WILHEIM ROMAN BUCHMAN v ATTORNEY GENERAL (1994) S.J. 76 (S.C.)

SUPREME COURT
CHAILA, CHIRWA AND MUZYAMBA, JJ.S.
5TH OCTOBER, 1994 AND 20TH OCTOBER, 1994
S.C.Z. JUDGMENT NO. 14 OF 1994
S.C.Z. APPEAL NO. 74 OF 1994

Flynote

Deportation - Court's refusal to grant of extension of time

Headnote
The appellant was deported some time back. He took out summons to challenge the action. He applied for an extension of time in which to wind up his affairs. That was granted. When that period expired, he made an application to the High Court for further extension. It was heard by Commissioner A J Nyangulu who extended the period for further two months. When that period expired the appellant applied for another extension. The learned Commissioner turned down tat application and the appellant has appealed against the refusal by Commissioner A J Nyangulu.

Held:
(i) A matter that is not raised in the court below cannot be raised before a higher court as a ground of appeal.

For the appellant: Mr E J Shamwana SC
For the respondent: Mr A G Kinariwala, Principal State Advocate

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Judgement
CHAILA, J.S.: delivered the judgement of the Court.

This appeal arises out of the decision of the High Court refusing to extend the period of stay in Zambia. The appellant was deported some time back. He took out summons to challenge the depotation order. The High court heard the case and dismissed the action. He applied for an extension of time in which to wind up his affairs. That was granted. When that period expired, he made an application to the High Court for further extension. It was heard by Commissioner A J Nyangulu who extended the period for further two months. When that period expired the appellant applied for another extension. The learned Commissioner turned down that application and the appellant has appealed against the refusal by Commissioner A J Nyangulu. There were no heads of argument filed, but the appellant's counsel indicated that the issue was a simple one. He argued that the learned Commissioner should have recused himself in the matter on the ground that his firm had represented one Catherine Mugala in a criminal matter. Mr Shamwana pointed out that he had some difficulty in that he did not have a record to support what he was saying. He has not filed an affidavit because he did not deal with the matter in the lower court. He informed the court that the appeal was against Commissioner Nyangulu's handling of the case. On an inquiry by the court Mr Shamwana admitted that Commissioner Nyangulu had not been asked to recuse himself when the matter came before him for the second time.

For the State Mr Kinariwala submitted that there was no evidence that the learned Commissioner had been requested to recuse himself. There was no objection raised and if it had been raised the learned Commissioner would have considered the matter and should have

made a ruling. He submitted that it was late in the day for the appellant to come to the Supreme Court and raise the matter involving the appellant came before the learned Commissioner twice. In the first instance the Commissioner extended the period and when that period expired the appellant went back to him. During that hearing the appellant never raised any objection to the learned Commissioner's handling of the case.

We have noted the objection raised by the learned Principal State Advocate. He has submitted that the appellant should go to the executive authorities for such extensions. The record shows of course that the appellant has stayed in Zambia for more than a year now and he has not according to him completed finalising his affairs. Section 24 of the Immigration and Deportation Act chapter 122 of the Laws of Zambia provides:

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(1) 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.

(2) If, after considering such representations, the Minister does not think fit to exercise to 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.

It is in the light of this section that Mr Kinariwala has complained that the courts are going too far in granting extensions. We fully agree with his sentiments. The people concerned should make representations to the executive authorities. As regards this matter, we note that the matter came before the High Court before Bweupe J. as he then was and granted three months to the appellant.

Later there was an extension made by the learned commissioner Nyangulu which culminated into an indefinite order when the appellant appealed to this court.

Mr Shamwana has raised before us some matter which was not raised before the Commissioner. Mr Shamwana has not supported his complaint that the learned Commissioner should have recused himself. If he had done so in the lower court then the Commissioner would have made a ruling. This matter was not raised before the Commissioner, it cannot be raised in this court as ground of appeal before this court. The record, however, shows that the learned Commissioner was never biased in any way. In the first instance he granted an extension. Later he refused to extend the period but when the appellant appealed, he granted an indefinite stay in Zambia. The ground raised by the appellant in this court cannot succeed.

The appeal is therefore dismissed with costs.

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