant's constitutional rights of free movement. He further contended that for the State to be justified in depriving the applicant's constitutional rights of free movement, the State had to adduce some evidence showing that to do so was in the interest of defence, public security, public order, public morality or public health. According to him there was no such evidence against the applicant. He referred to the case of *Patel v Attorney General*, (1968) Z.R.1. He urged this Court to apply an objective test in considering whether, in a democratic society as ours, it was reasonable, in the circumstances to expel the

applicant.

Referring to Article 20 (9) the learned Counsel submitted that the applicant was entitled to protection of law concerning his other cases which he has not as yet prosecuted in our Courts. He referred to the case of

Shipanga v The Attorney General, (1977) Z.R. 53.

Article 24 (1), (2) and (3) of the Constitution of Zambia, Cap. 1, provides as under:

- "(1) No person shall be deprived of his freedom of movement, and for the purposes of this Article the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.
- (2) Any restriction on person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this Article.
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision:

- (a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or public health or the imposition

p18

- of restrictions on the acquisition or use by any person of land or other property in Zambia, and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society;

- (b) for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Zambia;

- (c) for the imposition of restrictions upon the movement or residence within Zambia of public officers; or

- (d) "for the removal of a person from Zambia to be tried out side Zambia for a criminal offence or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted."

The opening provisions of Article 24 (3) and the provisions in 24 (3) (b), in my view, begs the question of freedom of movement of non Zambians.

The opening of Article 24 (3) and the provisions of 24 (3) (b) provides as under:

"24 (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this

Article to the extent that it is shown that the law in question makes provision (b) for the imposition of restriction on the freedom of movement of any person who is not a citizen of Zambia."

The above provisions, I consider, clearly provide that where restrictions on the freedom of movement of a non-Zambian citizen are imposed in accordance with the provisions of our law, such restrictions imposed would not be considered as inconsistent with or in contravention of Article 24 of the Constitution of Zambia, Cap. 1.

In this case the applicant does not complain of any restrictions of the freedom of movement whilst he has been a holder of a valid temporary permit, which expires at midnight on 12-3-83, i.e. today. Therefore until the time, I am, delivering this judgment the applicant has continued and continues to enjoy the unrestricted freedom of movements as enshrined in Article 24 of the Constitution of Zambia, Cap. 1. The learned Solicitor-General has informed this Court that he himself is not aware of what the authorities would do on the expiration of the applicant's permit. In the same vein it would be impossible for this Court to speculate the course of action the authorities would take, should the applicant remain in Zambia without a valid permit after midnight of 12-3-83 and should this Court refuse to grant the sought declaration. Consequently in absence of any good reasons it would at this stage be pure guess work to declare that the applicant's rights under Article 24 (3) would in future be derogated. The

p19

provisions of Article 24 (3) of the Constitution of Zambia, in my judgment, do not provide for or confer on a non-Zambian, right to remain continuously and indefinitely where that would be inconsistent or contravention to the statutory provisions of the Act, Cap. 122, or of any law in force in Zambia. With respect to Dr Mushota, the learned Counsel for the applicant, I cannot see how, in the applicant's circumstances, it could be said that the applicant's human rights are being derogated or are likely to be derogated. The same conclusions as above would hold good concerning the applicant's claim to constitutional rights under Article 20 (9) of the Constitution of Zambia, Cap. 1.

Coming to the declarations claimed, it is evident that the applicant before this application has applied before my brother, Chaila, J., for an injunction to restrain the authority from preventing him to remain in Zambia beyond the validity of his temporary permit on the grounds that the applicant's application for certiorari and mandamus were, pending before the High Court in Lusaka in Cause No. 1981/HP/693. In the application before this Court the applicant seeks declaration clearly the same effect but on the grounds that his civil claims in our Courts are still pending.

The declarations sought by the applicant in this case, if granted, would in my view amount to a grant of an injunction and specific performance against the State. In the applicant's circumstances the declarations have to be more or less binding otherwise they would be of no value to the applicant. To grant a binding declaration against the State declaring the plaintiff's right to continued and continuing stay in Zambia, would clearly amount to granting an injunction. Similarly to grant a binding declaration to the applicant's right to extension of his temporary permit would obviously be tantamount to specific performance.

For the foregoing reasons I find that the Chief Immigration Officer in refusing, to extend the applicant's temporary permit beyond 12-3-83 had neither acted in bad faith nor unfairly and nor unlawfully. I see no valid reason to find that the discretion exercised by the Chief Immigration

Officer in not extending; the applicant's temporary permit beyond 12-3-83 was in bad faith or was unfair. I have also come to the conclusion that the provisions of either Article 20 (9) or Article 24 or 24 (3) of the Constitution of Zambia, Cap. 1, do not provide or confer on the applicant, who is non - Zambian, right to remain in Zambia indefinitely in contravention of the provisions of the Immigration and Deportation Act, Cap. 122.

In my judgment this is not a case where it would be proper and justifiable to grant the declarations sought by the applicant. I dismiss the applicant s application for declaration with costs to the respondent.

Application dismissed
