



**IN THE SUPREME COURT OF NAURU**

[MISCELLANEOUS CAUSE]

Case No 56 of 2015

BETWEEN                      RODNEY HENSHAW                      **APPLICANT**

And                              SECRETARY FOR JUSTICE                      **RESPONDENT**

Before:                              Madraiwiwi CJ

For the Applicant:              V Clodumar

For the Respondent:          GE Leung and J Daurewa

Date of Hearing:                  19 June 2015

Date of Ruling:                  24 July 2015

CATCHWORDS:

Judicial review – visa application made to Secretary for justice – application refused – Principal Immigration Officer appropriate authority – application wrongly made – remedies not exhausted – Judicial review refused

**RULING**

1. There is before the Court two applications for judicial review of the purported decision of the Secretary for Justice to deny an entry visa to the plaintiffs' legal counsel Mr Jason Williams on 20 May 2015.
2. They are in respect of Miscellaneous Case No 56 relating to Mr Rodney Henshaw and Miscellaneous Case No 57 brought by Jamal Hamidan Bavi, Thamil Maran, Rahim

Valogerdzageh, Kazim Alipoor, Thilepan Sivayoganathan, Awni Anachar, Suthan Murugesu, Sriharan Thevarasa and Sibilraj Sriskantharaja. As they concern identical issues, the decision in these proceedings will apply equally to Miscellaneous Case No 57 of 2015

3. Leave to apply for judicial review was granted by the learned Registrar on 28 May and 6 June 2015 respectively to the applicants to allow them to seek:
  - a. A Writ of Certiorari bringing the decision of the Secretary for Justice into this Court to be quashed;
  - b. A Writ of Mandamus directing the Secretary for Justice to re-determine the application according to law; and
  - c. A Writ of Prohibition restraining the Secretary for Justice, his employees, officers, delegates or agents from acting upon or giving effect to the decision.
4. Whether the applicant has a ‘sufficient interest’ in terms of these proceedings as laid down in *R v Inland Revenue Commissioner; Ex parte National Federation of Self-Employed and Small Business*<sup>1</sup> is self-evident. Mr Jason Williams is his counsel and it is the purported refusal of his entry visa for Nauru that is being dealt with in these proceedings. The applicant has by definition a sufficient interest given his relationship to Mr Jason Williams with regard to this and other matters.
5. For general reference, section 3 (3) (b) of the Republic Proceedings Act 1972 provides:

*“(3) A person may take civil proceedings, without leave of Cabinet to enforce any of the following claims:*

*(b) a claim for judicial review of administrative action; ...”*

Therefore these proceedings do not require leave of Cabinet as required by section 3 (2) (a) of the Republic Proceedings Act. Although the point was not taken directly by the respondent, the issue of whether the Secretary for Justice is properly named as a party is a live one because whether judicial review applications are “civil proceedings” for the purposes of the Republic Proceedings Act remains an arguable proposition.

6. However, the Court will not deal with it further as counsel for the respondent has elected to defend the latter on the ground that the applicant (by his counsel) applied for an entry visa to the wrong party; and by instituting these proceedings has failed to exhaust his remedies under the Act and Regulations.
7. Upon filing the writ of summons and statement of claim pursuant to filing the application for judicial review as required, the applicants sought to canvass the events of January to March 2014 involving the former learned Resident Magistrate as well as the former learned Chief Justice, the suspension of five Opposition Members of Parliament and related matters which have, with respect, no legal relevance to these proceedings and therefore an abuse of process.

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<sup>1</sup> [1982] AC 617

8. Accordingly, in a ruling dated 10 June 2015, this Court struck out the other prayers pursuant to Order 15 rule 19 of the Civil Procedure Rules 1972 and confined the applicant to orders made on 5 June 2015.
9. On that occasion, Neil Williams SC learned counsel for the Commonwealth of Australia appeared in related proceedings to Civil Case No 56 of 2014 instituted by Mr Henshaw, being Civil Action No 8 of 2014, on an application to strike out the Commonwealth as a party in those proceedings.
10. The Court adjourned the interlocutory application in Civil Action No 8 of 2014 to abide resolution of this matter, at some inconvenience to learned counsel for the Commonwealth who was on island specifically to argue it.
11. However, the Court was of opinion that it ought as a matter of equity and fairness to deal first with the applicant's concerns about the non-availability of his counsel who had provided representation and support for him to that point.
12. The following affidavits have been filed:
  - a. Affidavit in support of Rodney Henshaw dated 24 May 2015;
  - b. Affidavit in reply of Secretary for Justice and Border Control dated 17 June 2015.
13. Both applicant and respondent filed written submissions dated 8 and 16 June 2015 respectively and the matter was heard on 19 June 2015.
14. The facts are not in dispute. Mr Jason Williams is a barrister representing the applicant and was admitted to practice in Nauru on 18 December 2014. On 20 May 2015 Mr Vinci Clodumar sent an email with attachments to the respondent seeking the issue of a business visa to enable Mr Jason Williams' entry into Nauru on 5 June 2015. The attachments consisted of:
  - a. A letter of application by Mr Vinci Clodumar on Mr Jason Williams' behalf;
  - b. A scanned copy of Mr Jason Williams' passport photo page;
  - c. A completed visa application form for a business visitor.

A few hours later the same day the respondent replied via email denying the application. Mr Vinci Clodumar subsequently sought clarification and the respondent affirmed that Mr Jason Williams was being denied entry.
15. Judicial review proceedings are instituted under Order 38 of the Civil Procedure Rules and concern the processes of administrative decision-making by public and statutory authorities. The prerogative orders of certiorari, prohibition and mandamus are discretionary remedies and usually not available where the avenues for relief have not been exhausted.
16. The legislation governing the issue of entry visas is the Immigration Act 2014 (the "Act") and Immigration Regulations 2014 (the "Regulations") made thereunder. Section 10 (1) and (2) of the Act state:

"10 Requirement for a visa

- (1) A person who is not a citizen of Nauru must not enter or remain in Nauru without a valid visa authorising that entry or presence and any person failing to comply with this subsection commits and (sic) offence and is liable to a maximum penalty of \$10,000.
- (2) The Regulations may exempt a person from the application of subsection (1) absolutely or subject to conditions.”

17. Under the Act, Principal Immigration Officers are appointed pursuant to section 4 which states:

“4 Principal Immigration Officer

- (1) The Secretary, acting on the recommendation of the Minister, may appoint two officers in the position of Principal Immigration Officer and they shall be:
  - (i) Principal Immigration Officer (Administration); and
  - (ii) Principal Immigration Officer (Operations).
- (2) The roles and duties of the Principal Immigration Officer (Administration) and Principal Immigration Officer (Operations) must be determined by the Secretary, acting on the recommendation of the Minister.
- (3) The Principal Immigration Officer is subject to control and direction by the Minister.
- (4) In this Act, unless otherwise stated, Principal Immigration Officer shall refer to both Principal Immigration Officer (Administration) and Principal Immigration Officer (Operations).”

These officers perform a pivotal role under the Act and Regulations as appears in the following paragraph.

18. Regulation 4 (1) sets out the public officer responsible for the grant of visas together with the classes of visas available as follows:

“4. Classes of visa

- (1) Subject to and in accordance with these Regulations, the Principal Immigration Officer may grant visas of the following classes:
  - (a) business visa;
  - (b) dependant’s visa;
  - (c) [Repealed]
  - (d) regional processing visa;
  - (e) residence visa;
  - (f) special purpose visa;
  - (g) visitor’s visa;
  - (h) (h)Temporary settlement visa.
- (2) ...

5. Visa application

- (1) An application for a visa of any class may be made to the Principal Immigration Officer.

- (2) An application for a visitor's visa may be made to the Head of a Nauruan mission or Nauruan consular post by a person present in that country in which that mission or post is located.
- (3) Subject to sub regulation (4), an application under sub regulation (1) or (2) must be made in the appropriate form set out in Schedule 1.
- (4) .....
- (5) An application must be accompanied by:
  - (a) any information or document
    - (i) required by the application form to be provided with it; or
    - (ii) reasonably required by the Principal Immigration Officer; or
    - (iii) otherwise relevant to the application; and
  - (b) except in the case of a regional processing centre visa, or a temporary settlement visa evidence of the payment of any fee payable under regulation 16 for the cases of visa visa being applied for.
- (6) The Principal Immigration Officer may require an applicant for a visa to verify by statutory declaration any information provided in connection with the application.
- (7) ....
- (8) [Repealed]
- (9) An applicant for a visa must hold a valid passport or travel document that is not due to expire within 3 months after the date of the application.

#### 6. Business visa

- (1) [Repealed]

Business visas are divided into the subclasses specified in column 1 of the Table

Column 1	Column 2
Business Visa (General)	Conduct a business or profession in Nauru
Business Visa (Diplomatic)	Perform the role of a diplomatic or consular representative of a foreign country
Business Visa (Education)	Engage in education
Business Visa (Media)	Engage in film, journalism or activities
Business Visa (Religious Vocation)	Engage in a religious vocation whether or not for reward
Business Visa (Research)	Engage in research, whether or not reward
Business Visa (employment)	Engage in employment in Nauru

- (2) The purpose of a business visa of a sub-class specified in column 1 of the Table in sub regulation (2) is to authorise the holder to engage in Nauru in the activity specified opposite it in column 2 of that Table.
- (3) Business Visa Conditions
  - (a) A Business Visa (General) is granted subject to the conditions that the holder must not while in Nauru:
    - i. Behave in a manner that is prejudicial to the peace, good order, good government or morale of the people of the Republic of Nauru;
    - ii. engage in any religious vocation except with the written approval of the Minister;

- iii. remove from Nauru any chattel, carving, object, or thing which relates to the history art, culture, and traditions or economy of the Republic of Nauru; and
- iv. Breach any other any (sic) reasonable condition (not inconsistent with the Act or these Regulations) that the Secretary considers necessary or desirable.

14 (4)A business visa may be granted:

- (a) for a period not exceeding 12 months; and
- (b) for a single entry or multiple entries; and
- (c) subject to any reasonable condition (not inconsistent with the Act or these Regulations) that the Principal Immigration Officer considers necessary or desirable.”

19. The relevant clauses relating to exemptions from visa requirements are set out in Regulation 14 (4) as follows:

“14 Exemption from visa requirement

- (4) person is exempt from the application of section 10 (1) of the Act if he or she:
  - (a) Is a national of a visa waiver agreement country; and
  - (b) does not intend to remain in Nauru for longer than the period specified in the agreement; and
  - (c) Satisfies and conditions specified in the agreement in eligibility for the exemption.”

20. In Part 4 of the Regulations, Regulation 25 states:

“24 Review of decisions

The Minister cannot delegate to the Secretary or the Principal Immigration Officer his or her power to review a decision under section 12 of the Act.”

21. Regulation 50 concerns the delegation of the Minister’s powers and provides:

“50 Delegation of the Minister’s powers

- (1) The Minister may, in writing, delegate to an authorised officer any of the Minister’s powers and functions under the following provisions:
  - (a) the power to issue an ordinary Nauruan passport or a travel-related document under section 6 or 11, unless the exercise of the power requires the exercise of discretion under section 15 (2);
  - (b) the power to request information under section 48;
  - (c) the power to disclose information under section 48;
  - (d) the power to endorse or make observations on a Nauruan travel document under section 55.
- (2) In exercising a delegated power or function, the authorised officer must comply with any directions of the Minister.”

There is no reference in either the Act or the Regulations about the delegation of powers by the Principal Immigration Officer under Regulation 4 (1); neither is there any evidence before the Court of anything to that effect.

22. Section 12 of the Act concerns the review of decisions relating to visas and the relevant provisions provide:

“12 Review of decisions relating to visas

(1) An application for a review of a decision in relation to visas, must be made to the Minister as follows:

(a) an applicant for a visa may apply to the Minister for review of a decision to refuse or grant the application or to impose visa conditions: or

(b) the holder of a visa may apply to the Minister for review of a decision to vary, or impose further, visa conditions or to suspend or cancel the visa.

(2) ...

(3) Subject to this section, the application for review must be made within 14 days after the person receives notice of the decision.

(4) If the reasons for a decision are not given in writing at the time it is made and a person who may apply for review of the decision requires, within 14 days after the making of the decision, the decision maker to give reasons in writing, the time for making an application for review runs from the time when the person receives the written statement of reasons.

(5) An application for review must be in writing and must set out the reasons for the application and must include the prescribed fee as stated in Schedule 2 of this Act.

(8) (sic) On a review of a decision made, the Minister may:

(a) affirm the decision;

(b) vary the decision; or

(c) set aside the decision and substitute a new decision.

(9) (sic) Notice of a decision on a review must be published in the Gazette.”

23. The applicants have made quite exhaustive submissions most of which can be disregarded because they concern issues that are not directly relevant to this application. They have also sought to impugn the purported decision on grounds familiar to judicial review such as unreasonableness, arbitrariness and illegality. However, the approach adopted by the Court obviates the need to deal with those issues.

24. The Act and Regulations create an elaborate structure with several types of visas and the processing and consideration thereof. The starting point is the Principal Immigration Officer as the statutory authority to consider applications; with the Minister being the final arbiter of the process of review. Under the Regulations, the discretion conferred on the Minister cannot be delegated.

25. In *Reginam v Inland Revenue Commissioner ex parte Preston*<sup>2</sup> the following proposition was stated:

*“Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available.”*

The Court respectfully adopts that approach in these proceedings.

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<sup>2</sup> [1985] AC 835 AT 862

26. It is common ground from a perusal of the affidavits filed, elaborated further by oral and written submissions from counsel, that counsel for the applicants forwarded Mr Williams' application to the Secretary for Justice. He then purported to deny Mr Williams both a visa as well as entry into the country.
27. The Secretary for Justice, while the administrative head of the Immigration Section as part of the Department of Justice and Border Control, is not the person referred to in Regulation 4 (1) of the Regulations. He is not, therefore, the proper person under the Act to whom counsel for the applicants applied for a visa on behalf of Mr Jason Williams. As to whether the respondent is estopped from denying he had the requisite authority to issue entry visas, his legal disability in that regard precludes that argument.
28. With respect, a cursory glance at the relevant legislation would have alerted counsel for the applicant as to the appropriate office holder to approach. At the same, it was also unnecessary for the Secretary for Justice to purport to make a decision he knew he was not entitled to make. Had counsel for the applicants been appraised of the provisions of Regulation 4 (1), this present excursion may well have been avoided.
29. In any event, the applicant has not only not exhausted his remedies he has simply not sought the requisite authorization from the public officer conferred with the statutory powers to do so in the first place. That defect is fatal to this application consistent with the position expressed in *R v Inland Revenue Commission* supra.
30. The relevant legislative provisions have been cited at length for good reason: to ensure the applicant and prospective parties are under no illusions about the appropriate procedures to follow when seeking to impugn decisions made under the Act and Regulations whether by the Minister or the Principal Immigration Officer or any other officer.
31. In future the Court will be inclined to dismiss at the threshold all applications which disclose on their face a failure to fulfil the prescribed statutory and/or procedural requirements; whether in terms of making application or in invoking the review process. Unless, of course, there are extenuating circumstances to be taken into account.
32. This forum ought to be one of last resort rather than a panacea for precipitate and hasty litigants who would readily invoke its jurisdiction without first pursuing more appropriate relief.
33. The application is therefore refused and costs awarded the respondent to be taxed by the Registrar if not agreed.



DATED this 24<sup>th</sup> day of July 2015.

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Joni Madraiwiwi  
CHIEF JUSTICE